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Dignity and the Australian Constitution

Scott Stephenson*

Abstract

Today dignity is one of the most significant constitutional principles across the world given that it underpins and informs the interpretation of human rights. This article considers the role of dignity in the *Australian Constitution*. The starting point is the 2019 decision of *Clubb v Edwards*, which marked the arrival of dignity in Australia. In that case, the High Court of Australia found that laws restricting protests outside of abortion facilities were justified under the implied freedom of political communication partly on the basis that they protect the dignity of persons accessing those facilities. The article argues that dignity was used in two ways in the Court's decision: first, as a means of distinguishing natural persons from corporations; and second, as one purpose that a law can pursue that is compatible with the implied freedom. The article develops and defends the first use of dignity, while identifying some challenges that arise with the second use of dignity.

I Introduction

Since the middle of the 20th century, dignity has become one of the most significant principles in both public international law and domestic public law across the world.¹ The reason being that dignity is 'a central organizing principle in the idea of universal human rights'.² As the recognition of human rights has spread around the globe at the domestic and international level, so too has the recognition of dignity — sometimes understood as a foundation for human rights, sometimes as a freestanding right and sometimes as a principle that guides the interpretation of other human rights.³ This seismic shift in the legal landscape has largely passed

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¹ For an overview of its spread across the legal texts of the world, see Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) *European Journal of International Law* 655, 664–75.

² Ibid 675. For example, the Preamble to the Universal Declaration of Human Rights begins by stating that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world ...': *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) Preamble para 1.

³ For a summary of the different connections between dignity and human rights, see McCrudden (n 1) 680–81.

by Australia due to the lack of a national bill of rights.⁴ While the International Court of Justice, the European Court of Human Rights, the European Court of Justice, the Inter-American Court of Human Rights, the Federal Constitutional Court of Germany, the Supreme Court of the United States, the Supreme Court of Canada, the Supreme Court of Israel, the Constitutional Court of South Africa and many other courts have issued important judgments on the meaning and use of dignity,⁵ the High Court of Australia has said almost nothing about the concept.⁶

The High Court's 2019 decision in *Clubb v Edwards*⁷ is, therefore, a major development because it represents the first time that the concept of dignity has been used to help interpret the *Australian Constitution*. The case involved a challenge to the constitutional validity of Tasmanian and Victorian legislation prohibiting protests held outside facilities where abortions are provided. The plaintiffs contended that these laws infringed the implied freedom of political communication. The Court dismissed the challenge, with a number of judges holding that the laws were enacted for the purpose of protecting the dignity of persons accessing the facilities and that this purpose is compatible with the constitutionally prescribed system of representative and responsible government. The protection of dignity thus now appears to be a principle with a degree of constitutional recognition in Australia, capable of justifying the imposition of restrictions on the implied freedom.

This article interrogates the introduction of dignity into the Australian constitutional landscape, advancing three claims. First, the High Court's decision in *Clubb* suggests there are two different ways in which dignity might be used in Australia. It can be used in the broad manner mentioned above — to identify one purpose that a law can pursue that is compatible with the constitutionally prescribed system of representative and responsible government (dignity as a legitimate purpose). But it can also be used in a narrower manner as a means of distinguishing the position of natural persons and corporations under the implied freedom. Natural persons have an interest that corporations do not — the protection of their dignity (dignity as a distinctive characteristic). In *Clubb*, Kiefel CJ, Bell and Keane JJ gesture towards this second use of dignity when they distinguish the case from the situation in *Brown v Tasmania*,⁸ where the Court invalidated legislation prohibiting protests near the site of forestry operations.⁹ The protests outside abortion facilities generated a form of harm that was not generated

⁴ While it is not necessary for a country to have a bill for rights for dignity to be a relevant principle of public law, the concept most commonly enters a legal system through a bill of rights, which explains the High Court of Australia's comparatively late engagement with the concept.

⁵ For an overview of these decisions, see McCrudden (n 1) 682–94.

⁶ Prior to *Clubb v Edwards* (2019) 366 ALR 1 ('*Clubb*'), there have been a very small number of cases where the Court has discussed the concept of dignity, though none of these discussions have directly related to the interpretation of the *Australian Constitution*: see, eg, *Secretary, Department of Health and Community Services v JWB* (1992) 175 CLR 218; *Maloney v The Queen* (2013) 252 CLR 168.

⁷ *Clubb* (n 6).

⁸ *Brown v Tasmania* (2017) 261 CLR 328 ('*Brown*').

⁹ *Clubb* (n 6) 23–4 [82].

in the case of protests outside forestry operations — harm to the dignity of persons accessing abortion facilities.¹⁰

Second, the article develops and defends the narrower use of dignity as a distinctive characteristic. It argues that corporations have generated two challenges under the implied freedom that have presented difficulties for the High Court in recent years. One is the extent to which the political communication of corporations is protected under the implied freedom. Evaluating the Court's decisions in *Unions NSW v New South Wales*¹¹ and *McCloy v New South Wales*,¹² the article suggests that the Court has not identified a satisfactory legal, as opposed to a factual, means of justifying its conclusions as to when legislatures can restrict the political communication of corporations. It argues that dignity as a distinctive characteristic might provide such a justification. The second challenge is the extent to which restrictions on political communication can be imposed to protect corporations from harm. The article argues that dignity as a distinctive characteristic, as gestured towards in *Clubb*, is a useful and justifiable way of differentiating between, on the one hand, the scope of the legislature's ability to protect corporations from harm and, on the other hand, the scope of the legislature's ability to protect natural persons from harm.

