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Correspondence should be addressed to:

*Sydney Law Review*

Sydney Law School

Building F10, Eastern Avenue

UNIVERSITY OF SYDNEY NSW 2006

AUSTRALIA

Email: [sydneylawreview@sydney.edu.au](mailto:sydneylawreview@sydney.edu.au)

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# When Climate Mainstreaming Is the Law: A Case Study of the Climate Change Act 2017 (Vic)

Anita Foerster\* and Alice Bleby†

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## Abstract

Framework climate legislation has been introduced in many jurisdictions around the world, at the national and subnational scales, to govern climate change mitigation and adaptation activities by governments. The *Climate Change Act 2017* (Vic) is an example which embodies many of the typical features of framework climate laws: emissions reduction targets, mitigation strategies and adaptation plans. Yet the Victorian legislation also includes explicit provision for climate mainstreaming: a general legal duty to take account of climate change, where relevant, in government decisions, policies, programs and processes, and a more specific duty to have regard to climate change considerations in prescribed decisions. These mainstreaming provisions reflect a legislative intent to promote an integrated, whole-of-government approach to climate change. This recognises that a broad range of policy areas both contribute to climate change and are affected by climate change, and that effectively integrating climate change across government functions is critical to achieve mitigation and adaptation objectives. This article reports on an empirical study exploring the effect of the mainstreaming provisions on government practices in Victoria. Interviews with Victorian public servants from a wide range of policy and operational areas provide insights into the value, role and function of legislation in supporting climate mainstreaming, as well as lessons from practice in how to effectively operationalise legal mainstreaming duties.

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\* Associate Professor, Department of Business Law and Taxation, Monash Business School, Caulfield, Victoria, Australia. Email: [anita.foerster@monash.edu](mailto:anita.foerster@monash.edu); ORCID iD: <https://orcid.org/0000-0002-5537-4865>.

† Lecturer, Department of Business Law and Taxation, Monash Business School, Caulfield, Victoria, Australia. Email: [alice.bleby@monash.edu](mailto:alice.bleby@monash.edu); ORCID iD: <https://orcid.org/0000-0003-3305-6417>. The authors would like to acknowledge this research was supported by a Monash Business School Impact Acceleration Grant Scheme grant in 2021. The Department of Environment, Land, Water and Planning (Vic) (since renamed the Department of Energy, Environment and Climate Action) contributed extensively in kind to the research design and research. Research reported in this article has been conducted in accordance with Monash University Ethics Approval (Project ID: 28928).

## I Introduction

Since the introduction of the first framework climate law in the United Kingdom in 2008,<sup>1</sup> many nation-states around the world have enacted similar legislation to underpin and propel their responses to climate change.<sup>2</sup> These laws typically create procedural architecture (a ‘framework’) designed to impel continuous policy and regulatory action towards achieving long-term emissions reduction (and sometimes climate change adaptation) targets. They do not provide for substantive climate policy measures such as emissions taxes or emissions trading schemes. Rather, they establish the impetus and the strategic planning processes for such measures to be developed and for their contribution to climate policy targets to be actively monitored and reported. Many of these laws align closely<sup>3</sup> with the international *Paris Agreement*, reflecting both its cycle of bottom-up emissions reduction commitments (Nationally Determined Contributions prepared every five years),<sup>4</sup> and its objective to reach net-zero emissions by 2050.<sup>5</sup>

The legislative model outlined above is not unique to the national jurisdiction but has also been implemented in some subnational jurisdictions. This includes several Australian states, which have led the development of climate law and policy during a long period of inaction and policy conflict at the national level in Australia.<sup>6</sup> The *Climate Change Act 2017* (Vic) (*‘Climate Change Act’*), enacted in the state jurisdiction of Victoria, is illustrative and represents one of the most comprehensive and established examples of framework climate legislation in Australia, and indeed around the world.<sup>7</sup>

One of the interesting features of the *Climate Change Act*, which is not common to other examples at a national or subnational scale, is its explicit provision for climate change mainstreaming.<sup>8</sup> The Act sets out a general legal duty for the

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<sup>1</sup> *Climate Change Act 2008* (UK).

<sup>2</sup> Matthias Duwe and Nicholas Evans, *Climate Laws in Europe: Good Practices in Net-Zero Management* (Report, European Climate Foundation, 2019); Thomas L Muinzer (ed), *National Climate Change Acts: The Emergence, Form and Nature of National Framework Climate Legislation* (Hart Publishing, 2020).

<sup>3</sup> Anita Foerster, Alice Bleby, Anne Kallies and Jonathan Church, “‘Paris’ at the Subnational Scale? An Exploration of the Role and Potential of Framework Climate Laws” (2022) 45(3) *Melbourne University Law Review* 1045.

<sup>4</sup> *Paris Agreement under the United Nations Framework Convention on Climate Change*, opened for signature 22 April 2016, [2016] ATS 24 (entered into force 4 November 2016) arts 4(2), (3), (9).

<sup>5</sup> *Ibid* art 4(1).

<sup>6</sup> Peter Christoff and Robyn Eckersley, ‘Convergent Evolution: Framework Climate Legislation in Australia’ (2021) 21(9) *Climate Policy* 1190. Framework climate laws are in place in South Australia, Tasmania and the Australian Capital Territory (as well as Victoria), although these differ in their legal design and comprehensiveness: see *Climate Change and Greenhouse Gas Reduction Act 2010* (ACT); *Climate Change and Greenhouse Emissions Reduction Act 2007* (SA); *Climate Change (State Action) Act 2008* (Tas). Following a change of government in 2022, the national government is now implementing a comprehensive climate policy agenda, including new framework climate legislation (*Climate Change Act 2022* (Cth)).

<sup>7</sup> ClientEarth, *Navigating Net-Zero: Global Lessons in Climate Law-Making* (Report, August 2021).

<sup>8</sup> There are few other examples of framework climate laws with explicit mainstreaming provisions. Notable exceptions are the *Climate Change (Scotland) Act 2009* (Scot) pt 4 (*‘Climate Change (Scotland) Act’*) and *Climate Change Act 2021* (Fiji) pt 5 (*‘Fiji’s Climate Change Act’*).

Victorian government to take account of climate change, where relevant, in all government decisions, policies, programs and processes;<sup>9</sup> and a more specific duty to have regard to climate change considerations in prescribed decisions.<sup>10</sup> Along with the broader legal architecture of the Act, which spreads responsibilities and accountabilities across all sectoral ministers, these mainstreaming duties reflect a legislative intention to deliver an integrated, whole-of-government approach to climate change. Such an approach recognises that a broad range of policy areas both contribute to climate change and are affected by climate change, and that effectively integrating climate change across government functions is critical to achieve climate policy objectives.<sup>11</sup>

Although framework climate laws are in themselves relatively understudied, given they have only emerged in their present form since 2008, mainstreaming provisions such as those set out in the Act attract even less attention in the literature. They are unusual features of this type of legislation, and are addressed to a broader, less tangible and more nebulous agenda for action than the core policy mechanisms established by framework climate laws which directly target climate change mitigation and adaptation objectives. Mainstreaming as a concept is not new; it has been explored and developed in the context of a number of cross-cutting policy issues including gender equality, environmental policy integration, disaster risk reduction and human rights.<sup>12</sup> However, climate change mainstreaming is a relatively new focus for mainstreaming practice.<sup>13</sup> Further, its application in the context of legal duties for government to take account of climate change in decision-making is novel and unexplored in both literature and practice. This presents an

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<sup>9</sup> *Climate Change Act 2017* (Vic) s 20 ('*Climate Change Act*').

<sup>10</sup> *Ibid* s 17.

<sup>11</sup> Alainnah Calabro, Stephanie Niall and Anna Skarbek, 'The Victorian Climate Change Act: A Model' (2018) 92(10) *Australian Law Journal* 814.

<sup>12</sup> See, eg, Charlotte Benson, John Twigg and Tiziana Rossetto, *Tools for Mainstreaming Disaster Risk Reduction: Guidance Notes for Development Organisations* (Report, January 2007) 5; Sylvia Walby, 'Gender Mainstreaming: Productive Tensions in Theory and Practice' (2005) 12(3) *Social Politics* 321, 327; Asa Persson, 'Environmental Policy Integration: An Introduction' (Background Paper, Stockholm Environment Institute, June 2004); Francis Seymour, Crescencia Maurer and Ricardo Quiroga, 'Environmental Mainstreaming: Applications in the Context of Modernization of the State, Social Development, Competitiveness, and Regional Integration' (Working Paper, Inter-American Development Bank, November 2005). Indeed, mainstreaming of human rights in government is institutionalised in Victoria through the *Charter of Human Rights and Responsibilities Act 2006* (Vic), which requires all public authorities and any people or organisations delivering services on behalf of the Victorian government to give proper consideration to human rights before making a decision and to act compatibly with human rights. For a general overview, see James Allan, 'The Victorian *Charter of Human Rights and Responsibilities*: Exegesis and Criticism' (2006) 30(3) *Melbourne University Law Review* 906; James B Kelly, 'A Difficult Dialogue: Statements of Compatibility and the Victorian *Charter of Human Rights and Responsibilities Act*' (2011) 46(2) *Australian Journal of Political Science* 257.

<sup>13</sup> The existing literature focuses largely on mainstreaming climate adaptation considerations, often in a sustainable development context: see, eg, Joyeeta Gupta, 'Mainstreaming Climate Change: A Theoretical Exploration' in Joyeeta Gupta and Nicolien van der Grijp (eds), *Mainstreaming Climate Change in Development Cooperation: Theory, Practice and Implications for the European Union* (Cambridge University Press, 2010) 67; Christine Wamsler and Stephan Pauleit, 'Making Headway in Climate Policy Mainstreaming and Ecosystem-Based Adaptation: Two Pioneering Countries, Different Pathways, One Goal' (2016) 137(1–2) *Climatic Change* 71.

opportunity, therefore, to examine the legal requirements for mainstreaming introduced by the Act to understand their nature, implications and impact in practice.

This article presents findings from an empirical study of climate mainstreaming undertaken from June 2021 to July 2022. The study was carried out in partnership with the Victorian Department of Environment, Land, Water and Planning ('DELWP')<sup>14</sup> which has primary responsibility for implementation of the *Climate Change Act*. The article examines the conceptualisation and practice of climate mainstreaming in the Victorian government. It draws on empirical evidence, gathered through research interviews, a survey and an interactive workshop, to analyse the impact of the mainstreaming provisions on governmental policy, decisions and operations. Although conducted early in the life of the Act, this study provides a snapshot of emerging mainstreaming practice: it draws on the experiences and insights shared by study participants to identify barriers to and enablers of climate mainstreaming, and to draw conclusions about best practice mainstreaming and the role of the Act. The article contends that although progress is uneven and there are opportunities to strengthen climate mainstreaming, explicit legislative duties are particularly valuable in supporting this important practice. This in turn suggests that mainstreaming provisions, drawing on the Victorian example, could be a useful addition to framework climate laws in other jurisdictions.

This article is in six Parts. Part II introduces the concept of mainstreaming, its application in the context of climate policy, and the explicit mainstreaming provisions of the *Climate Change Act*. Part III describes the research approach and methodology for the empirical study. Part IV reports on the findings, using the empirical data to develop insights into the scope, role and value of climate mainstreaming under the Act, to categorise mechanisms to further mainstreaming objectives, and to identify factors that hinder or enable effective climate mainstreaming in practice. Part V offers some critical reflection on mainstreaming practice in Victoria to date and discusses opportunities to further develop and deepen this practice; and Part VI concludes.

## II The Context for Climate Change Mainstreaming

### A What Is Climate Change Mainstreaming?

Mainstreaming is a public policy concept and practice intended to transform an issue of vital public importance from a peripheral, or add-on consideration, to a central and priority concern in policy and decision-making. Mainstreaming theory and practice have evolved over three decades or more in the context of gender equality, disaster risk reduction, environmental policy integration, human rights and other areas of public policy.<sup>15</sup> However, mainstreaming as applied to climate change is a relatively recent development, most often elaborated in the contexts of sustainable development and/or climate adaptation.<sup>16</sup>

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<sup>14</sup> DELWP was renamed the Department of Energy, Environment and Climate Action ('DEECA') on 1 January 2023, as a result of machinery-of-government changes.

<sup>15</sup> Benson, Twigg and Rossetto (n 12); Walby (n 12); Persson (n 12).

<sup>16</sup> Gupta (n 13); Wamsler and Gupta (n 13).

In a government context, climate change mainstreaming is generally understood as the integration of climate change considerations into policies, processes, decisions and other governmental activities across all sectors, to support overarching strategic objectives of reducing emissions and adapting to climate change.<sup>17</sup> This implies that the potential impacts of activities and decisions in all areas of government on climate policy objectives will be analysed, and that measures will be adopted to maximise alignment and minimise conflict with these objectives.<sup>18</sup>

Climate mainstreaming rests on a recognition that climate change is a cross-cutting issue that is relevant for all manner of government functions, and that climate policy objectives cannot be met by treating them as stand-alone goals.<sup>19</sup> As such, climate change should be embedded across government decisions and processes as a matter of good public policy and governance,<sup>20</sup> and particularly to reduce risks of maladaptation and counter-productive government activities<sup>21</sup> and maximise opportunities to generate co-benefits for multiple policy objectives.<sup>22</sup>

Climate mainstreaming is distinct from, but complementary to, direct substantive climate policy initiatives in mitigation or adaptation. Rather than targeted policy or regulatory interventions for addressing climate change (such as renewable energy incentives, emissions trading or adaptation planning), mainstreaming concerns the myriad decisions and actions that government takes in areas other than 'climate policy' which can contribute to reducing emissions and responding to climate change impacts. It also concerns those decisions and actions for which a failure to integrate climate change considerations can work against efficient and timely realisation of climate mitigation and adaptation goals.

Gupta and other scholars have conceptualised climate mainstreaming as 'more than integration'; rather, mainstreaming is the final step along a spectrum of activities or interventions that embed climate change to varying degrees.<sup>23</sup> This spectrum ranges from adding new climate-related considerations onto existing

<sup>17</sup> Franz Berkhout, Laurens M Bouwer, Joanne Bayer, Maha Bouzid, Mar Cabeza, Susanne Hanger, Andries Hof, Paul Hunter, Laura Meller, Anthony Patt, Benjamin Pfluger, Tim Rayner, Kristin Reichardt and Astrid van Teeffelen, 'European Policy Responses to Climate Change: Progress on Mainstreaming Emissions Reduction and Adaptation' (2015) 15(6) *Regional Environmental Change* 949, 949; Seymour, Maurer and Quiroga (n 12); Mariya Aleksandrova, 'Principles and Considerations for Mainstreaming Climate Change Risk into National Social Protection Frameworks in Developing Countries' (2019) 12(6) *Climate and Development* 511, 513; Gill Allwood, 'Mainstreaming Gender and Climate Change to Achieve a Just Transition to a Climate-Neutral Europe' (2020) 58 (Annual Review) *Journal of Common Market Studies* 173, 175.

<sup>18</sup> Benson, Twigg and Rossetto (n 12) 5.

<sup>19</sup> Allwood (n 17) 177; Calabro, Niall and Skarbek (n 11) 819.

<sup>20</sup> Gupta (n 13) 71; Seymour, Maurer and Quiroga (n 12) 2.

<sup>21</sup> MTJ Kok and HC de Coninck, 'Widening the Scope of Policies to Address Climate Change: Directions for Mainstreaming' (2007) 10(7–8) *Environmental Science and Policy* 587, 588; Seymour, Maurer and Quiroga (n 12) 1; Persson (n 12) 1; Sarah La Trobe and Ian Davis, 'Mainstreaming Disaster Risk Reduction: A Tool for Development Organisations' (Paper, Tearfund, January 2005) 1.

<sup>22</sup> Seymour, Maurer and Quiroga (n 12) 1; Persson (n 12) 1; La Trobe and Davis (n 21) 1.

<sup>23</sup> Gupta (n 13) 85. See also Christine Wamsler, Christopher Luederitz and Ebba Brink, 'Local Levers for Change: Mainstreaming Ecosystem-Based Adaptation into Municipal Planning to Foster Sustainability Transitions' (2014) 29 (November) *Global Environmental Change* 189; Wamsler and Pauleit (n 13).

processes; more systematic identification of win–win opportunities to achieve climate policy goals alongside sectoral goals; subjecting government policies, programs and projects to comprehensive climate screening and climate proofing to maximise alignment to mitigation and adaptation goals; through to, finally, a fundamental reorganisation and redesign of government organisational culture where climate change becomes a core consideration.<sup>24</sup> Mainstreaming practice is considered to be mature when climate change has shifted from a marginal discourse to the centre of discussions, resulting in the redesign of responses to other issues.<sup>25</sup>

Scholars have also usefully categorised the activities, mechanisms and initiatives that may contribute to and foster mainstreaming in climate and other policy contexts. Common categories include the *normative* (eg, political leadership and policy commitments), *organisational* (institutional organisation and coordination, accountability mechanisms, allocation of resources) and *procedural* (rules of decision-making including impact assessment, and other procedures and tools to support decision-makers in different contexts).<sup>26</sup> Many scholars emphasise the governance and organisational aspects of climate mainstreaming, in particular the shifting and broadening of responsibility for climate change responses and associated capacities and capabilities from a single (generally environmental) ministry or agency to all sectors of government.<sup>27</sup> Wamsler and colleagues also distinguish between vertical and horizontal dimensions of mainstreaming strategies: *vertical* mainstreaming involves powerful governmental actors and top-down guidance and direction, often achieved through regulation; *horizontal* mainstreaming involves coordination and collaboration activities to build capacity, capability and impetus for integrating climate considerations.<sup>28</sup>

## **B     *Distinguishing Climate Mainstreaming from Climate Risk Management***

Mirroring developments in the private sector,<sup>29</sup> in the public sector context, climate change has been increasingly framed as a source of material risk for government business, services and operations.<sup>30</sup> Enterprise risk management approaches are increasingly used to guide climate risk identification, assessment and treatment within government organisations.<sup>31</sup> These approaches are an important part of

<sup>24</sup> Gupta (n 13) 84–5, table 3.5.

<sup>25</sup> Ibid 79.

<sup>26</sup> Ibid 86–7; Persson (n 12) 31–6.

<sup>27</sup> Tearfund and Institute of Development Studies, ‘Overcoming the Barriers: Mainstreaming Climate Change Adaptation in Developing Countries’ (Tearfund Climate Change Briefing Paper No 1, 2006); Wamsler and Pauleit (n 13); Wamsler, Luederitz and Brink (n 23). See also ClientEarth (n 7) 44–6.

<sup>28</sup> Wamsler, Luederitz and Brink (n 23).

<sup>29</sup> Task Force on Climate-Related Financial Disclosures, *Recommendations of the Task Force on Climate-Related Financial Disclosures* (Final Report, June 2017) (‘TCFD Recommendations’).

<sup>30</sup> See, eg, Arjuna Dibley, Sam Hurley and Joshua Sheppard, ‘Public Authority Directors’ Duties and Climate Change: Managing the Latent Financial and Governance Risks’ (Discussion Paper, Centre for Policy Development, 2019).

<sup>31</sup> Habib Mahama, Mohamed Elbashir, Steve Sutton and Vicky Arnold, ‘Enabling Enterprise Risk Management Maturity in Public Sector Organizations’ (2022) 42(6) *Public Money and Management* 403; Enrico Bracci, Tallaki Mouhcine, Tarek Rana and Danture Wickramasinghe, ‘Risk Management



climate mainstreaming. For example, risk-based approaches are commonly used to integrate consideration of the physical risks posed by climate change into government processes and decision-making in ways which can support adaptation goals (eg, asset maintenance, upgrade and replacement decisions).

However, risk management approaches are potentially narrower than, and distinct from, mature climate mainstreaming as conceptualised above. A risk management approach focuses on risks posed by climate change to government business, services and operations. In contrast, a broadly framed mainstreaming strategy focuses on how government decisions and actions can support and align with climate policy goals. Steps taken to manage climate-related risks to government business might be quite different from steps taken to align different sectoral policies and activities with climate change objectives. For example, a risk management approach does not necessarily encompass the full range of decisions, actions and operations that government is involved in which might contribute to or detract from reaching climate change objectives. A risk management approach does not necessarily involve and influence the wide range of governmental actors and stakeholders interacting with government whose decisions and actions can impact the achievement of climate policy objectives. Further, a risk management approach does not necessarily support policy ambition, but rather aims to avoid negative consequences, meaning that it might not help to optimise policy approaches and realise co-benefits for multiple policy objectives.

### C *Legal Obligations to Mainstream Climate Change*

The *Climate Change Act* addresses climate change mainstreaming in three ways: as an overarching statutory objective; through explicit duties on government; and via its allocation of roles, responsibilities and accountabilities for key statutory functions.

Mainstreaming objectives are included within the purposes of the Act, which include ‘to facilitate the consideration of climate change issues in specified areas of decision making of the Government of Victoria’<sup>32</sup> and ‘to set policy objectives and guiding principles to inform decision-making under this Act and the development of government policy in the State’.<sup>33</sup>

The Act then sets out two explicit legal duties to mainstream climate change into government decisions and activities. Section 17 provides:

A person making a decision or taking an action [that is listed in sch 1 of the Act] must have regard to: (a) the potential impacts of climate change relevant to the decision or action; and (b) the potential contribution to the State’s greenhouse gas emissions of the decision or action.

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and Management Accounting Control Systems in Public Sector Organizations: A Systematic Literature Review’ (2022) 42(6) *Public Money and Management* 395.

<sup>32</sup> *Climate Change Act* (n 9) s 1(c).

<sup>33</sup> *Ibid* s 1(d).

Schedule 1 of the Act currently lists 24 decisions and actions under seven different pieces of legislation.<sup>34</sup> For example, decisions relating to licences and permits including the review of operating licences for industrial facilities under the *Environment Protection Act 2017* (Vic) are listed and subject to the s 17 duty.<sup>35</sup>

Section 20 of the *Climate Change Act* provides:

The Government of Victoria will endeavour to ensure that any decision made by the Government and any policy, program or process developed or implemented by the Government appropriately takes account of climate change if it is relevant by having regard to the policy objectives and the guiding principles.

This broadly framed duty to take climate change into account is underpinned and strengthened by reference to the policy objectives of the Act which target clear substantive outcomes. For example, the policy objective in s 22(a) aims ‘to reduce the State’s greenhouse gas emissions consistently with the long-term emissions reduction target and interim emissions reduction targets’, and s 22(b) aims ‘to build the resilience of the State’s infrastructure, built environment and communities through effective adaptation and disaster preparedness action’. Although there is not an explicit requirement to ensure alignment with these objectives as there is in some other framework laws,<sup>36</sup> the s 20 duty can arguably be interpreted in this way given its broader statutory context. There is also provision for the development of ministerial guidelines to inform the discharge of both the s 17 and s 20 duties.<sup>37</sup> To date, no guidelines have been developed.

The architecture of the Act also underpins a whole-of-government approach to climate change governance.<sup>38</sup> Sectoral emissions reduction pledges are the core policy mechanism designed to support the achievement of interim and long-term emissions reduction targets under the Act;<sup>39</sup> and the Act provides that different ministers can be allocated responsibility for developing and implementing these pledges.<sup>40</sup> In the first round of strategic planning under the Act (2017–21), a diverse range of government ministers led the development of emissions reduction pledges for the transport, agriculture, energy, industrial processes and product use, waste, and land use and forestry sectors.<sup>41</sup> The primary policy mechanism to drive climate change adaptation under the Act is the adaptation action plan, developed at the

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<sup>34</sup> *Catchment and Land Protection Act 1994* (Vic); *Marine and Coastal Act 2018* (Vic); *Environment Protection Act 2017* (Vic) (*‘Environment Protection Act’*); *Flora and Fauna Guarantee Act 1988* (Vic); *Public Health and Wellbeing Act 2008* (Vic); *Water Act 1989* (Vic); *Circular Economy (Waste Reduction and Recycling) Act 2021* (Vic).

<sup>35</sup> *Climate Change Act* (n 9) sch 1.

<sup>36</sup> For example, the *Climate Change (Scotland) Act* (n 8) pt 4 includes a clear positive obligation for public bodies to act in the way best calculated to contribute to the delivery of emissions reduction targets and to help deliver any statutory climate change adaptation program.

<sup>37</sup> *Climate Change Act* (n 9) ss 18, 21.

<sup>38</sup> Calabro, Niall and Skarbek (n 11) 818.

<sup>39</sup> *Climate Change Act* (n 9) ss 43–5.

<sup>40</sup> *Ibid.*

<sup>41</sup> ‘Victorian Government Action on Climate Change’, *Department of Energy, Environment and Climate Action* (Web Page) <<https://www.climatechange.vic.gov.au/victorian-government-action-on-climate-change>>.

system scale (eg, built environment, natural environment, water cycle).<sup>42</sup> Here also, different ministers can be allocated responsibility for developing and implementing adaptation action plans for different systems, and this approach was followed in the first round of policy development under the Act.<sup>43</sup> This allocation of roles and responsibilities beyond the central ministry responsible for the implementation of the Act potentially helps to embed consideration of climate change across different policy and operational areas.<sup>44</sup>

Since the introduction of the Act in 2017, the Victorian government has also dedicated resources to centralised coordination, promotion and facilitation of mainstreaming activities and interventions, including through a central climate mainstreaming team located within the Climate Change Division (‘CCD’) of DELWP.<sup>45</sup>

### III Research Approach and Methodology

As a rare example of a jurisdiction with framework climate legislation incorporating mainstreaming duties, the experience of the Victorian government offers a rich source of information about how mainstreaming is conceptualised and implemented by governments, and the role of framework legislation in catalysing mainstreaming. Although the *Climate Change Act* had been in force less than five years at the time this study was conducted, there is already evidence of government investment in mainstreaming activities, and ongoing efforts to interpret and implement the mainstreaming duties laid out in the Act. An empirical study conducted at this early stage in the life of the Act is timely, as it provides an opportunity for the Victorian government and observers to reflect on initial progress in mainstreaming, informing future efforts, as well as providing a reference point for future evaluations of the impact of this law. The study also offers a means of sharing early insights from the Victorian experience with other jurisdictions and practitioners who might benefit from lessons learned in Victoria as they develop their own climate mainstreaming activities and the theory and practice of climate mainstreaming expands beyond the current limited range of examples.

#### A Research Approach

Building on a previous research relationship, the authors approached DELWP about further research into the implementation of the *Climate Change Act*. Given the pioneering nature of the Act and the efforts contemporaneously under way in government to deliver what it requires, the authors proposed to co-design a collaborative, targeted project aligned with government priorities for implementing the Act.

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<sup>42</sup> *Climate Change Act* (n 9) ss 34–40.

<sup>43</sup> *Ibid* ss 34, 38.

<sup>44</sup> Foerster et al (n 3) 1070–3.

<sup>45</sup> At the time of writing, the mainstreaming team was called the Government Risk and International Relations Team.

The aim of the study was to contribute practical insights to the ongoing development and delivery of mainstreaming interventions to support robust and appropriate consideration of climate change across the Victorian government in line with statutory duties. To ensure the project aligned with current governmental priorities and optimised the practical knowledge that has built up in the CCD since the Act was enacted, the research team committed to co-develop the project with the climate mainstreaming team. Regular discussions and feedback informed the creation of a project plan designed to develop a clear, contextualised and practical understanding of the mainstreaming provisions in the Act, and to generate recommendations for the development of ministerial guidance and other tools and resources to build capacity for climate mainstreaming across the Victorian government. The project focused particularly on the role of DELWP in progressing and supporting robust and appropriate consideration of climate change in government decisions and activities.

In addition to participating in interviews and focus groups as part of the empirical data collection (discussed below), the mainstreaming team (and occasionally other members of the CCD) received regular updates about the project, helped to identify participants for the empirical research, supported the engagement of the research team with participants across government, reviewed project outputs, and provided comment on the final report.

It should be noted, however, that the findings and opinions expressed in this and other academic articles and project outputs reflect the view of the authors, and do not express the views or position of the Victorian government.

## **B     *Methodology***

Conducted from June 2021 to July 2022, the study adopted a mixed-method, socio-legal research approach involving both desktop and empirical investigation. In addition to legal analysis of the *Climate Change Act* in the context of the emerging body of framework climate laws around the world, the desktop research involved both a review of academic literature on mainstreaming in different policy contexts, and an analysis of relevant examples of guidance materials and other tools used to support decision-makers to integrate climate change in different jurisdictions.

Empirical research techniques were used to gather data on current and emerging mainstreaming practice from a sample of Victorian government public servants from diverse policy and operational areas (see Table 1 below).<sup>46</sup> The sample included all members of the climate mainstreaming team and some members of the CCD. It also included public servants working in climate or environment-related policy and operational roles, or risk management roles, in a wide range of other departments, agencies and government entities, all of whom were members of the inter-governmental Climate Risk Community of Practice. Senior managers, as well as more junior roles, were well represented. The broadly framed s 20 duty was

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<sup>46</sup> Participant selection was purposive and achieved good coverage of relevant stakeholders: Michael Quinn Patton, *Qualitative Research and Evaluation Methods: Integrating Theory and Practice* (Sage, 4<sup>th</sup> ed, 2015) ch 5, module 30.

relevant for all participants in the sample, and the more targeted s 17 duty was relevant for a smaller subset of participants. It should be noted that the sample contained only government actors and that all participants worked on climate change, albeit across different policy and operational areas. While this was appropriate to the targeted research objectives and scope of the project, the sample did not include external viewpoints (either from non-government actors or from government actors not working on climate change) which may have provided different perspectives, particularly on the potential effect of mainstreaming activities undertaken by the Victorian government.

Interviews, focus groups and an online interactive workshop were used to ask participants broadly framed open-ended questions about mainstreaming practice, barriers to and enablers of climate mainstreaming in different policy and operational contexts, and opportunities to support further integration of climate change in decisions and operations.<sup>47</sup> An online survey complemented these activities, asking similarly framed questions of a wider range of participants.<sup>48</sup>

Table 1 sets out the sequence of empirical research activities, outlining how each was used to progressively build a rich understanding of climate mainstreaming practice across government. Reference to data collected through the empirical research activities throughout this article is indicated with a numerical reference to the consultation record.<sup>49</sup>

**Table 1:** Empirical research activities

Activity and timing	Participants	Focus of inquiry	Consultation record
Interviews Focus groups  July–October 2021	Climate mainstreaming team, DELWP Climate Change Division, DELWP  (16 participants)	<ul style="list-style-type: none"> <li>• Interpretation of statutory duties and conceptual framing of climate mainstreaming</li> <li>• Activities and initiatives used by DELWP to foster and support climate mainstreaming</li> <li>• Effectiveness of mainstreaming interventions</li> <li>• Opportunities for new initiatives and activities</li> </ul>	Records 1–11

<sup>47</sup> Interviews (1 hour) and focus groups (1.5–2 hours) were conducted online by the authors. The interactive online workshop (2 hours) was conducted online using Zoom conferencing and break-out discussions, as well as Padlet discussion forums to gather data from participants. Audio recordings were transcribed for analysis.

<sup>48</sup> The survey was administered through Qualtrix. It included a mixture of multiple-choice and extended-answer questions designed to replicate and build on questions asked in initial interviews.

<sup>49</sup> This is in accordance with Monash University Ethics Approval (Project ID: 28928). Records include transcripts of the interviews, focus groups and workshop discussions and associated notes (including Padlets to which participants contributed during workshop discussions), as well as the survey results.

Activity and timing	Participants	Focus of inquiry	Consultation record
Online survey  October–November 2021	Victorian public servants in diverse policy and operational roles from a wide range of government departments, agencies and entities  (40 participants)	<ul style="list-style-type: none"> <li>• Relevance of climate change to different work areas</li> <li>• Awareness and interpretation of statutory duties</li> <li>• Current approaches to climate mainstreaming in different work areas</li> <li>• Challenges arising in the consideration of climate change in work area</li> <li>• Opportunities to support further integration of climate change in different work areas</li> </ul>	Record 12
Interactive online workshop  December 2021	Victorian public servants in diverse policy and operational roles from a wide range of government departments, agencies and entities  (35 participants)	<ul style="list-style-type: none"> <li>• Current approaches to climate mainstreaming in different work areas</li> <li>• Challenges arising in the consideration of climate change in work area</li> <li>• Examples of effective climate mainstreaming</li> <li>• Priorities for mainstreaming interventions in different work areas</li> <li>• Types of interventions needed (eg, guidance, tools, resources and other activities)</li> </ul>	Records 13–22
Supplementary interviews  December 2021 – February 2022	Select participants from across the Victorian public service, representing more mature mainstreaming practice  (12 participants)	<ul style="list-style-type: none"> <li>• Examples of more mature mainstreaming practice across the Victorian government</li> <li>• Key enablers of and opportunities to support further integration of climate change considerations in different government contexts</li> </ul>	Records 23–29

Qualitative content and thematic analysis approaches were employed to analyse the empirical data. Themes and questions for analysis were developed from the initial desktop research and were informed by the project objective to contribute

to the climate mainstreaming work program of DELWP.<sup>50</sup> Table 2 sets out the analytical framework used by the authors to guide manual coding of data.

**Table 2:** Analytical framework

Themes	Questions for analysis
Scope and role of climate mainstreaming	<ul style="list-style-type: none"> <li>• How is climate mainstreaming framed and understood by different government stakeholders?</li> <li>• Why is mainstreaming important?</li> <li>• How does mainstreaming interact with and underpin explicit climate policy initiatives?</li> <li>• Would mainstreaming happen without explicit statutory duties and targeted activities and initiatives?</li> </ul>
Scope and interpretation of statutory duties	<ul style="list-style-type: none"> <li>• Which decisions, policies, programs and processes need to consider climate change?</li> <li>• Which decision-makers and other government officers are bound by the statutory duties?</li> <li>• What amounts to robust consideration of climate change in line with statutory duties?</li> </ul>
Current mainstreaming practices	<ul style="list-style-type: none"> <li>• What are the types of decisions and other government activities for which climate change is considered relevant and material?</li> <li>• How is climate change integrated into decision-making and operations, if at all?</li> <li>• What resources, tools and other approaches are used?</li> <li>• What is the outcome of integrating climate change in decision-making and operations?</li> </ul>
Enablers of climate mainstreaming	<ul style="list-style-type: none"> <li>• What are the factors and conditions which drive and enable climate mainstreaming?</li> <li>• Which areas of government are successfully mainstreaming climate change? Why?</li> </ul>
Barriers to climate mainstreaming	<ul style="list-style-type: none"> <li>• What challenges are encountered in integrating climate change in government decisions and operations?</li> <li>• What are the factors and conditions that hinder climate mainstreaming?</li> <li>• Which areas of government are less advanced in mainstreaming climate change? Why?</li> </ul>
Opportunities to foster mature climate mainstreaming	<ul style="list-style-type: none"> <li>• What are the opportunities in government processes and systems to embed consideration of climate change?</li> <li>• What types of initiatives and activities help build capacity and capability to integrate climate change?</li> <li>• What inputs, tools and resources are needed to support decision-makers across government?</li> </ul>

<sup>50</sup> See generally Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 927, 933–5; Svend Brinkmann, 'Unstructured and Semi-Structured Interviewing' in Patricia Leavy (ed), *The Oxford Handbook of Qualitative Research* (Oxford University Press, 2014) 277, 277–99.

## IV Findings from the Empirical Study

This Part outlines the key findings of the empirical study. Informed by theories of mainstreaming proposed in the literature,<sup>51</sup> the discussion initially explores the scope, role and value of mainstreaming under the *Climate Change Act*. Empirical data is then used to delineate a range of factors that enable or hinder the realisation of mainstreaming objectives in practice and to group these into three main categories: regulatory, institutional and capacity/capability.<sup>52</sup> Discussion and categorisation of these factors is informed by taxonomies of mainstreaming activities set out in the literature,<sup>53</sup> as well as the diverse range of mainstreaming activities under way in the Victorian government, which provide evidence of progress to date as well as rich insights into how mainstreaming objectives can be achieved.

### A Scope, Role and Value of Mainstreaming

Project participants were asked to discuss their interpretation and conceptualisation of climate mainstreaming generally and in the context of the statutory duties set out in the *Climate Change Act*. The responses are useful for discerning a narrative and underpinning objective(s) for climate mainstreaming.

Most participants conceived of mainstreaming in ways that focused on *integrating* climate change considerations into decisions and activities, and *normalising* consideration of climate change across government.<sup>54</sup> For example, participants defined mainstreaming as ‘putting a climate change lens on everything you do’<sup>55</sup> or ‘embedding climate change considerations into everyday basic policies, programs and processes’.<sup>56</sup> One participant explained that they ‘consider whether climate change will affect the implementation of the policy ... [and] whether the policy [we’re] thinking about implementing will itself exacerbate or help to adapt to climate change’.<sup>57</sup> Participants also emphasised that mainstreaming implies normalisation, so that ‘people in their everyday business-as-usual roles ... have an understanding of climate risk that applies to them and ... factor it into their everyday work’<sup>58</sup> and ‘climate change is no longer viewed as an add-on’.<sup>59</sup>

In addition to themes of integration and normalisation, participants referenced the broadening of climate-related capabilities across government, particularly in relation to the use of climate change science to inform decision-

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<sup>51</sup> This literature is summarised briefly in Part II(A) above.

<sup>52</sup> The three categories of mainstreaming practice are further developed in a conceptual model for mature mainstreaming in Alice Bleby and Anita Foerster, ‘A Conceptual Model for Climate Change Mainstreaming in Government’ (2023) 12(3) *Transnational Environmental Law* 623.

<sup>53</sup> This literature is summarised briefly in Part II(A) above.

<sup>54</sup> Records 1, 3–11, 23, 26–9.

<sup>55</sup> Record 4.

<sup>56</sup> Record 1.

<sup>57</sup> Record 8.

<sup>58</sup> Record 3.

<sup>59</sup> Record 18. See also record 11.



making and operations.<sup>60</sup> For example, one participant explained that mainstreaming means that ‘practices that once occurred in various specialist settings ... things that used to be done by the climate experts somewhere [are] now generally done by more generalist workers’.<sup>61</sup> Another noted that mainstreaming does not necessarily require decision-makers to have all the relevant knowledge and expertise themselves, but they must know how to access relevant inputs for decision-making.<sup>62</sup> Many participants emphasised that good mainstreaming entails broad recognition that considering and responding to climate change is not only an environmental issue or responsibility of the environment or climate change department, but it is ‘owned’ by everyone and is part of everyone’s responsibility across government.<sup>63</sup> Others emphasised that climate-related capabilities must extend to everyone in an organisation, so all government staff are equipped to understand and act on climate change.<sup>64</sup>

Several participants also argued that mainstreaming means more than a change in process — it involves normative and cultural change, a change in attitude across government regarding the significance of climate change to government decisions and activities,<sup>65</sup> or a change of paradigm.<sup>66</sup> They suggested that mainstreaming should encompass both formal and informal decision-making with consideration of climate change becoming an integral part of organisational culture.<sup>67</sup>

When asked to consider what the outcomes of mainstreaming are or should be, participants noted that effective mainstreaming means that climate change is explicitly factored into decisions and, as a result, those decisions change to be better aligned with climate policy objectives.<sup>68</sup> Some suggested that mainstreaming is more than integrating another consideration into decision-making; rather, it involves some level of prioritisation. For example, one participant noted, ‘I’m not sure it counts as good mainstreaming if it can get lost among other competing considerations’<sup>69</sup> and another distinguished mainstreaming as ‘more than [integration] ... how do you actually transition to new processes that really ... [address] the impact that we have on the planet?’.<sup>70</sup>

In the context of the Act, many participants noted that climate mainstreaming is not only supported by the explicit statutory duties, but also by the general architecture of the Act, with the allocation of responsibilities for emissions reduction pledges and adaptation plans already resulting in a gradual building of awareness and capacity to address climate change across government.<sup>71</sup> They saw the core

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<sup>60</sup> Records 1–2, 14–16, 20, 26–7.

<sup>61</sup> Record 28. See also records 2, 27.

<sup>62</sup> Records 3, 9.

<sup>63</sup> Records 1–2, 4–6, 9–11, 15, 17, 26–9.

<sup>64</sup> Records 5, 19.

<sup>65</sup> Records 9, 11, 29.

<sup>66</sup> Record 4.

<sup>67</sup> Records 9, 19.

<sup>68</sup> Record 7. See also records 12–13, 21, 24–5, 27–8.

<sup>69</sup> Record 20.

<sup>70</sup> Record 27.

<sup>71</sup> See also Foerster et al (n 3) 1070–3.

climate policy initiatives and the mainstreaming duties as interdependent. Where climate change is well integrated into decision-making in particular sectors or systems, a strategic policy such as an emissions reduction pledge or adaptation plan will address climate change issues in a more comprehensive, robust and ambitious way. On the flipside, core climate policy mechanisms such as pledges and adaptation plans also drive more effective mainstreaming, as the work done developing and implementing the strategic policy informs and is infused into other decisions and activities.<sup>72</sup>

Nevertheless, participants conceptualised climate mainstreaming as distinct from the core climate policy measures in the Act. They discussed embedding climate considerations into centralised government decision-making processes (eg, Cabinet submissions, asset management frameworks) and developing and facilitating the use of tools to enhance consideration of climate change across government, including carbon valuation, climate-related financial risk disclosures, and guidance and training on the use of climate impact scenarios in various policy and operational settings.<sup>73</sup> Although some participants suggested that an explicit focus on mainstreaming will not be needed once consideration of climate change becomes better integrated and normalised across the Victorian government (including via the rollout of emissions reduction pledges and adaptation action plans under the Act),<sup>74</sup> others noted that ongoing engagement and investment of resources is required to sustain mature mainstreaming, as knowledge, best practices and government and community priorities evolve.<sup>75</sup>

As such, participants generally explained and framed climate mainstreaming under the Act as ambitious and transformative. This aligns well with the conceptualisation of mainstreaming by scholars such as Gupta as ‘more than integration’<sup>76</sup> and as a spectrum of activities and initiatives that embed climate change into government decisions and actions to varying degrees with the end point being ‘mature’ mainstreaming, illustrated in Figure 1 below (adapted from Gupta).<sup>77</sup>

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<sup>72</sup> Records 7, 10–11, 27.

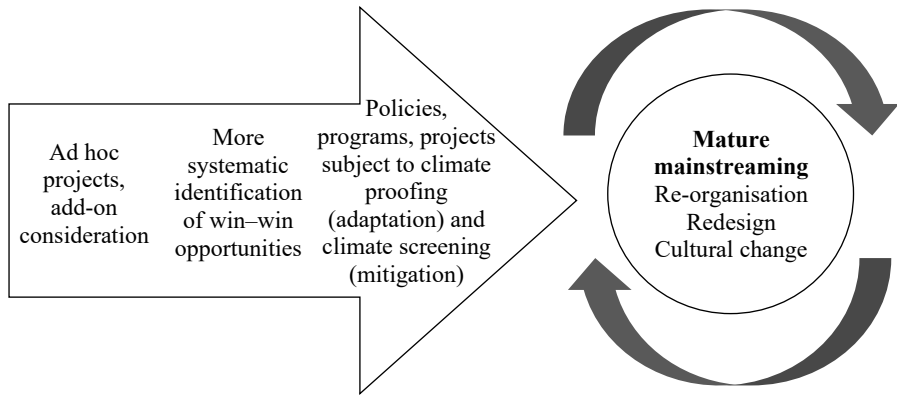
<sup>73</sup> Records 10–11.

<sup>74</sup> Records 5–6.

<sup>75</sup> Record 23.

<sup>76</sup> Gupta (n 13) 75.

<sup>77</sup> Ibid 85.

**Figure 1:** Towards mature mainstreaming

## **B     *Mechanisms, Barriers and Enablers for Climate Mainstreaming***

Project participants were asked to comment on their interpretation of statutory mainstreaming duties under the *Climate Change Act* and, in particular, what activities, mechanisms and practices they associated with climate mainstreaming and the discharge of statutory mainstreaming duties. They were also asked open-ended questions about the factors which enabled or hindered robust integration of climate change in their work areas. To illustrate the diversity of measures and influencing factors involved in mainstreaming, and to create a full and navigable picture of climate mainstreaming in Victoria, the research team organised the empirical data into three categories of mechanisms (regulatory, institutional and capacity/capability) with associated barriers and enablers.

### **1     *Regulatory Mechanisms, Barriers and Enablers***

Many participants identified formal rules and obligations to consider and address climate change in decision-making and processes, and requirements to report on climate risk management activities, as important regulatory drivers of climate mainstreaming. Such obligations can be provided through legislation, but also through authoritative guidelines, or other formal instruments such as government procedures and standards. When discussing these obligations, participants also referenced a range of complementary initiatives, activities and interventions that were used to clarify and provide authoritative guidance on meeting legal obligations. Examples of regulatory mainstreaming mechanisms discussed by study participants are set out in Table 3 below, with the explicit mainstreaming duties of the *Climate Change Act* also included.

**Table 3: Regulatory mechanisms**

Type of mechanism	Examples
Statutory duties and requirements (direct references to climate change)	<ul style="list-style-type: none"> <li>• <i>Climate Change Act</i>: Section 17 sets out a clearly defined duty to consider climate change in scheduled decisions and activities; s 20 sets out a broadly framed duty for the Victorian government to take climate change into account, where relevant, in decisions, policies, programs and processes.</li> <li>• <i>Local Government Act 2020</i> (Vic): Section 9 sets out the overarching governance principles for local government including that the ‘economic, social and environmental sustainability of the municipal district, including mitigation and planning for climate change risks, is to be promoted’.</li> <li>• <i>Marine and Coastal Act 2018</i> (Vic): Section 7 sets out the statutory objectives including ‘to promote the resilience of marine and coastal ecosystems, communities and assets to climate change’ and ‘to respect natural processes in planning for and managing current and future risks to people and assets from coastal hazards and climate change’. Guiding principles for the planning and management of the marine and coastal environment also reference climate change (eg, s 9).</li> <li>• Victoria Planning Provisions, developed under the <i>Planning and Environment Act 1987</i> (Vic): For example, VPP 13 <i>Environmental Risks and Amenity</i> includes planning directions on preparing for and responding to climate risks and hazards for strategic and statutory planning functions.</li> <li>• <i>Infrastructure Victoria Act 2015</i> (Vic): Section 8 sets out the functions of Infrastructure Victoria which include to undertake and publish research on matters relating to infrastructure including ‘infrastructure policy issues arising from climate change, such as the measurement of greenhouse gas emissions produced from infrastructure’.</li> </ul>
Statutory duties and requirements (indirect application to climate risks)	<ul style="list-style-type: none"> <li>• <i>Public Administration Act 2004</i> (Vic): Directors and boards of public entities are required to identify and address major risks as part of directors’ duties of due care and diligence (s 79). They must inform the responsible minister of known major risks to the operation of the entity and the systems in place to address these risks (s 81).</li> <li>• <i>Financial Management Act 1994</i> (Vic): Departments and other public bodies covered by this legislation must develop, implement and keep under review a risk management strategy (s 44B) and apply the Victorian Government Risk Management Framework (‘VGRMF’) (Standing Direction 3.7.1). The VGRMF requires consideration of material risks in agency planning and decision-making, as well as contribution to the management of state-significant risks. ‘Climate change impacts’ is identified as a priority state-significant risk, and ‘adverse outcomes from the transition to a low-carbon economy’ is also a state-significant risk.</li> </ul>

Type of mechanism	Examples
Guidelines for decision-makers (developed and endorsed by government)	<ul style="list-style-type: none"> <li>• <i>Managing Climate Change Risk: Guidance for Board Members and Executives of Water Corporations and Catchment Management Authorities</i> (2019): This guidance was prepared to assist board members to understand the scope of their responsibilities in relation to climate change, including under the <i>Public Administration Act</i> and the <i>Financial Management Act</i>.</li> <li>• <i>Local Government Climate Change Adaptation Roles and Responsibilities under Victorian Legislation: Guidance for Local Government Decision-Makers</i> (2020): This guidance was prepared to assist local government decision-makers to understand the scope of, and deliver on their roles and responsibilities for adaptation under, current Victorian legislation including the <i>Climate Change Act</i>, the <i>Local Government Act</i> and the <i>Planning and Environment Act</i>.</li> <li>• <i>Tackling Climate Change and Its Impact on Health through Municipal Public Health and Wellbeing Planning: Guidance for Local Government</i> (2020): This guidance was developed to assist councils in meeting their legislative obligations to consider climate change when preparing a municipal health and wellbeing plan under the <i>Public Health and Wellbeing Act 2008</i> (Vic), as required under s 17 and sch 1 of the <i>Climate Change Act</i>.</li> <li>• <i>Climate Change Risk Management Guide</i>, under the VGRMF (2021): This guide by the Victorian Managed Insurance Authority ('VMIA') is targeted to risk professionals, managers, executives and board members and provides general information on climate change risks relevant to Victoria, time horizons for risk assessments, and an example of risk management approaches adopted by an emergency services organisation.</li> </ul>
Standards and procedures	<ul style="list-style-type: none"> <li>• <i>Social Procurement Framework: Detailed Guidance for Implementation of Climate Change Policy Objectives</i>: This framework includes project-specific requirements to minimise greenhouse gas emissions and build resilience to climate impacts for government procurement activities valued at or above \$20 million.<sup>78</sup></li> </ul>

<sup>78</sup> See 'Detailed Guidance for Implementation of Climate Change Policy Objectives', *Buying for Victoria* (Web Page, July 2023) <<https://www.buyingfor.vic.gov.au/detailed-guidance-implementation-climate-change-policy-objectives>>.

Type of mechanism	Examples
Reporting obligations	<ul style="list-style-type: none"> <li>• FRD 24 <i>Reporting of Environmental Data by Government Entities</i> (June 2022): This financial reporting directive requires government entities to disclose aspects of energy and resource consumption and environmental performance in their annual reports, with disclosure requirements differing according to the size, environmental impact and capability of entities. More extensive reporting is required from scheduled tier 1 entities which must disclose climate-related risks and responses, relevant targets, and the entity's environmental management system.<sup>79</sup></li> </ul>

Participants noted the value of the *Climate Change Act* itself as an important regulatory enabler of climate mainstreaming, explaining how the legislation has contributed to greater awareness of, and concern about, climate change across government, particularly in work areas involved with developing emissions reduction pledges and adaptation plans, but also in central government agencies.<sup>80</sup> One participant noted, 'what the Act itself did is give us a much stronger platform to pursue those issues because we now had this statutory responsibility to consider things'.<sup>81</sup>

The mainstreaming duties were described as a valuable foundation (a 'hook' or justification) for activities to embed climate change in decision-making.<sup>82</sup> Another participant suggested that a legal obligation such as s 20 can 'clear the air ... about whether it's relevant and who says it's important'.<sup>83</sup> However, while the explicit mainstreaming duties were certainly seen as important enablers with broad potential reach into different policy areas, some participants argued that incorporating statutory obligations to consider and integrate climate change directly into sectoral legislation would better support mainstreaming.<sup>84</sup>

Participants also indicated that significant regulatory barriers to the effective consideration and integration of climate change in government decisions and operations in Victoria remain. One common theme was legal uncertainty concerning the interpretation of the broadly framed s 20 duty in the Act, including in relation to what it means to 'appropriately take account' of climate change,<sup>85</sup> who is responsible for discharging the duty given its very broad application to the Victorian government,<sup>86</sup> how to demonstrate that climate change has been taken into account

<sup>79</sup> See 'Financial Reporting Directions and Guidance', *Department of Treasury and Finance* (Web Page, 2022) <<https://www.dtf.vic.gov.au/financial-reporting-policy/financial-reporting-directions-and-guidance>>.

<sup>80</sup> Records 7–9, 12, 17, 23, 28–9.

<sup>81</sup> Record 28.

<sup>82</sup> Record 5–6, 28.

<sup>83</sup> Record 23.

<sup>84</sup> Records 5, 11, 29.

<sup>85</sup> Records 6, 23, 26.

<sup>86</sup> Record 28.

in a decision<sup>87</sup> and how duty-holders should balance competing considerations in considering climate change.<sup>88</sup>

When discussing these uncertainties, many participants drew attention to the lack of authoritative guidance available for decision-makers on how to address and consider climate change, including in relation to the s 17 and s 20 duties, and noted that guidelines have not yet been issued despite statutory provision for this.<sup>89</sup> They acknowledged, however, that there is no one-size-fits-all approach to responding to climate change, which means guidance on meeting legal obligations must also be tailored to a range of different circumstances.<sup>90</sup>

Further, s 20 was sometimes described as a weak obligation that would be more effective if expressed in stronger, more conclusive language.<sup>91</sup> Those participants who discussed the s 17 duty typically framed it as a stronger duty than s 20, with less uncertainty surrounding its interpretation.<sup>92</sup> However, concerns were expressed about the narrow application of this duty. With such a small number of decisions and actions currently prescribed under sch 1 of the Act, the practical effect of the provision is greatly constrained.<sup>93</sup>

Participants did note that awareness of and attention to the discharge of the mainstreaming duties had increased across the government recently as a result of litigation seeking to enforce these duties.<sup>94</sup> For example, in 2022, civil society groups brought a case in the Supreme Court of Victoria which argued, *inter alia*, that there had been a failure by the Victorian Environment Protection Authority ('EPA') to consider climate change, as required by the s 17 duty, in decisions to renew the operating permits for coal-fired power stations in the Latrobe Valley.<sup>95</sup> At the time

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<sup>87</sup> Records 23–5.

<sup>88</sup> Records 4, 6–7, 12–13, 17, 19, 26.

<sup>89</sup> Records 12, 23, 29.

<sup>90</sup> Record 1.

<sup>91</sup> Records 13, 26.

<sup>92</sup> Record 12.

<sup>93</sup> Records 10–11.

<sup>94</sup> Records 7, 11–12, 19, 21, 24–5, 29.

<sup>95</sup> *Environment Victoria Inc v AGL Loy Yang Pty Ltd* [2022] VSC 814 ('*Loy Yang*'). Gorton J confirmed that when imposing amended or new conditions on licensees, the EPA was clearly required to consider climate change in line with s 17 of the *Climate Change Act* (n 9). However, the Judge did not find that there had been a failure to do so. In his reasoning, Gorton J referred to the EPA's statement of reasons for the decision which indicated that the EPA had imposed new conditions requiring improved risk management and monitoring programs and that the EPA considered that such conditions would contribute to lowering Victoria's greenhouse gas emissions by driving efficiency improvements. Similarly, by reducing some of the discharge limits for other air pollutants covered by the licences, the EPA argued that the facilities would be effectively restricted from increasing their production or burning more coal, thereby capping greenhouse gas emissions at current levels. Gorton J found this to amount to a sufficient and appropriate consideration of climate change and emphasised that the exercise of statutory power at issue was the decision of the authority to impose amended conditions on existing licences following the review of licences. It was not a decision to regulate (or not to regulate) the emissions of greenhouse gas through these licences, and the Judge indicated that such a decision was not required to be taken by the EPA under the *Environment Protection Act* (n 34) (under which the licences had been issued and under which the review was undertaken). Gorton J stated: '[The Authority] was required to consider the potential impacts on climate change of the increased restrictions it placed on the emission of pollutants in

of the empirical study, this case had not yet been decided. It would be interesting to revisit these findings, given the case was ultimately unsuccessful with the Court finding that the EPA had sufficiently discharged its duty to consider climate change, despite not including conditions to regulate greenhouse gas emissions in the revised operating permits. The decision in this case underscored the relatively broad discretion embodied in s 17 concerning the consideration of climate change.<sup>96</sup> It is, however, worth noting that at the time the licence review was undertaken by the EPA, interim emissions reduction targets and the first round of emissions reduction pledges under the Act had not yet been finalised. As such, the EPA would not have been able to point to concrete factors such as interim targets when reviewing and revisiting licence conditions; nor was the government policy position on reducing emissions in the energy sector clearly set out. A judicial review of a similar decision in the future would have more to draw on in adjudicating whether the s 17 duty had been sufficiently discharged.

Beyond legislation, participants also discussed a wide range of regulatory instruments including authoritative guidance documents; statements of obligation for public authorities;<sup>97</sup> requirements to consider and account for climate change in central government processes such as Cabinet submissions, budget processes and procurement;<sup>98</sup> financial and other reporting by government entities, such as financial reporting directives;<sup>99</sup> risk registers and associated processes;<sup>100</sup> and other departmental strategies and plans.<sup>101</sup> While there are some examples of these instruments explicitly referencing climate change (see Table 3 above), many opportunities remain to embed climate change effectively into these types of sectoral instruments which guide and constrain government decisions and operations across the Victorian government.<sup>102</sup>

## 2 *Institutional Mechanisms, Barriers and Enablers*

When discussing climate mainstreaming activities and initiatives, governance arrangements which facilitate and support robust and appropriate consideration and

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circumstances where there was, and could be, no suggestion that the changes to the restrictions that the Authority made on the emission of pollutants would add to climate change': at [64]. The Judge emphasised that it was enough for the authority to consider climate change, and 'the weight given to such considerations was a matter for the Authority': at [65].

<sup>96</sup> *Climate Change Act* (n 9) s 17 frames climate change as an additional, albeit mandatory, consideration, with no indication of the weight to be attributed to climate change compared to other mandatory considerations that may be set out in relevant sectoral legislation scheduled under the Act. Unlike comparable provisions in other example framework laws, neither s 17 nor s 20 clearly requires decisions to be made in a way that best supports the achievement of emissions reduction targets and adaptation objectives of the Act. See, eg, *Climate Change (Scotland) Act* (n 8) pt 4, which includes a clear positive obligation for public bodies to act in the way best calculated to contribute to the delivery of emissions reduction targets and in the way best calculated to help deliver any statutory climate change adaptation program. See also *Fiji's Climate Change Act* (n 8) pt 5, s 18.

<sup>97</sup> Records 5–6, 10–11, 13, 15, 26–7.

<sup>98</sup> Records 4, 12, 17.

<sup>99</sup> Records 5, 12, 14, 17, 19.

<sup>100</sup> Records 6, 11–13, 17, 19, 20, 23, 27, 29.

<sup>101</sup> Records 12, 17, 23, 28.

<sup>102</sup> Records 12, 26.



integration of climate change emerged as a strong theme for many participants. As noted above, since the passage of the *Climate Change Act*, government resources have been allocated to a central climate mainstreaming team within the CCD. This team sees itself as ‘centrally coordinating ... capability building ... providing people with the tools and information they need in order to do it themselves ... enablers, capacity builders ... for other areas of government’.<sup>103</sup> The team has facilitated the delivery of several mainstreaming initiatives, including in partnership with central government agencies (the Department of Treasury and Finance and the Department of Premier and Cabinet). Raising awareness and building engagement at executive levels and within central government agencies with significant influence across government has been a strong focus for these activities.

Alongside this work, networks and ‘community of practice’ approaches have been introduced to facilitate collaboration, peer learning, and resource sharing. Several ad hoc partnerships between the climate policy and mainstreaming teams and other parts of government are also emerging to support the integration of climate consideration in different policy and operational settings. Some departments and agencies have also established climate-related roles in their leadership and institutional frameworks, thereby helping to broaden and decentralise climate change governance. Examples of institutional mainstreaming currently under way across the Victorian government are outlined in Table 4.

**Table 4:** Institutional mechanisms

Type of mechanism	Examples
Authorising environment for mainstreaming	<ul style="list-style-type: none"><li>• High-level cross-government committees have played a role in overseeing a range of mainstreaming initiatives led by the CCD. The Victorian Secretaries’ Board comprises the Secretaries of each department, the Chief Commissioner of Police and the Victorian Public Sector Commissioner. The State Significant Risk Interdepartmental Committee is comprised of Deputy Secretaries and senior executives from government departments and agencies and is chaired by the Department of Treasury and Finance.</li><li>• Some government departments (eg, the Department of Jobs, Precincts and Regions) have established dedicated climate change units tasked with developing department-wide work programs for climate mainstreaming in line with the statutory duties of the <i>Climate Change Act</i>.</li></ul>
Central agency engagement	<ul style="list-style-type: none"><li>• In 2022, the CCD worked with the Department of Treasury and Finance to issue the first whole-of-government climate risk statement following recommendations of the Task Force on Climate-Related Financial Disclosures.<sup>104</sup> The statement outlines the government’s actions to understand, manage and monitor climate-related risks and opportunities for Victoria as well as for the government’s own operations.</li></ul>

<sup>103</sup> Record 11.

<sup>104</sup> *TFCD Recommendations* (n 29).

Type of mechanism	Examples
Partnerships for the delivery of mainstreaming initiatives	<ul style="list-style-type: none"> <li>The CCD worked with the VMIA to develop the <i>Climate Change Risk Management Guide</i> and associated training (see Table 3). It has also worked with Ambulance Victoria to develop responses to the risks of increased frequency and severity of heatwave for ambulance services.</li> </ul>
Peer networks for knowledge exchange and capacity building	<ul style="list-style-type: none"> <li>The CCD hosts a Climate Risk Community of Practice comprising Victorian public servants from a wide range of departments and agencies, including senior managers and sectoral policy and operational experts. The aim is to facilitate peer learning, knowledge exchange, coordination and cooperation between departments and agencies on climate change and climate risks.</li> </ul>

Participants identified different features of the institutional context as important enablers of climate mainstreaming including dedicated climate change teams or roles within organisations,<sup>105</sup> and effective collaboration between different policy areas and the central climate policy team including on pilot projects.<sup>106</sup> Several participants from across government recognised the value of centralised climate policy and mainstreaming support, noting that the CCD and mainstreaming teams have played an important role in coordination,<sup>107</sup> advocacy on climate change within government,<sup>108</sup> and offering consistent, centralised advice to different areas of government on climate change issues.<sup>109</sup> Opportunities for peer learning and sharing experiences of mainstreaming across government through the Climate Risk Community of Practice were highly valued.<sup>110</sup>

Many participants noted the critical importance of support and buy-in from senior decision-makers, who provide a mandate and a strong authorising environment for mainstreaming.<sup>111</sup> Low levels of awareness of climate change and its implications for government at senior and executive levels can hinder progress on mainstreaming.<sup>112</sup> Similarly, participants noted the importance of engagement from central agencies in creating an authorising environment for climate change work across government.<sup>113</sup> However, the value of individual ‘champions’ of mainstreaming at all levels within departments was also noted.<sup>114</sup>

In terms of institutional architecture, participants discussed a lack of integration and coordination across government, and a risk of operating in ‘silos’ and failing to consider the interrelationships between systems (or sectors), risks and

<sup>105</sup> Records 23, 26.

<sup>106</sup> Record 27. See also records 2, 10–11, 28.

<sup>107</sup> Records 10, 29.

<sup>108</sup> Record 11.

<sup>109</sup> Records 4, 27.

<sup>110</sup> Records 2, 12, 29.

<sup>111</sup> Records 4, 6, 8, 10, 12, 17, 19, 28–9.

<sup>112</sup> Records 1, 3–4, 6, 9, 27, 29.

<sup>113</sup> Records 6, 9.

<sup>114</sup> Records 6, 10, 23, 26–7.

decision-makers, leading to inconsistent approaches and frustration.<sup>115</sup> They referred to a persistent framing of climate mainstreaming as an ‘environmental’ issue and therefore the responsibility of a climate change or sustainability team.<sup>116</sup>

Integrating climate change considerations into well-established processes was seen as more difficult than integrating it into a new process or project;<sup>117</sup> and while it might be possible to address climate change in high-level strategic documents, sufficient resources and capacity to implement these strategies in practice was often wanting.<sup>118</sup>

### 3 *Capacity and Capability Mechanisms, Barriers and Enablers*

Capacity and capability to consider and integrate climate change vary widely across the Victorian government. Developing targeted information, resources and user-friendly decision-support tools to address this unevenness has been a strong focus of the CCD. Early emphasis on providing accessible information on climate change impacts has expanded, with a more recent focus on embedding the use and application of this information in different decision- and policy-making contexts. In addition to resources and tools, participants discussed a range of associated activities which support decision-makers to apply climate change information to their own work context and to use decision-support tools, as well as pilot projects which demonstrate good climate risk management and can be adapted and replicated in different contexts. Examples of mainstreaming initiatives addressing capacity and capability are set out in Table 5 below.

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<sup>115</sup> Records 2, 6, 27.

<sup>116</sup> Records 5, 11, 14, 19, 27.

<sup>117</sup> Records 12, 15, 26.

<sup>118</sup> Record 26.

**Table 5:** Mechanisms to build capacity and capability

Type of mechanism	Examples
Information resources (climate science, climate impacts)	<ul style="list-style-type: none"> <li>• <i>Victorian Climate Projections 2019</i> (developed in partnership with CSIRO): The projections translate high-resolution climate modelling into an updated set of climate projections for use in impact/risk assessment. Data sets, guidance material, technical reports, regional reports and fact sheets are also provided.<sup>119</sup></li> </ul>
Decision-making tools / decision-support frameworks	<ul style="list-style-type: none"> <li>• Victoria's Future Climate Tool (developed in partnership with CSIRO): This interactive mapping tool provides access to locally scaled climate projection data to the 2090s. Climate information (including temperature, rainfall and heatwaves) can be viewed as maps and charts at different spatial scales and across different time periods and can be exported for use in different spatial tools.<sup>120</sup> Regional summaries have been developed.</li> <li>• <i>Victoria's Future Climate Tool: User Guide</i>: This guidance supports users of the tool.</li> </ul>
Training and support for use of tools/application of climate science	<ul style="list-style-type: none"> <li>• <i>Climate Change Risk Foundations</i>: This workshop developed by the VMIA is designed for risk professionals, governance professionals and environmental specialists. The training aims to build awareness of government expectations concerning climate risks, advise government organisations on these risks and likely impacts on government operations and services, and support the integration of these risks into relevant government risk management processes.<sup>121</sup></li> <li>• <i>Your Council and Climate Change: Understanding the Risks and Learning to Adapt</i> (April–June 2021): This online, interactive training course for local government councillors and executives on climate change risk and adaptation covered business risks and responses, local government roles and responsibilities, legal duties of due care and diligence, climate change impacts on councils, embedding climate change across council, and a range of local government case studies.</li> </ul>
Pilot projects and case studies	<ul style="list-style-type: none"> <li>• <i>Stress Testing for the Potential Impact of Heatwave on Ambulance Victoria</i>: This case study explores the use and application of the Victoria's Future Climate Tool to develop responses to the risks of increased frequency and severity of heatwaves for ambulance services.<sup>122</sup></li> </ul>

<sup>119</sup> See 'Victorian Climate Projections 2019', *Climate Change in Australia* (Web Page, 2019) <<https://www.climatechangeinaustralia.gov.au/en/projects/victorian-climate-projections-2019>>.

<sup>120</sup> See *Victoria's Future Climate Tool* (Web Page, 2019) <<https://vicfutureclimatetool.indraweb.io>>.

<sup>121</sup> See 'Climate Change Risk Foundations', *VMIA* (Web Page) <<https://www.vmia.vic.gov.au/training/our-offerings/climate-change-risk-foundations>>.

<sup>122</sup> See VMIA, Ambulance Victoria and DELWP, *Victoria's Future Climate Tool: Case Study — Stress Testing for the Potential Impact of Heatwave on Ambulance Victoria* ('*Victoria's Future Case Study*').

Awareness and experience of climate change risks and appreciation of the relevance of climate change is uneven across the Victorian government.<sup>123</sup> Climate change may be integrated on paper into strategies and plans, yet in practice there are often inadequate resources available to support full implementation and capacity building.<sup>124</sup> This unevenness can also be observed within a single agency: for example, climate change may be well integrated into strategic, large-scale or highly visible decisions, but less well considered in smaller or operational decisions.<sup>125</sup>

Participants indicated that climate mainstreaming is more mature in areas of government where there are existing climate science modelling capabilities or where staff have the skills to interpret and apply that information (eg, water, marine and coastal and bushfire policy areas).<sup>126</sup> Similarly, those areas of government where there is lived experience of responding to climate change impacts have developed more advanced practice (eg, water supply management following extensive recent droughts including from 1999 to 2009 and bushfire risk reduction and emergency management following catastrophic events in 2009 and 2019).<sup>127</sup>

Participants had reasonably good awareness of available information resources, tools and decision supports, set out in Table 5 above, such as the Victoria's Future Climate Tool.<sup>128</sup> Targeted and authoritative guidance for mainstreaming was considered by many to be vitally important, and practical case studies exemplifying the integration of climate change in different decision-making and operational contexts were highly valued.<sup>129</sup> Participants consistently argued for more centralised support for mainstreaming, either through the development of more decision-support tools and guidance, or through greater centralised capacity to advise and support different areas of government on climate change issues.<sup>130</sup> A particular focus of discussions was the need to build capability to better quantify climate change considerations in the development and appraisal of policies, projects and programs.<sup>131</sup> Participants also noted gaps in technical expertise to apply climate change science and climate scenarios to stress test policy and integrate climate science into risk assessments and operational matters (even with targeted decision-support tools such as the Victoria's Future Climate Tool), noting that further targeted support in using such tools was needed.<sup>132</sup>

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<sup>123</sup> Records 6, 11, 12, 28.

<sup>124</sup> Records 12, 13, 26.

<sup>125</sup> Record 26.

<sup>126</sup> Records 1, 10, 27.

<sup>127</sup> Records 3, 5, 6, 11, 13, 14, 26, 28.

<sup>128</sup> Records 2, 3, 10, 11, 12, 27, 30. Participants also noted and discussed a range of other guidance materials and tools set out in Table 3 including the VMIA Climate Risk Guidance (records 2, 11, 27), guidance on directors' duties for water boards (record 6); water supply guidance (records 15, 26), guidance for local government to consider climate change in municipal health and wellbeing plans (records 6, 29), guidance on local government roles and responsibilities for adaptation (record 6); and climate risk-ready training and guidance developed by the NSW government (record 27).

<sup>129</sup> Records 12, 15, 21, 24.

<sup>130</sup> Records 1, 4, 10, 11, 27, 29.

<sup>131</sup> Records 8, 9, 12.

<sup>132</sup> Records 1, 13, 15, 27.

## V Reflections on Mainstreaming under the *Climate Change Act 2017* (Vic)

The findings of the empirical study outlined in Part IV above illustrate that the enactment of statutory mainstreaming obligations has catalysed a range of activities across the Victorian government intended to change the way climate change is considered in government decisions, policies and processes. Bearing in mind that mature mainstreaming requires continuous effort along a spectrum of ambition, this Part reflects on progress towards this goal to date and considers opportunities to strengthen mainstreaming in the context of the *Climate Change Act*.

The mere inclusion of statutory duties for mainstreaming in legislation represents a significant step towards mainstreaming climate change in government operations. As one participant noted, mainstreaming becomes an expected practice ‘because it’s the law’.<sup>133</sup> Articulating legal obligations draws attention to the nature and importance of mainstreaming climate change, catalyses action from agents and areas of government concerned to demonstrate compliance with the law,<sup>134</sup> and potentially provides legal recourse for stakeholders if governments do not fulfil their obligations. Yet as the outcome of the first legal challenge to decision-making involving the mainstreaming duties under the Act highlights,<sup>135</sup> stronger, clearer wording of the statutory duties would heighten their potential enforceability and their impact on decision-making.

Beyond the mainstreaming obligations themselves, there is, however, broader evidence of progress in climate change mainstreaming in Victoria. Whether catalysed by, or complementary to, the mainstreaming obligations in the Act, several pieces of legislation now contain explicit requirements to consider climate change, including the *Local Government Act 2020* (Vic) and the *Marine and Coastal Act 2018* (Vic).<sup>136</sup> There are also a range of examples of government agencies adopting requirements to consider climate change in their internal documents, and in a range of regulatory processes. Further, consideration of climate change is demonstrated in a range of government policies, such as Infrastructure Victoria’s 30-year strategy published in 2021<sup>137</sup> and the Active Victoria strategy.<sup>138</sup> Other notable achievements in mainstreaming to date include successful pilot projects testing out ways to integrate climate change into government operations, such as Ambulance Victoria’s collaboration with DELWP to apply climate change projections to planning for heat risk,<sup>139</sup> and the establishment of the Climate Risk Community of Practice which facilitates information sharing and skill building to support climate mainstreaming across government.

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<sup>133</sup> Record 28.

<sup>134</sup> Record 23.

<sup>135</sup> *Loy Yang* (n 95). See discussion accompanying n 95.

<sup>136</sup> See Table 3 above.

<sup>137</sup> Infrastructure Victoria, *Victoria’s Infrastructure Strategy 2021–2051* (2021).

<sup>138</sup> Sport and Recreation Victoria, *Active Victoria 2022–2026: A Strategic Framework for Sport and Active Recreation in Victoria* (July 2022).

<sup>139</sup> *Victoria’s Future Case Study* (n 122).

Despite these achievements, discussions with study participants suggested that there are a range of opportunities to strengthen mainstreaming efforts and, in doing so, bolster the government's capacity to achieve its climate mitigation and adaptation objectives.

First, there are clear opportunities to clarify the nature and content of the statutory mainstreaming duties. This would strengthen the government's commitment to climate change mainstreaming and make it easier for different actors across government to implement their mainstreaming obligations. An immediate priority should be the development of ministerial guidance to support the implementation of ss 20 and 17, which is explicitly provided for in the *Climate Change Act*.<sup>140</sup> Appropriately drafted guidance could clarify the scope and application of the duties and build best practice expectations.

This would also assist in opening up pathways to enforce the duties. For example, guidance on s 20 could include a 'presumption of relevance' that clarifies that climate change is considered relevant to a decision or action unless it can be established to be otherwise. Guidance should also clarify that procedural requirements to consider climate change must be discharged with reference to substantive outcomes set out in the policy objectives of the Act.<sup>141</sup> For example, in relation to the climate change mitigation objectives,<sup>142</sup> guidance might provide that decision-makers must understand and consider the (direct and indirect) emissions associated with an activity; investigate options to mitigate associated emissions; and give priority to options which support, or which do not substantially detract from, achieving long-term and interim emissions-reduction targets. In relation to s 17, targeted sectoral guidance will be needed. Further, the schedule to which the s 17 duty applies should be reviewed and expanded to broaden the application of this more concrete duty.<sup>143</sup>

Creating a clear authorising environment for the oversight of mainstreaming under the Act would also engender stronger cross-government commitments to achieving mainstreaming objectives. The initial work program of DELWP's mainstreaming team was endorsed and overseen by the Victorian Secretaries' Board and an interdepartmental committee (see Table 4 above) — these bodies could adopt an ongoing mandate to ensure climate change mainstreaming is a priority across government. In addition, the fulfilment of the duties in ss 20 and 17 of the Act could be further encouraged and strengthened by creating requirements for government agencies to regularly report on their compliance with these provisions of the Act. Reporting obligations are used to complement and strengthen gender mainstreaming obligations under the *Gender Equality Act 2020* (Vic);<sup>144</sup> they are also recommended

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<sup>140</sup> *Climate Change Act* (n 9) ss 18, 21

<sup>141</sup> *Ibid* s 22.

<sup>142</sup> *Ibid* s 22(a).

<sup>143</sup> An independent review committee appointed to review the predecessor legislation to the 2017 Act also made this recommendation: see Martijn Wilder, Anna Skarbeck and Rosemary Lyster, *Independent Review of the Climate Change Act 2010* (Report, 2015) 75–8.

<sup>144</sup> Under this legislation, defined entities with obligations to promote workplace gender equality and consider gender equality in their policies, programs and services must conduct a Gender Impact

in guidance provided to public entities by the Scottish government under the *Climate Change (Scotland) Act 2009*.<sup>145</sup> These requirements could be introduced in such a way as to minimise the reporting burden: for example, as part of annual reporting processes.

In order to strengthen institutional arrangements and mandates for mainstreaming, and build capacity and capabilities, many participants discussed the value of centralised climate change information and policy advice. In Victoria, this could be enhanced either by expanding the remit and resourcing of the CCD in DELWP, or by establishing an Office of Climate Change in a central agency — or even as an independent body at arm's length from government, modelled on the independent Climate Change Committee established under the *Climate Change Act 2008* (UK).<sup>146</sup>

Climate change mainstreaming benefits substantially from dedicated staff capacity. Climate change roles and/or teams situated in different government entities can proactively encourage staff to understand and effectively discharge their duty to consider climate change in decision-making and operations. They can also develop consistent policies and operational approaches to climate change mainstreaming suitable for the department or agency; provide resources and support to build capacity in a tailored way; and monitor, evaluate and develop strategic improvements for mainstreaming. Departments or agencies without dedicated climate change teams or roles should establish them; and those that already exist in departments should have their mandates and resourcing affirmed and strengthened.

Finally, it is also important to acknowledge and address the need for climate literacy across the government workforce. Introductory training (covering climate risks and impacts for Victoria, an introduction to the legal duties to consider and integrate climate change, available tools and resources) could be rolled out to all Victorian Public Service officers, potentially as part of induction processes.<sup>147</sup> The individual responsibility of staff to develop and apply mainstreaming capability could be strengthened by incorporating climate change into the *Code of Conduct for*

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Assessment when developing or reviewing any policy, program or service provided by the entity that has a direct and significant impact on the public. Every two years they must also report all impact assessments undertaken. Guidance (including assessment and reporting templates) has been developed to provide support for reporting and ensuring compliance.

<sup>145</sup> In Scotland, public bodies have statutory duties under the *Climate Change (Scotland) Act* (n 8) to act in the way best calculated to contribute to the delivery of emissions reduction targets and any statutory climate change adaptation programs. Statutory guidance developed to assist public bodies to fulfil these duties includes recommendations to report on their discharge of these duties, through new or existing reporting mechanisms. This reporting is framed as an opportunity for public entities to monitor and evaluate the effectiveness of their climate change actions taken to discharge the public bodies' duties: Scottish Government, *Public Bodies Climate Change Duties: Putting Them into Practice* (Report, 2011) 46–52.

<sup>146</sup> The United Kingdom's Climate Change Committee is established under *Climate Change Act 2008* (UK) pt 2. The recently reformed framework climate legislation in New Zealand also establishes an independent expert body with a similar role advising government on climate policy settings, monitoring progress towards targets and facilitating public dialogue: see *Climate Change Response Act 2002* (NZ), as amended by *Climate Change Response (Zero Carbon) Amendment Act 2019* (NZ) pt 1A.

<sup>147</sup> Record 27.



*Victorian Public Sector Employees*,<sup>148</sup> via an amendment analogous to the existing requirement for public officials to ‘respect and promote the human rights set out in the *Charter of Human Rights and Responsibilities*’.<sup>149</sup> The s 20 duty applies to public service employees at all levels, and integrating consideration of climate change into the Code of Conduct would send a strong message reinforcing the significance of the duty.

The examples outlined here describe some of the possibilities for strengthening climate change mainstreaming under the Act — ultimately, the options are limited only by imagination, institutional and individual capacity, and the will of government. The Act creates a powerful, overarching legislative framework for climate change mainstreaming, which has had a catalytic effect in the Victorian government. Elaborating these duties, however, is only the first step — to fully realise the potential of statutory mainstreaming obligations, governments need to actively and ambitiously pursue a suite of mainstreaming activities that effectively engage with regulatory, institutional and capacity/capability enablers towards mature mainstreaming.

## VI Conclusion

This study of emerging climate mainstreaming practice in Victoria provides important insights into the role and value of statutory mainstreaming duties and the range of mechanisms that can support and operationalise these duties and foster climate mainstreaming in practice. As well as contributing to the literature exploring the impact of framework climate change laws around the world,<sup>150</sup> this study adds to and validates existing conceptualisations of policy mainstreaming.<sup>151</sup> It expands upon previous modelling of policy mainstreaming activities<sup>152</sup> using three simple categories of mechanisms (with associated enablers and barriers) that resonate strongly with practitioners: regulatory, institutional and capacity/capability.<sup>153</sup>

Articulating a narrative and clarifying objectives for mainstreaming is an important starting point for framing and understanding this emerging area of climate policy practice. Participants in this study framed climate mainstreaming as an important complement to, and underpinning foundation for, substantive climate policy measures. They shared an ambitious and transformative objective for climate mainstreaming that was more than integration and broader than climate risk management. They conceived of mainstreaming as a wholesale shift in government operations and culture, so that climate change becomes central to all government decisions and activities. While substantive climate policy measures set out in framework climate laws (targets, mitigation and adaptation strategies) are part of

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<sup>148</sup> Victorian Public Sector Commission, *Code of Conduct for Victorian Public Sector Employees* (2015) 26–7. The Code of Conduct is made under *Public Administration Act 2004* (Vic) s 61.

<sup>149</sup> This requires: ‘(i) making decisions and providing advice consistent with human rights; and (ii) actively implementing, promoting, and supporting human rights’.

<sup>150</sup> See above n 2.

<sup>151</sup> See above n 23.

<sup>152</sup> See above nn 26–8.

<sup>153</sup> These three categories are further developed in Bleby and Foerster (n 52).

achieving this shift, this study suggests that other tools and approaches are also needed to underpin and hasten progress towards mature climate mainstreaming. Plotting mainstreaming activities and mechanisms along a spectrum towards mature mainstreaming can provide a frame for developing and deepening mainstreaming practice progressively over time and monitoring and evaluating progress towards mature practice.

The Victorian experience illustrates the wide range of mechanisms which can support and foster mainstreaming. Regulatory drivers emerge as particularly important, in the form of clearly worded, explicit legal obligations to take account of climate change in government policy and operational decision-making accompanied by authoritative guidance on how to do so. In Victoria, the mainstreaming duties in the *Climate Change Act* play an important role but could be strengthened with clearer, stronger wording (particularly in the case of s 20, but also in s 17), broader application (in the case of s 17), and the development of ministerial guidance to support their discharge. However, other regulatory mechanisms including obligations in sectoral legislation, reporting requirements, and references to climate change in other types of formal regulatory instruments appear to be equally important.