Third, the article considers two issues that arise with the broader use of dignity as a legitimate purpose. One issue is the uncertainty that surrounds the meaning of dignity. As dignity has many different, and sometimes contradictory, aspects, the Court will need to provide further guidance as to what the term means in the Australian constitutional context. This will be no easy task. Take, for example, the aspect of dignity that was the focus of *Clubb* — the prevention of unwanted messages being forced upon people. The difficulty is that almost every political protest involves forcing unwanted messages upon people — people passing the protest in the street, people entering the legislative building, and so on. It cannot therefore be the case that the prevention of unwanted messages being forced upon people is compatible with the constitutionally prescribed system of representative and responsible government in all circumstances. It must be understood as the protection of *particular* messages being forced upon *particular* people in *particular* circumstances.

The second issue that arises with the broader use of dignity as a legitimate purpose is the uncertainty that surrounds the use of dignity. In Australia, there is a risk that dignity will only be recognised as relevant to the law's purpose, not also the law's effect on speakers, due to the limited scope of the implied freedom of political communication. The article identifies two related problems with this path. One is that it creates a partial and distorted conception of dignity. As *all* natural persons are understood to have dignity, it is misleading to recognise the dignity of listeners and disregard the dignity of speakers. The other is that it flips the principal objective of dignity on its head. Dignity is understood, first and foremost, as a justification for the existence of rights and freedoms, not as a justification for

¹⁰ Ibid.

¹¹ *Unions NSW v New South Wales* (2013) 252 CLR 530 ('*Unions NSW*').

¹² *McCloy v New South Wales* (2015) 257 CLR 178 ('*McCloy*').

their abrogation. If 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.

The article is divided into three parts. Part II advances the first claim by providing an overview of the High Court's invocations of dignity in *Clubb*. Part III makes the second claim by analysing the Court's approach to corporations and the implied freedom, and the role that dignity as a distinctive characteristic has played and could play in the future. Part IV puts forward the third argument by highlighting the challenges that the Court will need to confront if it intends to use dignity as a legitimate purpose.

II The Two Uses of Dignity in *Clubb*

The High Court in *Clubb*, particularly the joint judgment of Kiefel CJ, Bell and Keane JJ, invokes dignity in two different respects. First, it is used in a broad manner to identify one of the purposes or objectives of the law: that is, the law is designed to protect the dignity of persons accessing abortion facilities. Second, it is used in a narrow manner to identify a distinguishing characteristic of natural persons, implicitly differentiating the position of natural persons from corporations: that is, protests targeted at natural persons can cause a type of harm that does not arise in respect of protests targeted at corporations — namely, harm to dignity. To understand the two uses of dignity in *Clubb*, it is necessary to consider the decision in some detail.

The case involved 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 zones'). The Victorian law stated that the dignity of persons accessing abortion services was part of the rationale for the prohibition:

The purpose of this Part is—

- (a) to provide for safe access zones around premises at which abortions are provided so as to protect the safety and wellbeing and respect the privacy and dignity of—
 - (i) people accessing the services provided at those premises; and
 - (ii) employees and other persons who need to access those premises in the course of their duties and responsibilities ...¹³

The law also defined the prohibited protest activities in a way that might be understood as relating to the dignity of persons accessing abortion services, stating that the prohibited activities included

communicating by any means in relation to abortions in a manner that is able to be seen or heard by a person accessing, attempting to access, or leaving premises at which abortions are provided and is *reasonably likely to cause distress or anxiety* ...¹⁴

¹³ *Public Health and Wellbeing Act 2008* (Vic) s 185A.

¹⁴ *Ibid* s 185B(1) (emphasis added). By contrast, the Tasmanian law defined prohibited protest activities to include 'a protest in relation to terminations that is able to be seen or heard by a person

The laws were challenged on the basis that they violated the implied freedom of political communication doctrine ('implied freedom'). The implied freedom is a limitation on power that is derived from the fact that the *Australian Constitution* provides for a system of representative and responsible government.¹⁵ It prohibits state and federal legislatures from enacting legislation that burdens political communication unless the law is reasonably appropriate and adapted to serve a legitimate end in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.¹⁶

In 2015 in *McCloy*, a majority of the High Court drew on authorities from European jurisdictions to adopt a structured proportionality analysis for evaluating a law's compatibility with the implied freedom.¹⁷ Other judges have resisted the move,¹⁸ arguing that structured proportionality analysis is inconsistent with, inter alia, the rationale for the implied freedom and the common law approach to adjudication.¹⁹ These criticisms have prompted other judges to defend the use of structured proportionality analysis, with, for example, French CJ and Bell J stating in one case that '[t]he adoption of [structured proportionality analysis] in *McCloy* did not reflect the birth of some exotic jurisprudential pest destructive of the delicate ecology of Australian public law'.²⁰ While the subject has produced several years of contestation between members of the High Court, there are signs that the debate has reached an impasse, with one of proportionality's strongest opponents, Gageler J, stating in *Clubb* that '[m]y own reservations about structured proportionality have been outlined in the past. Nothing is to be gained by me elaborating further on those reservations'.²¹

In *Clubb*, Kiefel CJ, Bell and Keane JJ summarise the test set out in *McCloy* in the following terms:²²

Does the law effectively burden the implied freedom in its terms, operation or effect?