To complement these regulatory mechanisms, there are a range of measures that can help address institutional and capacity/capability barriers to robust and effective integration of climate change in government decision-making and processes. In Victoria, the Act spreads responsibilities for developing climate change policy across government and this has been observed to engage senior decision-makers and help embed consideration of climate change in different policy areas.<sup>154</sup> Central agencies are increasingly engaged on climate change, and climate leadership teams are beginning to emerge in some departments and policy areas. However, awareness of climate risks and climate-related capabilities remains uneven across government. In Victoria, a centralised mainstreaming team has played a catalytic role in facilitating climate mainstreaming activities across government and particularly in the development and rollout of decision-support tools and pilot programs and the establishment of networks to facilitate collaboration, peer learning and resource sharing. Ongoing support for explicit mainstreaming activities and increased resources to continue this work are still required and likely to be valuable ongoing investments alongside substantive climate policy measures.

Empirical investigation of climate change mainstreaming under the *Climate Change Act* provides a rich illustration of climate change mainstreaming in practice, elucidates opportunities to strengthen mainstreaming efforts, and offers evidence of the contribution that legislative mainstreaming provisions can make to overarching objectives of reducing emissions and adapting to climate change in a government context. It is hoped that these insights not only inform the Victorian government's mainstreaming agenda and climate law scholarship, but also provide points of reference and reflection for other jurisdictions enacting, implementing and evaluating mainstreaming obligations in law.

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<sup>154</sup> Foerster et al (n 3) 1070–3.

# Comparing Affirmative Consent Models: Confusion, Substance and Symbolism

Anna High\*

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## Abstract

Sexual assault law reform commonly involves legislating a statement of appropriate standards of sexual interaction in the form of a positive definition of consent. In jurisdictions contemplating a legislated definition, the question of whether to adopt an orthodox attitudinal or unorthodox expressive definition must be confronted. Discussion around the adoption of an unorthodox consent model, commonly known as ‘affirmative consent’, has been beset by confusion, caused in part by the diversity of legal models to which this label has been applied. This article sets out a detailed comparison of the doctrinal mechanisms in jurisdictions commonly identified as having adopted some version of affirmative consent. The analysis sheds light on the variety of ways rape law can be reconstructed to reflect the aspiration of communicative sexuality, while also highlighting the core unifying objective of transforming the legal meaning of passivity. From the comparative analysis, four key points of divergence are highlighted, alongside the implications of those points of divergence for jurisdictions contemplating affirmative consent reform. Finally, the article notes the paucity of evidence on the substantive impacts of affirmative consent, and discusses the potential educative and symbolic functions of embracing such a model, despite ongoing uncertainty as to its practical effects.

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\* Associate Professor, Faculty of Law, University of Otago, Aotearoa New Zealand. Email: [anna.high@otago.ac.nz](mailto:anna.high@otago.ac.nz); ORCID iD: <https://orcid.org/0000-0002-8884-6064>. For comments on a draft version of this article, I thank Jesse Wall, Andrew Dyer, Jamie Walvisch, the two anonymous reviewers, as well as the participants in the criminal law workshop at the University of Melbourne, February 2022. For research assistance, I thank Jonathon Yeldon, George Sabonadiere, Carrie Wooller and Connor Seddon. This research was supported by the Marsden Fund Council from government funding, managed by Royal Society Te Apārangi.

## I Introduction

Sexual violence law typically adopts consent as the principal benchmark for demarcating legally permissible from legally impermissible sex (for better or worse). In early rape law, a male-imagined conception of consent emerged that was frequently harmful to women. At common law, ‘consent’ could be given ‘tearfully’, ‘reluctantly’, even ‘unwillingly’;<sup>1</sup> and it could be assumed unless there was clear communication to the contrary.<sup>2</sup> This resulted, in practice, in strong rights of male access to female<sup>3</sup> bodies. Over time, different conceptions of consent emerged in law, conceptions which more meaningfully aligned with the experiences of women, and went further towards ensuring a rape law premised on sexual equality.

This evolution has taken place in tandem with societal shifts. Increasingly, a ‘yes means yes’ model of sexual intimacy has gained greater visibility and legitimacy in sexual politics, as compared to a ‘no means no’ model (see, for example, the #MeToo movement and North American college campus sexual assault training and disciplinary codes). The ‘yes means yes’ movement recognises that there might be something problematic and suspect about assuming an internal attitude of consent in the absence of an external expression thereof, and advocates a communicative model of sexuality.<sup>4</sup>

‘Yes means yes’, it has been pointed out, is not a legal standard.<sup>5</sup> As a slogan, it is broadly associated with ‘affirmative consent’, a construction of consent as an attitude of willingness that must be actively expressed or communicated to generate permission to proceed with sexual contact. This contrasts with the traditional common law understanding of consent as an internal attitude of willingness that can, in certain contexts, be assumed to be present, even in the absence of any active communication thereof.<sup>6</sup>

While affirmative consent is rightly described as unorthodox,<sup>7</sup> it is no longer a radical proposition. Affirmative consent as a legal standard has been adopted, in varying iterations, in a number of reformist jurisdictions. In jurisdictions contemplating legislative change to the law of consent — such as New Zealand, where sexual consent is not positively defined in legislation, and the government has indicated an intention to adopt a long-term work program directed at ‘transformative

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<sup>1</sup> See, eg, *Holman v The Queen* [1970] WAR 2, 6 (finding consent can be ‘hesitant, reluctant, grudging or tearful’); *R v Cook* [1986] 2 NZLR 93, 97 (finding consent can be ‘reluctant or even ... unwilling’).

<sup>2</sup> See generally Anna High, ‘The “Classical” Conception of Rape, and Its Partial Reform, in Aotearoa New Zealand’ [2022] (2) *New Zealand Law Review* 173.

<sup>3</sup> Rape was historically a gendered crime; today, rape law tends to be constructed in gender-neutral terms. Nonetheless, it is important to acknowledge that this article adopts a heteronormative perspective on the law of rape. For discussion of the implicit heterosexual bias in affirmative consent policies and discourse generally, see Jacob W Richardson, ‘“It Doesn’t Include Us”: Heterosexual Bias and Gay Men’s Struggle to See Themselves in Affirmative Consent Policies’ (2022) 5(1) *Sexuality, Gender & Policy* 69.

<sup>4</sup> Jonathan Witmer-Rich, ‘Unpacking Affirmative Consent: Not As Great as You Hope, Not As Bad as You Fear’ (2016) 49(1) *Texas Tech Law Review* 57, 65.

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

<sup>6</sup> High (n 2) 178.

<sup>7</sup> Jesse Wall, ‘Justifying and Excusing Sex’ (2019) 13(2) *Criminal Law and Philosophy* 283, 283–6.

options' for the law of consent<sup>8</sup> — the question of whether to adopt a reformist approach to consent must be confronted.

It is easy to take for granted the idea of 'affirmative consent in law'. In media reports of consent reform, and indeed also in academic scholarship, affirmative consent is frequently described as a 'yes means yes' approach to sexual violence.<sup>9</sup> This is problematic: as noted above, 'yes means yes' is a slogan, not a legal standard. 'Yes means yes' is a rejection of assumed consent in the bedroom; *consent* (verbal, sober, enthusiastic, honest) *is sexy*,<sup>10</sup> we implore. The hope is that emphasising active, meaningful communication will allow for greater mutuality, respect and equality in sexual intimacy. That is a laudable ideal, and hopefully not a particularly contentious one, as far as modern sexual politics go. The rejection of assumed consent as a sexual norm is increasingly seen as important for protecting people — particularly young women — from 'bad sex', sex they are not enthusiastically welcoming. But in law, a construction of consent as affirmative, for the purposes of demarcating lawful from unlawful sexual contact, is rather more complex. As Witmer-Rich notes, there is a cluster of substantive and procedural rules associated with the goal of affirmative consent.<sup>11</sup> And even zeroing in on substantive rules — more specifically, the definition of consent as an element of sexual assault — there are numerous iterations of and ways of tinkering with 'classic' rape law to attempt to move socio-sexual behaviour away from self-serving assumptions and towards mutual communication.

This lack of clarity manifests in commentary and scholarship on affirmative consent. Arguments are put forward about 'affirmative consent in law' without specifying the precise mechanisms of merit or concern. Once we unpack the divergence of those mechanisms, we can in turn be more precise about the issues under debate, and the specific trade-offs and benefits that might be associated with affirmative consent, depending on how it is legally constructed. It will also begin to make sense how, for example in Victoria, the very same reforms to consent were described by various informed commentators as delivering affirmative consent,<sup>12</sup>

<sup>8</sup> Cabinet Social Wellbeing Committee, Parliament of New Zealand, *Improving the Justice Response to Victims of Sexual Violence* (Cabinet Minute, 3 April 2019) 3 [17.3] <<https://www.justice.govt.nz/assets/7236-Proactive-release-SV-response-final2.pdf>>; Office of the Under-Secretary to the Minister of Justice (Domestic and Sexual Violence Issues), *Improving the Justice Response to Victims of Sexual Violence* (Cabinet Paper, April 2019) 13 [81] <<https://www.justice.govt.nz/assets/7236-Proactive-release-SV-response-final2.pdf>>.

See also Department of Justice and Attorney-General (Qld), *Queensland Government Response to the Report of the Queensland Women's Safety and Justice Taskforce, Hear Her Voice: Report Two — Women and Girls' Experiences across the Criminal Justice System* (Report, November 2022) 19 <<https://www.publications.qld.gov.au/dataset/wsjskforcereponse>> (supporting recommendation to amend the *Criminal Code* to legislate an affirmative model of consent in Queensland).

<sup>9</sup> See, eg, Alicia Vrajlal, 'What Do the New Affirmative Consent Laws Actually Mean?', *Refinery29* (online, 24 November 2021) <<https://www.refinery29.com/en-au/2021/11/10771181/affirmative-consent-laws-australia>>.

<sup>10</sup> Toma, 'Consent is Sexy', *Respect Me* (Blog Post) <<https://respectme.org.au/consent-sexy>>.

<sup>11</sup> Witmer-Rich (n 4) 59.

<sup>12</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 4 August 2022, 2899 (Sonya Kilkeny) (second reading speech for the Justice Legislation Amendment (Sexual Offences and Other Matters) Bill 2022 (Vic)).

failing to go far enough to deliver affirmative consent,<sup>13</sup> and going further than needed to deliver affirmative consent.<sup>14</sup>

This article seeks to bring clarity to the terms of the affirmative consent debate by way of a detailed comparison of the doctrinal mechanisms at play in jurisdictions commonly identified as having adopted some version of ‘affirmative consent’. The comparative doctrinal analysis of affirmative consent jurisdictions fills a descriptive void while raising a number of important points in terms of options for doctrinal reform. As the analysis will show, there is a variety of ways to attempt to reconstruct rape law that reflect and reach for the aspiration of communicative sexuality. It is important, in jurisdictions contemplating consent reform, that critics and proponents do not talk past one another based on different assumed legal models. The adoption of ‘affirmative consent laws’ is often put forward as a simple, presumably progressive step. After all, who doesn’t believe in the importance of communicative sex as a means to promoting autonomy, dignity and mutuality? But even assuming communicative sex is the ideal, there are implications to the precise legal route we adopt to work towards that ideal.

From the comparative doctrinal analysis it is possible to identify four key points of divergence among the surveyed ‘affirmative consent’ jurisdictions: first, whether consent is defined as internal or external vis-à-vis actus reus; second, to what extent affirmative consent laws proscribe the words/actions that suffice to communicate consent; third, whether a ‘mistake of law’ can be exculpatory<sup>15</sup> in cases involving a mistaken belief in silent passivity as consent; and fourth, whether mens rea is defined as a lack of reasonable belief in communicated consent or as a failure to ascertain consent. In relation to each, there are trade-offs and possible pitfalls; various concerns can justifiably be raised such as facial overreach, the potential for backlash and ineffectualness. In discussing the possible merits of affirmative consent reform — including substantive outcomes, educative effect and symbolism — it is essential to engage, in a granular way, with the specific doctrinal mechanisms at play, rather than glossing over these identified points of divergence within the affirmative consent law reform movement.

## A Outline of Article

The article begins in Part II by discussing the general usage of ‘affirmative consent’ as a term in society / sexual politics, before turning to ‘affirmative consent’ as a legal standard. Whereas the common law embraced assumed consent, the core defining premise of affirmative consent is the rejection of assumed consent. Over time, in many jurisdictions, a gradual but incomplete evolution away from assumed consent

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<sup>13</sup> Rachel Eddie, “‘No Room for Victim-Blaming’: Affirmative Consent to Become Law”, *The Age* (online, 31 August 2022), quoting Dr Rachael Burgin, Chief Investigator, Rape and Sexual Assault Research and Advocacy <<https://www.theage.com.au/politics/victoria/no-room-for-victim-blaming-affirmative-consent-to-become-law-20220831-p5be5w.html>>.

<sup>14</sup> Tania Wolff, President of the Law Institute of Victoria, argued the reforms would complicate matters, as affirmative consent *already* exists in Victorian law: Eddie (n 13).

<sup>15</sup> In discussing a defence argument of ‘mistaken belief in consent’ (which can be a mistake of fact or law, as discussed in this article), I use ‘exculpatory’ to accommodate both those jurisdictions in which the ‘defence’ is a failure-of-proof argument, and jurisdictions in which it is an affirmative defence.

has occurred, even in the absence of an express, legislated affirmative consent standard. This has resulted in what I call ‘partial’ or ‘category-based’ affirmative consent. This is compared to what I call a ‘full’ or ‘strong’ affirmative consent schema in which law more consistently rejects assumed consent as a basis for permission to engage in sexual contact. This is achieved by transforming the legal meaning of passivity generally rather than on a case-by-case basis.

In Part III, I illustrate the various ways jurisdictions have attempted to reshape the law of sexual assault such that the legal meaning of passivity is generally transformed. This is done with reference to ‘full’ affirmative consent jurisdictions in North America and Australia, in roughly chronological order. This detailed doctrinal analysis allows for a more precise discussion, in Part IV, of four key points of divergence across the surveyed jurisdictions in terms of how a redefined concept of consent as an external phenomenon impacts the actus reus and mens rea elements of sexual assault. The analysis shows that it matters, and matters a great deal, precisely how affirmative consent is constructed in law; there are implications and trade-offs relating to the choice of construction.

I conclude in Part V with discussion of the implications of the analysis for the political choice facing jurisdictions which have committed to exploring ‘transformative options’ for the law of consent. I conclude that while the symbolic and educative effects of affirmative consent-minded reforms might allow for an easy political win and have flow-on effects in sexual politics/norms, it remains unclear whether and to what extent such reforms will meaningfully shift the needle in practice. That being said, the possible symbolic and educative impacts might yet justify some form of affirmative consent law reform, provided there is care and precision in the doctrinal tinkering.

## II The Diversity of ‘Affirmative Consent’

### A *Affirmative Consent in Society / Sexual Politics*

Societally, affirmative consent is associated with a ‘yes means yes’ model of sexuality, in which the onus is on participants to obtain a clear expressive act of communication (verbal or non-verbal) from other participants. As Witmer-Rich notes, ‘yes means yes’ is not an actual legal standard or explanation thereof.<sup>16</sup> It is, nonetheless, a slogan that has achieved a strong hold in sexual politics, and may be a useful educational tool when it comes to challenging problematic sexual scripts. ‘Yes means yes’ contrasts with a ‘no means no’ model of sexuality, according to which an attitude of consent can legitimately be presumed or inferred unless and until unwillingness is expressed in a sufficiently clear way. The ‘yes means yes’ movement is closely associated with higher education in the United States, where college sexual assault disciplinary standards have over time converged on a requirement for some affirmative expression of consent.<sup>17</sup>

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<sup>16</sup> Witmer-Rich (n 4) 58.

<sup>17</sup> Deborah Tuerkheimer, ‘Rape on and off Campus’ (2015) 65(1) *Emory Law Journal* 1, 3–4.

An immediate and obvious question about ‘yes means yes’ arises: *what sort of yes* means yes? What acts or omissions amount to a sufficient communication of consent? Must the ‘yes’ be verbal, or can actions suffice? Must the ‘yes’ be given enthusiastically, or can it be given reluctantly or begrudgingly? Must the ‘yes’ be contemporaneous, or can it be given in advance? Is an external ‘yes’ invalidated by an internal opposition, or by certain forms of coercion? A range of responses is possible to these questions, and so a range of approaches to regulating sexual intimacy can be advocated for under the slogan of ‘yes means yes’.

More broadly, the primacy of consent (whether affirmative or otherwise) in sexual politics has been criticised as a problematic ‘valorisation’, in that consent may be an unreliable marker for sexual equality and wellbeing.<sup>18</sup> As Fischel has argued, ‘[b]ad sex, *even if consensual*, can be really bad, and usually worse for women: not just uninspired, unenthusiastic, or boring, but unwanted, unpleasant, and painful’.<sup>19</sup> The extent to which affirmative consent is capable of reducing the risk of consent to ‘bad sex’ is unclear. It is possible that the adoption of affirmative consent as an educative standard or social norm might go some way towards ameliorating the coercive societal forces that cause people to consent to unwanted sex.<sup>20</sup> It is also possible that, by continuing to place primacy on consent, an affirmative consent model of sexuality is not sufficiently transformative when it comes to the promotion of sexual equality, mutuality and empowerment.<sup>21</sup>

## **B     *The Emergence of Affirmative Consent as a Legal Standard***

### **1     *Orthodox Approach: No (General) Requirement to Communicate***

Consent has traditionally been constructed in sexual assault law, and indeed elsewhere in the law,<sup>22</sup> as an internal phenomenon: ‘an internal attitude of

<sup>18</sup> Robin West, ‘Sex, Law, and Consent’ in Franklin G Miller and Alan Wertheimer (eds), *The Ethics of Consent: Theory and Practice* (Oxford University Press, 2010) 221, 224, 232, 239; John Gardner, ‘The Opposite of Rape’ (2018) 38(1) *Oxford Journal of Legal Studies* 48, 53–4. A related critique of consent is its construction of a model for heterosexuality, in that consent is understood as something given by women (gatekeepers) to men (initiators): see generally Ngaire Naffine, ‘Possession: Erotic Love in the Law of Rape’ (2011) 57(1) *Modern Law Review* 10.

<sup>19</sup> Joseph J Fischel, *Screw Consent: A Better Politics of Sexual Justice* (University of California Press, 2019) 4 (emphasis added). See also Nicola Gavey, *Just Sex? The Cultural Scaffolding of Rape* (Routledge, 2<sup>nd</sup> ed, 2019) ch 5.

<sup>20</sup> See, eg, Rebecca Ortiz, ‘Explicit, Voluntary, and Conscious: Assessment of the Importance of Adopting an Affirmative Consent Definition for Sexual Assault Prevention Programming on College Campuses’ (2019) 24(9) *Journal of Health Communication* 728; Abigail R Riemer, Kathryn Holland, Evan McCracken, Amanda Dale and Sarah J Gervais, ‘Does the Affirmative Consent Standard Increase the Accuracy of Sexual Assault Perceptions? It Depends on How You Learn about the Standard’ (2022) 46(6) *Law and Human Behavior* 440, 440 (finding that exposure to consent standards sometimes aids sexual assault decision-making, but also leads to confusion).

<sup>21</sup> See, eg, Brandie Pugh and Patricia Becker, ‘Exploring Definitions and Prevalence of Verbal Sexual Coercion and Its Relationship to Consent to Unwanted Sex: Implications for Affirmative Consent Standards on College Campuses’ (2018) 8(8) *Behavioural Sciences* 69.

<sup>22</sup> See, eg, *R v Middleton* (1873) LR 2 CCR 38, 62 (Brett J): ‘Consent or non-consent is an action of the mind; it consists exclusively of the intention of the mind.’



willingness, intention, waiver, or acquiescence’.<sup>23</sup> Such an emphasis on consent as attitudinal does not mean that the law is uninterested in whether and how that internal attitude is communicated. Rather, it means that there is no general *requirement* that internal willingness is affirmatively (actively, positively) communicated in order to generate permission to proceed. As such, the common law of rape has traditionally accommodated the possibility that an instigator can legitimately *assume or infer* internal willingness, even where there is no external communication of that assumed internal state.

The result of this accommodation in the common law of rape was that, absent some external indication of non-consent, sexual contact was (often) functionally treated as consensual or not ‘really rape’<sup>24</sup> despite a person’s internal unwillingness. This was so by virtue of one of two mechanisms. The law either (i) required some manifestation, beyond mere silence or passivity, of non-consent as an evidentiary matter in order to prove the actus reus of ‘no consent’;<sup>25</sup> or (ii) deemed a purportedly honest but mistaken belief in consent, where that belief was based on either a *lack of* or *insufficiently clear* external indication of non-consent, to be credible such that the mens rea of ‘no belief in consent’ was not established.<sup>26</sup>

## 2 ‘Partial’ Affirmative Consent, or Affirmative Consent by Category

Over time, there have been incremental developments in relation to both (i) and (ii) above. As a result, in many common law jurisdictions, there has been a shift in the direction of a more communicative construction of consent in law. This occurs where the orthodox ‘consent as attitudinal’ construction is retained generally but certain categories of sex come to be treated as non-consensual in the absence of some form of communication. This can occur by way of statutory reform or by shifts in the interpretation of the fault standard (that is, changing norms of reasonableness, particularly vis-à-vis passive/non-communicative sex) or some combination of the two. I consider each in turn.

### (a) *Legislated Categories of ‘No Consent’*

First, in many jurisdictions the law has been amended to provide that for certain categories of sex (for example, where a complainant is asleep, unconscious or substantially intoxicated) there is no consent, meaning the actus reus element of non-consent is established regardless of whether non-consent was actively

<sup>23</sup> Wall (n 7) 284. Gruber notes that the terms used to describe the internal attitude(s) denoted by ‘consent’ — such as desire, want, willingness — are often used interchangeably, but can mean quite different things: Aya Gruber, ‘Consent Confusion’ (2016) 38(2) *Cardozo Law Review* 415, 423. The parsing of those distinctions is beyond the scope of this article.

<sup>24</sup> Susan Estrich, ‘Rape’ (1986) 95(6) *Yale Law Journal* 1087.

<sup>25</sup> Lois Pineau, ‘Date Rape: A Feminist Analysis’ (1989) 8(2) *Law and Philosophy* 217, 217 (noting that ‘physical injury is often the only criterion that is accepted as evidence that the actus reus is nonconsensual’). At its extreme, this mechanism required a victim to show evidence of physical resistance ‘to the uttermost’: see, eg, *Moss v State*, 45 So 2d 125, 126 (Alexander J) (Miss, 1950).

<sup>26</sup> At its extreme, this mechanism allowed for exculpation of a defendant on the basis of a mistake as to consent, even despite vehement physical resistance on the part of the complainant: see, eg, *DPP (UK) v Morgan* [1976] AC 182, 191C–E (Bridge J for the Court) (House of Lords) (‘*Morgan*’).

communicated by resistance. This is sometimes referred to as a ‘negative’ approach to defining consent, in that the law sets out circumstances where there is *no* consent, rather than defining what consent *is*. Such ‘negative’ definitions of consent amount to a partial rejection of ‘no means no’, but only in relation to certain specified categories of sex. For example, in New Zealand the *Crimes Act 1961* (NZ) (‘NZ *Crimes Act*’) was amended<sup>27</sup> in 2005 to provide that a person does not consent to sexual activity if the activity occurs *inter alia* while she is asleep, unconscious or sufficiently affected by alcohol.<sup>28</sup> Likewise, in England and Wales the *Sexual Offences Act 2003* (UK) sets out two circumstances in which there is a conclusive presumption that the complainant did not consent and the defendant did not reasonably believe in consent — namely, where the defendant intentionally deceived the complainant as to the nature or purpose of the act, or intentionally induced ‘consent’ by impersonating a person known to the complainant.<sup>29</sup>

Of note here is that issues can arise as to whether a ‘no consent where X’ definition applies only *vis-à-vis* *actus reus*, or also *vis-à-vis* *mens rea* (such that a mistaken belief in consent in such ‘no consent’ contexts is not exculpatory). In some cases, a ‘belief in consent’ defence has been allowed even in relation to an enumerated category of ‘no consent’. For example, in the New Zealand case of *Tawera*, sex with a passive teenager was found not to be consensual, as s 128A(1) of the NZ *Crimes Act* provides that passivity alone is not consent.<sup>30</sup> However, the Court of Appeal found that a mistaken belief in consent, based on passivity alone, was reasonable and therefore exculpatory. In so finding, the Court arguably wrongly permitted a ‘mistake of law’ defence.<sup>31</sup> Similarly, in the Western Australian case of *WCW* the Court of Appeal found there was an evidential foundation for an honest and reasonable mistaken belief in consent, based on passivity alone,<sup>32</sup> even though the Western Australian *Criminal Code* provides that passivity alone is not consent.<sup>33</sup>

<sup>27</sup> *Crimes Amendment Act 2005* (NZ).

<sup>28</sup> *Crimes Act 1961* (NZ) ss 128A(3)–(4) (‘NZ *Crimes Act*’).

<sup>29</sup> *Sexual Offences Act 2003* (UK) s 76(2) (‘UK *Sexual Offences Act*’). See also *R v Jheeta* [2008] 1 WLR 2582, 2590 [24] (Judge P for the Court) (Court of Appeal). The Act also sets out, in s 75, a number of circumstances in which there is a rebuttable presumption that the complainant did not consent and that the defendant did not reasonably believe in consent — such as where the complainant was asleep, unconscious, threatened, unlawfully detained, or unable to communicate consent due to a disability. As noted by Gunby, Carline and Benyon, the categories set out in s 75 ‘are considered to represent those situations in which most people would agree that consent was not present’: Clare Gunby, Anna Carline and Caryl Beynon, ‘Alcohol-Related Rape Cases: Barristers’ Perspectives on the Sexual Offences Act 2003 and Its Impact on Practice’ (2010) 74(6) *Journal of Criminal Law* 579, 583–4. However, in practice, the provisions have ‘had little impact on the prosecution of rape cases’: at 592.

<sup>30</sup> *R v Tawera* (1996) 14 CRNZ 290, 293 (Henry J for the Court) (‘*Tawera*’).

<sup>31</sup> High (n 2) 202 n 160.

<sup>32</sup> *WCW v Western Australia* (2008) 191 A Crim R 22, cited in Jonathan Crowe, Rachael Burgin and Holli Edwards, ‘Affirmative Consent and the Mistake of Fact Excuse in Western Australian Rape Law’ (2022) 50(1) *University of Western Australia Law Review* 284, 296.

<sup>33</sup> *Criminal Code Act Compilation Act 1913* (WA) sch (‘*Criminal Code*’) s 319(2)(b). Crowe and Lee have similarly noted that in Queensland a lack of resistance by the complainant ‘can provide the basis for the defence to argue a mistaken and reasonable belief in consent’, despite the *Criminal Code 1899* (Qld) providing in s 348(3) that a person does not consent only because they do not ‘say or do anything to communicate that the person does not consent’: Jonathan Crowe and Bri Lee, ‘The

*Contra Tawera* and *WCW*, I would submit that a ‘negative’ approach to consent should work to foreclose the possibility of ‘assumed or implied’ consent in relation to those enumerated categories of ‘no consent’ (and subsequent New Zealand law has adopted this position).<sup>34</sup> Importantly, a ‘mistake of law’ defence (disguised in ‘mistake of fact’ clothing) has also apparently been relied on in Australian ‘full’ affirmative consent jurisdictions,<sup>35</sup> a point I return to in Part IV(C) below.

(b) *Changing Norms of ‘Reasonableness’*

Second, in response to the infamous House of Lords decision of *Morgan*,<sup>36</sup> many jurisdictions<sup>37</sup> have enacted reforms requiring a belief in consent to be reasonable in order to be exculpatory. A reasonableness requirement does not of itself necessarily preclude an argument of belief in consent based on the complainant’s passivity. However, as the standard of reasonableness has evolved, it is plausible that a belief in consent based on passivity alone is less and less likely to be seen as reasonable. Admittedly, empirical evidence on changing standards of reasonableness is scant, but detailed jurisdictional analyses could be of use here. For example, Witmer-Rich, reviewing cases from US jurisdictions that have not adopted affirmative consent standards, notes that there are many cases affirming rape convictions on evidence of a purely passive complainant.<sup>38</sup> My own review of key appellate rape law decisions in New Zealand since the reasonableness standard was introduced shows a retreat from the ‘sex as prima facie consensual’ logic which infused earlier decisions involving passive victims.<sup>39</sup> On the other hand, also in Aotearoa, a recent analysis conducted by McDonald shows, dispiritingly, that even in cases where there was evidence of a clearly expressed lack of consent (by way of verbal or physical resistance) from the victim, acquittals were occurring on a regular basis.<sup>40</sup> This would suggest the ‘reasonable belief in consent’ argument is succeeding even in cases where there was verbal resistance.<sup>41</sup> Likewise, in England and Wales, research suggests that introduction of the reasonable belief standard had not resulted (by

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Mistake of Fact Excuse in Queensland Rape Law: Some Problems and Proposals for Reform’ (2020) 39(1) *University of Queensland Law Journal* 1, 12.

<sup>34</sup> See *Ah-Chong v The Queen* [2016] 1 NZLR 445, 463–4 [54]–[57] (McGrath, Glazebrook and Arnold JJ); *Christian v The Queen* [2018] 1 NZLR 315, 327–31 [25]–[46] (William Young, Glazebrook, O’Regan and Ellen France JJ), discussed in High (n 2) 201–3.

<sup>35</sup> See below Parts III(C) and (D).

<sup>36</sup> *Morgan* (n 26). *Morgan* was met with widespread disapproval and ‘hailed as the “rapists’ charter”’: Jennifer Temkin, *Rape and the Legal Process* (Routledge, 2<sup>nd</sup> ed, 2002) 119.

<sup>37</sup> See, eg, *NZ Crimes Act* (n 28) s 128(2)(b), amended by *Crimes Amendment Act (No 3) 1985* (NZ) s 2 (to set out a mens rea of not believing on reasonable grounds that the complainant was consenting); *UK Sexual Offences Act* (n 29) s 1(1)(c) (setting out a mens rea of not reasonably believing in consent). See also below Part III.

<sup>38</sup> Witmer-Rich (n 4) 77–8.

<sup>39</sup> High (n 2) 201.

<sup>40</sup> Elisabeth McDonald, ‘Communicating Absence of Consent Is Not Enough: The Results of an Examination of Contemporary Rape Trials’ (2020) 46(2) *Australian Feminist Law Journal* 205, 217–23. It should be noted here that ‘forcible’ is not an element of sexual violence in New Zealand, or indeed in any of the jurisdictions surveyed in this article (functionally, see below n 52). As such, acquittals typically relate to the ‘no consent’ or ‘no reasonable belief in consent’ elements.

<sup>41</sup> *Ibid.* See also Dan M Kahan, ‘Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases’ (2010) 158(3) *University of Pennsylvania Law Review* 729.

2013) in an increase in rape conviction rates.<sup>42</sup> And in both Queensland and Western Australia, detailed jurisdictional analyses show that complainant passivity continues to be cited as enlivening the ‘reasonable mistaken belief in consent’ defence.<sup>43</sup> Further, as Witmer-Rich points out, we simply do not know, and perhaps are unable to assess, how often in practice police, prosecutors or fact finders continue to require clear evidence of a ‘no’ from the complainant, as compared to applying a more progressive reasonableness standard which looks instead for a ‘yes’.<sup>44</sup>

In the face of entrenched and arguably outdated ideas about passivity as an indication of consent, some jurisdictions have legislated provisions which specify that the reasonableness of a belief in consent is to be determined having regard to whether the defendant took steps to ascertain whether the complainant consented.<sup>45</sup> Such provisions require fact finders to consider whether a defendant engaged in communication to discern consent, rather than assuming consent based on a lack of communication of ‘no’ from the complainant. Again, empirical evidence on the impact of these provisions is scant.<sup>46</sup> But they represent an attempt to shift the needle on the reasonableness standard. To whatever extent norms of reasonableness are changing, moving away from ‘assumed consent’ and towards an obligation to communicate, it could be argued that a full affirmative consent standard would not be particularly radical. Nevertheless, these efforts to shift the dial might still have educative and symbolic functions, as well as impacts on decisions to report, investigate, and prosecute.

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<sup>42</sup> Clare McGlynn, ‘Feminist Activism and Rape Law Reform in England and Wales: A Sisyphean Struggle?’ in Clare McGlynn and Vanessa E Munro (eds), *Rethinking Rape Law: International and Comparative Perspectives* (Routledge, 2010) 139, 142–3; Vanessa E Munro and Liz Kelly, ‘A Vicious Cycle? Attrition and Conviction Patterns in Contemporary Rape Cases in England and Wales’ in Miranda AH Horvath and Jennifer M Brown (eds), *Rape: Challenging Contemporary Thinking* (Routledge, 2013) 281, 282–3; Anna Carlina and Clare Gunby, ‘“How an Ordinary Jury Makes Sense of It Is a Mystery”: Barrister’s Perspectives on Rape, Consent and the Sexual Offences Act 2003’ (2011) 32(3) *Liverpool Law Review* 237, 248. See also Louise Ellison and Vanessa E Munro, ‘Better the Devil You Know? “Real Rape” Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations’ (2013) 17(4) *International Journal of Evidence & Proof* 299.

<sup>43</sup> Crowe and Lee (n 33); Crowe, Burgin and Edwards (n 32).

<sup>44</sup> Witmer-Rich (n 4) 75.

<sup>45</sup> See, eg, *UK Sexual Offences Act* (n 29) s 1(2); *Crimes Act 1958* (Vic) s 36A (*‘Victoria Crimes Act’*), inserted by *Crimes Amendment (Sexual Offences) Act 2016* (Vic) s 5, substituted as of July 2023 by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 5 (*‘Sexual Offences and Other Matters Act’*) (see below n 88 and accompanying text). See also *Crimes Act 1900* (NSW) s 61HE(4)(a) (*‘NSW Crimes Act’*); this provision, now repealed, was prima facie similar to the provisions mentioned earlier in that it required consideration of any steps taken to ascertain consent in assessing reasonableness of belief in consent. However, it was weakened in practice by the New South Wales Court of Criminal Appeal decision in *R v Lazarus* (2017) 270 A Crim R 378, 407 [147] (Bellew J, Hoeben CJ at CL and Davies J agreeing) (*‘Lazarus’*) (holding that an accused could take a ‘step’ without performing any physical or verbal act).

<sup>46</sup> For a significant and detailed analysis of a ‘taking steps to ascertain’ provision in a ‘full’ affirmative consent jurisdiction, see Helen Mary Cockburn, ‘The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials’ (PhD Thesis, University of Tasmania, 2012) <<https://eprints.utas.edu.au/14748>> (finding that affirmative consent reforms in Tasmania are not being implemented as intended).

In sum, it is increasingly common for ‘assumed consent’, as accommodated in the traditional common law of rape, to be displaced in practice, either by enumerating certain categories of sex as presumptively non-consensual, or by way of changing norms of ‘reasonableness’ vis-à-vis belief in consent. However, in the absence of a general affirmative consent standard, the law still accommodates the possibility of an incorrect but exculpatory assumption of consent, rather than requiring consent to be ascertained by way of communication.

### 3 ‘Full’ or ‘Strong’ Affirmative Consent: Communication Generating Permission

As compared to the foregoing trends, a more definitive break with assumed consent can come in the form of an across-the-board adoption of affirmative consent. Affirmative consent understands consent as something that must *always* be externally<sup>47</sup> expressed in order to generate legally valid permission, not just in relation to certain ‘suspect’ categories (such as where a person is asleep or intoxicated). As Anderson puts it, affirmative consent assumes that to be meaningful, consent must be active. As a result, ‘a person should have to communicate positive, verbal or nonverbal agreement to engage in penetration before someone else should be allowed to penetrate them’.<sup>48</sup>

Affirmative consent in law, then, is a rejection of assumed consent, and an embrace of an understanding of consent as something that must be communicated in order to generate a legally valid permission. In other words, an affirmative consent standard attempts to prohibit any and all sexual encounters to which a party has not communicated or expressed consent (the terms ‘communicative’ and ‘expressive’ consent are used interchangeably), with the goal of shifting socio-sexual intimacy into more communicative territory. To that end, consent which is not expressed is treated as legally invalid in terms of generating permission to proceed with sexual contact.<sup>49</sup> To give effect to this, the legal meaning of passivity must be transformed,<sup>50</sup> and transformed *generally* rather than on a case-by-case basis.

<sup>47</sup> Gruber (n 23) 438 notes that the ‘affirmative consent’ label is sometimes applied to a legal model which allows for communication by way of silence and passivity, notably in past drafts of the American Law Institute’s Model Penal Code, which have purported to establish ‘affirmative consent’ but have allowed almost free reign on the interpretation of external manifestations as consent (including, sometimes, silence and passivity). By ‘affirmative’ I assume that something more than passivity/silence is required. Otherwise, there is no meaningful distinction between affirmative and attitudinal/assumed consent, and the traditional common law approach (allowing passivity plus context to ground an exculpatory belief in consent) remains all but untouched.

<sup>48</sup> Michelle J Anderson, ‘Campus Sexual Assault Adjudication and Resistance to Reform’ (2016) 125(7) *Yale Law Journal* 1940, 1978.

<sup>49</sup> A brief sidenote: affirmative consent assumes that communication is *necessary* to generate moral/legal permission to proceed; it does not necessarily follow that communication is *sufficient*. A victim might be internally dissenting but externally communicating consent. While it may be difficult, under either attitudinal or affirmative consent, to make out the elements of sexual assault in such cases, affirmative consent laws can be drafted in such a way that the possibility is not foreclosed (for example, in cases where it should have been apparent, to a reasonable person, that the complainant’s ‘yes’ belied internal dissent or a lack of capacity to make or offer free and informed consent).

<sup>50</sup> Deborah Tuerkheimer, ‘Affirmative Consent’ (2016) 13(2) *Ohio State Journal of Criminal Law* 441, 448.

### III Transforming Passivity: Specific Affirmative Consent Legal Models

As noted in Part II, there is a cluster of substantive and procedural rules associated with the goal of affirmative consent. The focus in Part III is on rules relating to the definition of consent in sexual assault law, a concept which is pivotal in relation to both the actus reus and mens rea of rape and related sexual offences. As the discussion of exemplar jurisdictions illustrates, there is a degree of divergence in how jurisdictions have gone about redefining consent. Despite divergence in these models, the underlying goal is the same: establishing communication as a prerequisite for moral and legal permission to proceed. The broader question of how successful such doctrinal change can be in terms of shifting socio-sexual norms towards meaningful communication is one I return to below.

#### A United States: 'Diluted' versus 'Pure' Affirmative Consent

In her review of affirmative consent in the United States, Tuerkheimer notes that the majority of US jurisdictions 'still reflect traditional conceptions about the necessity of force and even resistance', but that there is a 'modern reformist trend toward consent-based formulations'.<sup>51</sup> Tuerkheimer surveyed a significant number of states which have legislated or judicially interpreted consent as requiring 'an affirmative gesture of willingness', thereby constructing consent as an externally communicated phenomenon. However, in the majority of these states, affirmative consent is 'diluted' by retention of the common law force requirement, meaning the element of force or threat of force must also be established. Generally, a force requirement works to put the focus firmly on resistance or the expression of non-consent, rather than on whether consent has been affirmatively expressed. By contrast, in a minority of 'pure' affirmative consent jurisdictions, force is not (functionally)<sup>52</sup> an element of rape, and consent is defined as requiring communication.<sup>53</sup>

By way of example of 'pure' affirmative consent, Wisconsin defines consent as 'words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact'.<sup>54</sup> The statute also sets out a number of circumstances in which consent is 'not an issue' (that is, where there is a non-rebuttable presumption of no consent). These

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<sup>51</sup> Ibid 443.

<sup>52</sup> See ibid 449 n 35. New Jersey maintains 'force' as an element of rape, but has interpreted the statutory force requirement as satisfied by the force inherent in sexual contact in the absence of affirmative consent; functionally, then, the force requirement has been replaced by 'no communicated consent': *State of New Jersey in the Interest of MTS*, 609 A 2d 1266, 1277 [5] (Handler J for the Court) (NJ, 1992) ('*MTS*').

<sup>53</sup> Tuerkheimer, 'Affirmative Consent' (n 50) 447–51.

<sup>54</sup> Wis Stat Ann § 940.225(4) (West 2022). Writing in 2016, Tuerkheimer noted two other 'pure' affirmative consent jurisdictions, Vermont and New Jersey: see Tuerkheimer, 'Affirmative Consent' (n 50) 451. In 2017, Montana passed rape law reforms bringing it into alignment with these jurisdictions: see Mont Code Ann § 45-5-501(1)(a) (West 2019) (defining consent as 'words or overt actions indicating a freely given agreement to have sexual intercourse or sexual contact'). See also Vt Stat Ann tit 13, § 3251(3) (2022) (defining consent as 'the affirmative, unambiguous, and voluntary agreement to engage in a sexual act, which can be revoked at any time').

circumstances include where the complainant was asleep or so intoxicated as to be unable to consent, so long as the defendant is aware of the qualifying circumstance, but only where the charge is second degree sexual assault. That is, consent and belief in consent may still be in issue, even in relation to such circumstances, if the charge is first degree sexual assault.