If 'yes' to question 1, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

accessing, or attempting to access, premises at which terminations are provided': *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 9(1).

¹⁵ See, especially, *Australian Constitution* ss 7, 24, 64, 128.

¹⁶ *Coleman v Power* (2004) 220 CLR 1, 50 [93] (McHugh J) ('*Coleman*'). For the purposes of this article, it is not necessary to consider whether the implied freedom also applies to the actions of the executive.

¹⁷ *McCloy* (n 12) 193–5 [2]–[3].

¹⁸ See, eg, the judgments of Gageler J: *McCloy* (n 12) 234–8 [140]–[149]; *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 71–2 [99]–[101] ('*Murphy*'); *Brown* (n 8) 376–7 [157]–[161]; *Clubb* (n 6) 39–40 [160]. See also the judgments of Gordon J: *Murphy* (n 18) 122–4 [294]–[305]; *Brown* (n 8) 464–8 [429]–[438]; *Clubb* (n 6) 101–4 [389]–[404].

¹⁹ For an analysis of these arguments, see Adrienne Stone, 'Proportionality and its Alternatives' (2020) 48(1) *Federal Law Review* 123.

²⁰ *Murphy* (n 18) 52 [37].

²¹ *Clubb* (n 6) 39–40 [160]. Though Gageler and Gordon JJ have continued to express their reservations in subsequent decisions: see, eg, *Comcare v Banerji* (2019) 372 ALR 42, 72 [96] (Gageler J), 86 [161] (Gordon J).

²² *Clubb* (n 6) 10 [5].

If 'yes' to question 2, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

Structured proportionality analysis enters at the third stage:

The third step of the *McCloy* test is assisted by a proportionality analysis which asks whether the impugned law is 'suitable', in the sense that it has a rational connection to the purpose of the law, and 'necessary', in the sense that there is no obvious and compelling alternative, reasonably practical, means of achieving the same purpose which has a less burdensome effect on the implied freedom. If both these questions are answered in the affirmative, the question is then whether the challenged law is 'adequate in its balance'. This last criterion requires a judgment, consistently with the limits of the judicial function, as to the balance between the importance of the purpose served by the law and the extent of the restriction it imposes on the implied freedom.²³

For Kiefel CJ, Bell and Keane JJ in *Clubb*, the concept of dignity was relevant to the second question (the legitimacy of the purpose) and the third question's second and third elements (the law's 'suitability' and 'adequacy in its balance'). For the legitimacy of the law's purpose and the law's adequacy in its balance, the three judges invoked dignity in a broad manner as an interest held by the people (either by persons accessing abortion services or by the people generally). For the law's suitability, their Honours invoked dignity in a narrower manner as a type of harm that natural persons might suffer.

In relation to the legitimacy of the purpose, Kiefel CJ, Bell and Keane JJ noted that one purpose of the Victorian legislation is 'the preservation and protection of the privacy and dignity of women accessing abortion services. Privacy and dignity are closely linked; they are of special significance in this case.'²⁴ This purpose, their Honours stated, is 'readily seen to be compatible with the maintenance of the constitutionally prescribed system of representative and responsible government'.²⁵ Their Honours elaborated on what dignity means by reference to the writings of Aharon Barak, former President of the Supreme Court of Israel. Indeed, Barak is the only person cited in their judgment on the meaning of dignity. Their Honours state:

Generally speaking, to force upon another person a political message is inconsistent with the human dignity of that person. As Barak said, '[h]uman dignity regards a human being as an end, not as a means to achieve the ends of others'.²⁶

In other words, the three judges concluded that the legislation's purpose is to protect the dignity of persons accessing abortion services because it prohibits political messages from being forced upon those persons.

²³ Ibid 10 [6].

²⁴ Ibid 17 [49]. On privacy as a legitimate purpose, see *Monis v The Queen* (2013) 249 CLR 92 ('*Monis*').

²⁵ *Clubb* (n 6) 17–18 [51].

²⁶ Ibid 17 [51] (citations omitted).

This understanding of dignity is also invoked in *Clubb* when Kiefel CJ, Bell and Keane JJ considered the law's adequacy in its balance. Their Honours held that the law did not pursue its 'purpose by means that have the effect of impermissibly burdening the implied freedom'²⁷ and stated:

The implied freedom is not a guarantee of an audience; a fortiori, it is not an entitlement to force a message on an audience held captive to that message. As has been noted, it is inconsistent with the dignity of members of the sovereign people to seek to hold them captive in that way.