In New Jersey, the shift to affirmative consent was achieved by judicial interpretation. In the landmark case of *MTS*, the Supreme Court of New Jersey concluded that the offence of sexual assault occurs when a defendant engages in an act of sexual penetration ‘without the affirmative and freely-given permission of the victim to the specific act’.<sup>55</sup> The Court went on to say that permission ‘may be inferred either from acts or statements reasonably viewed in light of the surrounding circumstances’.<sup>56</sup>

## B Canada

Legislation and case law have together moved Canadian law towards affirmative consent. Prior to 1992, Canada adopted a traditional approach to sexual assault,<sup>57</sup> with the actus reus based on non-consent, threat or fraud. In 1992, a definition of consent as ‘the voluntary agreement of the complainant to engage in the sexual activity in question’ was embedded in the *Canadian Criminal Code* for the first time.<sup>58</sup> Further, in relation to mens rea, the common law ‘mistake of fact’ defence, available for those who honestly but mistakenly believed there was consent to the touching, was limited to where the accused took ‘reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting’.<sup>59</sup>

These amendments laid the groundwork for a shift to affirmative consent. Subsequently, in the key Supreme Court decision of *Ewanchuk*, the Court held that absence of consent vis-à-vis the actus reus of ‘unwanted sexual touching’ is ‘subjective and determined by reference to the complainant’s subjective internal state of mind towards the touching’, and rejected a (failure of proof) defence of implied consent.<sup>60</sup> This firmly did away with the common law approach of requiring some external sign of resistance as proof of non-consent.

<sup>55</sup> *MTS* (n 52) 1277 [5] (Handler J for the Court).

<sup>56</sup> *Ibid.*

<sup>57</sup> While I use the term ‘rape’ generally in this article to refer to the crime of non-consensual sexual intercourse, much of the discussion on consent pertains also to related sexual assault offences. In Canada, the crime of rape was replaced in 1983 with the current gender-neutral, three-tier structure of sexual assault: Lise Gotell, ‘Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women’ (2008) 41(4) *Akron Law Review* 865, 867–8 n 9.

<sup>58</sup> *Criminal Code*, RSC 1985, c C-46, s 273.1(1) (*‘Canadian Criminal Code’*). Interestingly, as noted by Gotell (n 57), the definition was primarily intended to reduce the use of complainant sexual propensity evidence: at 867.

<sup>59</sup> *Canadian Criminal Code* (n 58) s 273.2(b).

<sup>60</sup> *Ewanchuk* [1999] 1 SCR 330, 346 [23], 348 [26], 349–50 [31] (Major J for Lamer CJ, Cory, Iacobucci, Major, Bastarache and Binnie JJ) (*‘Ewanchuk’*).

In relation to mens rea, the *Ewanchuk* Court noted the ‘honest but mistaken belief in consent’ defence.<sup>61</sup> In this context, the Court held, ‘consent’ is to be considered from the perspective of the accused, and means ‘that the complainant had affirmatively communicated by words or conduct her agreement to engage in sexual activity with the accused’.<sup>62</sup>

In other words,

In order to cloak the accused’s actions in moral innocence, the evidence must show that he believed that the complainant *communicated consent to engage in the sexual activity in question*. A belief by the accused that the complainant, in her own mind wanted him to touch her but did not express that desire, is not a defence. The accused’s speculation as to what was going on in the complainant’s mind provides no defence.<sup>63</sup>

To create a legally valid permission, then, there must be a belief that agreement has been communicated: in other words, an honest but mistaken belief in *communicated* consent.<sup>64</sup> Relatedly, ‘a belief that silence, passivity or ambiguous conduct constitutes consent is a mistake of law, and no defence’.<sup>65</sup>

The *Ewanchuk* decision is now reflected in s 273.2(c) of the *Canadian Criminal Code*, added in 2018 to create an additional category of circumstances in which there can be no exculpatory (non-reckless) belief in consent: namely, where there is ‘no evidence that the complainant’s voluntary agreement ... was affirmatively expressed by words or actively expressed by conduct’.<sup>66</sup> This provision is even more explicit than the preceding ‘reasonable steps’ provision in establishing communication as a prerequisite for permission, and firmly entrenches affirmative consent in Canadian legislation.

In sum, consent in Canadian sexual assault law is attitudinal vis-à-vis actus reus (did the complainant in her mind want the sexual touching?) and communicative vis-à-vis mens rea (requiring a belief that consent has been affirmatively communicated by words or conduct indicating voluntary agreement in order to exculpate). Further, both case law and legislation set out additional limits as to when consent has been validly communicated in relation to the mens rea. These limits include that consent must be ongoing throughout a sexual encounter, and that consent must be given when shifting from one form of sexual activity to another.<sup>67</sup>

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<sup>61</sup> Ibid 353–4, citing *Pappajohn v The Queen* [1980] 2 SCR 120, 148 (Dickson J) (discussing mistake as a ‘negation of guilty intention’ (that is, failure of proof) defence).

<sup>62</sup> *Ewanchuk* (n 60) 354–5 [49] (Major J for Lamer CJ, Cory, Iacobucci, Major, Bastarache and Binnie JJ).

<sup>63</sup> Ibid 354–5 [46] (emphasis in original).

<sup>64</sup> *R v Barton* [2019] 2 SCR 579, 630 [92] (Moldaver J for Côté, Brown and Rowe JJ) (*‘Barton’*) (noting that ‘it is appropriate to refine the judicial lexicon and refer to the defence more accurately as an “honest but mistaken belief in *communicated* consent”’ (emphasis in original)).

<sup>65</sup> *Ewanchuk* (n 60) 356 [51] (Major J for Lamer CJ, Cory, Iacobucci, Major, Bastarache and Binnie JJ).

<sup>66</sup> *Canadian Criminal Code* (n 58) s 273.2(c).

<sup>67</sup> Gotell (n 57) 871 n 27, 875.



## C *Tasmania*

The *Tasmanian Criminal Code*<sup>68</sup> was amended in 2004 to implement changes that, at the time, were ‘amongst the most progressive in the common law world’.<sup>69</sup> At the reform Bill’s second reading, the amendments were described as importing ‘the notions of mutuality and reciprocity into the concept of consent’, and rejecting silence or passivity as a basis for a belief in agreement.<sup>70</sup> To that end, two key changes were made. One was to define ‘consent’ as ‘free agreement’, with an expanded list of circumstances in which there is no consent.<sup>71</sup> Crucially, this list includes where a person does not say or do anything to communicate consent.<sup>72</sup> The other was to provide that a mistaken belief in consent is not honest or reasonable when inter alia the accused failed to take reasonable steps, in the circumstances known to them at the time of the offence, to ascertain consent.<sup>73</sup>

Dyer has noted that there is limited case law concerning the meaning of the ‘failure to take reasonable steps’ test in s 14A(1)(c).<sup>74</sup> However, he notes that it would seem that the requirement might be satisfied in the absence of explicitly asking for permission. The Tasmanian provision follows the Canadian provision closely; and the Canadian Supreme Court has noted, when interpreting a similarly worded provision (relating to certain online offences), that ‘[r]easonable steps need not be active’ and may extend to ‘observing conduct or behaviour’.<sup>75</sup> More recently, the same Court also observed that ‘the reasonable steps requirement is highly contextual’, while also finding that an accused cannot point to reliance on a complainant’s ‘silence, passivity, or ambiguous conduct as a reasonable step’.<sup>76</sup>

## D *New South Wales*<sup>77</sup>

Prior to 2022, New South Wales had a ‘partial’ or category-based approach to affirmative consent. The *Crimes Act 1900* (NSW) provided a non-exhaustive list of factors which would render consent not freely and voluntarily given,<sup>78</sup> and failure to take steps to ascertain consent was a non-conclusive factor to be regarded in assessing the reasonableness of a mistaken belief in consent.<sup>79</sup> As such, it was still

<sup>68</sup> *Criminal Code Act 1924* (Tas) sch 1 (‘*Tasmanian Criminal Code*’).

<sup>69</sup> Cockburn (n 46) 1.

<sup>70</sup> Tasmania, *Parliamentary Debates*, House of Representatives, 3 December 2003, 44 (Judy Jackson, Attorney-General), quoted in Cockburn (n 46) 5.

<sup>71</sup> *Tasmanian Criminal Code* (n 68) s 2A(1).

<sup>72</sup> *Ibid* s 2A(2)(a).

<sup>73</sup> *Ibid* s 14A(1)(c).

<sup>74</sup> *Ibid*; Andrew Dyer, ‘Yes! To Communication about Consent; No! To Affirmative Consent: A Reply to Anna Kerr’ (2019) 7(1) *Griffith Journal of Law and Human Dignity* 17.

<sup>75</sup> *R v Morrison* [2019] 2 SCR 3, 52 [109], [112] (Moldaver J for Wagner CJ, Gascon, Côté, Brown, Rowe and Martin JJ), quoted in Dyer (n 74) 17. As Dyer also points out, this approach was taken in the 2017 New South Wales decision of *Lazarus* (n 45), discussed in text accompanying n 80 below.

<sup>76</sup> *Barton* (n 64) 637 [107]–[108] (Moldaver J for Côté, Brown and Rowe JJ).

<sup>77</sup> The Australian Capital Territory also reformed its consent laws in 2022: *Crimes (Consent) Amendment Act 2022* (ACT). With respect to the key points of reform in New South Wales, the Territory’s reforms are equivalent, and so I do not give them separate treatment: see *Crimes Act 1900* (ACT) ss 50B, 67(5).

<sup>78</sup> *NSW Crimes Act* (n 45) s 61HE(2) (repealed).

<sup>79</sup> *Ibid* s 61HE(4)(a) (repealed).

possible for consent to be inferred, at least in some circumstances, from passivity and context. Further, the ‘failure to take steps’ provision was weakened, in terms of its ability to promote communication, by the finding in *Lazarus* that a defendant can be considered as having ‘taken steps’ to ascertain consent merely by observing the complainant’s conduct and forming a belief that she is consenting.<sup>80</sup>

Two major reforms to the law of consent came into effect on 1 June 2022.<sup>81</sup> First, the law now expressly provides that consent must always be affirmatively communicated, in that a person does not consent if ‘the person does not say or do anything to communicate consent’.<sup>82</sup> As such, silent passivity is now sufficient to establish non-consent, regardless of the complainant’s internal attitude of willingness or unwillingness.

Second, the law also precludes the type of argument raised in *Lazarus* — that turning one’s mind to the issue of consent amounts to taking steps to ascertain. Section 61HK(2) provides that a belief in consent is not reasonable (and therefore not exculpatory) if the accused person did not, within a reasonable time before or at the time of the sexual activity, say or do anything to find out whether the other person consents to the sexual activity,<sup>83</sup> although exceptions are in place for an accused with cognitive or mental health impairment contributing to the failure.<sup>84</sup> As such, merely ‘turning one’s mind to consent’ is no longer a basis for an exculpatory mistaken belief in consent.

## E *Victoria*

Victoria amended the definition of consent in 2016 to provide inter alia that a person does not consent where ‘the person does not say or do anything to indicate consent’.<sup>85</sup> Consent being so defined, this would suggest that any belief in consent formed in the face of a complainant’s silence/passivity would amount to a mistake of law, and would not be exculpatory. However, the law still allowed for a belief in consent to be reasonably formed even in cases involving silence/passivity.<sup>86</sup> Further, there was no obligation to take active steps to ascertain consent in order for a belief to be deemed reasonable, with s 36A(2) providing that taking steps to ascertain consent is a non-conclusive factor going to the reasonableness of a belief in consent.<sup>87</sup>

<sup>80</sup> *Lazarus* (n 45) 406–7 [146]–[147] (Bellew J, Hoebe CJ at CL and Davies J agreeing).

<sup>81</sup> *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW).

<sup>82</sup> *NSW Crimes Act* (n 45) s 61HJ(1)(a).

<sup>83</sup> *Ibid* s 61HK(2).

<sup>84</sup> *Ibid* s 61HK(3).

<sup>85</sup> *Victoria Crimes Act* (n 45) s 36(2)(l), inserted by *Crimes Amendment (Sexual Offences) Act 2016* (Vic) s 5.

<sup>86</sup> Rachael Burgin and Jonathan Crowe, ‘The New South Wales Law Reform Commission Draft Proposals on Consent in Sexual Offences: A Missed Opportunity?’ (2020) 32(3) *Current Issues in Criminal Justice* 346, 348.

<sup>87</sup> *Victoria Crimes Act* (n 45) s 36A(2).

In August 2022, the Victorian Parliament passed amendments which became law in July 2023,<sup>88</sup> and have been described as an adoption of affirmative consent.<sup>89</sup> As in New South Wales, the ‘reasonable belief’ provision now specifies that a person’s belief in another’s consent is not reasonable if the accused did not, within a reasonable time before or at the time of the sexual activity, say or do anything to find out whether the other person consents to the sexual activity.<sup>90</sup>

## IV Comparative Analysis: Redefining Consent, Actus Reus and Mens Rea

The survey of affirmative consent jurisdictions in Part III shows a diversity of approaches to redefining consent, in relation to both actus reus and mens rea. In Part IV, I highlight four key points of divergence among the surveyed jurisdictions. In doing so, I point to the importance, for affirmative consent advocates and sceptics alike, of engaging with the specific implications of various doctrinal iterations of affirmative consent.

### A *Actus Reus: Consent as Willingness versus Consent as Communicated Willingness*

Importantly, Canada maintains an understanding of consent as wholly attitudinal vis-à-vis establishing the actus reus element of ‘no consent’. The enquiry into that element is directed solely to the internal state of mind of the complainant. In other words, consent is defined, for the purpose of actus reus, as a state of mind rather than an externalised phenomenon. As such, the law recognises that a person who is completely passive and silent throughout the touching in question may in fact be internally willing, welcoming, desiring the touching, in which case the ‘no consent’ element of the actus reus would not be established. The implication of maintaining consent as attitudinal vis-à-vis actus reus is immediately apparent: it risks opening the door to arguments that passivity is evidence of internal desire (or perhaps more accurately, it leaves open a door that has historically always been wide open in rape law). However, the Supreme Court has been clear that there is no place for ‘implied consent’ (that is, inferring consent from a failure to resist) in Canadian sexual assault law.<sup>91</sup>

By contrast, the remaining surveyed jurisdictions, while each setting out a ‘positive’ definition of consent as an *attitude* of free agreement or permission,<sup>92</sup> also each define consent negatively as not legally present if there are no *words or actions*

<sup>88</sup> *Sexual Offences and Other Matters Act* (n 45).

<sup>89</sup> Jaclyn Symes, ‘Affirmative Consent Model Now Law in Victoria’ (Media Release, 31 August 2022) <<https://www.premier.vic.gov.au/affirmative-consent-model-now-law-victoria>>.

<sup>90</sup> *Victoria Crimes Act* (n 45) s 36A(2).

<sup>91</sup> *Ewanchuk* (n 60). But see below n 135 and accompanying text.

<sup>92</sup> New Jersey (‘affirmative and freely-given permission’: *MTS* (n 52) 1277 [5], 1279 [9] (Handler J for the Court)); Wisconsin, Montana and Vermont (‘freely given agreement’ per respective criminal Codes, above n 54); Tasmania (‘free agreement’: *Tasmanian Criminal Code* (n 68) s 2A); New South Wales (‘free and voluntary agreement’: *NSW Crimes Act* (n 45) s 61HI(1)); Victoria (‘free agreement’: *Victoria Crimes Act* (n 45) s 36(1)).

communicating such an attitude. The New Jersey Supreme Court in *MTS* is explicit about the implications of this construction of consent as an external phenomenon:

In [non-forcible sexual assault] cases neither the alleged victim's subjective state of mind nor the reasonableness of the alleged victim's actions can be deemed relevant to the offense. ... [T]he law places no burden on the alleged victim to have expressed non-consent or to have denied permission, and no inquiry is made into what he or she thought or desired or why he or she did not resist or protest.<sup>93</sup>

In Wisconsin, Montana, Vermont, Tasmania, New South Wales and Victoria, the same outcome, is achieved in cases involving a silent/passive victim, by legislation specifying that consent is not legally present in the absence of words or actions indicating agreement.<sup>94</sup>

This divergence is at least theoretically significant. If consent is deemed in law to be absent if there are no words or actions communicating consent, this firmly closes the door on the argument that silent passivity implies desire. It ensures that an alleged victim's failure to protest or resist (which, as is now commonly known, may be due to a 'frozen in fear' reaction) cannot be offered as evidence of an attitude of consent, as the quote from *MTS* makes clear. However, it creates a concern about potential doctrinal overreach, in terms of the expansion of the bounds of the *actus reus* of rape. By that I mean, in cases where there were no words/actions communicating consent, the *actus reus* element of 'non-consensual sexual contact' is made out, regardless of whether the passive actor was indeed 'frozen in fear', or whether they were in fact internally willing, desirous, welcoming of the sexual contact.

Combined with a *mens rea* of no reasonable belief in communicated<sup>95</sup> or ascertained<sup>96</sup> consent, this *actus reus* allows for culpability in relation to sexual contact that was, in fact, internally desired on the part of the complainant. Such an allowance would seem to redefine the wrongfulness of rape from 'sex with an unwilling partner' to 'non-communicative sex'. That is quite a significant expansion of the bounds of rape law. That is not to say it is an illegitimate or irrational change, but it is a significant shift from rape as a violation of personal will. It aligns with the (contestable) idea that there is culpability<sup>97</sup> whenever someone *hazards* that non-communicated internal desire may be present, regardless of whether they happen to get it right. Such culpability might be controversial — particularly as it would apply to people in long-term, mutual, consensual sexual relationships, where arguably people are very likely to get it right — but it is defensible in theory. For example, we might argue that those who risk inflicting unwanted sexual contact by engaging

<sup>93</sup> *MTS* (n 52) 1279 [8] (Handler J for the Court).

<sup>94</sup> Wis Stat Ann § 940.225(4) (West 2022); Mont Code Ann § 45-5-501(1)(a) (West 2019); Vt Stat Ann tit 13, § 3251(3) (2022); *Tasmanian Criminal Code* (n 68) s 2A(2)(a); *NSW Crimes Act* (n 45) s 61HJ(1)(a); *Victoria Crimes Act* (n 45) s 36(2)(l).

<sup>95</sup> See Wisconsin, Vermont, Montana and New Jersey (above nn 54, 55 and accompanying text).

<sup>96</sup> See Tasmania, New South Wales and Victoria (above nn 68, 83, 87 and accompanying text).

<sup>97</sup> Culpability for rape or its analogues, and not merely for attempted rape; for discussion of whether attempt liability is more appropriate in cases where consent was internal, and no belief in consent is present, see Kimberly Kessler Ferzan, 'Consent, Culpability, and the Law of Rape' (2016) 13(2) *Ohio State Journal of Criminal Law* 397.

in sex with a non-communicative partner are acting wrongfully, in that by doing so they participate in a problematic, chauvinistic culture which is harmful to women generally.<sup>98</sup> Or we might argue that because sex is a high-stakes context, an external or public act of communication resulting in common knowledge is always required for consent to be morally transformative.<sup>99</sup> In this view, simply taking a punt and assuming internal consent is present is itself morally pernicious, and an affront to dignity and autonomy, even if one happens to get it right on a particular occasion.

Whether such culpability for desired but non-communicative sex aligns with community expectations of how rape laws will be constructed and used is debatable (and shifting those expectations would presumably require a concerted effort, and take time). It also means that any interest in engaging in sex with a non-communicative but internally desirous partner is not accommodated in law, although such sex would presumably be unlikely to lead to a criminal complaint. Indeed, as Gruber points out, the response to this overreach concern is frequently that ‘affirmative consent laws won’t be used in this way’:

Affirmative consent critics decry the risk that a willing sexual partner will report rape, for whatever reason, and unless there was a ‘yes’, the accused is guilty. Advocates respond that this vision of a world full of vindictive or unreasonable complainants utilizing broad affirmative consent standards to punish ordinary sexual actors is nothing more than men’s persistent ‘nightmare’.<sup>100</sup>

I am in agreement with Gruber that fears of malicious false complaints are exaggerated.<sup>101</sup> However, such a radical reconstruction of the actus reus of rape, even if it will not in practice lead to liability for sexual contact that was internally desired, might give pause. If one of the strongest arguments for affirmative consent reform is that it will bring our laws into alignment with norms and aspirations of communicative socio-sexual behaviour, to the end of giving greater effect to sexual autonomy, the Canadian example shows that is possible to achieve this without also criminalising *desired* sexual contact along the way and thereby impinging on sexual autonomy.<sup>102</sup>

On the other hand, the obvious concern about continuing to conceive of consent as entirely attitudinal vis-à-vis actus reus is that, in cases of a silent and passive complainant, juries (and before them, investigators and prosecutors) will inevitably continue to make inferences about the complainant’s internal state of mind based on such silent passivity. We can posit that this is likely to be so, regardless of judicial admonishment against implied consent, and there is Canadian

<sup>98</sup> See, eg, Pineau, ‘Date Rape’ (n 25); Lois Pineau, ‘A Response to My Critics’ in Leslie Francis (ed), *Date Rape: Feminism, Philosophy, and the Law* (Pennsylvania State University Press, 1996) 63, 84.

<sup>99</sup> Tom Dougherty, ‘“Yes Means Yes”: Consent as Communication’ (2015) 43(3) *Philosophy & Public Affairs* 224. See further Mollie Gerver, ‘Inferring Consent Without Communication’ (2020) 46(1) *Social Theory & Practice* 27.

<sup>100</sup> Gruber (n 23) 453–4.

<sup>101</sup> Ibid 453. See generally Philip NS Rumney, ‘False Allegations of Rape’ (2006) 65(1) *Cambridge Law Journal* 128.

<sup>102</sup> On consent as an internal phenomenon, as it relates to autonomy, see Ferzan (n 97).

research showing this play out.<sup>103</sup> Further, by externalising consent vis-à-vis actus reus, not just mens rea, the law sends a clear message that it is a wrongful act to engage in sexual conduct in the absence of overt communication. Arguably that will ultimately serve sexual autonomy more effectively on the whole, despite the non-accommodation of the choice to engage in desired but non-communicative sex.

## **B     *Actus Reus: Words/Actions Indicating Consent***

Affirmative consent is often touted as bringing greater clarity to sexual intimacy, and to some degree it does. In jurisdictions which define consent as requiring some words or actions indicating agreement, at a minimum silent passivity is no longer legally congruent with consent. Instead, unless there is some form of verbal or non-verbal communication in the form of words or actions, the ‘no consent’ element is made out. However, this raises the question: what sort of words/actions suffice to communicate consent?

Confusion on this point can arise because in the ‘yes means yes’ social movement, as discussed above, a spectrum of formulations is available as to ‘what sort of yes means yes’. As Gruber has canvassed, the meaning of communicated consent can range from ‘narrow communicative prescriptions (contract, verbal yes) to any behavior that conveys internal agreement (foreplay, acquiescence)’.<sup>104</sup> For example, we might imagine a legal rule that there is no consent unless there are words/actions that *unambiguously* communicate *enthusiasm* for the sexual contact in question. ‘Clear/unambiguous consent’ and ‘enthusiastic consent’ are ideals often held up in the ‘yes means yes’ movement. But I am not aware of any criminal models of affirmative consent that require words/actions that unambiguously communicate permission, or that communicate enthusiastic agreement/permission. Such requirements might be common on college campuses<sup>105</sup> and useful for educative/political purposes<sup>106</sup> but are not (yet) features of affirmative consent legal models.

Indeed, to require enthusiastic and/or unambiguous agreement to sexual contact would be an extreme intervention in private sexual intimacy. On enthusiasm: free and voluntary consent to sexual intimacy can be, and very often is, given reluctantly, including to sex that may not be particularly desired but is, nonetheless, welcomed.<sup>107</sup> In sexual politics, there is an understandable push to counteract the coercive societal forces that lead many, especially women, to consent to sex that is not fully desired, but to deem such sex non-consensual would represent a remarkable and significant widening of the actus reus of rape law. Despite this, in some jurisdictions affirmative consent law reform has been described as requiring

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<sup>103</sup> See, eg, Rakhi Ruparelia, ‘Does No “No” Mean Reasonable Doubt? Assessing the Impact of *Ewanchuk* on Determinations of Consent’ (2007) 25(1) *Canadian Woman Studies* 167.

<sup>104</sup> Gruber (n 23) 430.

<sup>105</sup> Jacob Gersen and Jeannie Suk, ‘The Sex Bureaucracy’ (2016) 104(4) *California Law Review* 881.

<sup>106</sup> Gruber (n 23) 432.

<sup>107</sup> See generally Anna High, ‘Reluctant Consent’ [2022] (9) *New Zealand Law Journal* 310, 311–12; Dyer (n 74) 3, 22. See further Ferzan (n 97) 406.

‘enthusiastic consent’,<sup>108</sup> a description which I suggest conflates law’s aspirations (in terms of encouraging and incentivising certain ideal sexual norms) and law’s actual doctrinal effects (in terms of what is criminally sanctioned).

As to whether affirmative consent means unambiguous consent: from the comparative review, we see that at most affirmative consent forecloses the argument that silence/passivity is a form of communication that suffices to convey consent.<sup>109</sup> Affirmative consent does not require unambiguous consent; it simply forecloses the argument that ‘her *silent passivity* was ambiguous, and I got it wrong’. Provided there were words or actions that could plausibly be construed as communicating consent, there will still be scope in law for an exculpatory (failure of proof) defence based on a mistaken belief in communicated consent, even in affirmative consent jurisdictions, and even where the communication was ambiguous.<sup>110</sup> This will always be so, unless the law takes a more regulative approach and rejects sexual ambiguity entirely by specifying precisely what form of words/actions will suffice as an indication of consent.<sup>111</sup> But that would raise competing concerns about undue infringement on sexual liberty<sup>112</sup> and associated backlash.<sup>113</sup>

<sup>108</sup> See, eg, Victoria: ‘simply, it must be a clear and enthusiastic go-ahead’: Symes (n 89) (discussing the *Sexual Offences and Other Matters Act* (n 45)).

<sup>109</sup> Canada and Vermont might give us pause here. In *Ewanchuk* (n 60) 356, the Court stated that a belief that ‘silence, passivity or ambiguous conduct constitutes consent is a mistake of law’. However, the subsequent and corresponding legislative amendment simply requires evidence that voluntary agreement ‘was affirmatively expressed by words or actively expressed by conduct’, with no requirement that the expression be unambiguous: *Canadian Criminal Code* (n 58) s 273.2(c). Further, Witmer-Rich (n 4) 69 notes that Canadian case law does not appear to require unambiguous consent. In Vermont, the definition of consent includes ‘unambiguous’: Vt Stat Ann tit 13, § 3251(3) (2022). However in practice, it is difficult to see how an ‘unambiguous’ standard could be workable in law, unless the precise nature of ‘unambiguous consent’ is set out (for example, ‘there must be a verbal “yes” in response to a verbal request’): see Witmer-Rich (n 4) 68–74 (discussing the conflation in commentary and scholarship of affirmative and unambiguous consent).

<sup>110</sup> As Anderson has noted, an affirmative consent model ‘relies on a man’s ability to infer actual willingness from a woman’s body language’ but does not necessarily account for his misinterpretation of non-verbal behaviour: Michelle J Anderson, ‘Negotiating Sex’ (2005) 78(6) *Southern California Law Review* 1401, 1406. See further Ferzan (n 97) 432; Philip Rumney, ‘The Review of Sex Offences and Rape Law Reform: Another False Dawn?’ (2001) 64(6) *Modern Law Review* 890, 900.

<sup>111</sup> Wall describes this as one of two horns of the inherent dilemma of affirmative consent: Jesse Wall, ‘The Expressive Consent Dilemma’ (Conference Paper, Perspectives on the Law of Sexual Violence, 8 December 2022) (on file with author).

<sup>112</sup> Stephen J Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (Harvard University Press, 1998) 272 (suggesting that a ‘world without ambiguity in erotic interaction might be a very dull place’); Tuerkheimer, ‘Affirmative Consent’ (n 50) 445 n 16 (noting arguments about the ‘cost of doing away with [sexual] ambiguity’); Melissa Hardesty, Sarah R Young, Allison M McKinnon, Ann Merriwether, Richard E Mattson and Sean G Massey, ‘Indiscrete: How Typical College Student Sexual Behavior Troubles Affirmative Consent’s Demand for Clear Communication’ (2022) 19(3) *Sexuality Research and Social Policy* 1114, 1127 (noting that mandating specific words or actions as the only means to communicate consent might be seen as an unacceptable intrusion into private lives as it ‘amounts to telling [people] how to have sex’). For a brief survey of empirical research on the diversity of ways that people in fact communicate about consent, see Mark A Levand, ‘Consent as Cross-Cultural Communication: Navigating Consent in a Multicultural World’ (2020) 24(3) *Sexuality & Culture* 835, 837–8.

<sup>113</sup> See generally Gruber (n 23) 446 (discussing the risk of attempting to ‘shove’ through societal change using ‘radical behavioral prescriptions’).

As such, it would overstate the effect of affirmative consent to say that it removes scope for exculpation based on genuine sexual miscommunication; it would still be possible, in an affirmative consent schema, for two parties to a sexual encounter to construe certain words or actions differently, in terms of whether those words or actions are understood to represent communication or willingness to engage in the sexual activity. Nonetheless, while affirmative consent does not completely do away with the possibility of sexual miscommunication based on ambiguous words/conduct, it at least represents a decisive break from the common law understanding of silent passivity as evidence of internal desire. Common law deemed silent passivity to be ambiguous. That approach historically served men well, in terms of preserving rights of access to female bodies, and relates to an understanding of sex as *prima facie* consensual.<sup>114</sup> Affirmative consent rejects the idea that silent passivity is ambiguous by requiring some words/actions as communication of consent; silent passivity plus context would not suffice. But that is not, in my view, the same as requiring that those words/actions be unequivocal.

### C *Mens Rea: Disallowing or Allowing the ‘Mistake of Law’ Defence*

In Canada and the surveyed US jurisdictions, the mens rea of sexual assault can be satisfied *inter alia* by showing absence of belief in communicated (whether by words or actions) consent. This construction of mens rea forecloses the possibility of an exculpatory mistaken belief in internal consent formed on the basis of silent passivity as such a mistake would be a ‘mistake of law’. As the Canadian Supreme Court explained in *Ewanchuk*, because (Canadian) law defines consent, for the purpose of mens rea, as something ‘affirmatively communicated by words or conduct’, it is a mistake of law — and therefore no defence — to form a belief in consent based on anything less than words or conduct.<sup>115</sup> This judicial dictum was subsequently legislated into s 273.2(a), added in 2018, which expressly provides that there can be no exculpatory (non-reckless) belief in consent where there is no evidence of an affirmative expression, by words or conduct, of voluntary agreement on the part of the complainant.<sup>116</sup>

By contrast, a ‘mistake of law’ defence seems to have been accommodated in the surveyed Australian jurisdictions. In Tasmania, New South Wales and Victoria, the law provides that a person does not legally consent where they do not say or do anything to communicate consent. This should have the effect of foreclosing a ‘belief in consent’ defence, if such a belief is based on the complainant’s silence/passivity, as such a belief would amount to a mistake of law. However, in Victoria, Burgin and Crowe have noted that, despite this, a defendant can argue mistaken belief in consent based on silent passivity.<sup>117</sup> In New South Wales, the ‘no consent if no words/actions to communicate consent’ provision only came into effect in June 2022, but I have not found any case law to suggest the

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<sup>114</sup> See generally High (n 2).

<sup>115</sup> *Ewanchuk* (n 60) 356 (Major J for Lamer CJ, Cory, Iacobucci, Major, Bastarache and Binnie JJ).

<sup>116</sup> *Canadian Criminal Code* (n 58) s 273.2(a).

<sup>117</sup> Burgin and Crowe (n 86) 348.



Victorian approach would not be followed. Finally, in Tasmania, Cockburn has noted that consent is legally defined as not present where a person does not say or do anything to communicate consent;<sup>118</sup> therefore, in the absence of any such words or actions from the complainant, a defence of mistaken belief in consent should be precluded as a mistake of law. However, she also notes it is ‘by no means clear’ that this is the case in practice.<sup>119</sup>

## D *Mens Rea: Failure to Ascertain Desire versus No Reasonable Belief in Communicated Desire*

Following on from this: in jurisdictions such as Victoria which have (wrongly, in my view) allowed for ‘mistake of law’ arguments, a consequence is that despite a clear definition of consent as affirmative, it has remained possible for a defence of mistaken belief in consent to be raised, even in cases involving a silently passive victim. Rather than recognising this as a mistake of law that should not be accommodated, New South Wales and Victoria have further reformed the mens rea of sexual assault. Their latest round of reforms provide that a belief in consent is not reasonable (and therefore not exculpatory) if the accused person did not, within a reasonable time before or at the time of the sexual activity, *say or do anything* to find out whether the other person consents to the sexual activity.

These ‘failure to ascertain’ provisions would seem to preclude any argument of reasonable belief in consent based on silent passivity, as they require the accused to have actively communicated, by way of words or actions, with the complainant before a mistaken belief in consent can be deemed reasonable. It is no longer reasonable, in law, to simply turn one’s mind to the question of consent, and to make assumptions based on an absence of resistance / verbal objection.<sup>120</sup>

On the face of the New South Wales and Victoria ‘failure to ascertain’ laws, mens rea is established whenever an accused fails to use some form of words or some type of conduct to ascertain consent. This apparently requires, in order for an exculpatory state of mind to exist, that a sexual agent ‘stop and ask’, by way of words or gestures, *even if* their partner has already communicated and continues to communicate consent. In this, the reforms arguably have overshot, risking redundancy and backlash. The concern I raise is admittedly largely theoretical, in that if consent has been communicated and is continuing, actus reus is not made out, and no criminal liability would ensue (unless, as above, we assume vindictive false complaints). But by requiring all agents to always ‘stop and ask’, the law gives rise to a ‘not raped, but by a rapist scenario’ — by which I mean, a mind is deemed guilty due to failure to take steps to ascertain, despite such steps being redundant if consent is being clearly communicated during the encounter in question. Admittedly, ‘stop and ask’ might be the safest and most prudent way to ensure sex is mutually and genuinely welcomed, and as such is useful as an educative socio-sexual script. However, it is an overly prescriptive and inappropriate expansion of the mens rea of rape to require active ascertainment in all cases, and at every step of a sexual

<sup>118</sup> Cockburn (n 46) 31.

<sup>119</sup> Ibid.

<sup>120</sup> Cf the approach taken in *Lazarus* (n 45), discussed above in n 80 and accompanying text.

encounter, where consent continues to be actively communicated by one's partner. This mens rea expansion arguably represents a sacrifice of sound legal doctrine for the sake of an educative and/or symbolic function, and therefore risks backlash once those precise doctrinal bounds are pointed out.

By contrast, in Canada and the surveyed US jurisdictions, an absence of belief in *communicated* consent satisfies mens rea, but there is no general and additional 'stop and ask' obligation to actively ascertain where consent has been communicated (although again, that is not to say that 'stop and ask' might not be prudent, and a useful script to promote in sexual education). The possible drawback of this approach, as compared to that of New South Wales and Victoria, is that it keeps the evidentiary emphasis on what the complainant did or said by way of communication, whereas the 'failure to ascertain' approach puts the emphasis on what the *accused* did or said by way of communication. As noted in *MTS*, advocates for rape reform have long argued that one of the key problems is how law tends to focus on victim behaviour rather than defendant conduct.<sup>121</sup>

## V Discussion and Conclusions

At the outset of this article I noted that consent is here to stay, for better or worse, as a key concept in sexual violence law. Valid concerns have been raised about the valorisation of consent in law, but this article assumes that it will continue to be a key marker for delineating morally/socially/legally permissible from impermissible sex. But that is only the beginning of the discussion. For legislators contemplating whether the legal meaning of consent is fit for purpose in the modern context, and in light of the well-documented problems with preventing and prosecuting sexual violence, the question arises: what values will we imbue in consent in law? As Cowan has argued:

Consent is a concept which we can fill with either narrow liberal values, based on the idea of the subject as an individual atomistic rational choice maker, or with feminist values encompassing attention to mutuality, embodiment, relational choice and communication.<sup>122</sup>

When affirmative consent law reform is promoted politically, it is often framed by proponents as a straightforward value judgment. By choosing affirmative consent, we purport to affirm a communicative model of intimacy, to better give effect to the values of mutuality, respect, autonomy and dignity. Assuming, rather than ascertaining, consent, involves regarding the bodies of others as in a perpetual state of consent unless or until they clearly state otherwise, and is rightly rejected as antithetical to communicative values.

As discussed in Part III, even in the absence of an express affirmative consent standard, Anglo-American jurisdictions have trended broadly away from the common law's uncritical embrace of assumed consent and towards ascertained

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<sup>121</sup> *MTS* (n 52) 1274 [1] (Handler J for the Court).

<sup>122</sup> Sharon Cowan, "'Freedom and Capacity to Make a Choice': A Feminist Analysis of Consent in the Criminal Law of Rape" in Vanessa E Munro and Carl F Stychin (eds), *Sexuality and the Law: Feminist Engagements* (Routledge-Cavendish, 2007) 51, 53.

consent. Over time, the scope of rape law has expanded such that the legal legibility of unwanted sex has at least theoretically improved. Affirmative consent, some might say, is simply the natural next step in our progression away from assumed consent and towards a model that requires active, meaningful, reciprocal ascertainment of desire.

Indeed, in all of the surveyed jurisdictions, there has been a stated, express intention, in shifting towards affirmative consent, to import certain values into law. Landmark affirmative consent cases such as *Ewanchuk* and *MTS*, in interpreting consent as requiring communication, point to autonomy, privacy, dignity and bodily control as interests at stake and more fully protected by affirmative consent.<sup>123</sup> The Tasmanian legislature described its 2004 amendments as importing ‘the notions of mutuality and reciprocity into the concept of consent’.<sup>124</sup> The 2022 reforms in New South Wales included legislating an objective of the subdivision on consent as the recognition of the right to choose whether or not to participate in sexual activity.<sup>125</sup> And the most recent Victorian reforms were described as promoting ‘healthy sexual relationships that are based on the principles of mutual respect and bodily autonomy’.<sup>126</sup>

However, it is reductive to set up the legal debate about affirmative consent as a matter of whether one is for or against communicative sexuality. As Gruber argues, it is common and uncontentious to hope that over time, norms of sexual behaviour and communication will change such that ‘harmful sex is reduced and the costs and benefits of sex are distributed more equally between men and women’.<sup>127</sup> But to speak vaguely of values such as autonomy, equality, dignity and mutuality as justification for affirmative consent rather glosses over a number of important points of theory, doctrine and practice. This comparative analysis has sought to shed greater light on a number of doctrinal issues raised by affirmative consent. It does not purport to resolve the normative issues raised by affirmative consent, nor to advocate or argue against a reconstruction of consent in law, but to bring clarity to the debate in terms of the doctrinal repercussions and trade-offs associated with reform.

## A Doctrinal Trade-offs of Affirmative Consent

Despite this aim of clarity, the comparative analysis might raise more questions than it answers. It certainly shows that there are different versions of affirmative consent in law, and the need to be specific about those versions. We cannot debate, critique or defend affirmative consent as a legal model without establishing the doctrinal mechanisms under discussion. Further, the comparative analysis has shed light on four key points of divergence. These are granular but important points, and they must be confronted, because if affirmative consent is the goal of legislative reform, there

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<sup>123</sup> *Ewanchuk* (n 60) 348 (‘Having control over who touches one’s body, and how, lies at the core of human dignity and autonomy’); *MTS* (n 52) 1277 [6] (discussing rape as it relates to bodily integrity, autonomy and privacy).

<sup>124</sup> Tasmania, *Parliamentary Debates*, House of Representatives, 3 December 2003, 44 (Judy Jackson, Attorney-General), quoted in Cockburn (n 46) 5.

<sup>125</sup> *NSW Crimes Act* (n 45) s 61HF(a).

<sup>126</sup> Victoria, *Parliamentary Debates* (n 12) 2900.

<sup>127</sup> Gruber (n 23) 445. See also Dyer (n 74).

are trade-offs and compromises to be made, depending on which version is adopted. It will not do to obfuscate or gloss over those trade-offs and compromises.

‘Consent’ is pivotal to the definition of both the *actus reus* and *mens rea* of rape. In relation to *actus reus*, if consent is defined as not legally present in the absence of active communication, this gives rise to potential culpability for sexual contact that was, in fact, internally desired. This is a profound expansion of the harmfulness and wrongfulness that rape law has traditionally sanctioned, and might be critiqued as facially over-broad. On the other hand, if consent is defined as wholly internal vis-à-vis *actus reus*, as in Canada, do we risk juries (and police, prosecutors, sexual actors) continuing to assume, despite judicial admonishment, that a failure to protest or resist is evidence of internal assent or acquiescence?

Relatedly, where *actus reus* is defined as satisfied by sexual contact in the absence of words or actions indicating consent, questions remain about the precise nature of words/actions that will suffice. Should we attempt to regulate ambiguity away, going further than ‘silent passivity does not suffice’ and specifying other ways in which words/actions will fall short of the requirement for an active indication of consent (for example, consent provided in advance, ambiguous consent, unenthusiastic consent)? To what extent should the law be more stipulative, and therefore regulative, about how we communicate sexually?

In relation to *mens rea*, I have argued that if consent is defined as something that must be communicated, then it is doctrinally unsound to allow for a ‘mistake of law’ defence, where a belief in consent is based on silent passivity. In other words, affirmative consent law reform, if properly applied, essentially transforms a ‘mistake of fact’ into a ‘mistake of law’. Mistakes of law are classically not accommodated in criminal law because our laws are assumed to align with social/moral norms, such that ignorance of the law is no excuse for morally suspect behaviour. A concern with affirmative consent is that it may not align with prevalent social/moral norms about assuming versus ascertaining consent.<sup>128</sup> If that is so, will affirmative consent create ignorant ‘sacrificial lambs’ as we wait for socio-sexual norms catch up with the law? If the broader criminal system is discriminatory, who are those sacrificial lambs most likely to be? The question is essentially ‘whether criminal law ... is an appropriate tool of ... cultural transformation’.<sup>129</sup>

Also relating to *mens rea*, the most recent reforms in New South Wales and Victoria raise questions. By providing for a ‘failure to ascertain’ as satisfying *mens rea*, these reforms arguably overshoot in that they amount to a ‘stop and ask’ requirement in all cases, including when consent has already been actively communicated. On the other hand, the reforms may in time prove to be more successful, as compared to efforts in other jurisdictions, in shifting the focus of the legal enquiry from complainant behaviour and towards defendant conduct.

Turning again to the bigger picture of affirmative consent reform: the analysis also illustrates that affirmative consent is not necessarily a radical shift in rape law doctrine, depending on how it is constructed. But neither is it necessarily a silver

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<sup>128</sup> Ferzan (n 97) 444–7.

<sup>129</sup> Gruber (n 23) 445.

bullet, either in terms of actually shifting norms of sexual behaviour towards ‘more communicative terrain’,<sup>130</sup> thereby reducing harmful sex, or in terms of addressing the structural barriers to criminal justice for victims.

## **B     *Affirmative Consent Is Not (Necessarily) Radical***

In light of the more general shift in rape law away from assumed consent, it is possible that legislating affirmative consent represents more of a symbolic gesture, rather than a meaningful shift in doctrine. As discussed in Part III, there is already, frequently, liability in law for assuming rather than ascertaining consent, at least on paper. Even in jurisdictions that have not established an across-the-board rule that communication is required to generate legal permission to engage in sexual contact, it is very often the case that the law finds blame where there is an absence of active communication. This can be so by way of certain categories of sex being deemed presumptively or conclusively non-consensual in the absence of communication. Additionally, we might posit that fact finders will over time become less likely, in light of growing societal acceptance of ‘yes means yes’, to find a belief in consent reasonable if based on something less than active communication (although I admit that I might justly be accused of undue optimism on this point).

In reviewing US state jurisdictions on this point, a number of commentators have similarly made the observation that affirmative consent is not necessarily a radical shift. The shift in legal standard away from requiring a clear ‘no’ and towards requiring an affirmative ‘yes’ has been underway for decades in most US jurisdictions, regardless of whether affirmative concept is expressly invoked.<sup>131</sup> As such, affirmative consent ‘does not represent a meaningful departure from the existing law of consent in most jurisdictions’,<sup>132</sup> and will directly impact relatively few cases — primarily those in which one party to an encounter is entirely passive and silent, and there is a plausible narrative of belief in consent (that is, factors such as sleep, intoxication or fear are not at play).<sup>133</sup> It will not make a difference, doctrinally, in cases where there is an active expression of ‘no’ by way of words or conduct, or in cases in which there is an active expression of ‘yes’, but reason to doubt the freedom or capacity to consent.

## **C     *Shifting towards Communicative Sexuality: No Silver Bullets***

Witmer-Rich, in making this point about affirmative consent, describes it as ‘not as bad as you fear’, meaning fears of a radical departure from ‘rape as we know it’ are overblown (although I have argued above that there is a danger of overshooting or overreaching, depending on how the model is implemented). His focus is doctrinal, as mine has been, and he acknowledges that doctrine and practice are distinct. In practice, regardless of doctrine, it might frequently be the case that complainants are still required to say ‘no’ in order for their cases to be investigated, prosecuted and

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<sup>130</sup> Vanessa E Munro, ‘Constructing Consent: Legislating Freedom and Legitimizing Constraint in the Expression of Sexual Autonomy’ (2008) 41(4) *Akron Law Review* 923, 925.

<sup>131</sup> Witmer-Rich (n 4) 58.

<sup>132</sup> *Ibid* 80.

<sup>133</sup> *Ibid* 88; Tuerkheimer, ‘Affirmative Consent’ (n 50); Anderson, ‘Negotiating Sex’ (n 110).

result in conviction; but to the extent this is true, this is an issue of procedure rather than doctrine:

In practice, it may be true that some prosecutors, judges, and juries are reluctant to find guilt in cases involving a complainant who is silent or passive rather than one who affirmatively expresses her nonconsent. This practice question is different, however, from the substance of the existing legal doctrine.<sup>134</sup>

On this, Witmer-Rich possibly glosses over the potential of doctrinal reform to effect systemic changes, in terms of the decisions made by those procedural actors. It is certainly possible that a clearer embrace, in doctrine, of affirmative consent could have flow-on effects in terms of decisions to report, investigate, prosecute and convict. On the other hand, while affirmative consent is a relatively recent legal development there are already studies demonstrating that doctrinal rules have been inconsistently and incorrectly applied, lessening the impact of affirmative consent reform in practice.<sup>135</sup>

It is unclear, and we may never have empirical evidence, as to whether and to what extent redefining consent vis-à-vis actus reus and/or mens rea improves the reporting, prosecution and conviction of unwanted sex. Cynically, then, we might say that affirmative consent in law is a cheap political win, one that glosses over the fact that it is likely to impact relatively few cases, while also glossing over the various ways that affirmative consent doctrine will be undermined in practice, in terms of reporting, investigating, prosecuting and fact finding. The problem of vindicating rape victims by way of legal processes runs deep and wide, and there is a multitude of ways that affirmative consent doctrine can be abrogated in practice. Most obviously, the inherent ‘he said / she said’ nature of most rape trials will remain unchanged, no matter how we tinker with the law of consent. Will affirmative consent simply reformulate the defence script that needs to be advanced in these contests of credibility — from ‘she didn’t resist, how was I to know?’ to ‘she said yes’? In other words, affirmative consent reform might assist with questions of interpretation (such as, in law, how is silent passivity to be interpreted vis-à-vis the actus reus and mens rea of rape). But it will not assist with factual disputes, in terms of whose version of events to accept. Neither will it solve the perennial issue of juror bias against ‘imprudent, norm-violating women’.<sup>136</sup>

It is equally unclear whether legislating affirmative consent has a tangible impact outside of courtrooms. Research in this space is limited and in its early

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<sup>134</sup> Witmer-Rich (n 4) 75.

<sup>135</sup> See, eg, Ruparelia (n 103) (demonstrating that the *Ewanchuk* (n 60) rules have been inconsistently applied, and in some cases misapplied, at trial); Elaine Craig, ‘Ten Years after *Ewanchuk* the Art of Seduction Is Alive and Well: An Examination of the Mistaken Belief in Consent Defence’ (2009) 13(3) *Canadian Criminal Law Review* 247 (finding that *Ewanchuk*’s rejection of the doctrine of implied consent has not been consistently followed by lower courts); Cockburn (n 46) (finding that affirmative consent reforms in Tasmania are not being implemented as intended, due to reluctance or inability of lawyers and judges to engage with the new concept of consent).

<sup>136</sup> David P Bryden, ‘Redefining Rape’ (2000) 3(2) *Buffalo Criminal Law Review* 317, 425.

stages.<sup>137</sup> Optimistically, we might argue that affirmative consent allows the law to be reformulated in a way that reflects the communicative socio-sexual norms to which we aspire. This does not need to be dismissed as ‘mere symbolism’; symbolism might be powerful in terms of shifting society’s ‘moral posture’.<sup>138</sup> Legislative change might eventually have flow-on effects in terms of shifting socio-sexual behaviour, encouraging greater attention to communicative values, and reducing opportunity for sexual miscommunication. But even adopting this optimistic position, such change will inevitably take time and will require proactive educative measures. Perhaps in the meantime, affirmative consent really is about a political decision: what are the norms and values we choose to be symbolised in our legal construction of consent?

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<sup>137</sup> Ibid 419 (noting the paucity of social-scientific research on the educational and deterrent effects of redefining rape). See further Riemer et al (n 20) (finding that affirmative consent policies, if properly communicated, may shape perceptions of assault in scenarios involving physical, but not verbal, coercion); Monica K Miller, ‘Judgments about Sexual Assault Vary Depending on Whether an Affirmative Consent Policy or a “No Means No” Policy Is Applied’ (2020) 12(3) *Journal of Aggression, Conflict and Peace Research* 163. On the impact of sexual assault education programs generally, see Lauren A Wright, Nelson O O Zounlome and Susan C Whiston, ‘The Effectiveness of Male-Targeted Sexual Assault Prevention Programs: A Meta-Analysis’ (2020) 21(5) *Trauma, Violence, & Abuse* 859, 866 (concluding that ‘there is little evidence that sexual assault prevention programs reduce the incidence of sexual assault’).

<sup>138</sup> Susan Caringella, *Addressing Rape Reform in Law and Practice* (Columbia University Press, 2009) 203.





# Constitutional Dignity post Farm Transparency

Ashleigh Barnes\*

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## Abstract

In this article I consider the state of play for dignity in Australian constitutional law in the light of *Clubb v Edwards*; *Preston v Avery* ('*Clubb*') and *Farm Transparency International Ltd v New South Wales* ('*Farm Transparency*'). In Part II, I explore the meaning of dignity in these decisions. I respond to the concern voiced following *Clubb* that dignity is an indeterminate, incoherent or empty concept. Together, the judgments in *Clubb* and *Farm Transparency* give dignity some content and meaning. Doctrinal analysis of these judgments reveals the emerging meaning of dignity in Australian constitutional law. This article offers this original doctrinal analysis, focusing on the new light that *Farm Transparency* can cast on the meaning of dignity. This doctrinal analysis suggests that dignity in Australian constitutional law is a multidimensional concept, including dignity as the intrinsic worth of natural persons, and dignity as a thick autonomy interest. In Part III, I address the second concern voiced following *Clubb* that the quirks of the Australian constitutional law system preclude recognition of the dignity of the speaker, and thus will cause dignity to be relevant only to the limitation of the implied freedom of political communication and not its protection. I address the complexities that apply in the Australian context and argue that none of these completely closes the door on dignity.

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\* DPhil Candidate, University of Oxford, Oxford, United Kingdom; Lecturer, Macquarie Law School, Macquarie University, New South Wales, Australia. Email: [ashleigh.barnes@mq.edu.au](mailto:ashleigh.barnes@mq.edu.au); ORCID iD:  <https://orcid.org/0009-0007-6322-6452>.

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## I Introduction

It is arguable that dignity was recognised in *Clubb v Edwards; Preston v Avery* ('*Clubb*')<sup>1</sup> as a constitutional value.<sup>2</sup> In that decision, dignity received 'a degree of constitutional recognition in Australia capable of justifying the imposition of restrictions on the implied freedom'.<sup>3</sup> It was 'a major development' and 'the first time that the concept of dignity [had] been used to help interpret the *Australian Constitution*'.<sup>4</sup> The limited scholarship responding to *Clubb* thus far has raised several concerns. One concern is that it is not immediately clear 'what is actually meant by the term' dignity,<sup>5</sup> leaving it vulnerable to criticisms that it is a 'vacuous concept'<sup>6</sup> and that Australia 'has said almost nothing about the concept'.<sup>7</sup> Another concern is that the High Court of Australia will 'recognise the dignity of listeners and disregard the dignity of speakers'.<sup>8</sup> This would be 'misleading' and '[flip] the principal objective of dignity on its head'.<sup>9</sup> Rather than conceiving of dignity as the basis for rights and freedoms, the Court may rely exclusively on dignity as a justification for the limitation of the implied freedom of political communication.<sup>10</sup> This would be wrong, because dignity is relevant to 'both sides of the equation'.<sup>11</sup>

More recently, dignity appeared in the reasoning in *Farm Transparency International Ltd v New South Wales* ('*Farm Transparency*').<sup>12</sup> Together, the judgments in *Clubb* and *Farm Transparency* begin to answer some of these questions. First, while it is correct that the meaning of dignity is contingent, and faces a 'definitional challenge',<sup>13</sup> these judgments give dignity some content and meaning. This article develops the argument I advanced in earlier work that doctrinal

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<sup>1</sup> *Clubb v Edwards; Preston v Avery* (2019) 267 CLR 171 ('*Clubb*').

<sup>2</sup> Caroline Henckels, Ronli Sifris and Tania Penovic, 'Dignity as a Constitutional Value: Abortion, Political Communication and Proportionality' (2021) 49(4) *Federal Law Review* 554, 555–6 (referring to 'the High Court's nascent recognition of dignity as a constitutional value'). It is beyond the scope of this article to make an argument for or against the claim that dignity was in fact recognised as a constitutional value in *Clubb* (ibid). It is also arguable that the dignity value in *Clubb* was a statutory value only and does not yet have an independent constitutional basis. If that is the case, this article offers an explanation of the meaning of dignity adopted in *Clubb*, for which an independent constitutional basis may develop. It is also beyond the scope of this article to answer the separate but related question concerning whether dignity should be recognised as an Australian constitutional value, although the article does respond to some of the concerns regarding the operation of dignity in the Australian constitutional context in Part II. For an overview of what is meant by the term 'constitutional value' and current debates, see Rosalind Dixon, 'Functionalism and Australian Constitutional Values' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart, 2018) 3.

<sup>3</sup> Scott Stephenson, 'Dignity and the Australian Constitution' (2020) 42(4) *Sydney Law Review* 369, 370.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid 388.

<sup>6</sup> Henckels, Sifris and Penovic (n 2) 556. There are related debates as to whether dignity is properly grounded in the text and structure of the *Constitution*: at 555; Stephenson (n 3) 391.

<sup>7</sup> Stephenson (n 3) 370.

<sup>8</sup> Ibid 371.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid 371–2.

<sup>11</sup> Ibid 390.

<sup>12</sup> *Farm Transparency International Ltd v New South Wales* (2022) 403 ALR 1 ('*Farm Transparency*').

<sup>13</sup> Stephenson (n 3) 389.

analysis of express invocations of dignity in these judgments may reveal the emerging meaning of dignity in Australian constitutional law.<sup>14</sup> I previously analysed the *meaning* of constitutional dignity in *Clubb*.<sup>15</sup> This article offers original doctrinal analysis in the new light that the *Farm Transparency* judgments cast on the meaning of dignity in Australian constitutional law. Second, this article goes further than my previous work and considers the role of constitutional dignity in *Clubb* and *Farm Transparency*. I briefly respond to the second concern mentioned above that dignity will only be used ‘on one side of the equation’ in Australian constitutional law.<sup>16</sup>

## A Overview of the Judgments

Both cases concerned challenges to legislation on the basis that the impugned statutes impermissibly burdened the implied freedom of political communication (the ‘implied freedom’). In both cases, members of the High Court identified dignity as one of the purposes or objectives of the impugned laws. The protection of dignity was a legitimate purpose, compatible with the constitutionally prescribed system of representative and responsible government.

*Clubb* concerned challenges to the constitutional validity of Tasmanian and Victorian legislative provisions prohibiting protest activities within a 150-metre radius of a facility where abortion services are provided (‘safe access zone’). The High Court found that laws restricting protests outside abortion facilities were justified limitations on the implied freedom partly on the basis that they protect the dignity of persons accessing those facilities.<sup>17</sup>

*Farm Transparency* concerned the validity of certain provisions of the *Surveillance Devices Act 2007* (NSW) (‘*Surveillance Devices Act*’) that, in broad terms, prohibit the publication and possession of recordings obtained by unlawful means using optical surveillance devices.<sup>18</sup> Farm Transparency International is a company and a not-for-profit charity which seeks to raise public awareness of animal cruelty, increase understanding of the importance of preventing and alleviating animal suffering, and improve the treatment of animals including through changes to law, policy, practice and custom. It has published photographs, videos and audiovisual recordings of animal agricultural practices in Australia, including in New South Wales, which it obtained through acts of trespass.

Gordon J and Edelman J (writing individual judgments) considered the protection of the dignity of the owners or occupiers of property to form part of the legitimate purpose of the impugned provisions, compatible with the constitutionally prescribed system of representative and responsible government. Their Honours found that the impugned provisions had ‘dual, legitimate purposes which necessarily

<sup>14</sup> Ashleigh Barnes, ‘Constitutional Dignity’ (2023) 46(3) *University of Melbourne Law Review* 683.

<sup>15</sup> *Ibid.*

<sup>16</sup> Stephenson (n 3) 391.

<sup>17</sup> In *Clubb* (n 1), members of the Court also used dignity in a ‘narrow manner’ to identify a distinguishing characteristic of natural persons distinct from corporations: *ibid* 369. For a more detailed account of the role and use of dignity in *Clubb*, see Barnes (n 14).

<sup>18</sup> *Surveillance Devices Act 2007* (NSW) ss 8(1), 11, 12.

intersect'.<sup>19</sup> These were the protection of privacy and dignity, and the protection of property rights.<sup>20</sup> In the course of assessing the nature and extent of the burden on the implied freedom by the impugned legislation, Gordon J and Edelman J also considered the way the wider legal context protected dignity.<sup>21</sup> Edelman J also considered the connection between the legislation's legitimate purpose of protecting dignity and the necessity of the law,<sup>22</sup> and considered dignity in undertaking the final 'adequacy in the balance' assessment.<sup>23</sup>

Conversely, the remaining five Judges did not consider the protection of dignity to be a purpose of the impugned law. Kiefel CJ and Keane J (Steward J agreeing) identified the legislative purpose of the impugned provisions as the protection of privacy only,<sup>24</sup> including 'the interest in privacy which arises out of the enjoyment of private property',<sup>25</sup> 'the privacy interests of those having possession of the property',<sup>26</sup> and 'privacy interests in activities conducted on premises as an aspect of a person's possessory rights over their property'.<sup>27</sup> Writing separately, Gageler J also understood the purpose of the legislative scheme to be 'to protect the privacy of all activities that occur on private property'.<sup>28</sup> Gleeson J agreed with Gageler J.<sup>29</sup> In summary, two members of the Bench in *Farm Transparency* considered that the impugned provisions pursued the legitimate aim of privacy *and* dignity (Gordon and Edelman JJ), and five members considered that they pursued privacy only (Kiefel CJ, Keane, Steward, Gageler and Gleeson JJ). This detail is significant as whether the harm protected against is appropriately characterised as an interference with privacy, dignity or both tells us something about what each of these values or interests protects.

## II The Meaning of Dignity in Australian Constitutional Law

### A *The Meaning of Dignity*

This Part responds to the 'definitional challenge' posed by dignity.<sup>30</sup> It is well established that '[d]ignity has come to mean different things to different people'.<sup>31</sup> Within the legal context alone, dignity is used in different ways in different

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<sup>19</sup> *Farm Transparency* (n 12) 40–3 [170]–[181] (Gordon J), 58 [247] (Edelman J).

<sup>20</sup> *Ibid* 58 [247] (Edelman J).

<sup>21</sup> *Ibid* 37–8 [159] (Gordon J), 52 [225], 54–5 [231]–[232], 55 [234], 56 [237], 57 [241] (Edelman J).

<sup>22</sup> *Ibid* 61 [258]–[259].

<sup>23</sup> *Ibid* 62–3 [262]–[264].

<sup>24</sup> *Ibid* 4 [5].

<sup>25</sup> *Ibid* 10 [31].

<sup>26</sup> *Ibid* 10 [32].

<sup>27</sup> *Ibid* 15 [52].

<sup>28</sup> *Ibid* 17 [65].

<sup>29</sup> Gleeson J agreed with Gageler J's construction of the impugned provision and his reasons 'why the prohibitions in ss 11 and 12 infringe the constitutional guarantee of political communication by lacking an adequate balance between the benefit sought to be achieved by the provisions and their adverse effect on the implied freedom': *ibid* 65 [273].

<sup>30</sup> Stephenson (n 3) 389.

<sup>31</sup> Meir Dan-Cohen, 'Introduction: Dignity and Its (Dis)content' in Jeremy Waldron, *Dignity, Rank, and Rights*, ed Meir Dan-Cohen (Oxford University Press, 2012) 3, 3.

jurisdictions, areas of law and institutions, and over time.<sup>32</sup> I have previously demonstrated that it does not follow that a definition of dignity is completely indeterminate, this being one of the main charges put against dignity by the sceptics, and a concern about the introduction of dignity into Australian constitutional law.<sup>33</sup> What does follow is that there is a range of senses in which dignity is used.<sup>34</sup> The meaning of dignity becomes clearer once these different conceptions are separated out.<sup>35</sup> Drawing on my previous work, in this Part I *briefly* set out the main uses or understandings of human dignity in modern constitutional law.<sup>36</sup> This provides a bird's eye view of the terrain within which we can locate the Australian position. I discuss four uses: (1) dignity as worth, with particular attention to the Kantian notion; (2) dignity as freedom or autonomy, with particular attention to the Dworkinian notion; (3) dignity as an expressive quality; and (4) 'equal status'—based conceptions of dignity, with particular emphasis on Waldron's dignity as transvaluated rank account. These are not necessarily rival accounts. Indeed, some conceptions inadvertently overlap while others consciously borrow or rely on another account. Waldron has hinted that these accounts could be 'combinable as complementary contributions to a single multifaceted idea'.<sup>37</sup> An understanding of the various meanings of dignity at play and their relationships to each other will guide our analysis of the meaning of dignity in Australian constitutional law.<sup>38</sup>

## 1 *Dignity as Worth, or Dignity as Intrinsic Value*

The predominant 'dignity as worth' account is Kant's moral theory.<sup>39</sup> Kantian dignity consists of the intrinsic, non-negotiable, non-fungible worth of each human being as an end in itself. It necessitates two duties of respect: humans cannot use other humans *merely* as a means to an end, and humans have a duty of self-respect.<sup>40</sup> Dignity inheres in every human being by virtue of his or her moral capacity. Kantian

<sup>32</sup> Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) *European Journal of International Law* 655, 698.

<sup>33</sup> Barnes (n 14).

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> For an overview of contemporary debates, see Christopher McCrudden, 'In Pursuit of Human Dignity: An Introduction to Current Debates' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press, 2013) 1. For an overview of the proliferation of 'dignity' as a right or value in legal texts throughout the world, see McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (n 32). For a more detailed exploration of the four accounts briefly explored in this piece and their relationship to each other, see Barnes (n 14).

<sup>37</sup> Jeremy Waldron, 'Lecture 1: Dignity and Rank' in Jeremy Waldron, *Dignity, Rank, and Rights*, ed Meir Dan-Cohen (Oxford University Press, 2012) 13, 16. Waldron was referring to (1) the Kantian idea of non-fungibility, (2) the Dworkinian idea of self-determination and (3) his own idea of transvaluated noble rank. His omission of the expressive concept of dignity does not undermine his argument. See also the basic minimum content of human dignity outlined in McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (n 32) 679.

<sup>38</sup> This approach was also used in Barnes (n 14).

<sup>39</sup> Another school of thought regarding 'dignity as worth' is the Roman Catholic teaching on human dignity. Kant is understood to have opened the way for a secular understanding of the dignity of human beings: Michael Rosen, *Dignity: Its History and Meaning* (Harvard University Press, 2012) 25.

<sup>40</sup> Ibid.

dignity is a deeply egalitarian concept, applying categorically and equally to each human being.<sup>41</sup>

## 2 *Dignity as Freedom or Autonomy*

A second conception of dignity regards dignity as freedom or autonomy. However, like dignity, autonomy is also a protean concept in need of explication. Dignity could consist of a 'thin' concept of autonomy that focuses only on the rational capacity to choose and the exercise of the power to choose.<sup>42</sup> Dworkin proposes a 'thicker' account.<sup>43</sup> For Dworkin, dignity consist of two basic principles: self-respect and authenticity. These principles concern how one ought to live (ethics) and how one ought to treat others (morality). First, the principle of self-respect requires that each person take his own life seriously (an ethical principle). The principle of self-respect also yields a moral imperative concerning how one ought to treat others. This is because recognition of the objective importance of one's own life generates recognition of the objective importance of other people's lives. This amounts to respect for humanity in all its forms. Accordingly, Dworkin's principle of self-respect communicates the understanding that all humans have an intrinsic value.<sup>44</sup> The second principle, that of authenticity, is a robust principle of self-determination. It refers to a special personal responsibility to shape one's life according to self-chosen standards; to identify, design and live by one's own understanding of success in life, not according to decisions and values of others. The same ethical responsibility and independence must be recognised and respected in others. The key content of Dworkin's dignity is thus a principle of self-determination<sup>45</sup> not incorporated within the Kantian notion of dignity.

## 3 *An Expressive Dignity: Dignity as the Opposite of Indignity or Humiliation, or Dignity as Virtue*

A third conception of dignity focuses on the expressive character of dignity. Khaitan argues that 'what dignity takes seriously is the expression of disrespect/insult/humiliation etc to a cherished person, object or value'.<sup>46</sup> However, several expressive conceptions of dignity are possible. For example, under a 'dignity as

<sup>41</sup> Dan-Cohen (n 31) 4.

<sup>42</sup> See, eg, James Griffin, *On Human Rights* (Oxford University Press, 2008) 152; Joel Feinberg, *Rights, Justice, and the Bounds of Liberty: Essays in Social Philosophy* (Princeton University Press, 1980) 151.

<sup>43</sup> Dworkin is careful to distinguish his authenticity principle from a thin concept of autonomy, clarifying that '[a]uthenticity, on the other hand ... is very much concerned with the character as well as the fact of obstacles to choice': Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011) 212.

<sup>44</sup> Ibid 205–9. See also Ronald Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (Harper Collins, 1993); Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press, 2008) 11–17.

<sup>45</sup> Dworkin, *Justice for Hedgehogs* (n 43) 214.

<sup>46</sup> Tarunabh Khaitan, 'Dignity as an Expressive Norm: Neither Vacuous nor a Panacea' (2012) 32(1) *Oxford Journal of Legal Studies* 1, 4. Khaitan's objective is to demonstrate 'dignity's special contribution to human rights law, one that sets it apart from other non-expressive values such as autonomy and equality. ... [T]he expressive conceptions alone can make a distinctive contribution to human rights law. If dignity is not expressive, there is little it does that other values cannot do on their own.': at 5.

autonomy' conception, any action which suggests that an autonomous being is not capable or worthy of being autonomous would violate one's dignity.<sup>47</sup> This is an instance where one theoretical conception is insufficient to guide legal actors. An expressive dignity must be substantiated by a determinate concept of dignity. This will be closely tied to a community's idea of civilised life and what is distinctly valued about human existence.<sup>48</sup>

Related to dignity as an expressive concept, dignity may even have a *negative* content: 'that which a person has when not humiliated by others'.<sup>49</sup> For Margalit, the 'essence of the concern' is *indignity*, irrespective of 'whether that human being is conscious of the indignity or not'.<sup>50</sup> This creates a duty not to humiliate other human beings<sup>51</sup> and an instruction to act in ways that express appropriate attitudes.<sup>52</sup>

#### 4 *Dignity as Equal Status*

Under status-based accounts of dignity, dignity is an attributed quality giving expression to moral status. Historically, dignity or *dignitas* was connected to hierarchy, rank and office and the privileges and deference due to each. Dignity was understood as an honour attached to people of certain status. Waldron introduces a conception of dignity as universalised high social rank ('dignity as equal status' or 'dignity as transvaluated rank') — an account that is a world apart from, yet in 'faith' with, the historic conception. Waldron's account is of 'dignity as a high-ranking status, comparable to a rank of nobility — only a rank assigned now to every human person, equally without discrimination: dignity as nobility for the common man'.<sup>53</sup> The modern notion of dignity 'involves an upwards equalization of rank'.<sup>54</sup> Combining the historical conception with modern commitments to equality leads to an equal status-based conception of the dignity of the citizen. The motivation behind the account is Waldron's view that 'we *should* contrive to keep faith' with these ancient connections.<sup>55</sup>

### B *The Meaning of Dignity in Clubb and Farm Transparency*

The foregoing brief overview of the main uses of dignity in modern constitutional law will guide our analysis of *Clubb* and *Farm Transparency*. It will assist us to identify the meanings of dignity that are conveyed in the various judgments, including whether these are consistent and coherent uses of the concept.

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<sup>47</sup> Ibid 14.

<sup>48</sup> R James Fyfe, 'Dignity As Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada' (2007) 70(1) *Saskatchewan Law Review* 1, 3.

<sup>49</sup> McCrudden, 'In Pursuit of Human Dignity: An Introduction to Current Debates' (n 36) 40.

<sup>50</sup> Ibid.

<sup>51</sup> Avishai Margalit, 'Human Dignity between Kitsch and Deification' in Christopher Cordner (ed), *Philosophy, Ethics and a Common Humanity: Essays in Honour of Raimond Gaita* (Routledge, 2011) 106, 110–19.

<sup>52</sup> Khaitan (n 46) 5.

<sup>53</sup> Waldron, 'Lecture 1: Dignity and Rank' (n 31) 22.

<sup>54</sup> Ibid 33.

<sup>55</sup> Ibid 30 (emphasis added).

First, we can learn something from the presence of dignity in *Clubb* for Kiefel CJ and Keane J (the joint judgment)<sup>56</sup> and for Gageler J, and the absence of dignity from their reasoning in *Farm Transparency*. Second, we can learn something from the use of dignity by Edelman J and Gordon J who, in individual judgments, handled dignity briefly in both *Clubb* and *Farm Transparency*. I analyse these uses and compare them to determine whether the meaning of dignity in Australian constitutional law thus far is consistent and coherent. To identify the meaning of dignity in Australian constitutional law, I adopt an ‘inductive approach: identifying the ideas about dignity that are seeping from the pores’ of these decisions.<sup>57</sup> In Australia, the High Court ‘takes a “cautious and restrained” approach to answering questions concerning the constitutional validity of provisions’.<sup>58</sup> The parties are not entitled to an answer on a question of law unless the Court is satisfied that ‘there exists a state of facts which makes it necessary to decide [the] question in order to do justice in the given case and to determine the rights of the parties’.<sup>59</sup> It follows that what we can learn about dignity is relatively narrow. However, the inductive approach enables us to piece together the dignity puzzle.

# 1 *Presence in Clubb; Absence from Farm Transparency: Kiefel CJ and Keane J, and Gageler J*

## (a) *Dignity Is Connected to but Different from Privacy*

The first observation that can be drawn from the presence of dignity in *Clubb* and its absence from *Farm Transparency* for Kiefel CJ and Keane J is that privacy is different from and not equivalent to dignity. This is significant as both privacy and dignity are contested, amorphous concepts and both have been tied to an autonomy interest. Following *Clubb* alone, the distinct features of each value for the plurality were not necessarily clear. Kiefel CJ, Keane J and Bell J observed that privacy is ‘closely linked’ to dignity<sup>60</sup> and often referred to them in tandem throughout their judgment.<sup>61</sup> The judgment cited Aharon Barak’s account of dignity.<sup>62</sup> This was particularly notable as Barak was the only person cited in the judgment on the meaning of dignity.<sup>63</sup> Barak observed: ‘Most central of all human rights is the right to dignity. It is the source from which all other human rights are derived. Dignity

<sup>56</sup> Bell J also wrote the joint judgment in *Clubb* (n 1) (2019), but was no longer on the Bench when *Farm Transparency* (n 12) was decided (2022).

<sup>57</sup> McCrudden, ‘In Pursuit of Human Dignity: An Introduction to Current Debates’ (n 36) 55.

<sup>58</sup> *Farm Transparency* (n 12) 7 [20] (Kiefel CJ and Keane J), quoting *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219, 248 [57] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ) (*Mineralogy*). See also *Duncan v New South Wales* (2015) 255 CLR 388, 410 [52]; *Knight v Victoria* (2017) 261 CLR 306, 324 [32]; *Zhang v Commissioner of Australian Federal Police* (2021) 273 CLR 216, 229–30 [21]; *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490, 511 [90].

<sup>59</sup> *Farm Transparency* (n 12) 7 [20] (Kiefel CJ and Keane J), quoting *Mineralogy* (n 58) 247 [56] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), quoting *Lambert v Weichelt* (1954) 28 ALJR 282, 283 (Dixon CJ).

<sup>60</sup> *Clubb* (n 1) 195–6 [49].

<sup>61</sup> See *ibid* 195 [47], 197–8 [56], 198–9 [60], 203 [78], 204 [82], 205 [85]. Cf at 196 [50]–[51], 208–9 [98], 209 [99], 209 [101].

<sup>62</sup> *Ibid* 196 [50].

<sup>63</sup> Stephenson (n 3) 374.



unites the other human rights into a whole.<sup>64</sup> In isolation, this could have been understood as suggesting that dignity is only relevant as the source of other interests, such as privacy or the implied freedom. However, the presence of dignity in *Clubb* coupled with its absence from *Farm Transparency* for Kiefel CJ and Keane J may further our understanding of what both dignity and privacy capture. Dignity is the primary focus of this article, but the meaning of privacy following *Farm Transparency* is also ripe for investigation.

(b) *Dignity Attaches to Natural Persons and not Corporations*

In *Clubb*, the plurality considered dignity to apply only to natural persons and their activities. This is clear from their Honours' response to Mrs Clubb's argument concerning the alleged special potency of on-site protests. In rejecting that argument, the plurality relied on dignity to identify a type of harm caused by the protest activities — 'an attack upon the privacy and dignity of other people'.<sup>65</sup> Stephenson observes that, in doing so, their Honours distinguished the position of natural persons from that of corporations:

The reason why the harm to dignity was relevant in *Clubb*, but not *Brown*, is that in *Brown*, the protests were targeted at forestry operations (that is, corporations and their activities), while in *Clubb*, the protests were targeted at persons accessing abortion services (that is, natural persons and their activities).<sup>66</sup>

Thus, natural persons have an interest that corporations do not: the protection of their dignity. The provisions challenged in *Farm Transparency* protect the owner's or occupier's interests. This could plausibly be either a natural person or a corporation. For instance, Farm Transparency International expressly intended to expose the practices of commercial agricultural facilities, which would include corporations. However, such corporations would have employees who are natural persons and are also protected by the impugned law. The facts of *Farm Transparency* were that the plaintiffs engaged in conduct that purportedly contravened the impugned provisions, and they may in the future engage in such conduct. However, the conduct engaged in, or to be engaged in, was not specified in any detail. Given that both corporations and natural persons may have been affected by the proscribed conduct, it was arguably open to Kiefel CJ and Keane J to find dignity relevant in *Farm Transparency*. However, this is a very narrow point. To say that natural persons have dignity tells us something about dignity but does not give the full picture. It tells us who has dignity, but not what it means to have dignity or what dignity requires. Whether dignity was relevant in *Farm Transparency* thus necessitates a more thorough understanding of what dignity comprises.

My previous work identified key aspects or dimensions of the dignity reasoning in the joint judgment in *Clubb*.<sup>67</sup> In *Clubb*, the plurality suggested that dignity: (i) protects a natural person's life-shaping choice from being denied or

<sup>64</sup> Aharon Barak, *The Judge in a Democracy* (Princeton University Press, 2006) 86, quoted in *Clubb* (n 1) 196 [50] (Kiefel CJ, Bell and Keane JJ). This passage was also quoted in *Monis v The Queen* (2013) 249 CLR 92, 180 [247] (Heydon J).

<sup>65</sup> Ibid 204 [82] (Kiefel CJ, Bell and Keane JJ).

<sup>66</sup> Stephenson (n 3) 375–6, citing *Brown v Tasmania* (2017) 261 CLR 328 ('Brown').

<sup>67</sup> Barnes (n 14).

impacted; (ii) protects a person's autonomous political participation; (iii) protects a natural person's choice not to receive a political message; (iv) is more serious than, and distinct from, the protection of subjective hurt feelings or discomfort; (v) may prevent particular speech, dependent on the time, place and content of the message, as well as the identity of the messenger and recipient; and (vi) where the conditions in (v) justify proscribing speech, also prevents the speaker from using the recipient as a means to communicate their political message. The first three aspects suggest that dignity consists of a thick autonomy interest, related to but distinct from privacy, and invoking the Dworkinian conception of dignity. The fourth aspect casts additional light on what indignity means: it is different from and more serious than discomfort or hurt feelings. This recalls dignity as an expressive concept. The fifth and sixth aspects concern the relationship between dignity and certain forms of political communication. They invoke, among other ideas, dignity as worth, prohibiting the manipulation, co-optation or use of a natural person. They suggest that dignity protects the non-fungible worth of humans, preventing them from being used as *merely* a means to an end, in line with the Kantian tradition. Several (but not all) of these key aspects also emerge in *Farm Transparency*. The reasoning in the two decisions is fruitfully contrasted below.

(c) *Dignity Protects Life-Shaping Choices*

The first aspect of dignity in *Clubb* is concerned with an individual's life-shaping choice being denied or impacted. There was nothing on the facts of *Farm Transparency* suggesting that the owners or occupiers being protected by the *Surveillance Devices Act* were at risk of their autonomous, life-shaping choices being interfered with. There was no suggestion that the owners or occupiers were at risk of ceasing or altering their behaviour due to a risk of surveillance. There was also no suggestion that they were exercising *life-shaping* choices, comparable to those of the individuals in *Clubb*. Therefore, in this regard, the absence of dignity from *Farm Transparency* is arguably consistent with its presence in *Clubb*. For instance, in the latter case Kiefel CJ and Keane J stressed the consequences of the proscribed conduct, adding more depth or 'thickness' to the autonomy interest protected by dignity, and differentiating it further from mere privacy. The concern was that the proscribed conduct would prevent women from exercising their choice to have an abortion. This was clear in the plurality's characterisation that 'persons attending to a private health issue, while in a vulnerable state by reason of that issue, are subjected to behaviour apt to *cause them to eschew the medical advice* and assistance that they would otherwise be disposed to seek and obtain'.<sup>68</sup> Further, in the course of rejecting Mrs Clubb's argument as to the alleged special potency of on-site protests, the plurality said:

[I]t is within those zones that intrusion upon the privacy, dignity and equanimity of persons already in a fraught emotional situation is *apt to be most effective to deter those persons* from making use of the facilities available within the safe access zones.<sup>69</sup>

<sup>68</sup> *Clubb* (n 1) 198 [59] (Kiefel CJ, Bell and Keane JJ) (emphasis added).

<sup>69</sup> *Ibid* 204 [82] (emphasis added).

Finally, in the course of rejecting Mr Preston's argument that the protest prohibition should be limited to protest likely to cause distress or anxiety, the plurality put this in even clearer terms. It stated that a threat to dignity inevitably arises 'whether or not such a person is likely to suffer distress or anxiety as a result. *A decision to avoid a protest* about abortions may reflect a calm and reasonable decision to eschew an unwelcoming environment as well as a stressed and anxious reaction to it.'<sup>70</sup>

These descriptions demonstrate a clear understanding that interfering with someone's autonomous decision amounts to an interference with dignity. However, consistent with Dworkinian dignity, the nature of the autonomous decision in question is of a certain importance. The plurality consistently emphasised the personal nature of the decision, the fact that it is connected to health, and the vulnerability of the person making the decision. These factors do not necessarily apply to the decisions of corporations or employees to participate in commercial agricultural practices.<sup>71</sup> Therefore, the absence of this aspect of dignity from *Farm Transparency* is arguably consistent with its presence in *Clubb*.

(d) *Dignity Protects a Listener from Unwanted Political Messages*

Another key aspect of dignity reasoning in the joint judgment in *Clubb* is the concern that 'to force upon another person a political message is inconsistent with the human dignity of that person'.<sup>72</sup> Akin to the first aspect, proscribing interference with life-shaping choices, this suggests that dignity protects an autonomy interest.<sup>73</sup> In this instance, the plurality extended that autonomy interest to preventing a person from being forced to receive political information they do not want to receive. This was underscored by the plurality's statement that the implied freedom does not operate to oblige any member of the Australian community to receive information, opinions and arguments concerning government and political matters. The implied freedom 'is not an entitlement to force a message on an audience held captive to that message'.<sup>74</sup> The plurality also repeatedly used the word 'captive' in this context.<sup>75</sup> This can be dealt with briefly because this conception of dignity clearly did not arise in *Farm Transparency*, where the impugned provisions were concerned with the *surreptitious* interference with owners or occupiers. Thus, they were not 'listeners' or 'recipients' of a political message. Therefore, the absence of this aspect of dignity from *Farm Transparency* is consistent with its presence in *Clubb*.

<sup>70</sup> Ibid 214 [126] (emphasis added).

<sup>71</sup> There may be exceptions to this that did not arise on the facts. For example, it is plausible that the decision by vulnerable persons to work in a commercial agricultural business may be deeply personal and may not arise in conditions that reflect 'thick autonomy' or dignity.

<sup>72</sup> *Clubb* (n 1) 196 [51] (Kiefel CJ, Bell and Keane JJ). Applying a reconstructive gloss, it may be more plausible to say that dignity prevents particular speech, dependent on the time, place and content of the message, as well as the identity of the messenger and recipient.