A law calculated to maintain the dignity of members of the sovereign people by ensuring that they are not held captive by an uninvited political message accords with the political sovereignty which underpins the implied freedom. A law that has that effect is more readily justified in terms of the third step of the *McCloy* test than might otherwise be the case.²⁸

By contrast, when Kiefel CJ, Bell and Keane JJ evaluated the law's suitability, their Honours gestured towards an alternative, narrower conception of dignity. On the question of suitability, Mrs Clubb argued that the law had no rational connection to its legitimate purpose on the basis that it targeted 'on-site protests'.²⁹ She submitted that as protest outside of premises where abortions occur has been a characteristic feature of political debate about abortion, the law targeted political communication at the very location where it is most effective. In making this argument, Mrs Clubb drew on the 2017 decision in *Brown*,³⁰ where the High Court invalidated a Tasmanian law restricting protest activities near forestry operations. In that case, there was some discussion of the fact that there is a long history of political protests at environmental sites in Australia,³¹ which suggested that the law imposed a considerable burden on political communication.³² In *Clubb*, Kiefel CJ, Bell and Keane JJ rejected the analogy for a number of reasons, including the lack of evidence of the 'special efficacy of on-site protests as a form of political communication'.³³ However, they said that the most important reason for distinguishing the two cases is that '[t]he on-site protests against forest operations discussed in *Brown* did not involve an attack upon the privacy and dignity of other people as part of the sending of the activists' message.'³⁴ Their Honours observed that the restriction on protest activities only applied within safe access zones and that, '[w]ithin those zones, 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.'³⁵

Here Kiefel CJ, Bell and Keane JJ use dignity to identify a type of harm caused by the protest activities — 'an attack upon the privacy and dignity of other people'.³⁶ In doing so, their Honours implicitly distinguished the position of

²⁷ Ibid 27 [96].

²⁸ Ibid 27 [98]–[99].

²⁹ Ibid 23 [80].

³⁰ *Brown* (n 8).

³¹ Ibid 346–7 [32]–[37].

³² Ibid 353–9 [61]–[87], 371–3 [139]–[146].

³³ *Clubb* (n 6) 23 [81].

³⁴ Ibid 23–4 [82].

³⁵ Ibid.

³⁶ Ibid.

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). This distinction is discussed in greater detail below in Part III of the article.

Kiefel CJ, Bell and Keane JJ reached a broadly similar set of conclusions in relation to the Tasmanian law. Their Honours found that the Tasmanian law's purpose is also to protect the dignity of women accessing abortion services even though it is not expressly stated in the *Reproductive Health (Access to Terminations) Act 2013* (Tas).³⁷ And their Honours found that this purpose helps establish that the law satisfied the third step of the *McCloy* test.³⁸

In separate judgments, Gageler J, Nettle J and Edelman J also invoked dignity in the first, broad manner, concluding that the protection of dignity is a legitimate purpose. In relation to the Tasmanian law, Gageler J concluded that its purpose is

to ensure that women have access to premises at which abortion services are lawfully provided in an atmosphere of privacy and dignity. The purpose so identified is unquestionably constitutionally permissible and, by any objective measure, of such obvious importance as to be characterised as compelling.³⁹

In relation to the Victorian law, Nettle J stated:

The protection of the safety, wellbeing, privacy and dignity of the people of Victoria is an essential aspect of the peace, order and good government of the State of Victoria and so a legitimate concern of any elected State government.⁴⁰

Mrs Clubb submitted that the protection of dignity is not a legitimate purpose 'because all political speech has the potential to or does affect the dignity of at least some others'.⁴¹ Nettle J rejected this submission on the basis that it

misconceives the nature of the implied freedom. It is a freedom to communicate ideas regarding matters of political controversy to persons who are willing to listen. It is not a licence to accost persons with ideas which they do not wish to hear, still less to harangue vulnerable persons entering or leaving a medical establishment for the intensely personal, private purpose of seeking lawful medical advice and assistance. A law which has the purpose of protecting and vindicating 'the legitimate claims of

³⁷ Ibid 30 [120]. Although the protection of dignity is not expressed in the terms of the Act, counsel for the respondent did describe the purpose of the legislation as being to 'preserv[e] the privacy and dignity of women', citing the Second Reading Speech where the Attorney-General said that the purpose was to protect 'people's rights of privacy and freedom from abuse': Elizabeth Avery and Scott Wilkie, 'Respondents' Submissions', *Preston v Avery*, Case No H2/2018, 3 August 2018, 4 [24] <https://www.hcourt.gov.au/assets/cases/05-Hobart/h2-2018/Preston-Avery_Res.pdf>.

³⁸ *Clubb* (n 6) 32 [126], [128].

³⁹ Ibid 48 [197].

⁴⁰ Ibid 67 [258].