<sup>73</sup> Barnes (n 14) 718–20.

<sup>74</sup> *Clubb* (n 1) 208 [98] (Kiefel CJ, Bell and Keane JJ).

<sup>75</sup> Ibid 204–5 [83], 208–9 [97]–[100] (Kiefel CJ, Bell and Keane JJ).

(e) *Indignity or Harm to Dignity Is More Serious than Discomfort or Hurt Feelings*

Another dimension of dignity conveyed by Kiefel CJ and Keane J in *Clubb* is that indignity is more serious than discomfort or hurt feelings and does not flow automatically from all political speech.<sup>76</sup> This emerged from the response to Mrs Clubb's argument that political speech is inherently apt to cause discomfort<sup>77</sup> and that all political speech has the potential to or does affect the dignity of at least some others.<sup>78</sup> The plurality said that the argument had

no attraction in a context in which persons attending to a private health issue, while in a vulnerable state by reason of that issue, are subjected to behaviour apt to cause them to eschew the medical advice and assistance that they would otherwise be disposed to seek and obtain.<sup>79</sup>

This passage has already been relied on above to develop the idea that dignity protects interference with certain autonomous choices. It suggests that the harm in *Clubb* — which amounted to a threat to dignity — is different from, and more serious than, discomfort or hurt feelings, and does not flow automatically from all political speech. That this dimension was present in *Clubb* but not in *Farm Transparency* is also entirely conceivable. It conveys that there is a high bar for a dignity interference. It also reinforces that harm to dignity (an objective quality, consisting of a gravity that is more serious than subjective discomfort or hurt feelings) is different from the privacy interference occasioned by illegal surveillance and the publication and possession of material gained through that surveillance.

This same passage also gives us a further clue as to what indignity is (in addition to an interference with a life-shaping choice or an imposition of an unwanted political message).<sup>80</sup> Gageler J's brief identification of the legitimate aim as being 'to ensure that women have access to premises at which abortion services are lawfully provided in an *atmosphere* of privacy and dignity' is also helpful.<sup>81</sup> Together, an expressive notion of dignity emerges. In the context of *Clubb*, that included protecting the *atmosphere* of the exercise of the choice and extended to proscribing harassment, stigma, shame-inducing treatment, haranguing or molestation. In a similar vein, Nettle J (who was on the Bench in *Clubb* but not in *Farm Transparency*) identified the legitimate purpose as facilitating 'access to a lawful termination service, privately, with dignity and without harassment, stigma or shame'.<sup>82</sup> His Honour observed that 'women seeking an abortion and those involved in assisting or supporting them are entitled to do so safely, privately and with dignity, without haranguing or molestation' and that the implied freedom 'is not a licence to accost persons ... still less to harangue vulnerable persons entering or leaving a medical establishment for the intensely personal, private purpose of

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<sup>76</sup> Barnes (n 14) 723.

<sup>77</sup> *Clubb* (n 1) 197 [53] (Kiefel CJ, Bell and Keane JJ).

<sup>78</sup> Ibid 261 [259] (Nettle J).

<sup>79</sup> Ibid 196–7 [52] (Kiefel CJ, Bell and Keane JJ).

<sup>80</sup> Barnes (n 14).

<sup>81</sup> *Clubb* (n 1) 235–6 [197] (emphasis added).

<sup>82</sup> Ibid 280–1 [307].

seeking lawful medical advice and assistance’.<sup>83</sup> These passages add depth to the expressive conception of dignity emerging in *Clubb*.

(f) *Dignity as Non-Fungible Human Worth*

Finally, the conception of dignity arguably recognised by the joint judgment in *Clubb* concerned natural persons being manipulated. In *Clubb*, the plurality was concerned that ‘co-optation as part of a political message’ amounts to an ‘interference with the privacy and dignity of members of the people of the Commonwealth’.<sup>84</sup> The concern was with being manipulated as part of the unwanted message. This invokes a Kantian notion of dignity, consisting of the non-fungibility of natural persons. This notion of dignity prevents natural persons from being used as merely a means to an end.

However, this conception of dignity is potentially relevant to *Farm Transparency*. If the impugned provisions are valid and the material obtained through trespass could be published, the property owners or occupiers could become ‘co-opted’ as part of Farm Transparency International’s political message. How should we understand the presence of this aspect of dignity in *Clubb* and its absence from *Farm Transparency*? It could be understood to suggest that this is not the primary concern of dignity in *Clubb* and, in fact, is more relevant to dignity as decisional autonomy, which is invoked in both *Clubb* and *Farm Transparency*. However, the connections between this concern and the Kantian concept of dignity are difficult to overlook. Moreover, the plurality also quoted Barak’s invocation of Kant: ‘Human dignity regards a human being as an end, not as a means to achieve the ends of others.’<sup>85</sup> It could simply be that this omission is a consequence of the Court’s ‘restrained’ approach to adjudication. As this did not arise on the fact pattern in *Farm Transparency*, it was not necessary to consider this interest.

## 2 *Interim Conclusions*

Following *Clubb*, Stephenson intuited that ‘recognising dignity as a legitimate purpose might yield important benefits. ... [I]t might help attach an appropriate level of importance and weight to particular categories of government action’.<sup>86</sup> I suggest that there is, for the plurality, a distinction drawn here between the protection of vulnerable persons attending to a life-shaping decision in *Clubb*, which furthers both dignity and privacy, and the proscription of the possession and publication of the business activities of owners and occupiers, which furthers only privacy. This could be one such instance of attaching ‘an appropriate level of importance and weight’ to certain activity.<sup>87</sup> Alternatively, removing the normative lens, it could simply help us to understand the differences between dignity and privacy, with neither necessarily having a greater level of importance. Together, the judgments could be understood as suggesting that the publication or possession of a recording of an

<sup>83</sup> Ibid 260–1 [258]–[259], 280–1 [307].

<sup>84</sup> Ibid 280–1 [60] (Kiefel CJ, Bell and Keane JJ) (emphasis added).

<sup>85</sup> Ibid 196 [51] (Kiefel CJ, Bell and Keane JJ), quoting Barak (n 64) 86.

<sup>86</sup> Stephenson (n 3) 388.

<sup>87</sup> Ibid.

owner's or occupier's activities does not generate harm to the dignity of those persons. Instead, it generates harm to their privacy.

In sum, three key lessons can be learned from comparing the absence of dignity from the reasoning of Kiefel CJ, Keane J and Gageler J in *Farm Transparency* against the presence of dignity in their reasoning in *Clubb*. First, dignity and privacy are discrete interests; not every interference with privacy amounts to an interference with dignity. Second, one of the discrete interests protected by dignity is the exercise of decisional autonomy (the protection of certain life-shaping choices and the conditions of the exercise of these choices). Together, the decisions give us some insight into the particularities of Australian constitutional dignity. This adds depth to Stephenson's argument that the use of dignity in *Clubb* 'must be understood as the protection of *particular* messages being forced upon *particular* people in *particular* circumstances'.<sup>88</sup> I demonstrate that dignity may prevent particular speech, dependent on the time, place and content of the message, as well as the identity of the messenger and recipient. Third, it is unclear whether dignity also protects against being co-opted as part of a political message.

### 3 *Absence from Clubb; Presence in Farm Transparency: Edelman J and Gordon J*

We can also learn something from the use of dignity by Edelman J and Gordon J who, in individual judgments, handled dignity briefly in both *Clubb* and *Farm Transparency*. Their Honours understood the provisions under review in *Farm Transparency* to be pursuing privacy *and* dignity. Both Judges also understood privacy *and* dignity to be relevant in *Clubb*. This could mean three things: first, that Edelman and Gordon JJ understand these interests to be inextricably connected or equivalent; second, that Edelman and Gordon JJ understand dignity to be something different from and *additional* to privacy, *and* that both concepts are relevant in *Farm Transparency*; third, that their Honours understand dignity to be a multivalent concept, and that some aspect of it is relevant to *Farm Transparency*, even if not the same aspect that was relevant to *Clubb*. A closer review of the judgments suggests the latter position is the best understanding. This has significant implications for the meaning of Australian constitutional dignity: additional dimensions of dignity emerge from these judgments. In *Clubb*, Edelman and Gordon JJ conceived of dignity as protecting a decisional, thick autonomy interest, in line with the plurality and Gageler J. However, this is not the aspect of dignity that was relied on by Edelman J or Gordon J in *Farm Transparency*. In that decision, their Honours identified a dignity interest that protects private information that is 'personal' and the harm that occurs in certain types of privacy violations. Two different, but related, dimensions of dignity are at play in each case. These dignity interests are neither incompatible nor incoherent.

#### (a) *Dignity Protects Life-Shaping Choices*

In *Clubb*, Edelman and Gordon JJ conceived of dignity as protecting a thick autonomy interest, in line with the plurality and Gageler J. Edelman J understood

<sup>88</sup> Stephenson (n 3) 371 (emphasis in original).

the impugned laws to be pursuing ‘the safety, privacy, and dignity of clinic workers and visitors’<sup>89</sup> and ‘social human rights goals involving respect for the dignity of the human person’.<sup>90</sup> Gordon J also accepted that the purpose of the impugned provisions was ‘to protect the safety and wellbeing, and respect the privacy and dignity, of both people accessing the services provided at those premises and employees and other persons who need to access those premises in the course of their duties and responsibilities’.<sup>91</sup>

Edelman J additionally observed that the legitimate purpose included ‘ensuring that women have access to termination services in a confidential *manner without the threat of harassment*’.<sup>92</sup> Edelman J cited the extrinsic materials preceding the *Reproductive Health (Access to Terminations) Act 2013* (Tas) including the second reading speech:

Today members are, quite simply, being asked to vote for or against women’s *autonomy* ... to vote for or against a bill that acknowledges women as *competent and conscientious decision-makers* and recognises that a woman is in the best position to make decisions affecting her future and her health.<sup>93</sup>

Thus, consistent with Kiefel CJ, Keane and Gageler JJ, Edelman J invokes a Dworkinian concept of dignity as thick autonomy. Edelman J also refers to the manner or way in which the choice is exercised, suggesting that the threat of harassment while exercising a private medical choice offends dignity.<sup>94</sup> This is consistent with, and builds on, the expressive concept of dignity that proscribes certain conduct. However, this is not the aspect of dignity that was relied on by Edelman J or Gordon J in *Farm Transparency*.

(b) *Dignity Underpins Certain Aspects of Privacy and May Protect against the Communication of Certain Private Information*

In *Farm Transparency*, Edelman J and Gordon J, in individual judgments, undertook a review of the general law outside the impugned provisions to determine the extent of the incremental burden the *Surveillance Devices Act* imposed on freedom of political communication. This was because

[w]here the general law validly denies liberty of communication on particular political matters, then any law that imposes a prohibition upon political communication can only incrementally burden the implied freedom in so far as it extends beyond the existing prohibition.<sup>95</sup>

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<sup>89</sup> *Clubb* (n 1) 324 [440] (Edelman J).

<sup>90</sup> *Ibid* 344 [499]. See also at 344 [497] (Edelman J): ‘Another facet is the ability of Parliament to make laws for peace, order and good government, including those laws that provide substantive aspects of a free and democratic society and laws that guarantee social human rights, such as “respect for the inherent dignity of the human person”’ (citations omitted).

<sup>91</sup> *Ibid* 291 [344] (citations omitted).

<sup>92</sup> *Ibid* 344 [499] (emphasis added).

<sup>93</sup> *Ibid* 345 [500], quoting Tasmania, *Parliamentary Debates*, House of Assembly, 16 April 2013, 13 (emphasis added).

<sup>94</sup> This is also consistent with Nettle J: see above n 82 and accompanying text.

<sup>95</sup> *Farm Transparency* (n 12) 52 [223] (Edelman J).

This required a review of the action in equity for breach of confidence, which protects three categories of information: private information that arises in the course of a relationship of confidence, private information that is secret, and private information that is personal in the sense that it concerns the dignity of an individual.<sup>96</sup>

At the outset of her Honour's review, Gordon J observed that the protection afforded to personal affairs and private life at general law 'has been said to be based on "respect for human autonomy and dignity"'.<sup>97</sup> Notably, Gordon J cited the plurality in *Clubb*.<sup>98</sup> This was a clear adoption of the plurality view that dignity and privacy are bound up in autonomy interests. In the 'breach of confidence' sphere, dignity interests bolster the privacy claim over 'personal' information.

Edelman J cast further light on the relationship of dignity and privacy in his consideration of the third category of information protected by a breach of confidence action in equity. His Honour observed: 'It may be that personal information should be protected not merely where the information is secret, but also where further disclosure would compromise foundational interests of human dignity and autonomy.'<sup>99</sup> He continued: 'Whatever might be the boundaries of this category of confidential information, its protection extends beyond the secrecy of the information to the dignity of the individual.'<sup>100</sup> Edelman J cited *Lenah Game Meats* in which Gleeson CJ observed that the 'foundation of much of the privacy protection afforded by the action for breach of confidence is "human dignity"'.<sup>101</sup> Edelman J concluded:

At its narrowest, the present state of the law concerning the third category of breach of confidence is, therefore, that it can extend to all private information where human dignity is concerned. In that category, *it cannot be conclusively said that extends to corporations or that human dignity would be compromised by the communication of any private information*.<sup>102</sup>

These passages are consistent with the idea of decisional autonomy or autonomy as control, whereby only the person to whom the personal information applies can permit the communication of that information.

Following this, Edelman J held that the equitable doctrine was consistent with the implied freedom of political communication. He considered the constitutional requirements of representative democracy and in so doing observed:

It is no more necessary for representative democracy to require, in the name of political communication, a liberty to impair a person's dignity by the communication of private and personal information concerning lawful activities that might be

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<sup>96</sup> Ibid 52 [225].

<sup>97</sup> Ibid 38 [159], quoting *OBG Ltd v Allan* [2008] AC 1, 74 [275] and citing *Campbell v MGN Ltd* [2004] 2 AC 457, 472–3 [50]–[51] (Lord Hoffman) and *Clubb* (n 1) 195–6 [49] (Kiefel CJ, Bell and Keane JJ).

<sup>98</sup> *Farm Transparency* (n 12) 38 [159] n 161, citing *Clubb* (n 1) 195–6 [49] (Kiefel CJ, Bell and Keane JJ).

<sup>99</sup> Ibid 54 [231] (Edelman J), citing *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 226–7 [43], 256 [125] ('*Lenah Game Meats*').

<sup>100</sup> *Farm Transparency* (n 12) 54 [232].

<sup>101</sup> Ibid 55 [234], citing *Lenah Game Meats* (n 99) 221 [43] (Gleeson CJ).

<sup>102</sup> *Farm Transparency* (n 12) 56 [237] (emphasis added).



characterised in the broad sense as political, than it is for the law to provide a liberty to assault a person or to trespass on a person's property in order to communicate about matters that could broadly be described as political.<sup>103</sup>

Several ideas about dignity emerge from this part of the judgment. For Edelman J, the general law, which is consistent with the *Constitution*, provides that the possession and publication of private and personal information concerning lawful activities *may* offend a person's dignity. This adds content to the notion of dignity he invoked in *Clubb*: that dignity is an expressive concept proscribing certain conduct. It sheds new light on the particularities of dignity in Australian constitutional law. Both Gordon J and Edelman J also confirmed the close relationship between dignity and privacy suggested by the plurality in *Clubb*. However, Edelman J clearly maintained that they are not equivalent concepts. This is evident from his explanation that a breach of privacy does not always amount to a harm to dignity.

This could be read as a divergence from Kiefel CJ, Keane and Gageler JJ, who characterised the same conduct as amounting to a harm to privacy only. However, the judgments could also be read so as to be consistent. Kiefel CJ, Keane and Gageler JJ may have omitted the dignity interest because, as highlighted by Edelman J, 'it cannot be conclusively said that ... human dignity would be compromised by the communication of any private information'.<sup>104</sup> Absent facts establishing this, it could be that Kiefel CJ, Keane and Gageler JJ did not consider it necessary to mention the dignity interest. Alternatively, it could be that in this instance, their Honours were content to rely on privacy as the umbrella term that includes the foundational interests of dignity. In this way, the word 'privacy' may have been shorthand and intended to include dignity to the extent it was relevant.

In summary, across *Clubb* and *Farm Transparency*, the close relationship between dignity and privacy is maintained by Kiefel CJ, Keane, Gageler, Gordon and Edelman JJ.<sup>105</sup> It also appears each Judge maintains that, despite this close relationship and a degree of overlap, dignity and privacy make distinct contributions. Only Gordon J and Edelman J explicitly identify that a breach to privacy through the communication of surveillance of owners' and occupiers' lawful activities can amount to a breach to dignity.

### (c) *Dignity as Non-Fungible Human Worth*

Edelman J also invoked a second understanding of dignity in *Farm Transparency*. When considering whether the impugned provisions were a permissible limitation on the implied freedom, his Honour observed:

It would diminish the respect which the law affords to dignity, privacy, and the security of property to conclude that the *Surveillance Devices Act* is invalid in its application to trespassers, and those complicit in the trespass, who seek to *take*

<sup>103</sup> Ibid 57 [241].

<sup>104</sup> Ibid 56 [237].

<sup>105</sup> This was also the position of Bell J, who sat on the Bench in *Clubb* but not *Farm Transparency*.

*advantage* of their trespass by communicating or publishing a record or report of lawful activities.<sup>106</sup>

This invokes the Kantian aspect of dignity as non-fungible human worth, which I argue is also invoked by the plurality in *Clubb*.<sup>107</sup> Here, Edelman J was concerned with the trespassers, and those complicit in the trespass, seeking to use their trespass (and relatedly, the persons recorded during the trespass and possibly the property owners) as *merely* a means to their political end. The concern was that the dignity of the persons recorded during the trespass or the dignity of the property owners is diminished. While this was hardly central to the facts of the case, this articulation is consistent with the plurality's use of dignity in *Clubb*. This was also consistent with (albeit not identical to) Edelman J's own use of dignity in *Clubb*, as an expressive concept that proscribes certain conduct. Gordon J also narrowed in on the precise purpose of ss 11 and 12 of the *Surveillance Devices Act* as prohibiting the possession of or use of 'the *fruits of trespass*', which furthers the protection of privacy, dignity and property rights.<sup>108</sup> In addition, in her assessment of adequacy in the balance, Gordon J held: 'It is open to Parliament to prevent such persons from *benefiting from* the fruits of their unlawful conduct.'<sup>109</sup> With those of Edelman J, these statements strike at an interest that is connected to but independent of the privacy interest. They invoke the non-fungible dimension of dignity, and the indignity caused through publication, for a political purpose, of material that was obtained through a privacy violation.

### C *Conclusions: Consistent Ideas about Dignity in Australian Constitutional Law?*

This Part has explored the meaning of dignity in Australian constitutional law. It responded to the first, pressing concern following *Clubb* that dignity is an indeterminate, incoherent or empty concept and that this indeterminate, incoherent or empty concept had been imported into Australian constitutional law. I began with a sketch of the main uses or understandings of human dignity. The ensuing doctrinal analysis of *Clubb* and *Farm Transparency* exposed that three of these accounts are present in Australian constitutional law: dignity as intrinsic value inhering in a person, dignity as thick autonomy, and dignity as an expressive concept proscribing certain conduct. While certain invocations of dignity may be mutually inconsistent, these particular meanings are not.<sup>110</sup> They are combinable and severable. I have argued elsewhere that dignity in Australian constitutional law is a multidimensional concept.<sup>111</sup> In this article, I enrich that account, illustrating these dimensions. Dignity is an interest held by natural persons. It is related to the privacy interest but is distinct from it. This means that not every interference with privacy amounts to an interference with dignity. Dignity consists of and protects a range of human qualities, including most predominantly a thick concept of autonomy akin to the Dworkinian principle of self-determination. This protects certain life-shaping choices from

<sup>106</sup> Ibid 62 [263] (emphasis added).

<sup>107</sup> See above Part II(B)(1)(f).

<sup>108</sup> Ibid 41 [171] (emphasis added).

<sup>109</sup> Ibid 42 [178] (emphasis added).

<sup>110</sup> Barnes (n 14) 702–8.

<sup>111</sup> Ibid.

interference and prescribes certain conditions of the exercise of these choices. There have been some suggestions that the non-fungible nature of dignity's inherent worth protects against being co-opted as part of a political message. This multi-layered understanding of dignity has operated in *Clubb* and *Farm Transparency* to justify legislative proscription of treatment that is inconsistent with these qualities, despite interfering with the implied freedom of political communication. I do not claim that this conception of dignity is highly developed or stable. Rather, I seek to point out 'the kind of ideas [that] are creeping into our constitutional law'.<sup>112</sup> Understanding precisely what dignity means in *Clubb* and *Farm Transparency* opens the door to important normative analysis of whether this is the appropriate meaning of dignity in Australian constitutional law.

### III The Relationship between Dignity and the Implied Freedom

Many questions about Australian constitutional dignity remain including, inter alia, its appropriate role in constitutional adjudication. Part II of this article responded to concerns regarding the meaning of dignity. In Part III, I respond to Stephenson's concern that the High Court may 'recognise the dignity of listeners and disregard the dignity of speakers'.<sup>113</sup> This would be 'misleading' and '[flip] the principal objective of dignity on its head'.<sup>114</sup> Rather than conceiving of dignity as the basis for rights and freedoms, the Court may rely exclusively on dignity as a justification for limiting the implied freedom of political communication.<sup>115</sup> This would be a distortion, because dignity is relevant to 'both sides of the equation'.<sup>116</sup> To respond to this concern, I highlight judicial recognition of dignity as relevant to both sides of the equation in *Clubb* and *Farm Transparency*. I also consider the relevance of the implied freedom's complexities to the scope for dignity to protect as well as limit the implied freedom. These include the 'text and structure' approach to interpreting the implied freedom of political communication, and the implied freedom's conceptual basis as a limit on power as opposed to an individual right. To conclude, I briefly consider the relationship between dignity and freedom of speech generally. Despite acknowledging complexities in the Australian context, I argue that none of these completely close the door on dignity.

#### A The Basis of the Implied Freedom

It is helpful here to summarise the established basis and nature of the implied freedom. Freedom of political communication is an indispensable incident of the system of representative and responsible government established in the *Australian Constitution*. Specifically, it is implied by the requirement discerned from ss 7 and 24 that 'the members of the Senate and the House of Representatives ... be directly

<sup>112</sup> Elisa Arcioni and Adrienne Stone, 'The Small Brown Bird: Values and Aspirations in the Australian Constitution' (2016) 14(1) *International Journal of Constitutional Law* 60, 75.

<sup>113</sup> Stephenson (n 3) 371.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid 371–2.

<sup>116</sup> Ibid 390.

chosen at periodic elections by the people', by the requirement of responsible ministerial government found in the provisions that set out the relationship between the executive and Parliament, and by the provision for constitutional amendment by popular referendum in s 128. These sections necessarily protect 'that freedom of communication between the people concerning political or government matters which enables the people to *exercise a free and informed choice* as electors'.<sup>117</sup> The implied freedom restrains Commonwealth and state power but does not confer a personal right on members of the Commonwealth.<sup>118</sup> Instead, the implied freedom 'invalidates laws and consequently creates an area of immunity from legal control, particularly from legislative control'.<sup>119</sup> This means that the assessment whether a law impermissibly burdens the freedom considers how the law burdens the freedom of political communication 'generally'.<sup>120</sup> The modern test for infringement of the implied freedom is:

First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law 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.<sup>121</sup>

## **B     *Judicial Recognition of Dignity as Relevant to the Implied Freedom***

The first point to make in response to Stephenson's concern is that there is already some judicial recognition that dignity is a basis of the implied freedom and thus relevant to its protection as well as its limitation. In *Clubb*, the plurality allayed the concern that dignity will be relied on exclusively as a justification for the abrogation of the implied freedom rather than for its protection. While dignity was ultimately part of the justification for limiting the implied freedom in that case, the plurality explicitly recognised that dignity was a constitutional value that underpinned the implied freedom. Thus, they held that dignity was relevant to both sides of the equation. Their Honours stressed that 'the burden on the implied freedom is justified by the very considerations of the dignity of the citizen as a member of the sovereign people that necessitate recognition of the implied freedom';<sup>122</sup> that the protection of dignity 'accords with the constitutional values that underpin the implied freedom';<sup>123</sup> that a 'law calculated to maintain the dignity of members of the sovereign people ... accords with the political sovereignty which underpins the implied freedom';<sup>124</sup> and

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<sup>117</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) (emphasis added) ('*Lange*').

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*, quoting *Cunliffe v Commonwealth* (1994) 182 CLR 272, 327 (Brennan J).

<sup>120</sup> *Unions NSW v New South Wales* (2013) 252 CLR 530, 553 [35] (French CJ, Hayne, Crennan, Kiefel and Bell JJ) ('*Unions NSW*').

<sup>121</sup> *Lange* (n 117) 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) (citations omitted).

<sup>122</sup> *Clubb* (n 1) 204 [82] (Kiefel CJ, Bell and Keane JJ).

<sup>123</sup> *Ibid* 205 [85].

<sup>124</sup> *Ibid* 209 [99] (citations omitted).

that the ‘challenged law can, in significant part, be assessed in terms of the same values as those that underpin the implied freedom itself in relation to the protection of the dignity of the people of the Commonwealth’.<sup>125</sup> Thus, while the protection of the dignity of the listeners was justified in this particular assessment, it cannot be said that this judgment suggests dignity is irrelevant to the protection of the implied freedom. Indeed, the only cited definition of dignity referred to dignity as ‘the source from which all other human rights are derived’.<sup>126</sup>

This connection was not revisited by Kiefel CJ and Keane J in *Farm Transparency* because, as set out above, their Honours maintained that only the privacy interest was in the balance in that case. However, the idea was picked up by Edelman J, who observed:

[T]he balance is not even truly between the values of dignity, privacy, and security of property, on the one hand, and freedom of political communication, on the other. In the relevant application to trespassers and those complicit in the trespass, the protection of dignity, privacy, and security of property is itself a protection of freedom of political communication. An assault on the one can be an assault on the other. As Gageler J said in *Smethurst v Commissioner of the Australian Federal Police*, paraphrasing the State Trials report of Lord Camden’s speech in *Entick v Carrington*, there is a ‘link between protection of personal property and protection of freedom of thought and political expression’. Thus, as Kirby J said in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*, the Tasmanian legislation empowering the issue of an injunction in the circumstances of that case was not merely compatible with the representative democracy created by the *Constitution*, it was ‘a feature of that democracy’.<sup>127</sup>

In line with the plurality in *Clubb*, this statement indicates that the dignity interests are relevant to the implied freedom of speech. Edelman J suggests that the protection of the owners’ or occupiers’ privacy and dignity in turn bolsters the freedom of political communication. As mentioned above, an assessment of the interference on political freedom involves assessing freedom of political expression ‘generally’.<sup>128</sup> Notwithstanding this, the extent of the burden is usually ascertained by reference to the effect upon the ability of persons to communicate political speech in various ways.<sup>129</sup> In this case, it involved considering the burden on the privacy, dignity and expression interests of the owners or occupiers, and the burden on the same interests of the trespassers or those complicit in trespass. Again, while the

<sup>125</sup> Ibid 209 [101].

<sup>126</sup> Ibid 196 [50], quoting Barak (n 64) 86. When analysing *Clubb*, Henckels, Sifris and Penovic (n 2) also state: ‘We have seen that dignity operates on both sides of the scale in speech cases’: at 562. Later in their paper they observe that ‘one could argue that the only real relevance of the identification of the constitutional value is to serve as a yardstick in order to determine whether the impugned provisions’ statutory purpose is legitimate (compatible with the system of representative and responsible government protected by the *Constitution*), rather than to serve some higher purpose’: at 563. But this sits in tension with their more thoroughly developed claim that dignity both underpinned the implied freedom itself and underpinned the limitation of the implied freedom, and that this played out ‘most significantly in relation to the balancing stage of proportionality review’. While this had ‘its predicate in a law having an objective compatible with the implied freedom’, dignity played a far larger role than merely as a ‘yardstick’ for assessing compatibility. It also was significant to the ultimate finding of validity.

<sup>127</sup> *Farm Transparency* (n 12) 62–3 [264] (citations omitted).

<sup>128</sup> *Unions NSW* (n 120) 553 [35] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

<sup>129</sup> *Brown* (n 66) 374 [150] (Kiefel CJ, Bell and Keane JJ).

protection of the dignity of the owners or occupiers justified a burden on the implied freedom in that assessment, it cannot be said that the Court is not alive to the relevance of dignity to freedom of political communication. While I agree with Stephenson that it is not appropriate for dignity to be in use only on one side of the equation, I do not consider that to be an accurate characterisation of the two instances of dignity balancing that we have seen so far. Two current (Keane and Edelman JJ) and two former (Kiefel CJ and Bell J) High Court Justices understand dignity to be relevant on both sides of the equation. A better explanation of dignity operating to limit the implied freedom in these two cases is that the dignity value guided the application of the proportionality test on this occasion.

### C *Is 'Text and Structure' a Dead End for Dignity?*

Despite this judicial recognition of dignity as a basis of the implied freedom, Stephenson is concerned that this claim cannot be maintained unless dignity has 'some basis in the text and structure of the *Australian Constitution*'.<sup>130</sup> There are two related points to make in response to this argument. First, the plurality in *Clubb* asserted that the constitutional text and structure requires political sovereignty for the members of the Commonwealth, which in turn requires a degree of protected political communication. The political sovereignty of the members of the Commonwealth also safeguards the dignity of the members of the Commonwealth.<sup>131</sup> Whether this is a strong argument is open for debate and beyond the scope of this article.<sup>132</sup> The first short point is that it has not been conclusively shown that dignity cannot be sourced in the 'text and structure' method.

The second point is that it is not settled that the only way to source values relevant to the interpretation and the application of the implied freedom is through the 'text and structure' method developed in *Lange v Australian Broadcasting Corporation* ('*Lange*'). There is a near consensus among scholars that the 'text and structure' approach to constitutional implications established in *Lange* is unsatisfactory. Several scholars have argued that this interpretive method is unsustainable because it does not guide the Court in instances of indeterminacy.<sup>133</sup>

<sup>130</sup> Stephenson (n 3) 391.

<sup>131</sup> *Clubb* (n 1) 196 [51], 198–9 [60] (Kiefel CJ, Bell and Keane JJ).

<sup>132</sup> In a footnote Stephenson observed that 'the problem with this understanding of representative and responsible government is that it is arguably so capacious as to include almost anything (ie, if representative and responsible government requires the protection of the dignity of the people, presumably it also requires protection of the safety, wellbeing, prosperity, happiness, etc of the people)': Stephenson (n 3) 391 n 123.

<sup>133</sup> See, eg, Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23(3) *Melbourne University Law Review* 668; Adrienne Stone, 'The Limits of Constitutional Text and Structure Revisited' (2005) 28(3) *UNSW Law Journal* 842; Jeremy Kirk, 'Constitutional Implications I: Nature, Legitimacy, Classification, Examples' (2000) 24(3) *Melbourne University Law Review* 645; Jeremy Kirk, 'Constitutional Implications II: Doctrines of Equality and Democracy' (2001) 25(1) *Melbourne University Law Review* 24; Nicholas Aroney, 'Towards the Best Explanation of the Constitution' (2011) 30(1) *University of Queensland Law Journal* 145; Jeffrey Goldsworthy, 'Constitutional Implications Revisited' (2011) 30(1) *University of Queensland Law Journal* 9; Jeffrey Goldsworthy, 'Kable, Kirk and Judicial Statesmanship' (2014) 40(1) *Monash University Law Journal* 75; Catherine Penhallurick, 'Commonwealth Immunity as a Constitutional Implication' (2001) 29(2) *Federal Law Review* 151.

Adrienne Stone has persuasively argued that the constitutional text and structure method provides little guidance as to the values that underpin the implied freedom, and that this value base is deeply disputed and necessitates judicial choice.<sup>134</sup> It is arguable that, particularly in the context of guiding constitutional values, other options are open to the Court. Dixon has observed that ‘there are at least two possible understandings of what it means for the text and structure of the *Constitution* to provide support for various values’.<sup>135</sup> There is the ‘stronger’ understanding, wherein the *Constitution* must provide affirmative support for a value in order for it to attract the label ‘constitutional’.<sup>136</sup> There is also the ‘weaker’ understanding, which requires merely that the *Constitution* is consistent with a value.<sup>137</sup> Dixon intuits:

When the High Court identifies a freestanding implication under the *Constitution*, the current interpretive consensus in Australia is generally that it must show textual and structural support of a stronger, more affirmative kind. But where values are relied on only as a source of additional guidance to the Court in interpreting and enforcing some other capital ‘C’ constitutional norm, it seems plausible to apply either a strong or weak notion of textual and structural support.<sup>138</sup>

It is plausible that dignity has *at least* the weaker understanding and therefore could be relevant to the shape of the implied freedom. Outside of this astute observation, the question of what it means for a value to be appropriately sourced in the text and structure of the *Constitution* largely turns on one’s method of constitutional interpretation:

[T]he more strictly textual or originalist one’s approach to constitutional meaning, the more difficult it will be to see how the text and structure of the *Constitution* provide support for a broad range of values; whereas the ‘looser’, or more hybrid one’s approach to interpretation of the text, the more scope there will be to find indirect sources of support for a variety of constitutional values.<sup>139</sup>

Importantly, the ‘text and structure’ method does not prescribe a certain approach to constitutional interpretation. Within this approach, members of the High Court of Australia can use any methodology they see fit.<sup>140</sup> Thus, it is the interpretive method of any given judge that will be most decisive in determining the relevance of dignity to the implied freedom or not. Indeed, this is one of the reasons the ‘text and

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<sup>134</sup> Stone, ‘The Limits of Constitutional Text and Structure Revisited’ (n 133) 843, 850; Adrienne Stone, ‘Insult and Emotion, Calumny and Invective: Twenty Years of Freedom of Political Communication’ (2011) 30(1) *University of Queensland Law Journal* 79, 90–1. See also Arcioni and Stone (n 112).

<sup>135</sup> Dixon, ‘Functionalism and Australian Constitutional Values’ (n 2) 10.

<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.* 10–11 (citations omitted).

<sup>139</sup> *Ibid.* Dixon also explains that adherents of textualism or originalism consider the *Constitution* to have a relatively settled meaning and therefore reject the argument that values can be adopted by the judicial custom.

<sup>140</sup> Justice Bradley Selway, ‘Methodologies of Constitutional Interpretation in the High Court of Australia’ (2003) 14(4) *Public Law Review* 234, 250; Justice Susan Kenny, ‘The High Court on Constitutional Law: The 2002 Term’ (2003) 26(1) *UNSW Law Journal* 210; Nicholas Aroney, ‘The High Court on Constitutional Law: The 2012 Term — Explanatory Power and the Modalities of Constitutional Reasoning’ (2013) 36(3) *UNSW Law Journal* 863, 864–5; Chief Justice Robert French, ‘Theories of Everything and Constitutional Interpretation’ (Speech, University of New South Wales, 19 February 2010).

structure' approach is criticised.<sup>141</sup> This puts further pressure on any claim that it is not possible to source dignity from the 'text and structure' of the *Constitution*. It is far from settled, but *Clubb* and *Farm Transparency* provide glimmers of an implied freedom partially underpinned by dignity values.

### D *Is the Implied Freedom's Character as a Limitation on Power a Dead End for Dignity?*

Stephenson also argues that dignity is precluded as a value underpinning the implied freedom on the basis that 'the implied freedom is a limitation on power, not a personal right. This means that the focus of analysis is not on the law's effect on individuals and their dignity, but the law's effect on political communication generally.'<sup>142</sup> Underpinning this statement is Stephenson's related concern that the dignity interests of the speakers will be overlooked.<sup>143</sup>

However, the assessment of the burden on 'political communication generally' does not preclude considerations of the interests of the speaker, which may or may not include dignity. The case law demonstrates that it is not the case that this assessment considers only listeners and not speakers. As a starting point, the extent of the burden on protected speech is usually ascertained by reference to the effect upon the ability of persons to communicate political speech in various ways.<sup>144</sup> Thus, it is arguable that the general or holistic nature of the assessment of political communication at large necessitates some consideration of the interests of both the speaker and the listener.<sup>145</sup>

One example of where the interests of the speaker prevailed is the case of *Coleman v Power*.<sup>146</sup> The case considered the quality of political communication and to some extent safeguarded critical and unpleasant political debate. It concerned the constitutional validity of a state law criminalising offensive language in public in its application to a protestor against police corruption. A bare majority quashed Mr Coleman's conviction, holding that the law could not apply to his protected political speech. The majority did so partially by reference to the practices of political debate, which necessarily includes the interests of the speaker. In Kirby J's

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<sup>141</sup> See above n 133.

<sup>142</sup> Stephenson (n 3) 391.

<sup>143</sup> *Ibid* 392.

<sup>144</sup> *Brown* (n 66) 374 [150] (Kiefel CJ, Bell and Keane JJ).

<sup>145</sup> If Stephenson is correct that the assessment of interference with the freedom of political communication as a whole precludes consideration of the interests of the speaker, an alternative argument would be to attribute to free political communication a type of dignity — the dignity of free political communication. This would fly in the face of the use of dignity in *Clubb* (n 1) and *Farm Transparency* (n 12), which were understood to attach dignity to natural persons. However, there is a body of scholarship on the dignity of inanimate objects which could help to develop this argument: see Jeremy Waldron, *The Dignity of Legislation* (Cambridge University Press, 1999); Jeremy Waldron, 'Citizenship and Dignity' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press, 2013) 327; Christopher Tollefson, 'The Dignity of Marriage' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press, 2013) 483. A full consideration of this argument is beyond the scope of this article.

<sup>146</sup> *Coleman v Power* (2004) 220 CLR 1.



words, ‘insult and emotion, calumny and invective’ are protected speech.<sup>147</sup> Importantly, this vision of public debate was justified because it was understood to improve the political process and ensure that voters exercise a true choice in federal elections. Thus, without being converted into a claim right, considerations of how to safeguard the political process do involve both the speaker and the listener. Thus, both the speaker and listener are relevant to assessing a burden on the implied freedom of political communication, even though this burden is ultimately determined by reference to its impact on the freedom ‘generally’.

However, it remains to be seen whether the dignity interest of the speaker is relevant, or whether it is some other interest or interests that are. It is arguable that dignity is relevant. While the word ‘dignity’ has not yet been used in connection to the speaker in an implied freedom case, considerations relevant to the speaker’s dignity interest arguably have been. As set out above, the freedom of political communication is implied from the Australian constitutional institutions of representative and responsible government. It protects ‘the making and receipt of communications capable of bearing on electoral choice’.<sup>148</sup> It has already been shown in Part II that dignity is bound up in autonomy. Electoral choices could arguably be understood as the type of life-shaping decisions at least partially underscored by the dignity value. Despite a mass of scholarship on the various theories which may support a free speech principle (including, *inter alia*, justifications based on the functioning of democracy, the importance of discovering truth, speech as an aspect of self-fulfilment, and a suspicion of government),<sup>149</sup> the links between such theories should not be overlooked. For instance, the interest in participation in political debate (the so-called ‘democratic justification for free speech’) can be linked to arguments for free speech from dignity and self-fulfilment.<sup>150</sup>

## E *Is Dignity Relevant to the Protection of Freedom of Speech?*

Despite contesting Stephenson’s claim that the implied freedom as a limitation on power required by the text and structure of the *Constitution* cannot be underpinned by dignity, I do accept that in a certain category of cases dignity will have a greater weight on one side of the equation. The reason dignity will be more relevant to the limitation of freedom of speech as opposed to its protection is that, as alluded to above, dignity is but one value that justifies freedom of speech. Nor is it self-sufficient as a justification for free speech. A justification for free speech must be one that ‘can be distinguished from other areas of human conduct and activity’.<sup>151</sup> A principle protecting free speech on the basis of dignity alone ‘does not provide any clear basis for determining the scope of a free speech principle or for distinguishing it from a general claim to liberty’.<sup>152</sup> So, while free speech may be associated with or underpinned by human dignity, human dignity alone will not provide a coherent

<sup>147</sup> Ibid 91 [239] (citations omitted). See also Stone, ‘Insult and Emotion, Calumny and Invective’ (n 133).

<sup>148</sup> *Brown* (n 66) 388 [194]–[195] (Gageler J).

<sup>149</sup> For an overview, see Eric Barendt, *Freedom of Speech* (Oxford University Press, 2<sup>nd</sup> ed, 2007) ch 2.

<sup>150</sup> Ibid 20, 34.

<sup>151</sup> Ibid 7.

<sup>152</sup> Ibid 14–15.

principle for free speech. For robust protection of free speech, an argument is needed to show ‘why *speech* is special’.<sup>153</sup> Moreover, a glance at comparative constitutional law confirms that this is not a novel conundrum faced by the dignity value and its relationship to free speech. For example, several jurisdictions have proscribed hate speech directed at racial or religious groups on the basis of human dignity.<sup>154</sup> It is plausible that dignity may operate to limit speech more than it protects speech.<sup>155</sup>

## F *Conclusions: Dignity and the Implied Freedom*

Part III has addressed Stephenson’s concern that dignity may be confined to acting as a limitation on the implied freedom, rather than as a basis for its protection. I have highlighted initial judicial recognition that dignity is relevant to the implied freedom itself, and not just its limitation. I have argued that the constitutional text and structure does not rule out the relevance of dignity to the implied freedom. A judge’s interpretive method will likely be more determinative for the relevance of dignity than the ‘text and structure’ approach developed in *Lange* because that approach itself necessitates judicial value judgments. I have also argued that the nature of the implied freedom as a limitation on power as opposed to a personal right does not confine the dignity value or interest to one side of the equation. However, what does limit dignity’s relevance to the protection of political communication is the meaning of dignity itself. Indeed, it could simply be the case that, in a certain set of circumstances, dignity is more suited to limiting freedom of speech not due to any of the Australian constitutional constraints addressed here but because of the content of dignity and the interests it serves to protect, set out in Part II of this article.

Stephenson correctly observed that ‘[a] striking feature of dignity is that it is used simultaneously to justify the protection of human rights and freedoms and to justify the imposition of limitations on human rights and freedoms’.<sup>156</sup> However, it does not follow that ‘[i]f the High Court were to use dignity only as a legitimate purpose, it would turn the concept solely into a vehicle for limiting rights and freedoms’.<sup>157</sup> Dignity operating as a limit on a particular right or freedom — for example, the implied freedom of political communication — does not turn it into exclusively a ‘vehicle for limiting rights and freedoms’. Rather, in limiting political communication, it can operate to prioritise another important value or interest. It is well established that the implied freedom covers only a narrow category of expression and provides relatively weak protection for that expression.<sup>158</sup> However, rather than focusing on these weaknesses, this article has sought to welcome the value-oriented reasoning in *Clubb* and *Farm Transparency*. While acknowledging its complexities, I have sought in Part III to begin to demonstrate its potential significance for the implied freedom and beyond.

<sup>153</sup> Ibid 15 (emphasis added).

<sup>154</sup> For an assessment of the merits of this approach, see Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012); Jonathan Seglow, ‘Hate Speech, Dignity and Self-Respect’ (2016) 19(5) *Ethical Theory and Moral Practice* 1103.

<sup>155</sup> Notwithstanding this position, dignity as a limitation will only be relevant in a subcategory of cases and so its influence as a limitation may be intermittent only.

<sup>156</sup> Stephenson (n 3) 390.

<sup>157</sup> Ibid 393 (emphasis added).

<sup>158</sup> See, eg, Stone, ‘Insult and Emotion, Calumny and Invective’ (n 133) 80.

## IV Conclusion

This article has considered the state of play for dignity in Australian constitutional law in the light of *Clubb* and *Farm Transparency*. It addressed two concerns. Part II built on previous work to explore the meaning of dignity in these decisions. It responded to the first pressing concern following *Clubb* that dignity is an indeterminate, incoherent or empty concept and that this indeterminate, incoherent or empty concept had been imported into Australian constitutional law. The focus was on the new light that *Farm Transparency* can cast on the meaning of dignity. This doctrinal analysis suggested that dignity in Australian constitutional law is a multidimensional concept, including dignity as the intrinsic worth of natural persons and dignity as a thick autonomy interest. This explanation will enable important normative work on whether this is the appropriate meaning of dignity in Australian constitutional law.<sup>159</sup> In Part III, I addressed the second concern following *Clubb* that the quirks of Australian constitutional law preclude recognition of the dignity of the speaker, and thus will cause dignity to be relevant only to the limitation of the implied freedom and not its protection. I addressed the complexities that apply in the Australian context and argued that none of these completely closes the door on dignity. Many questions remain including, *inter alia*, if dignity is a constitutional value, how (if at all) might constitutional law change? Specifically, how (if at all) might the implied freedom change? My future research will probe these, and other related, questions.

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<sup>159</sup> This is the subject of my doctoral research.



# *Before the High Court*

## What's in a Name? Fairness and a Reasonable Opportunity: *AB v Independent Broad-Based Anti-Corruption Commission*

Matthew Groves\*

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### *Abstract*

In *AB v Independent Broad-Based Anti-Corruption Commission*, the High Court of Australia will consider the level of disclosure that the rules of fairness require an investigative body to observe when finalising a draft report. The central issue is the tension between the duty to provide adverse material (enough for an affected person to have a fair chance to respond) and the need for the investigator to withhold some material (enough for it to still be able to discharge its function). This question has arisen as a narrow one of construction under s 162(3) of the *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic), but it raises the age-old dilemma of the rules of fairness — how to protect the interests of someone who may be adversely affected by administrative action without unduly impairing the functions of the officials responsible for that action. This column argues that the dilemma may not be able to be resolved beyond the statement of broad principles.

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\* Alfred Deakin Professor, Law School, Deakin University. Email: [m.groves@deakin.edu.au](mailto:m.groves@deakin.edu.au); ORCID iD: <https://orcid.org/0000-0001-5925-8362>.

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## I Introduction

Fairness is a cornerstone of good governance. It is also easy to state as a legal principle in broad terms. When public powers are exercised, basic procedural rights must be provided to people who may be adversely affected. This right to be heard — known as the hearing rule<sup>1</sup> — contains some core ingredients, such as the right to receive notice of adverse material and the right to respond to it. Natural justice, or ‘procedural fairness’ as it is increasingly known,<sup>2</sup> is a right so fundamental that it is protected by the principle of legality.<sup>3</sup> There is an immense body of doctrine about the variable content of the hearing rule,<sup>4</sup> a common law rule which can be modified or removed by statute. When the requirements of fairness are modified by statute, this typically occurs within a legislative framework where the function of the relevant body or the purpose of a power is thought to be assisted by restricting the requirements of fairness.<sup>5</sup> In these instances, the purpose of the power is enhanced, or able to be given appropriate effect, if the requirements of fairness attaching to its exercise are trimmed.

In *AB v Independent Broad-Based Anti-Corruption Commission* (‘the forthcoming case’),<sup>6</sup> the High Court will consider what material Victoria’s Independent Broad-Based Anti-Corruption Commission (‘IBAC’) must disclose to a person it has been investigating before it can finalise a report of an investigation. Both parties agree about applicable wider principles — namely, that fairness applies but is modified by the *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic) (‘*IBAC Act*’) — and that the person under investigation (‘AB’) has been provided with some information. The disagreement lies in the detail. AB argues that he requires more information if the chance to be heard is to be meaningful. IBAC

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<sup>1</sup> The hearing rule is often referred to as one of the ‘twin pillars’ of natural justice. The other pillar is the rule against bias.

<sup>2</sup> The two terms are generally treated as interchangeable: *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 14 [37] (Gleeson CJ). This article uses the term ‘natural justice’ because it was preferred by the Independent Broad-Based Anti-Corruption Commission (‘IBAC’) and the Victorian courts: *AB v Independent Broad-Based Anti-Corruption Commission* [2022] VSCA 283, [55], [61] (‘*AB v IBAC (Appeal)*’).

<sup>3</sup> *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259 [15] (‘*Saeed*’); *BVD17 v Minister for Immigration and Border Protection* (2019) 268 CLR 29, 51 [55] (‘*BVD17*’).

<sup>4</sup> The content of fairness is ‘eminently variable’: *Dunsmuir v New Brunswick* [2008] 1 SCR 190, 232 [79] (citations omitted). See also Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 7<sup>th</sup> ed, 2022) chs 8–9.

<sup>5</sup> The nature of these detailed procedural frameworks serves to limit the operation of the principle, for reasons explained by Gageler and Keane JJ in *Lee v NSW Crime Commission* (2013) 251 CLR 196, 310–11 [313]–[314]. Their Honours reasoned that the principle existed to protect ‘from inadvertent and collateral alteration rights, freedoms, immunities, principles and values that are important’ but had little to add in instances ‘where the objects or terms or context of legislation make plain that the legislature has directed its attention to the question of the abrogation or curtailment of the right, freedom or immunity’. In the case of the *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic) (‘*IBAC Act*’), both the purpose and detail of the statute make clear that the legislature has turned its attention to the question of limiting the hearing rights of people who may be affected by IBAC investigations.

<sup>6</sup> *AB (a pseudonym) v Independent Broad-Based Anti-Corruption Commission* (High Court of Australia, Case No M63/2023).

argues that it has provided enough material for AB to make an informed response. IBAC also argues that providing more material is not required by the *IBAC Act* and might undermine the performance of its functions. These issues have an air of artifice. AB has been under investigation for many years and gained considerable knowledge of the issues that IBAC has investigated. When IBAC tables the report of its investigation, the fact that AB has been under investigation for many years by an anti-corruption body will become public knowledge. This itself is highly likely to damage AB's reputation. The delay and complexity feared by IBAC have arguably already occurred. But important wider issues remain. How much information should an anti-corruption body provide to a person it is investigating? How much fairness can be expected within an environment that is carefully structured to limit many basic elements of fairness? Before answering those questions, we must examine the history of the case.

## II Background and Procedural History

AB is a senior officer of a non-governmental body ('CD') in Victoria. Both have been under investigation by IBAC since 2019. The strict requirements of secrecy covering IBAC investigations mean little is known about the identity or work of AB or CD.<sup>7</sup> AB gave evidence in a private examination conducted by IBAC in November 2020.<sup>8</sup> AB was examined over two days and represented by senior counsel.<sup>9</sup> AB and his agency were subject to directions from IBAC, which greatly restricted the knowledge that each received about key aspects of the investigation and the evidence IBAC received. The confidentiality notice issued to AB explained that he could not disclose evidence given to IBAC, any documents given to or seized by IBAC, the subject matter of the investigation, the existence of or information about the confidentiality notice, or any information that might identify a person subject to any compulsory process by IBAC.<sup>10</sup>

IBAC completed a draft report containing 'adverse comments and opinions' about AB and CD and sent them a redacted version of that document as required by ss 162(2) and (3) of the *IBAC Act*. Those provisions make clear that draft reports are given to affected parties to provide them an opportunity to respond to adverse comments, though a curious divergence in drafting allows 'an opportunity' to agencies and a 'reasonable opportunity' to people. IBAC is required to 'fairly set out

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<sup>7</sup> *AB v IBAC (Appeal)* (n 2) [3]–[4]. Those paragraphs identify AB as male, which is the only identifying information so far disclosed. The name and work of AB, the name and activity of CD and the title of IBAC's investigation remain publicly unknown. The redacted submissions published on the High Court website provide no further detail: see 'Case M63/2023', *High Court of Australia* (Web Page) <[https://www.hcourt.gov.au/cases/case\\_m63-2023](https://www.hcourt.gov.au/cases/case_m63-2023)>.

<sup>8</sup> Unless there are exceptional circumstances and it is in the public interest, examinations must be held in private: *IBAC Act* (n 5) s 117.

<sup>9</sup> *AB v IBAC (Appeal)* (n 2) [37]. People directed to appear before IBAC have a right to representation, unless IBAC directs otherwise: *IBAC Act* (n 5) s 127.

<sup>10</sup> The notice was issued under *IBAC Act* (n 5) s 42.

each element of the response in its [revised] report'.<sup>11</sup> People who may be the subject of adverse comment are given the further right to be provided with 'the relevant material in relation to which IBAC intends to name that person'.<sup>12</sup> AB's lawyers requested copies of the transcript of his and further interviews and other material relied upon by IBAC because this was 'necessary to provide context' for AB to make an adequately informed response.<sup>13</sup> IBAC provided only the transcript of AB's examination, as is normally required by statute, though even this may be withheld if IBAC considers on reasonable grounds that providing witnesses with copies of their own testimony may prejudice an investigation.<sup>14</sup>

## A Supreme Court of Victoria

AB sought judicial review in the Supreme Court of Victoria, claiming that IBAC had breached the requirements of natural justice by failing to provide the material he requested.<sup>15</sup> Ginnane J held that the *IBAC Act* did not exclude the requirements of fairness but instead struck a 'compromise between confidentiality of the investigative process and natural justice'.<sup>16</sup> That compromise did not include an entitlement of AB to seek material additional to the draft report. Even a heavily redacted version of witness statements might identify those people, which would defeat the confidentiality the *IBAC Act* strived to create and preserve.<sup>17</sup> The ability of affected people to gather information, whether directly or otherwise, was clearly limited. Ginnane J noted there was no general right of cross-examination in administrative hearings and the implication of one for IBAC hearings did not sit easily with other procedural modifications such as restrictions on the right to be present during witness examinations.<sup>18</sup> Ginnane J held that the tension between providing someone who might be the subject of adverse commentary in a report by IBAC with a reasonable opportunity to respond and preserving the confidential nature of the investigation could be reconciled in several ways. One was for IBAC to disclose 'the substance or gravamen of the allegations' or the 'substance of the adverse material in a draft report'.<sup>19</sup> The subtle distinction between the two reflects

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<sup>11</sup> *IBAC Act* (n 5) ss 162(2), (3). Revised reports are designated as 'special reports', a category which encompasses all reports from IBAC except its annual report. Special reports are tabled in Parliament and attract privilege when this occurs: at ss 162(1), (11), (13), (14).

<sup>12</sup> *Ibid* s 162(4). The same duty arises if IBAC intends to include such information in its annual report: at s 165(4).

<sup>13</sup> *AB v IBAC (Appeal)* (n 2) [4].

<sup>14</sup> *IBAC Act* (n 5) s 133(4).

<sup>15</sup> CD, which was provided the same redacted draft report, was joined to the claim at AB's request and sought the same remedies: *AB v IBAC (Appeal)* (n 2) [8]–[9].

<sup>16</sup> *AB (a pseudonym) v Independent Broad-Based Anti-Corruption Commission* [2022] VSC 570, [119] ('*AB v IBAC (Trial)*'). This decision, like the publicly available decision of the Court of Appeal, is a redacted version of a confidential judgment published to the parties.

<sup>17</sup> *Ibid* [120]–[124].

<sup>18</sup> *Ibid* [119]. This right is altered by *IBAC Act* (n 5) ss 118(1)(c) and 119 which provide that people other than IBAC staff cannot be present during witness examinations unless allowed by a direction of IBAC.

<sup>19</sup> *AB v IBAC (Trial)* (n 16) [151], [154]. This was the solution reached in *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 ('*VEAL*').



an uncertainty about whether draft reports must be disclosed to affected people.<sup>20</sup> Ginnane J noted that the statutory obligation of IBAC to ‘fairly set out each element of the response in its report’<sup>21</sup> provided another means for affected people to respond. Most administrative processes require decision-makers to consider a response, but not necessarily to address it directly or recount key details in any subsequent decision. The duty of IBAC to fairly set out elements of a response enables that material to become a matter of public record, even if IBAC strongly disagrees with that material. That duty could be discharged in many other ways, such as by adding, removing or amending material in a draft report, providing a revised draft to affected people for further comment, or inviting the affected people to respond orally.<sup>22</sup> These rights will be available to AB after his case is decided.<sup>23</sup>

## B Victorian Court of Appeal

On appeal, the parties agreed that the key issues were the steps required to satisfy the hearing rule and whether IBAC had taken sufficient steps.<sup>24</sup> The Victorian Court of Appeal noted that the flexibility of the hearing rule enabled it to adapt to the circumstances of each case and avoid practical injustice. To avoid injustice, IBAC had to provide AB a reasonable opportunity to respond. The Court considered that the relevant circumstances included the scope and purpose of the relevant statute, the nature of the power exercised, the right or interest of whoever might be affected by that exercise, and the ‘severity of the consequences to that person resulting from the exercise of the power’.<sup>25</sup> Those orthodox principles led the Court to identify five issues relevant to the content of the hearing rule in this case:

- (i) A ‘key object’ of the *IBAC Act* is to identify, investigate and expose corrupt conduct. Those goals are fostered by the ‘significant coercive powers’ conferred upon IBAC.
- (ii) IBAC’s statute assumes that IBAC will receive sensitive information which, if disclosed, could ‘jeopardise the safety or reputation’ of people. The various mechanisms in the Act to protect information and the identity of people involved in investigations are intended to manage that danger.
- (iii) The Act recognises that IBAC’s work could affect the rights and interests of investigated people. Those rights are protected in many ways, such as by allowing legal representation and private hearings and for witnesses

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<sup>20</sup> *AB v IBAC (Trial)* (n 16) [150] where Ginnane J held that *IBAC Act* (n 5) s 166, which imposes restrictions on recipients of proposed or draft reports, ‘appears’ to assume draft reports could be disclosed. His Honour did not suggest this created a presumption that drafts would or should always be disclosed.

<sup>21</sup> *IBAC Act* (n 5) s 162(2).

<sup>22</sup> *AB v IBAC (Trial)* (n 16) [141], [173].

<sup>23</sup> It was unnecessary to decide the effect of broadly similar rights under the *Crime and Corruption Act 2002* (Qld) in *Crime and Corruption Commission (Qld) v Carne* (2023) 97 ALJR 737, 750 [79] (Gordon and Edelman JJ).

<sup>24</sup> *AB v IBAC (Appeal)* (n 2) [160].

<sup>25</sup> *Ibid* [161].

to receive transcripts of their own evidence. Section 162(3) contains another key protection for people under investigation.

- (iv) When IBAC transmits reports to Parliament, the procedural protections associated with that action are intended to protect the reputation of people named in those reports.
- (v) The reputational damage caused by transmission of an IBAC report may be severe.<sup>26</sup>

While the imperatives of IBAC's work and the requirements of its statute narrow aspects of the hearing rule, the Court of Appeal thought that a reasonable opportunity for AB to respond was 'obviously' not met by providing 'adverse comments and opinions in bare, conclusionary form'.<sup>27</sup> The right to respond would be made reasonable if IBAC provided 'other contents of the draft report which disclose the basis upon which IBAC formed the adverse comments and opinions or which provide necessary context for them'.<sup>28</sup> A requirement to provide *enough* of the contents *or* context of a report offers little guidance. The Court of Appeal conceded as much when it noted that a reasonable opportunity could be provided if IBAC disclosed the 'substance or gravamen' of matters adverse to a person, or the draft report itself.<sup>29</sup> The Court noted that, in the case at hand, one part of IBAC's report was 'sufficiently detailed to enable the applicants to understand, and respond to, the adverse comments and opinions concerning them'.<sup>30</sup> The Court conceded that this part did not reveal the identity of some witnesses, but noted that those redactions were intended to protect the unnamed witnesses.<sup>31</sup>

If the requirement to provide a reasonable opportunity to respond can be met by disclosing a full draft report, one part of a report, or only the gravamen of adverse comments and conclusions, the adequacy of disclosure rests on two competing issues. One is the level of detail required to provide affected people with enough insight into the basis of adverse comments and opinions to be able to respond effectively to them. The other is the potential danger disclosure might pose either to the safety of other people or to the conduct of the investigation. These imperatives will often be in tension and may not always be reconcilable. The Court of Appeal indicated one way to resolve such problems in its finding that IBAC had not provided sufficient detail or information for AB to respond to its statement that '[o]ther concerns were also raised' about witnesses giving evidence against AB or CD.<sup>32</sup> That vague statement was 'so general and lacking in content' that it was impossible for AB to respond to it, though the Court noted that AB could make that very criticism and also request that the vague statement be amended or deleted.<sup>33</sup> Even if that request was denied, the right of affected people to have their response

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<sup>26</sup> Ibid [162].

<sup>27</sup> Ibid [164].

<sup>28</sup> Ibid.

<sup>29</sup> Ibid [166].

<sup>30</sup> Ibid [169].

<sup>31</sup> Ibid [170].

<sup>32</sup> Ibid [177].

<sup>33</sup> Ibid.

reproduced in a final report was ‘significant because it ensures that anyone reading the report is able to consider not only IBAC’s findings but also the applicants’ perspective in relation to those findings’.<sup>34</sup> The Court of Appeal held that, aside from this shortcoming, IBAC had disclosed enough material to satisfy the requirements of fairness and its governing statute.

### III Disclosure, Opportunity and Fairness for Both Sides

There is no doubt that the hearing rule can be excluded by statute,<sup>35</sup> but the rights contained within the hearing rule are so important that legislation to exclude them is viewed strictly. Edelman J recently explained that the ‘right to a reasonable opportunity to present a case ... is not an aspect of procedural fairness that can usually be abolished by Parliament by a nudge and a wink’.<sup>36</sup> There are, however, some administrative regimes where amendments to elemental parts of the hearing rule are so extensive they cannot be characterised as mere parliamentary winking. Those extensive amendments are individual aspects of a wider administrative structure that seeks both to limit the procedural rights of affected people and to confirm the discretionary and often coercive powers of officials.<sup>37</sup> This is the very nature of extraordinary investigative bodies such as IBAC. Hearings (and thus the hearing rule itself) are not excluded because hearings are central to IBAC’s functions. But the hearings that are contemplated are so vastly different from the normal processes of courts or administrative bodies that recourse to traditional notions of the hearing are inapt, perhaps to an extent that can obscure the novel functions of IBAC.

One novel power attending IBAC investigations is the ability of affected people to comment upon perceived deficiencies or errors in the process. As noted above, the Court of Appeal suggested such comments could be included in the final reports tabled in Parliament. In the normal course of administrative decision-making, insufficient disclosure is unfair and the resulting decision unlawful because of that breach of fairness. In IBAC investigations, applicants have a different, two-fold right: to complain about inadequate disclosure, and to have those complaints included in a final report if those objections are not given the weight an affected person has sought. The novelty of this second step turns tradition on its head. Inadequate disclosure does not compel quashing of the report, but instead enables the report to record that flaw.<sup>38</sup> An error on the face of the record, the traditional insignia of fatal legal flaw, is arguably transformed by this provision to a legislative duty which signals that the concerns of an affected person have been noted.

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<sup>34</sup> Ibid [179]. Ginnane J similarly held this requirement meant IBAC’s final report must ‘demonstrate that it has properly considered’ the responses of affected people and agencies: *AB v IBAC (Trial)* (n 16) [173].

<sup>35</sup> See, eg, the cases cited in n 3.

<sup>36</sup> *BVD17* (n 3) 52 [56].

<sup>37</sup> A detailed scheme of this nature triggers the cautions quoted in n 5 above.

<sup>38</sup> The procedure exists elsewhere: see, eg, *Inquiries Act 1992* (ACT) s 26A(2)(b).

The extent to which such a novel procedure might affect disclosure requirements is unclear. The Court of Appeal acknowledged that notice of adverse material could be modified to balance the needs of an affected person and the institutional concerns of the decision-maker. In the leading case of *VEAL*,<sup>39</sup> the High Court emphasised that disclosure should not be conceived in an absolute manner to require that material from a confidential source be either released in full or withheld entirely.<sup>40</sup> To provide the gist or gravamen of that material would strike a balance between the imperatives of confidentiality and the need for affected people to be able to provide a sufficiently informed reply.<sup>41</sup> There are some instances where it is wholly impractical to apply the hearing rule,<sup>42</sup> but the complex investigations required by the *IBAC Act* are not inherently at odds with the implication of aspects of the hearing rule. The more difficult question is not whether disclosure, or greater disclosure, can be implied but instead the extent to which an implication to that effect can be drawn without defeating the limits clearly imposed upon the hearing rule by the Act. The strength of the implication rule is contestable in such cases because the legislature has clearly set parameters by restricting many procedural rights. Put another way, the playing field is not level and is deliberately made that way by Parliament.

If legislative amendments disturb the hearing rule without clearly excluding the possibility of the implication of further aspects of the rule, the balancing task faced by the courts is the perpetual one faced in cases of fairness — what is the right balance and how can it be struck? It is well settled that there is no ‘package of procedural rules which must always be observed’,<sup>43</sup> which means that lists derived from earlier cases may provide helpful rather than exhaustive guidance.<sup>44</sup> Within these vague parameters, two issues have particular relevance to this case. The first is that the requirements of disclosure are inevitably limited. The requirement of disclosure and the associated right to comment on what is disclosed cannot become an ‘endless game of tennis’ where every point must be returned over the net.<sup>45</sup> If the courts have accepted that the common law rules of implication may impose such limits, they should accept that the legislature is also able to impose limits. The second caution relevant to the balancing exercise required to determine the content

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<sup>39</sup> *VEAL* (n 19) 99–100 [28]–[29].

<sup>40</sup> The UK Supreme Court adopted a similar position when it held that fairness required that a prisoner transferred to a highly restrictive regime be told ‘the substance of the case being advanced in sufficient detail to enable him to respond’: *R (Bourgass) v Secretary of State for Justice* [2016] AC 384, 422 [100]. That approach meant the identity of confidential informants and aspects of prison security could be preserved, while providing the prisoner with the key reasons why he was placed in more restrictive custody.

<sup>41</sup> See also *Coutts v Close* [2014] FCA 19, [118]–[127].

<sup>42</sup> See, eg, *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 541 [51] (French CJ), 622–3 [368]–[369] (Gageler J, Crennan J agreeing) where it was held that trappings of the hearing rule were not compatible with powers exercised on the high seas in difficult circumstances.

<sup>43</sup> *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, 388 [85] (Allsop CJ, Middleton and Foster JJ).

<sup>44</sup> *Canada (A-G) v Mavi* [2011] 2 SCR 504, [42]. See also *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475, 504 (Kitto J).

<sup>45</sup> *Calardu Penrith Pty Ltd v Penrith City Council* [2010] NSWLEC 50, [180].

of the hearing rule is what Beatson LJ described as the ‘nightmare of a Tennysonian “wilderness of single instances”’,<sup>46</sup> which occurs if appellate courts focus too much on the particular context of a case at the expense of workable general principles. Beatson LJ thought the solution lay in courts providing ‘simplified guidance which is practical and does not constitute either a procedural straitjacket, or “safe harbour” for longstanding ways of doing things in a particular context’.<sup>47</sup> The very prescriptive legislative regime governing IBAC arguably presents the danger identified by Beatson LJ. We should not presume that dilemma is capable of satisfactory judicial resolution.

A different approach is to accept that a process contains a level of unfairness that cannot be cured. A variant of this problem arose in *R (Begum) v Secretary of State for the Home Department* (*‘Begum’*),<sup>48</sup> where the applicant could not gain leave to enter the United Kingdom (*‘UK’*) to instruct her lawyers and attend her appeal in the Special Immigration Assessment Commission that challenged the removal of her British citizenship. Ms Begum argued that refusing her leave to enter meant the Commission hearing could not proceed fairly, so her appeal should be allowed. The Supreme Court invoked Eleanor Roosevelt’s statement that ‘justice cannot be for one side alone, but must be for both’.<sup>49</sup> On this view, the flaw of allowing the appeal because of the unfairness faced by Ms Begum was the unfairness it would visit upon the respondent. Lord Reed suggested that the substantive claim be stayed until Ms Begum was better able to participate, but conceded there was ‘no perfect solution to a dilemma of the present kind’.<sup>50</sup> Lord Reed also conceded there were

many situations in which a party to legal proceedings may be unable to present her case effectively: for example, because of the unavailability of evidence as a result of the death, illness or incapacity of a witness. If the problem is liable to be temporary, the court may stay or adjourn the proceedings until the disadvantage can be overcome. If the problem cannot be overcome, however, then the court will usually proceed with the case. The consequence is not that the disadvantaged party automatically wins her case: on the contrary, the consequence is liable to be that she loses her case, if the forensic disadvantage is sufficiently serious.<sup>51</sup>

This reasoning marks a distinct shift from recent cases in which UK courts have reviewed policies and practices on a holistic basis, under an overarching notion of systemic or structural unfairness.<sup>52</sup> The UK Supreme Court recently made clear that any freestanding principle of systemic unfairness was overly vague, so the appropriate guiding principle was one of lawfulness more generally.<sup>53</sup> While

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<sup>46</sup> *R (L) v West London Mental Health NHS Trust* [2014] 1 WLR 3101, 3125 [69].

<sup>47</sup> *Ibid.*

<sup>48</sup> *R (Begum) v Secretary of State for the Home Department* [2021] AC 765.

<sup>49</sup> *Ibid* 801 [90].

<sup>50</sup> *Ibid* 814 [135].

<sup>51</sup> *Ibid* 801 [90].

<sup>52</sup> See, eg, *R (Refugee Legal Centre) v Secretary of State for the Home Department* [2005] 1 WLR 2219, [10]; *R (Detention Action) v First-Tier Tribunal (Immigration and Asylum Chamber)* [2015] 1 WLR 5341, [45]; *R (BF (Eritrea)) v Secretary of State for the Home Department* [2020] 4 WLR 38, [63].

<sup>53</sup> *R (A) v Secretary of State for the Home Department* [2021] 1 WLR 3931.

constitutional differences may limit the extent to which much English administrative law doctrine can be usefully applied in Australia, the acceptance in *Begum* that some forensic problems simply cannot be overcome is instructive. *Begum* also aligns with the curbing of systemic unfairness by making clear that notions of fairness cannot somehow provide a vehicle that trumps all other issues.<sup>54</sup>

## IV The Pendulum of Fairness

Most recent cases about natural justice have focused on the narrow question of materiality. Whether a breach of fairness was material reflects the High Court's acceptance that legislation usually contains an implied requirement that a decision or exercise of power is not invalid if any legal error is not material.<sup>55</sup> That implication has generated significant commentary, not all of it favourable.<sup>56</sup> In *Nathanson v Minister for Home Affairs* ('*Nathanson*'),<sup>57</sup> Edelman J despaired that recent High Court decisions about materiality have 'eroded the bedrock of natural justice that is ordinarily implied in statute as a reflection of reasonable and widespread expectations'.<sup>58</sup> His Honour was especially concerned by the 'regrettable premise' in *MZAPC v Minister for Immigration and Border Protection* that the onus for proving materiality rested with those who challenged a decision.<sup>59</sup> Edelman J identified a practical solution, which was to accept that 'almost nothing' should be sufficient to satisfy that onus,<sup>60</sup> but his Honour's deeper concern about the practical effect materiality may have upon the operation of fairness bears upon the forthcoming case.

Edelman J acknowledged that materiality, like so many interpretive implications, reflects values widely accepted to underpin administrative law such as efficiency or 'good administration'. The connection is obvious. To overturn a decision for an immaterial error causes expense and delay, with little if any benefit to good government. His Honour cautioned that this instrumental focus saw 'weaker values' such as efficiency prevail over 'stronger values concerned with natural justice and respect for human dignity'.<sup>61</sup> This recourse to dignitarian values reflects another recent trend in natural justice cases: emphasising the innate benefit of

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<sup>54</sup> There is something of a loose parallel with the application of unreasonableness in Australian law in a way that allows that ground to require procedures effectively the same as might otherwise occur by use of the hearing rules: see, eg, *BVD17* (n 3) 44 [33]–[34] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ), 53 [61] (Edelman J).

<sup>55</sup> The decisive turn occurred in *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 122 ('*Hossain*').

<sup>56</sup> In *CCU21 v Minister for Home Affairs* (2023) 297 FCR 503, Perram, Halley and Goodman JJ lamented that the recent cases left the principles of materiality 'unclear': at 524 [86].

<sup>57</sup> *Nathanson v Minister for Home Affairs* (2022) 403 ALR 398 ('*Nathanson*').

<sup>58</sup> *Ibid* 424 [88], citing *BVD17* (n 3) and *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 400 ALR 417.

<sup>59</sup> *Nathanson* (n 57) 425 [93], citing *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506.

<sup>60</sup> *Nathanson* (n 57) 425 [93].

<sup>61</sup> *Ibid* 424 [89].

treating people affected by the exercise of official power in a respectful manner.<sup>62</sup> Edelman J has previously suggested that a greater focus on the philosophical foundations of fairness can help inform more practical questions about fairness, such as exclusion of the hearing rule, or how the institutional imperatives and individual interests should be balanced.<sup>63</sup> These questions transcend the interpretation of individual statutes, though we should not assume that fairness has an inherent virtue which has always prevailed.

Natural justice may be elemental and longstanding, but it has a chequered past. The doctrine lay almost dormant for a long period until its revival in Victorian England as part of the judicial toolbox the courts fashioned to respond to the industrial revolution and centralised bureaucratic government.<sup>64</sup> Another ‘setback’ occurred after World War II, when English and Australian courts adopted a more restrictive approach to natural justice.<sup>65</sup> The reversal of that trend by the landmark case of *Ridge v Baldwin*<sup>66</sup> signalled the birth of expansive procedural protections cast by the courts over the many decisions made by the welfare state in areas such as social security and migration.<sup>67</sup> If the cautions expressed by Edelman J are located within these historical ebbs and flows, the concern moves beyond an immediate one of the mechanics of materiality to the longer term danger that we may be at the cusp of another era in which the rigour of fairness is blunted. The ministerial powers at the centre of *Nathanson* have a common quality with the investigative powers exercised by IBAC: they are often referred to as exceptional but have become so common as to make this descriptor inapt. Extraordinary ministerial powers have proliferated in migration decision-making.<sup>68</sup> Anti-corruption agencies also wield exceptional powers, but these bodies have become so embedded in Australian government that those exceptional powers are perhaps becoming an accepted and unremarkable part of public law.

This trend is not limited to Australia. The use of closed hearings in the UK, which are a striking exception to the common law tradition of open justice, are a useful example. Those hearings allow for the exclusion of the public and sometimes an affected person. This controversial procedure has become well established in the

<sup>62</sup> See, eg, *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80, [2] (Allsop CJ); *R (Osborn) v Parole Board* [2014] AC 1115, 1149 [68] (Lord Reed); *Hossain* (n 55) 147–8 [72] (Edelman J, Nettle J agreeing).

<sup>63</sup> Justice James Edelman, ‘Why Do We Have Rules of Procedural Fairness?’ (2016) 23(3) *Australian Journal of Administrative Law* 144, 148–9.

<sup>64</sup> Key cases of the Victorian era were *Cooper v Wandsworth Board of Works* (1863) 14 CB NS 180; 143 ER 414 and *Dimes v Grand Junction Canal Proprietors* (1852) 3 HL Cas 759; 10 ER 301.

<sup>65</sup> CF Forsyth and IJ Ghosh, *Wade & Forsyth’s Administrative Law* (Oxford University Press, 12<sup>th</sup> ed, 2023) 359.

<sup>66</sup> *Ridge v Baldwin* [1964] AC 40.

<sup>67</sup> A change foreshadowed by the influential article Charles Reich, ‘The New Property’ (1964) 73(5) *Yale Law Journal* 733.

<sup>68</sup> An example is the discretionary powers enabling migration officials to vary or bypass legislative restrictions, which are typically expressed as non-compellable and exempt from the requirements of fairness: Emily Hammond, ‘Procedural Fairness in Application Cases: Is Compellability of Consideration a Critical Safeguard?’ (2016) 25(2) *Australian Journal of Administrative Law* 122.

UK legal system, though one study<sup>69</sup> argued that the very institutional acceptance distracted attention from the unprincipled approach taken to the role of fairness in closed hearings. The immediate problem was that the courts often failed to provide coherent principles for closed hearings. The deeper problem was that a clearly unfair procedure had become ‘normalised’, in part because of an unwitting lack of attention to the impact of the procedure on the foundational principles of fairness.<sup>70</sup> An arguably similar danger arises if the extraordinary powers of bodies such as IBAC are considered as isolated interpretive questions, rather than indicative of the increasingly unequal nature of many administrative regimes. Some courts have conceived this as an ‘inequality of arms’.<sup>71</sup> The knowledge and resources of public agencies and decision-makers are so vastly superior to those of most people over whom official power is exercised that many, perhaps even most, instances in which people seek to challenge official decisions cannot comprise a level playing field. Whether and how public law may deal with that inequality is unclear.<sup>72</sup> The forensic disadvantage caused by disparity in expertise and resources is different to the disadvantage caused by the restrictions of anti-corruption and other novel bodies such as IBAC, but the consequences are strikingly similar. The disadvantages that exist in the processes of bodies such as IBAC differ in that they are the deliberate creation of parliaments. If the courts seek to wind back the extent of the procedural disadvantages within these regimes, the basis upon which they do so must be clearly identified. The normal principles of the implication rule, to imply further procedures in the guise of the justice of the common law,<sup>73</sup> cannot be invoked uncritically to regimes so abnormal such as the *IBAC Act*.

The extent to which we can glean guidance from the High Court’s examination of similar issues in different decision-making environments is unclear. An arguably similar regime was examined in *SDCV v Director-General of Security* (‘*SDCV*’).<sup>74</sup> The central question was whether a legislative restriction imposed on the disclosure of information in an appeal heard by the Federal Court about a case heard in the security division of the Administrative Appeals Tribunal contravened ch III of the *Constitution*. The restriction prevented a court from disclosing

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<sup>69</sup> Eva Nanopoulos, ‘Human Rights and the Normalisation of the “Closed Material Procedure”: Limit or Source?’ (2015) 78(6) *Modern Law Review* 913.

<sup>70</sup> Ibid. A recent analysis of closed hearings in UK courts argued that their ongoing use will continue to encounter more difficulties from human rights principles and should be supplemented with a scheme enabling compensation in cases where full disclosure and a fair hearing are not possible: Maxwell Davie, ‘Striking at Shadows: Disclosure in the Closed Material Procedure’ (2023) 42(4) *Civil Justice Quarterly* 364.

<sup>71</sup> *MZAIB v Minister for Immigration and Border Protection* (2015) 238 FCR 158, 186 [124] (Mortimer J) (‘*MZAIB*’); *DOB18 v Ng* [2019] FCA 1575, [46] (Stewart J); *CMC18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1358, [42] (Mortimer J).

<sup>72</sup> Mortimer J suggested the requirements of ch III of the *Australian Constitution* might provide an organising principle: *MZAIB* (n 71) 186 [124]. See also Matthew Groves, ‘Equality of Arms in Administrative Review’ (2023) 46(3) *Melbourne University Law Review* (forthcoming).

<sup>73</sup> The so-called implication rule is a common law interpretive rule that enables aspects of the hearing rule to be implied as procedural requirements where there otherwise appears a legislative gap to this effect. This approach assumes that legislatures are aware of this presumption, so its application enables the true legislative intention about the hearing rule to be ascertained: *Saeed* (n 3) 258–9 [12].

<sup>74</sup> *SDCV v Director-General of Security* (2022) 405 ALR 209 (‘*SDCV*’).



information to anyone other than the judges comprising an appellate court.<sup>75</sup> A narrow majority of the High Court held the provision was constitutionally valid, mainly because other less restrictive avenues of review remained available.<sup>76</sup> *SDCV* could be distinguished on the basis that it involved restrictions in judicial proceedings, which occupy a more clearly constitutional position than administrative inquiries such as a hearing by IBAC.<sup>77</sup> The strong dissent of Gordon J emphasised the ‘rigidity’ of the prohibition preventing any disclosure of the restricted information beyond members of the relevant court.<sup>78</sup> IBAC is granted some level of discretion to adjust the level of disclosure of information to affected people,<sup>79</sup> which shifts focus to a key finding of the majority in *SDCV*. Kiefel CJ and Keane and Gleeson JJ rejected suggestions that there was some sort of ‘constitutional imperative that the balance of competing public interests in litigation must always be left to be struck on a case-by-case basis by a court’.<sup>80</sup> If IBAC is not subject to the rigidity that troubled Gordon J, the difficult question which may then fall into sharp focus in the forthcoming case is the extent to which the High Court may be prepared to enable IBAC to strike the balance of competing interests to determine the appropriate level of disclosure.

## V Conclusion

If the adoption of materiality is seen as another instance of the fading rigours of fairness, the concerns expressed by Edelman J arguably extend beyond the detail and difficulties of materiality to a deeper concern: of an unwitting judicial acquiescence in a new period of slumber for natural justice. Interpretations of legislative restrictions on elements of the hearing rule pose a similar danger. It is one thing to accept that anti-corruption agencies are an important part of effective government. It is a very different thing to accept that those bodies can only operate effectively if their governing legislation empowers them to curb the most elementary parts of the hearing rule. The difficult question for the courts is how they may strike the balance between the competing interests of an investigative agency such as IBAC and the people who are affected by its investigations. Balancing those interests is what can be called the Goldilocks aspect of fairness — if the balance reflects too much of one concern or too little of another, it will be unpalatable to many. Striking the right balance is an intuitive exercise that is not easy to express in anything other than

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<sup>75</sup> *Administrative Appeals Tribunal Act 1975* (Cth) s 46(2), which provides that material must not be disclosed if certification has been issued under certain other statutes to declare that release of the material is contrary to the public interest.

<sup>76</sup> This finding is strongly criticised in John Lidbetter, ‘Rationalising National Security, Closed Hearings and Procedural Fairness: *SDCV v Director-General of Security* [2022] HCA 32’ (2023) 42(3) *Civil Justice Quarterly* 213.

<sup>77</sup> See, eg, *SDCV* (n 74) 252–3 [174] where Gageler J acknowledged that ‘no court in Australia can be required by statute to adopt an unfair procedure’, citing *Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 110 [194]. The constitutional principles that compel this conclusion for courts cannot be automatically transposed to administrative bodies such as IBAC.

<sup>78</sup> *SDCV* (n 74) 247 [152]–[153].

<sup>79</sup> See, eg, the text accompanying n 14 above.