⁴¹ Ibid 67–6 [259].

individuals to live peacefully and with dignity', as is the case here, is consistent with the implied freedom.⁴²

Finally, Edelman J held that it is legitimate for 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'.⁴³

III Dignity as a Distinctive Characteristic

This part of the article seeks to develop and defend the narrow manner in which dignity is used in *Clubb* — as a means of differentiating natural persons and corporations. In other words, dignity as a distinctive characteristic of natural persons. In order to do so, it is necessary to set out the challenge that corporations pose for the implied freedom of political communication — what is called in the article the 'corporate challenge'. The corporate challenge, in its most basic form, has two dimensions.⁴⁴ The first dimension is whether the political communications of corporations are entitled to protection under the implied freedom. Can a law that restricts the freedom of corporations to communicate about political matters ever violate the implied freedom? And, if so, when? The second dimension is whether the protection of corporations from harm is a justification for restricting political communication under the implied freedom. Can a law that restricts the freedom of natural persons to communicate about political matters ever be justified on the basis that it protects corporations from harm? And, if so, when? The article will consider each of these questions in turn.

A *Are Corporations Entitled to Protection under the Implied Freedom?*

The extent to which corporate speech is protected under the implied freedom is an issue that has existed since the doctrine's establishment in 1992. Indeed, the implied freedom's very first two cases concerned the speech of media corporations.⁴⁵ The High Court has always held that laws burdening the ability of corporations to engage in political communication are capable of violating the implied freedom. However, the issue took on a new salience in the 2010s as the limits of protection for corporate speech began to be tested in the United States ('US') and, soon after, in Australia.

The first dimension of the corporate challenge came into sharp focus in the US with the well-known case of *Citizens United v Federal Election Commission*,⁴⁶

⁴² Ibid.

⁴³ Ibid 131 [497].

⁴⁴ To avoid any doubt, the claim is not that these two challenges are exhaustive. There may be other challenges that relate to the intersection between corporations and the implied freedom of political communication.

⁴⁵ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 ('*Nationwide News*'); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 ('*ACTV*').

⁴⁶ *Citizens United v Federal Election Commission*, 558 US 310 (2010) ('*Citizens United*').

a 2010 decision of the US Supreme Court. The case involved a federal law that prohibited corporations and unions from undertaking independent expenditures on speech that advocated for the election or defeat of a candidate or that amounted to ‘electioneering communication’, which was defined to mean broadcast communications referring to a candidate for federal office made within 30 days of a primary election or 60 days of a general election. By a majority of five judges to four, the US Supreme Court held that the prohibitions violated the First Amendment to the *United States Constitution*, which provides that ‘Congress shall make no law ... abridging the freedom of speech’.⁴⁷

Writing for the majority, Kennedy J stated that ‘[p]olitical speech is “indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.”’⁴⁸ Among the reasons his Honour gave for this conclusion was that it levels the playing field between wealthy and non-wealthy corporations:

Corporate executives and employees counsel Members of Congress and Presidential administrations on many issues, as a matter of routine and often in private. ... [T]he result [of the prohibition] is that smaller or nonprofit corporations cannot raise a voice to object when other corporations, including those with vast wealth, are cooperating with the Government.⁴⁹

As wealthy corporations generally have greater access to government than non-wealthy corporations, the prohibition exacerbates the imbalance between the two by removing one of the means by which non-wealthy corporations can counteract their disadvantage: by ‘presenting both facts and opinions to the public’.⁵⁰ Kennedy J held that Congress is limited to the enactment of laws suppressing freedom of speech that prevent quid pro quo corruption.⁵¹ Other forms of influence over elected representatives are an integral part of democratic politics and thus protected under the First Amendment. Quoting himself in an earlier case, Kennedy J said:

Favoritism and influence are not ... avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.⁵²

In dissent, Stevens J drew a sharp distinction between corporations and natural persons:

In the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous

⁴⁷ *United States Constitution* (‘*US Constitution*’) amend I (‘*First Amendment*’).

⁴⁸ *Citizens United* (n 46) 349, citing *First National Bank of Boston v Bellotti*, 435 US 765, 777 (1978).

⁴⁹ *Citizens United* (n 46) 355.

⁵⁰ *Ibid.*

⁵¹ *Ibid* 359.

⁵² *Ibid*, citing *McConnell v Federal Election Commission*, 540 US 93, 297 (2003).

contributions to our society, corporations are not actually members of it. They cannot vote or run for office. Because they may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters. The financial resources, legal structure, and instrumental orientation of corporations raise legitimate concerns about their role in the electoral process.⁵³

His Honour continued:

Campaign finance distinctions based on corporate identity tend to be less worrisome, in other words, because the ‘speakers’ are not natural persons, much less members of our political community, and the governmental interests are of the highest order.⁵⁴

Citizens United was an important development for Australia’s implied freedom for two reasons. First, it gave corporations seeking to challenge Australian laws restricting their political activities a favourable decision from an influential foreign court. While the High Court has always stressed that the implied freedom is not the same as the First Amendment, the Court has continually drawn on US case law to help articulate the scope and limits of the implied freedom, sometimes analogising to the position in the US and sometimes distinguishing from it.⁵⁵ The influence of the US has arguably not diminished over time. In *Clubb*, for example, Gageler J drew on US authorities for his analysis of ‘the appropriate level of scrutiny and corresponding standard of justification’⁵⁶ for laws imposing restrictions on a person’s ability to protest.⁵⁷ His Honour criticised the submissions of both parties to the case for failing to reflect ‘the richness of the approach in the United States’ and for failing to relate ‘adequately ... that approach to the implied freedom of political communication’.⁵⁸ As this last statement suggests, the High Court has sought to employ US authorities in a detailed and nuanced manner.