<sup>80</sup> *SDCV* (n 74) 232 [85].

general terms. The principles governing disclosure of adverse material are no different to any other part of the hearing rule. Rules expressed in highly prescriptive terms can be counterproductive because they invite decision-makers to approach the requirements of fairness as an exercise in compliance with those rules, which distracts attention from the facts of the case at hand. At the same time, however, those decision-makers need a level of guidance that goes beyond the judicial settlement of individual cases or statutes.

# Review Essay

## Sorting Sources

*Common Law, Equity and Statute: A Complex Entangled System* by Mark Leeming (2023)  
Federation Press, 352 pp, ISBN 9781760024574

**Robert Stevens\***

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### *Abstract*

Using Judge of Appeal Mark Leeming's fascinating work on sources of law as a springboard, this review essay makes three sweeping claims about the different sources of law in Australia that that work analyses. First, that judge-made law without statutory foundation, our law in common, has a different nature that may justify its continuing existence in uncodified form. Second, that equitable rules have a different formal structure that explains why they often differ from those at common law. Third, that although a common law of Australia is possible, it is still too soon to say whether that has been achieved.

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\* Professor of English Private Law, University of Oxford, Oxford, United Kingdom.  
Email: [robert.stevens@law.ox.ac.uk](mailto:robert.stevens@law.ox.ac.uk).

## I Introduction

Even at this distance, under the dull, drizzly skies of Oxford, it is easy to admire the judgments given by Judge of Appeal Mark Leeming in the warm, bright sunshine of Sydney. A personal favourite, amongst dozens that could be selected, is *Mainteck Services v Stein Heurtey SA*<sup>1</sup> on contractual interpretation, the critics of which seemingly not having grasped when they have decisively lost an argument. Not content with his day job, however, he produces high-quality academic legal texts, of which this is the latest. The work<sup>2</sup> has the hallmarks of having grown from the more than 20 years of teaching the author has undertaken at the University of Sydney Law School.

This is a work on sources of law, their differences and interaction. It is written, inevitably, from the perspective of an Australian judge: how are these different legal sources to be used in reaching a result? It seeks to defend the historical importance of the separation of ‘equity’ and the ‘common law’ (chapter 2), explain the impact of the judicature legislation (chapters 5 and 6) and defend equity’s distinctiveness from the dark forces of fusionism (chapter 7). A variety of different forms of statute are distinguished (chapter 3) and how statute law is entangled with judge-made law so as to form a patchwork explained (chapter 4). Finally, the distinctive features of judge-made law in the Australian context are considered (chapters 9 and 10) and the proposition that there is ‘but one common law of Australia’ defended (chapter 8). Primarily, the examples come from commercial or private law, unsurprisingly given the author’s expertise, but public and criminal law also feature.<sup>3</sup>

Although an ‘advocacy checklist’ for counsel in making use of the different forms of judge-made and statutory law is presented,<sup>4</sup> this book is best understood as a guide for other judges. The perspective is that of resolving disputes, so that we are told that many statutes ‘do not greatly matter because they are almost never litigated’,<sup>5</sup> when of course they may matter a great deal in the real world in guiding how people behave.

Books and articles produced by judges often display a caution that writers who draw their pay solely from universities do not always adopt. Grand claims are not the mode in which the stronger members of the judiciary operate, and without skilful handling this can lead to dull, crabbed writing. Here, however, the book clips along, if not quite with the excitement of a fast-paced novel, then at least with a great deal more than that of the standard textbook. We are told that the ‘book is designed to be read’,<sup>6</sup> and some chapters are quirkily interspersed with modern-day dialogues between a teacher and two students, clearly intended to be a contemporary recreation

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<sup>1</sup> *Mainteck Services Pty Ltd v Stein Heurtey SA* (2014) 89 NSWLR 633.

<sup>2</sup> Mark Leeming, *Common Law, Equity and Statute: A Complex Entangled System* (Federation Press, 2023).

<sup>3</sup> See, eg, *ibid* 84.

<sup>4</sup> *Ibid* x–xi.

<sup>5</sup> *Ibid* 57.

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

of St Germain's *Doctor and Student* dialogues. (The students are, alas, too able and quick to be plausible, but then Socrates' interlocutors were probably considerably duller than Plato portrayed them.)

I have the freedom of being neither a judge nor an Australian, and so here are three incautious, unqualified reflections stimulated by this work.

## II What Makes the Common Law Different from Statutory Law?

It is not only false that judges simply declare the positive law to be what it always was, a conception famously described as a fairy tale by Lord Reid;<sup>7</sup> it is rather that the judiciary cannot stop themselves from making law, even when they try. Leeming JA, although agreeing with Reid, claims there is much less lawmaking going on by judges than is often supposed,<sup>8</sup> but that may be too modest.

Common law systems operate on the basis of *stare decisis*. Whenever a case is decided, the reasons given for the result will have weight in deciding future cases. The reasons given by appellate courts for the result in a case bind future judges in like cases. It is very rare to find an appellate court decision that simply says: 'The facts are X, the applicable rule is Y, the result is Z.' Rules will begin to form whenever reasons are given, however much the judges may disclaim any intention to create them. Over time, what crystallises is a body of law with a granularity that would be impossible for a legislature alone to create.

What then could a jurist as fine as Blackstone or a judge as great as Sir George Jessel have meant when they appeared to endorse some variety of the 'declaratory' theory of law, if it is such pure hokum?

There are many reasons why we should, in principle, prefer our posited law to be set down in legislation. Today, legislation has a democratic legitimacy that judge-made law does not. Outside of cases construing modern legislation, our foundational judge-made rules were originally set down by unelected white men of the distant past who had different attitudes in many respects from most of us today. In common law jurisdictions outside of England, those long-dead men are now foreigners.

The common law is also inaccessible to non-lawyers. It is ridiculous that someone who wishes to know, say, what the rules on causation in the English law of torts are, or when a duty to take care not to inflict 'pure' economic loss will be owed in Australia, is required to read dozens of decisions of enormous length by judges saying mutually inconsistent things that somehow must be reconciled. How can such 'law' be used as a guiding rule for conduct? By contrast, Google gives me access to all of the legislation in Australia, the United Kingdom and elsewhere in an instant.

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<sup>7</sup> Lord Reid, 'The Judge as Law Maker' (1972–73) 12 *Journal of the Society of Public Teachers of the Law* 22, 22, cited in Leeming (n 2) 182.

<sup>8</sup> Leeming (n 2) 24.

Any judge-made rule can, in principle, be overturned, with retrospective effect, by our ultimate appellate courts. This means it is inherently uncertain, as is illustrated by the recent, radical attempt of the Supreme Court of the United Kingdom ('UK') to re-write the entire UK law on illegality in private law, creating a rule that differs not only from the past, but also from the law that prevails in every other common law system in the world. Bentham, not someone for whom I usually have much time, was correct to think that there is a significant rule of law problem with judge-made law that legislation does not possess. If judge-made law is only different from statutory law by virtue of its source, we should seek to replace it as soon as possible.

However, it is at least plausible that the common law, our judge-made law freestanding of the legislature, is not only a different source but a different sort of law.

At one point in the past, the judges were appointed by a sovereign to do justice. If we go back far enough, they were presented with a blank page. What kind of rules will be created in that situation?

One view is that the judges were, and are, mini-legislators, able to take into account the full range of considerations as to how society ought to be organised. What kind of competition is efficient? Should we encourage innovation through patent law, or will that just put up prices? What is the optimal speed limit in an urban area? And so on. The judg(e)ments of long-dead Englishmen of the 17<sup>th</sup> century are unlikely to be trustworthy in modern Australia for determining what is best for society now. Those judges were untrained in economics, did not have the advantage of Brandeis briefs, and were operating in an entirely different context.

If the common law still has legitimacy, it is because it is not and was not created in this way. The rights that the judges recognised at common law were necessarily minimalist, or basic, because they were judge created. That basic set, required so that we are able to lead lives that are not subject to the choices of others, is relatively small. Others must not interfere with our bodies, burn down our crops, tell us lies we believe, damage the reputations we need in order to interact with our communities, enter our homes without permission, break the promises they make in our agreements.

The role of the judges, for centuries, has been to give *determinatio* to this basic set in cases of uncertainty (eg, Who has title to the house? What counts as an agreement?) Of course, the judges made and make law; that is central to their role; but the foundations upon which they are building the common law were, and are, not made by anyone but exist independently of the positive law in any particular time and place. It is in this sense that the declaratory account is not simply a lie.

It is also for this reason, and not just tradition, that modern legal education places such priority on the understanding of the common law of contract, torts and property. This can have a distorting effect, as Leeming JA shows, by both creating the misleading impression that, in modern litigation, legislation is less important than it is, and failing to train in its use.

It is no accident, however, that — in private law — intellectual property rights, company law, limitation rules, consumer and employment protections and the Torrens system are the creation of legislation. More generally, the modern regulatory states in which we live were not, in the main, the creation of the judges but of legislatures. This does not mean that the legislature cannot reshape the common law rules, as the diverse civil liability statutes did across Australia 20 years ago. It does, however, mean that great care needs to be taken in determining the interaction between our (statutory) regulatory rules and the common law. The two are not oil and water, but the principal difference is not simply one of pedigree within the legal order.

### III What Distinguishes the Common Law from Equity?

Perhaps unsurprisingly, given our different backgrounds, it is in relation to the distinctiveness of the body of rules that is the product of the Court of Chancery that my strongest disagreement with this work occurs. Mark Leeming is an editor of the equity bible, *Meagher, Gummow & Lehane*,<sup>9</sup> whereas I learned my law at the feet of the archetypal fusionists Peter Birks and Andrew Burrows.<sup>10</sup>

‘Why is it then sensible in the 21<sup>st</sup> century still to divide judge-made law between common law and equity?’<sup>11</sup> Four answers are given. The first is an appeal to the history of the legal system, and the considerable transaction costs there would be in smoothing out the anomalies created by having two independent sources. Second, equity, unlike the common law, was supplemental to other rules, including statutory rules. Third, the separate body of equitable rules has been recognised by legislation, most obviously the Judicature Acts. Fourth, equity relies upon principles as opposed to rules, has a distinctive approach to the evaluation of all the facts, and in the field of court orders allows for more discretion, relief on terms, and a range of different forms of remedies.

Of these four answers, the first and the third will never satisfy the fusionist. Of course, our law as it is can only be understood in terms of its history. Their claim is that we should not be its prisoners. Where there are differences, these should be eliminated, unless justifiable, because ‘like cases should be treated alike’. This may not be achievable in one big bang reform, but the fusionist case is that the judges and legislature should, over time, eliminate the differences and create a unified system.

As to the fourth, it is true that equity seems to be more reliant upon homely maxims than is the common law, but this is not altogether to its credit. Those maxims need considerable unpacking if they are to make sense. So, we are told that ‘equity will not assist a volunteer’, but if I declare myself a trustee of my title to land in your

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<sup>9</sup> JD Heydon, Justice MJ Leeming and PG Turner, *Meagher, Gummow & Lehane’s Equity: Doctrines & Remedies* (LexisNexis, 5<sup>th</sup> ed, 2014).

<sup>10</sup> Their most important fusionist works are Peter Birks, ‘Equity in the Modern Law: An Exercise in Taxonomy’ (1996) 26 (July) *University of Western Australia Law Review* 1; Andrew Burrows, ‘We Do This at Common Law but That in Equity’ (2002) 22(1) *Oxford Journal of Legal Studies* 1.

<sup>11</sup> Leeming (n 2) 181.

favour, you are a volunteer, but equity will assist you when the common law would not. We all also know that ‘equity looks on as done that which ought to have been done’. But why? Without more, that seems a very odd fiction to adopt as a general principle.

Further, it is simply untrue to claim that equity is distinguished by the application of principles instead of rules. As the Court of Chancery and its successors operated on the basis of *stare decisis*, it would be impossible, over time, for that to be so. As students of the law of trusts quickly learn, that field employs rules as sharp and bright as any that the common law possesses. Conversely, the common law is no enemy of general principles, and at many points employs the black box of reasonableness rather than any fixed rule.

The second answer, and the part of the fourth concerning court orders, are much more promising lines of defence against the fusionist, at least in demarcating some areas of equity as conceptually distinct.<sup>12</sup> We are rightly told:

Equity never regarded itself as a self-sufficient system. Instead, an important premise of equity was that there were other rules which called for softening, or adjustment, or supplementation.<sup>13</sup>

But not, notice, contradiction or overturning. As Maitland said:

It’s of no use for Equity to say that A is the trustee of [title to] Blackacre for B, unless there be some court that can say that A is the owner of Blackacre. Equity without common law would have been a castle in the air, an impossibility.<sup>14</sup>

A nice illustration of equity’s second-order role is the law of assignment of debts.<sup>15</sup> Why did the common law not permit the assignment of contractual debts? The straightforward explanation is that assignees of contractual debts do not satisfy the conditions for acquiring a contractual right against the promisor. The promisor has not promised the assignee anything, is not party to any agreement with them, and the assignee provided the promisor with no consideration. We do not generally have standing to enforce the rights of other people, and so any assignment was wholly ineffectual at common law.<sup>16</sup>

*Statutory* assignment proceeds by creating a blunt exception to this rule.<sup>17</sup> Equitable assignment of a contractual right, despite its name and by contrast, did not involve the transfer of the contractual right, but rather the creation of a *new* right in the ‘assignee’, the subject matter of which was the assignor’s contractual right against the promisor. It is a close cousin of the trust. It involves no contradiction of,

<sup>12</sup> Cf Lionel Smith, ‘Equity Is Not a Single Thing’ in Dennis Klimchuck, Irit Samet and Henry E Smith (eds), *Philosophical Foundations of the Law of Equity* (Oxford University Press, 2020) 145.

<sup>13</sup> Leeming (n 2) 189. See also Chief Justice James Allsop, ‘The Intersection of Companies and Trusts’ (2020) 43(3) *Melbourne University Law Review* 1128, 1135.

<sup>14</sup> FW Maitland, *Equity and The Forms of Action at Common Law: Two Courses of Lectures* ed AH Chaytor and WJ Whittaker (Cambridge University Press, 1910) 19.

<sup>15</sup> Cf Leeming (n 2) 39 for a different account.

<sup>16</sup> Even the hard-hearted common law allowed for exceptions where the purpose was to create a transferable right, such as bills of exchange.

<sup>17</sup> *Judicature Act 1873* (UK) s 25(6), now *Conveyancing Act 1919* (NSW) s 12 and *Law of Property Act 1925* (UK) s 136.



or even any exception to, the common law rule on the (non-)transferability of contractual rights.

The different rules applicable to equitable and statutory assignment are then explicable because the latter involves a transfer whilst the former involves the creation of a new right in relation to another right. Statutory assignment (as a transfer) requires formality to be used (signed writing); equitable assignment does not. Statutory assignment requires notice to be given to the debtor as it involves a change in the party to whom the debtor owes their obligation; equitable assignment does not. Statutory assignment, because a transfer, cannot be used to assign debts not yet in existence; equitable assignment has no such restriction. Statutory assignment does not permit the debt to be partially assigned (if it did, the debtor could be prejudiced by having multiple different creditors instead of one); equitable assignment has no such restriction because it involves no change in the identity of the creditor. If an equitable assignee wishes to enforce the underlying debt, the assignor must be a party to the action, because the assignor is still the creditor and there are in fact two actions (assignee v assignor; assignor/creditor v debtor) not one. Statutory assignment requires no joinder, because it is a transfer. Equitable assignment requires consideration to have been provided by the assignee because the assignor must be both obliged and compellable to hold the right for them. Statutory assignment, as a transfer, has no such condition.

Commercially, equitable assignment has many of the desired effects of a transfer (most importantly, protection against the assignor's bankruptcy) but this should not blind us to its different legal form. Seeking to defend equity's distinctiveness based upon its history downplays how *clever* it is. The crude fusionist, by contrast, cannot account for why the rules for the different forms of assignment are so different, nor explain why equity is not simply contradicting the common law rules on the acquisition of contractual rights.

This then makes sense of Sir George Jessel's remark:

[I]t must not be forgotten that the rules of Courts of Equity are not, like the rules of the Common law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time — altered, improved, and refined from time to time. In many cases we know the names of the Chancellors who invented them.<sup>18</sup>

The equitable rules are supplemental to, or parasitic upon, the common law. They are not themselves part of our basic set of entitlements against one another.

As Leeming JA argues, this 'supplementary' approach then led to a distinctive attitude to the interaction with statute. A startling example, only made less so by familiarity, is the doctrine of part performance. Section 4 of the *Statute of Frauds* stated that 'noe action shall be brought' on a contract for the sale of an interest in land unless there is a written memorandum and signature.<sup>19</sup> In apparent contradiction of these words, equity would permit enforcement of such an agreement in the absence of writing where one party had done certain acts by way of part

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<sup>18</sup> *Re Hallett's Estate; Knatchbull v Hallett* (1880) 13 Ch D 696, 710.

<sup>19</sup> 29 Car 2, c 3 (1677).

performance. In England, the doctrine of part performance was (foolishly) abolished by the *Law of Property (Miscellaneous Provisions) Act 1989* (UK). In effect, however, it has now been reintroduced by equity under the peculiar label of ‘proprietary estoppel’ (*sic*), which does not concern estopping the assertion of anything.<sup>20</sup> Humble common lawyers may be perplexed by such boldness.

The second major difference between the common law and equity is apt to be lost sight of if our perspective is that of a judge. Judges are inevitably prone to overestimate their importance in a system of law. The most extreme example of this was Holmes’ claim that the ‘prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law’.<sup>21</sup> If, however, we closed all the courts, most of what we mean by law would still be in operation. The law would still tell us which side of the road to drive on, to stop at red lights, to keep our contracts, and not to trespass on one another’s land. Within our legal system as it is, contractual obligations that are unenforceable or tortious obligations to pay damages after the expiry of the applicable limitation period are not a nullity and continue to have important legal effects.

Equity appears different. It is meaningless to speak of an ‘unenforceable’ trust or to conceive of rectification or rescission in equity or equitable relief against forfeiture as operating outside of the courtroom. Equity is a subset of our law of court orders, and unlike our common law rules would not survive if civil recourse were abolished.

When orders are made by judges, a much wider range of considerations can be brought into play than is true for rules that are expected to operate outside of a courtroom. An illustration is the contrast between common law and equitable rescission of a contract. At common law, rescission is relatively restricted, roughly confined to cases of duress and fraud, and easily lost: if it is not possible to return what was received, rescission is barred. By contrast, rescission in equity is much broader, including for example rescission for undue influence and innocent misrepresentation, and more robust: if what was received cannot precisely be returned, a monetary allowance is possible. One of the reasons for these differences is that the equitable rules are expected to be applied by a judge, who can determine terms that may be impossible to set down as bright line rules in advance.

Because of the wide range of considerations that can, and should, be taken into account in determining a court order — when compared with determining the rights of the parties *inter se* before they enter the court — equity can often, but not always, appear more ‘discretionary’ than the common law. This is not, however, simply a matter of the history of the two areas, but rather of to whom the rules are addressed.

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<sup>20</sup> *Guest v Guest* [2022] 3 WLR 911.

<sup>21</sup> Oliver Wendell Holmes Jr, ‘The Path of the Law’ (1897) 10(8) *Harvard Law Review* 457, 361.

## IV Is an 'Australian Common Law' Possible?

An English (but not British) common law is possible because of a unified court structure. Although the UK Supreme Court sometimes (pointlessly) sits in England outside of London, including in Manchester,<sup>22</sup> legally this is of no significance. There is but one tier at each stage in the legal system, and the rules of precedent entail one common law rule (where there is a rule at all).

The Commonwealth of Australia, by contrast, is made up of six states, and two self-governing territories. Decisions by the intermediate appellate courts of those states and territories are binding upon the lower courts of those states and territories. What if intermediate appellate courts reach inconsistent decisions? In time, this conflict may be subsequently resolved by an appeal to the High Court, binding on all courts below, but what is the position in Australia in the interim?

Leeming JA describes the position as follows:

[T]here is on this point a uniform rule throughout Australia although, like Schrödinger's cat, one cannot presently say what that rule is right now ...<sup>23</sup>

This is unpersuasive. As a matter of the positive law there are different rules in these jurisdictions, and no Australian rule at all unless and until the High Court (or possibly the federal Parliament) resolves the issue, and so no common law of Australia.

What if an intermediate appellate court in a state decides an issue that has not yet been authoritatively resolved by the High Court or other intermediate appellate courts? Is that the 'common law of Australia' or is its effect limited to the state in which it is decided? This depends upon whether courts outside of that state are bound by that decision or not. What are the rules of precedent in this regard?

Here there is an interesting parallel between the judicial rebellion of Lord Denning MR in England in the 1970s, and the attempt by the High Court of Australia in *Farah Constructions v Say-Dee*<sup>24</sup> to impose discipline upon intermediate appellate courts.

At one time, the judicial House of Lords was bound by its own decisions. Even where a decision was plainly wrong, only legislative intervention could overturn it. This position was reversed by the Practice Statement 1966 (which the UK Supreme Court adopts).<sup>25</sup> In the Court of Appeal, however, the rule has long been that (subject to exceptions) that Court must follow its own decisions.<sup>26</sup> The justification for the difference is that if the Court of Appeal gets it wrong, there is still another tier of appeal left to correct any mistake.

<sup>22</sup> 'UK Supreme Court Sits in Manchester for First Time', *BBC News* (online, 6 March 2023) <<https://www.bbc.co.uk/news/uk-england-manchester-64833684>>.

<sup>23</sup> Leeming (n 2) 232.

<sup>24</sup> *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 ('*Farah Constructions v Say-Dee*').

<sup>25</sup> Practice Statement (Judicial Precedent) [1966] 1 WLR 1234.

<sup>26</sup> *Young v Bristol Aeroplane Co Ltd* [1944] KB 718.

Lord Denning, the most significant member of the Court of Appeal almost from the day of his appointment in 1948 until his retirement in 1982 (with an interregnum in the House of Lords from 1957 to 1962) always opposed this rule. From there he led what Lord Diplock described as a ‘one man crusade’<sup>27</sup> to try to overturn it. This culminated in *Davis v Johnson* where, sitting in the House of Lords, Lord Diplock stated that that Court should ‘expressly, unequivocally and unanimously’<sup>28</sup> affirm that the Court of Appeal was bound by its own decisions.

But what is the legal effect of such a statement? It is necessarily *obiter dicta*. The rules of precedent applicable in the Court of Appeal can never form a sufficient reason for the disposition of a case before the ultimate appellate court, because that court is not bound by decisions of the Court of Appeal. Before the ultimate appellate court, the only rules of precedent that can be relevant to the disposition of the case before it, and on which it can effectively rule as part of the *ratio* of its decision, are the rules binding on it.

Lord Salmon expressed himself in rather different terms from Lord Diplock:

In the nature of things however, the point [of precedent] could never come before your Lordships’ House for decision or form part of its *ratio decidendi*. This House decides every case that comes before it according to the law. If, as in the instant case, the Court of Appeal decides an appeal contrary to one of its previous decisions, this House, much as it may deprecate the Court of Appeal’s departure from the rule, will nevertheless dismiss the appeal if it comes to the conclusion that the decision appealed against was right in law.

... I would also point out that [the Practice Statement 1966] was made with the unanimous approval of all the Law Lords: and that, by contrast, the overwhelming majority of the present Lords Justices have expressed the view that the principle of *stare decisis* still prevails and should continue to prevail in the Court of Appeal. I do not understand how, in these circumstances, it is even arguable that it does not.<sup>29</sup>

Lord Salmon’s point is that the rules of precedent for the Court of Appeal were (and are) necessarily a matter for that Court; as Lord Denning was in a minority of one in that tier in his view of the matter, the Court of Appeal remained bound by its own decisions.<sup>30</sup>

Thirty years later, in *Farah Constructions v Say-Dee*, the High Court of Australia criticised the New South Wales Court of Appeal in the following terms:

Intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation unless they are convinced that the interpretation is plainly wrong. Since there

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<sup>27</sup> *Davis v Johnson* [1979] AC 264, 328.

<sup>28</sup> *Ibid* 328.

<sup>29</sup> *Ibid* 344.

<sup>30</sup> Cf *Willers v Joyce [No 2]* [2018] AC 843 on whether the Court of Appeal should follow decisions of the Privy Council. This is the only decision I am aware of that is entirely *obiter dicta*.

is a common law of Australia rather than of each Australian jurisdiction, the same principle applies in relation to non-statutory law.<sup>31</sup>

Again, this is necessarily *obiter dicta* and could not sensibly have formed part of the argument before the High Court. This statement does not therefore sit comfortably with the High Court's criticism of the Court of Appeal for reaching its decision on a basis never argued.<sup>32</sup> If lower courts are bound by 'seriously considered dicta'<sup>33</sup> of a majority of the High Court, as that Court also suggested (in *obiter dicta*), then the High Court could potentially alter the rules of precedent for lower courts in this way. However, in order for a statement to count as 'seriously considered', it must at a minimum have been subject to argument by counsel, in the end proving unnecessary for the result reached, rather than a statement expressing a view that has not been subject to any such scrutiny. It is, again, of the nature of things that it is unnecessary for the outcome of a case before the High Court what the rules of precedent for other courts may be, and so they will not be subject to such argument.

Therefore, whether we have a 'common law of Australia' is not for the High Court to determine, as it is not a matter on which the Court can authoritatively rule. Rather, it is a matter for the various intermediate appellate courts to decide — in New South Wales, for Leeming JA and his colleagues.

A more rebellious New South Wales Court of Appeal, composed of Australian Dennings, might have responded to the High Court's decision in *Farah Constructions v Say-Dee* in the following way:

Thank you for your interesting *obiter* statements on our rules of precedent. If we accept them in their entirety, we are bound by the decisions of intermediate appellate courts of other jurisdictions. *A fortiori* we are bound by our own decisions. Our previous decision in *Say-Dee v Farah Constructions* depended upon our being free to depart from other intermediate appellate courts. That decision on our rules of precedent, unlike your statement, was necessarily part of the *ratio* of that case. Which we accept we are bound by. Therefore, we are henceforth free to depart from the decisions of intermediate appellate courts of other jurisdictions.

No court with Leeming JA as a member will ever say anything so injudicious. But it would be great fun if they did.

<sup>31</sup> *Farah Constructions v Say-Dee* (n 24) 151–2 [135], citing *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 492 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ) (this too was *obiter dicta*).

<sup>32</sup> *Farah Constructions v Say-Dee* (n 24) 149 [132].

<sup>33</sup> *Ibid* 151 [134]. It is surprising to learn that some *dicta* are not seriously considered.



# Book Review

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**Mark Leeming\***

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This is a very unusual book. It is 420 pages of argument, beautifully and clearly laid out on the page, and beautifully and clearly advocated in its text. The footnotes (nearly 1,900 in all) carry none of the argument, and for the most part simply supply citations, letting the text flow without interruption. The book is probably best read two or three chapters at a time, carefully — and the reader who does so will hear Stevens' voice, mostly forceful, at times impassioned, seldom apologetic, and never uncertain. Reading it took me back to the course taught on Friday afternoons by the author and Professors McFarlane and Swadling, which I was fortunate to audit in Michaelmas Term 2022. I learned much from the free-flowing exchanges between the three academics and a large class of very bright BCL and doctoral students, which constantly shifted between analysis of the case, the often divergent approaches of each presenter, and how each differed from the views of Professors Birks and Burrows. 'Peter Birks would have none of this' or 'Andy Burrows would say this' were frequent refrains, and most often it would be Stevens presenting those men's positions, and attempting to do so in their voices (and accents). All three had mastered the difficult craft of keeping the students' minds alert and engaged. It was

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\* Judge of Appeal, Supreme Court of New South Wales; Challis Lecturer in Equity, The University of Sydney Law School, New South Wales, Australia.

immensely stimulating for me, perhaps even more so than for the students, for I was not required to read the materials or to sit an examination.

The book is, in large measure, a polemic. I mean that in the best possible way. The main argument is that those seeking to unify the ‘law’ of restitution or unjust enrichment have made a great mistake. Instead of unity, there is a miscellany of classes of case, each with its own rules. The title’s plural encapsulates its central thesis.

There is no disguising the book’s ambition. The first page of the first chapter proclaims:

The negative purpose of this work is to ensure that no further books on this topic are written.

... [I]t seeks to show that there is no unified area of law called ‘restitution’ or ‘unjust enrichment’. There are instead (depending upon how you count them) seven or eight different kinds of private law claim, none of which has anything important in common one with another, that have been grouped together by commentators. Few of them have anything very much to do with ‘enrichment’ as that word is used in everyday speech, and what is restituted differs between them.<sup>1</sup>

Having identified its negative purpose, the book explains that ‘[t]he positive purpose of this work is to identify and describe the various reasons for “restitution” that any properly constructed system of private law ought to recognise’.<sup>2</sup> That overlaps with its negative purpose, but confirms an intention, borne out in the ensuing chapters, that in the course of criticising the conventional approach, the principles and themes underlying this area of the law are to be illuminated.

The book’s main purpose is not to present the material, but to attack what has become, at least in England, the dominant academic paradigm, which was created by the very men who both taught, and later taught with, the author. The statement of the book’s negative purpose on page 1 is fittingly preceded by gracious acknowledgements to Birks and Burrows. It must be said that none of this comes as a great surprise, and was foreshadowed by the author’s ‘The Unjust Enrichment Disaster’,<sup>3</sup> an article cited in five decisions of the High Court and Court of Appeal of England and Wales and influential in many more. Building upon the exclusion of gains by wrongdoing from coverage in Birks’ *Unjust Enrichment*<sup>4</sup> and *Goff & Jones on Unjust Enrichment*,<sup>5</sup> Stevens there contended that there remained ‘still four or five different jigsaw puzzles in one box’.<sup>6</sup> This work is the book-length treatment of that idea.

The book’s structure, as well as something of its punchy style, may be seen in its table of contents. Each of the 20 chapters bears a single word title: ‘Summary’,

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<sup>1</sup> Robert Stevens, *The Laws of Restitution* (Oxford University Press, 2023) 3.

<sup>2</sup> Ibid.

<sup>3</sup> Robert Stevens, ‘The Unjust Enrichment Disaster’ (2018) 134 *Law Quarterly Review* 574.

<sup>4</sup> Peter Birks, *Unjust Enrichment* (Oxford University Press, 2<sup>nd</sup> ed, 2005).

<sup>5</sup> Charles Mitchell, Paul Mitchell and Stephen Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 9<sup>th</sup> ed, 2016).

<sup>6</sup> Stevens (n 3) 574.



'Foundations', 'Performance', 'Reversal', 'Theory', 'Practice', 'Conditions', 'Contract', 'Discharge', 'Necessity', 'Things', 'Equity: General', 'Equity: Restitution', 'Improvements', 'Wrongs', 'Profits', 'Damages', 'Defences', 'Illegality' and 'Conclusion'. Each chapter has its own structure, and the detailed table of contents is a model of its type, and will be a convenient first port of call for those consulting as opposed to reading the book.

The approach is captured by a passage from the book's conclusion which combines metaphors popularised by Isaiah Berlin and Charles Darwin:

In law, there is no scope for being a hedgehog concerned with one big idea, or a fox with many. We all of us must be both splitters and lumpers. Each reason [for the classes in which restitution is awarded] must occupy the space it rightly has, neither more nor less.<sup>7</sup>

Lord Rodger once wrote, in the context of identifying a rule for determining a duty of care, that 'appellate judges should follow the philosopher's advice to "Seek simplicity, and distrust it"',<sup>8</sup> sentiments endorsed in Lord Reed's foreword. He might also have relied upon Fullagar J's caution to the same effect that judges should resist 'the temptation, which is so apt to assail us, to import a meretricious symmetry into the law'.<sup>9</sup>

The book presents a large body of case law. It 'attempts to straddle what, as a matter of low brute fact, the positive law actually is in different jurisdictions, and the high principles of justice to which they all aspire'.<sup>10</sup> Much like those Friday afternoon seminars, readers are supposed not to be wholly ignorant of the material, although a pithy summary is given of the aspects which bear upon the argument. The prose is sparing, with short, direct, clear sentences with no room to hide ambiguity in subordinate clauses or undefined qualifiers. It recalls that of Orwell or Cormac McCarthy. As Lord Reed's generous foreword observes, the book is highly readable. There is no shilly-shallying. The reader is left in no doubt as to the author's position. Decisions of ultimate appellate courts throughout the common law world are described as right or wrong. On the whole, British decisions fare worse than Australian decisions — but that is to be expected given the different attitudes in those jurisdictions to the book's thesis. Unsurprisingly, Lord Reed's distancing from the 'four-stage test' for liability in *Investment Trust Companies v Revenue and Customs Commissioners* is endorsed;<sup>11</sup> the statement that the four questions 'are not themselves legal tests, but are signposts towards areas of inquiry involving a number of distinct legal requirements'<sup>12</sup> is antithetical to a conception that there is a unified, rule-based area of law analogous to the law of contract. However, *Banque Financière de la Cité v Parc (Battersea)*,<sup>13</sup> *Dextra Bank v Bank of Jamaica*<sup>14</sup> and

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<sup>7</sup> Ibid 417.

<sup>8</sup> *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181, 204 [51].

<sup>9</sup> *Attorney-General (NSW) v Perpetual Trustee* (1952) 85 CLR 237, 285.

<sup>10</sup> Stevens (n 1) 16.

<sup>11</sup> *Investment Trust Companies v Revenue and Customs Commissioners* [2018] AC 275, 295 [41] ('*Investment Trust Companies*'). Cf *Mann v Paterson Constructions* (2019) 267 CLR 560, 598 [79]–[80], 648–50 [212]–[213].

<sup>12</sup> *Investment Trust Companies* (n 11) 295 [41].

<sup>13</sup> *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221.

<sup>14</sup> *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193.

*Sempra Metals v Inland Revenue Commissioners*<sup>15</sup> are ‘wrongly decided’; more, including *Patel v Mirza*,<sup>16</sup> *Menelaou v Bank of Cyprus*<sup>17</sup> and *Lipkin Gorman v Karpnale*<sup>18</sup> are ‘wrongly reasoned’. My impression is that the majority of the recent decisions of ultimate appellate English courts analysed in this book are regarded as wrongly decided or wrong reasoned or both.

Although most of the decisions considered are English, the book extends to Australian decisions, especially, recent ones. The approach taken by the High Court of Australia in cases of illegality, ‘remorselessly focusing upon the purpose of the statutory prohibition concerned’,<sup>19</sup> is strongly preferred, with the author criticising the approach advocated by Professor Burrows<sup>20</sup> that the common law somehow ‘takes over’ where a statute fails to deal with the consequences of its breach:

It is difficult to understand how *any* approach, other than the ordinary one of construing a statute’s legal effects, may be sensibly or legitimately adopted by a court in cases of regulatory illegality created by legislation.<sup>21</sup>

The award of damages in *Clark v Macourt*<sup>22</sup> is labelled correct, but the generous approach in *Ancient Order of Foresters v Lifeplan Australia Friendly Society*<sup>23</sup> in making third parties who assist in a breach of fiduciary duty accountable for profits is deprecated. While *Farah Constructions v Say-Dee*<sup>24</sup> is regarded as correct in rejecting the Court of Appeal’s approach to unjust enrichment, ‘the court’s conclusion that the other family members had no notice of the director’s breach is insupportable’, since the father’s knowledge when acquiring the properties for his wife and daughter should have been attributed to them.<sup>25</sup> The result in the High Court in *Baltic Shipping v Dillon*<sup>26</sup> is treated as wrong on the facts, the book favouring the decision of Kirby P,<sup>27</sup> holding that the contract should have been treated as one where the entitlement to payment depended on the ship completing its cruise, rather than sinking on the tenth day. The innovative aspects of *Waltons Stores v Maher*<sup>28</sup> are singled out for special criticism, with Gaudron J’s analysis endorsed. Gageler J’s answer in *Mann v Paterson Constructions*<sup>29</sup> that the contract price should operate as an overall cap upon what is recoverable is ‘correct’, with the dissentients’ position

<sup>15</sup> *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2008] AC 561.

<sup>16</sup> *Patel v Mirza* [2017] AC 467.

<sup>17</sup> *Menelaou v Bank of Cyprus plc* [2016] AC 176.

<sup>18</sup> *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548.

<sup>19</sup> Such as *Equuscorp v Haxton* (2012) 246 CLR 498 and *Gnych v Polish Club* (2015) 255 CLR 414, cited in Stevens (n 1) 400.

<sup>20</sup> Andrew Burrows, ‘Illegality as a Defence in Contract’ in Simone Degeling, James Edelman and James Goudkamp (eds), *Contract in Commercial Law* (Thomson Reuters, 2016) 435, 439.

<sup>21</sup> Stevens (n 1) 397 (emphasis in original) (citations omitted).

<sup>22</sup> *Clark v Macourt* (2013) 253 CLR 1.

<sup>23</sup> *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* (2018) 265 CLR 1.

<sup>24</sup> *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89.

<sup>25</sup> Stevens (n 1) 260–1.

<sup>26</sup> *Baltic Shipping Co v Dillon* (1993) 176 CLR 344.

<sup>27</sup> *Baltic Shipping Co v Dillon* (1991) 22 NSWLR 1.

<sup>28</sup> *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

<sup>29</sup> *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560.

‘insupportable’.<sup>30</sup> Allsop P’s judgment in *Bunnings Group v CHEP Australia*<sup>31</sup> ordering user damages following the defendant’s conversion of the plaintiffs’ pallets, even though it had not lost sales, is endorsed. And so on.

I think it’s a terrific book. I liked it when I first began to read it. My liking does not derive merely from the pleasant memory of an Oxford sabbatical. Nor is it merely because of my sympathy for the major premise. I think there are three main reasons which may not be apparent from the foregoing.

First, there is an immense quantity of dense, sturdy, rigorous analysis of cases. That is why an essentially English work can address many of the most important recent Australian cases in its area (the same is true, so far as I can see, for Canada). The succinct, pared back style permits a great many points to be made about a very large number of cases. In short, rather like a prospector finding an especially rich lode of ore, it is satisfying to find a book with so much valuable analysis.

Secondly, the book reflects Stevens’ familiarity with the reality of the litigation process. He well recognises that courts are constrained at every turn by litigants’ choices: the case pleaded, the evidence advanced, and the submissions made. There is so much more to most important decisions than the purple passages where abstract propositions of law are formulated, and it is refreshing and immensely stimulating to be confronted, repeatedly, by the facts of the case and the author’s critique of the correctness of their characterisation or the application of the law to them. Instead of that far too common refrain, to the effect that ‘this case was a missed opportunity to clarify the law’, Stevens insists that ‘[l]ess criticism should be directed at courts who are constrained by the way in which cases are argued before them’.<sup>32</sup> That is said when criticising *Waltons Stores* and the difficulties encountered by claims for restitution for the value of work done based upon ‘unjust enrichment’. The flavour of the work emerges from its contention that

through sticking to what they know, practitioners have resorted to ill-suited rules such as ‘estoppel’ for a solution, and academics have proposed other principles to fill the gap, variously labelled ‘unjust sacrifice’ or the ‘promise-detriment’ principle. No such new concept is however required or justified.<sup>33</sup>

Thirdly, the effectiveness of the book is in part a product of its style. The book is immensely readable. Many legal authors would do well to think more about making their works less unreadable. Stevens has done just that, and it is reflected in the size of each chapter, which often commence with an enticing anecdote or memorable metaphor, and a racy style with short, pungent, often pugnacious sentences.

No doubt some readers will disagree with many of this book’s contentions, and all will disagree with some of them; that does not make it less valuable. No doubt also some will disagree with the vigour of its critique. There is force in that viewpoint, although to my mind there is room for criticism, including robust

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<sup>30</sup> Stevens (n 1) 134.

<sup>31</sup> *Bunnings Group Ltd v CHEP Australia Ltd* (2011) 82 NSWLR 420.

<sup>32</sup> Stevens (n 1) 287.

<sup>33</sup> *Ibid.*

criticism, of the reasoning in decisions. Devlin once wrote in a different context, ‘The English judiciary is popularly treated as a national institution, like the navy, and tends to be admired to excess’,<sup>34</sup> and I suspect that the disadvantages of an absence of criticism probably outweigh the disadvantages of robust challenges to legal reasoning exemplified in works such as this.

If I were a judge in the United Kingdom, I would be interested in this book’s endorsement or criticism of any decision I was founding my decision upon. That is not necessarily because I would agree with the view expressed, but because it would help me to satisfy myself that I had considered as many angles as I could and my approach was as sturdy as could be. The book will be useful for similar reasons to Australian practitioners and judges, especially because in the areas of law addressed Australian authority is often thin and English authority persuasive. It would have assisted me to deal with a submission based on the ‘transfer of value’ in one recent appeal.<sup>35</sup> Many aspects accord with the position in Australia, where the notion that complicated problems in contract and tort and equity are to be resolved by a talismanic formula generally applicable across the board has never been especially well received. It remains to be seen how in tune with the times this book will turn out to be in the United Kingdom. Lord Reed’s sympathetic and insightful foreword hints that the tide may have turned.

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<sup>34</sup> Patrick Devlin, *The Judge* (Oxford University Press, 1979) 25.

<sup>35</sup> *Jaken Properties Australia Pty Ltd v Naaman* [2023] NSWCA 214.