Second, *Citizens United* gave corporations seeking to challenge Australian laws restricting corporate political activities a set of arguments that are couched partly in general terms capable of application to the Australian context. While the particular features and history of the US’s constitutional system feature prominently in the judgments,⁵⁹ the entire decision did not turn on them. Take, for instance, Kennedy J’s argument that extending freedom-of-speech protections to corporations levels the playing field by allowing small corporations to speak about the connections between government and large corporations. This argument is a general one capable of application to Australia. To avoid any doubt, the article’s claim is not that the argument is a meritorious one that *should* be accepted in

⁵³ *Citizens United* (n 46) 394.

⁵⁴ *Ibid* 424.

⁵⁵ See, eg, *ACTV* (n 45) 143–4 (Mason CJ), 150, 159 (Brennan J), 181–2, 186 (Dawson J), 213–14 (Gaudron J), 228, 231, 239, 240–41 (McHugh J); *Nationwide News* (n 45) 43 (Brennan J), 73, 79 (Deane and Toohey JJ).

⁵⁶ *Clubb* (n 6) 44 [178].

⁵⁷ *Ibid* 44–5 [178]–[182], 47–9 [192]–[198], 49–51 [202]–[206].

⁵⁸ *Ibid* 47 [192].

⁵⁹ There is, for instance, an extensive discussion of the US Supreme Court’s previous case law on whether Congress can discriminate between natural persons and corporations for the purposes of the First Amendment: see the conflicting interpretations of that case law by Kennedy J (for the majority) and Stevens J (in dissent): *Citizens United* (n 46) 342–65 (Kennedy J), 432–46 (Stevens J).

Australia, but simply that *Citizens United* supplied parties with arguments that *might* be accepted in Australia. As in the US, Australia has small corporations (for example, charities, think tanks, lobby groups) that can and do speak out about the influence that large corporations have on government.

It did not take long for corporations in Australia to take inspiration from *Citizens United* and to draw on its arguments and findings to challenge Australian laws restricting corporate political activities. Just three years after *Citizens United*, a corporation sought to rely on the US Supreme Court's decision before the High Court to invalidate a New South Wales ('NSW') law under the implied freedom. *Unions NSW* involved an electoral law that, inter alia, prohibited political parties, politicians and candidates for political office from accepting donations unless they were from an individual enrolled to vote (that is, the provision banned political party donations from corporations and other artificial legal persons).⁶⁰ As Keane J explained,

the plaintiffs relied upon *Citizens United v Federal Election Commission* to argue that political communications by corporations and industrial organisations should not be treated differently from those of enrolled voters simply because such organisations are not natural persons entitled to vote.⁶¹

The joint judgment of French CJ, Hayne, Crennan, Kiefel and Bell JJ expressed some sympathy for the position that, similar to Kennedy J in *Citizens United*, natural persons are not the only actors relevant to the operation of a democratic system of government. Their Honours stated:

Political communication may be undertaken legitimately to influence others to a political viewpoint. It is not simply a two-way affair between electors and government or candidates. There are many in the community who are not electors but who are governed and are affected by decisions of government. Whilst not suggesting that the freedom of political communication is a personal right or freedom, which it is not, it may be acknowledged that such persons and entities have a legitimate interest in governmental action and the direction of policy.⁶²

The discussion of the issue, however, stopped there, avoiding any further statements that might be relevant to the extent to which corporate expression is protected under the implied freedom. The reason their Honours were able to stop at that point is due to the way in which the joint judgment identified the burden on political communication imposed by the NSW law. Instead of holding that the burden was a restriction on the political communication of *corporations*, the joint judgment held that the ban on corporate donations burdened the political communication of *political parties and candidates* by restricting the funds they had to spend on political communication.⁶³ As a result, it was not necessary to consider the extent to which the political communication of corporations could be restricted.

The joint judgment in *Unions NSW* proceeded to find the ban on donations unconstitutional on the basis that it was not rationally connected to the purpose that

⁶⁰ *Unions NSW* (n 11).

⁶¹ *Ibid* 570 [99].

⁶² *Ibid* 551 [30].

⁶³ *Ibid* 554 [38].

was said to justify it; namely, the prevention of undue or corrupt influence being exerted on the political process.⁶⁴ There was no rational connection because the ban was selective in its application and ‘the basis for the selection was not identified and is not apparent’.⁶⁵ The joint judgment noted that if the purpose for the ban had been to address the threat of corruption posed by corporations, it was not connected to that purpose because ‘[t]he terms of [the ban] are not directed to corporations alone. They extend to any person not enrolled as an elector, and to any organisation, association or other entity.’⁶⁶

While the High Court managed to avoid directly addressing the first aspect of the corporate challenge in *Unions NSW*, the issue came back to the Court a mere two years later in *McCloy*.⁶⁷ That case concerned, inter alia, a NSW electoral law provision that made it unlawful for a ‘prohibited donor’ to make a political donation and for a person to accept a political donation from a prohibited donor. A prohibited donor was defined to include corporations in particular industries, including property development.⁶⁸ As in *Unions NSW*, the plaintiffs once again invoked US authorities, including *Citizens United*, to support their argument. In *McCloy*, the plaintiffs submitted that

gaining access through political donations to exert persuasion is not undue influence. This mirrors what was said by Kennedy J, writing the opinion of the Court in *Citizens United v Federal Election Commission*, that ‘[i]ngratiation and access ... are not corruption’.⁶⁹

In contrast to *Unions NSW*, the joint judgment of French CJ, Kiefel, Bell and Keane JJ in *McCloy* expressed no sympathy for this line of argument.⁷⁰ Their Honours noted that there are ‘different kinds of corruption’.⁷¹ In addition to ‘quid pro quo’ corruption where financial assistance to an elected official is exchanged for favourable treatment by that official, there is what the joint judgment calls ‘clientelism’, which refers to ‘an office-holder’s dependence on the financial support of a wealthy patron to a degree that is apt to compromise the expectation, fundamental to representative democracy, that public power will be exercised in the public interest’.⁷² The joint judgment in *McCloy* held that, unlike in the US,⁷³ Australian legislatures can enact statutes that have as their object the prevention of clientelism.⁷⁴ Their Honours stated that ‘[q]uid pro quo and clientelistic corruption threaten the quality and integrity of governmental decision-making’ and that ‘[e]quality of opportunity to participate in the exercise of political sovereignty is an aspect of the representative democracy guaranteed by our Constitution’.⁷⁵ Their Honours also noted that, unlike in the US, the implied freedom does not confer

⁶⁴ Ibid 557 [51].

⁶⁵ Ibid 558 [53].

⁶⁶ Ibid 558 [55].

⁶⁷ *McCloy* (n 12).

⁶⁸ The prohibition also included persons who are close associates of a corporation: ibid 199 [15].

⁶⁹ Ibid 204 [35]. See also ibid 182.

⁷⁰ Ibid.

⁷¹ Ibid 204 [36].

⁷² Ibid.

⁷³ Ibid 205–6 [41].

⁷⁴ Ibid 206 [42].

⁷⁵ Ibid 205 [38], 207 [45].

‘a personal right to make personal donations as an exercise of free speech’.⁷⁶ Finally, they held that it is permissible for a legislature to impose special restrictions on property development corporations. The economic interests of property developers are dependent on government decisions to a greater extent than other persons in the community (for example, they rely on the government for decisions related to zoning of land and development approvals) and there is an established history in NSW of property developers seeking to influence government by way of donations.⁷⁷ As a result, the joint judgment in *McCloy* held that the case could be distinguished from *Unions NSW*.⁷⁸

Two observations can be made about the first dimension of the corporate challenge following the High Court’s decisions in *McCloy* and *Unions NSW*. First, the extent to which corporate political communication should be protected under the implied freedom is an issue of considerable complexity. On the one hand, corporate political communication must enjoy some level of protection under the implied freedom if only for the reason that it is often essential to facilitating political communication between electors. The role of media corporations in disseminating information and opinion about political matters is the most obvious example, but it is possible that all corporations play a role, at least to some extent. It could be argued that when non-media corporations take public stances on political matters, as they have done in recent years in Australia on issues such as same-sex marriage and carbon taxes, they are making significant contributions to political discourse in a manner similar to media corporations. The importance of corporations to the facilitation of political communication has been recognised by the High Court since it first established the implied freedom.⁷⁹

On the other hand, the ability of corporations to engage in political communication appears to be particularly apt for legislative restriction. Corporations cannot vote in federal and state elections and therefore any interest they have in facilitating political communication is derivative of, and subsidiary to, the interests of electors. Furthermore, corporations can present a considerable threat to a system of representative and responsible government. Where business operations are highly dependent on government decisions, there is a risk that corporations will seek to exercise improper influence over government. Further, because corporations’ resources to spend on lobbying and speech can far exceed the resources of most electors, this exacerbates the risk that corporations may attempt to distort the actions of government in their favour. The need to allow legislatures to respond to these risks was recognised by the High Court in *McCloy*.⁸⁰

The second observation about the first dimension of the corporate challenge is that the High Court has struggled to find a legal, as opposed to a purely factual, means of reaching and justifying its conclusions about the extent to which the implied freedom permits legislatures to single out corporate political communication for special regulation. In *McCloy*, the joint judgment identified two

⁷⁶ Ibid 205 [40].

⁷⁷ Ibid 208–9 [48]–[53].

⁷⁸ Ibid 210 [55]–[56].

⁷⁹ *ACTV* (n 45).

⁸⁰ *McCloy* (n 12) 208–9 [48]–[53].

related legal reasons. First, the position in Australia is different from that in the US, where corporations enjoy greater freedom to engage in political communication, due to the First Amendment. Second, the implied freedom is a limitation on power — unlike in the US, where the First Amendment confers a right to free speech. However, neither legal reason determines or justifies the High Court's conclusions.

Even if the *US Constitution* provides greater protection to corporations than the *Australian Constitution* does, this point is of minimal assistance because all it justifies is a lower limit — Australian legislatures can regulate corporate speech more than US legislatures. It provides no justification for the particular conclusions that the High Court has reached about what Australian legislatures can regulate under the *Australian Constitution*. Similarly, the distinction between rights and limitations is of minimal assistance — at best, it justifies the same lower limit that Australian legislatures can regulate more than US legislatures can regulate. Indeed, it is not clear that the distinction is at all relevant in this context. As mentioned above, the joint judgment in *McCloy* draws on the rights/limitation distinction to conclude that the implied freedom does not confer 'a personal right to make political donations as an exercise of free speech'.⁸¹ But this line of reasoning conflates two separate issues. The question of whether the implied freedom is a right or a limitation is distinct from the question of whether political donations constitute political communication. The answer to one does not depend on the answer to the other. It is entirely consistent to say that the implied freedom is a limitation on power *and* that political donations constitute political communication.

The upshot is that the High Court's most persuasive means of reaching and justifying its conclusions about the extent to which legislatures can regulate corporate political communication is factual rather than legal. Legislatures can limit corporate political communication to prevent clientelistic corruption when clientelistic corruption is, on the facts before the court, shown to be a demonstrable threat to representative democracy. In *McCloy*, the most persuasive reason for concluding that the NSW Parliament could ban donations from property developers was the considerable body of evidence establishing a link between property developers and corruption in NSW.⁸² The object of this article is not to evaluate the advantages and disadvantages of relying on facts to determine and justify the scope of a constitutional limitation on power, but it is important for the purposes of this article to note that this approach is not without potential difficulties. A fact-centric approach gives rise to a number of challenging questions. What happens to the scope of the constitutional limitation if the facts change? Does a fact-centric approach mean that the scope of the constitutional limitation differs between jurisdictions in Australia? What evidence is necessary to make a conclusion about the scope of the constitutional limitation?⁸³ The argument is not that these questions are impossible to answer or that it is possible to avoid

⁸¹ *McCloy* (n 12) 205 [40].

⁸² *Ibid* 208–9 [51]–[53].

⁸³ Some of these questions, and particularly the last one, are considered in the scholarship of Anne Carter: see, eg, Anne Carter, 'Proportionality and the Proof of Facts in Australian Constitutional Adjudication' (PhD Thesis, The University of Melbourne, 2018).

reliance on facts in constitutional interpretation, but instead that there may be sound reasons not to determine and justify the scope of constitutional limitations on power *solely* by reference to facts.

In sum, the first dimension of the corporate challenge (that is, whether the political communications of corporations are entitled to protection under the implied freedom) is one of considerable complexity. It is not a question that appears to admit a simple binary answer, but rather one of degree (that is, legislatures can impose *some* restrictions on the ability of corporations to engage in political communication in *some* circumstances). Further, the Court has not developed a particularly persuasive *legal* means of justifying the answer to this question. The next part of this article considers the second dimension of the corporate challenge (that is, whether the protection of corporations can be a justification for restrictions on political communication) and argues that dignity as a distinctive characteristic is a persuasive legal means of justifying the answer to that question. It also suggests that dignity as a distinctive characteristic might provide a legal means of determining and justifying the High Court's answer to the first dimension of the corporate challenge (that is, the challenge just discussed).

B *Can the Protection of Corporations be a Justification for Restricting Political Communication?*

Two years after the decision in *McCloy*, the High Court was squarely faced with a case concerning the second dimension of the corporate challenge: *Brown*.⁸⁴ The case involved a constitutional challenge to the *Workplaces (Protection from Protesters) Act 2014* (Tas) ('*Protesters Act*').⁸⁵ The purpose of the *Protesters Act* was, according to the Tasmanian Government, to 'seek to regulate inappropriate protest activity that impedes the ability of businesses to lawfully generate wealth and create jobs'.⁸⁶ The case involved the question of whether the freedom of natural persons to communicate about political matters could be restricted in order to protect corporations from harm, in particular, economic harm.

Broadly stated, s 6 of the *Protesters Act* prohibited a 'protester' from doing any act on 'business premises' or a 'business access area' that prevents, hinders or obstructs the carrying out of a 'business activity'. Section 11 of the *Protesters Act* empowered a police officer to direct a person to leave a business premises or business access area without delay if the police officer suspected the person to be in contravention of s 6. A direction to leave a business premises or business access area could be imposed for a period of up to three months. Under s 11 it was an offence, *inter alia*, to fail to comply with a direction. Under s 8, it was also an offence to re-enter an area within four days of having received a direction to leave that area.

The *Protesters Act*'s principal object was to protect forestry operations from anti-logging protesters.⁸⁷ As the High Court noted, there is a long history of

⁸⁴ *Brown* (n 8).

⁸⁵ *Workplaces (Protection from Protesters) Act 2014* (Tas) ('*Protesters Act*').

⁸⁶ Quoted in *Brown* (n 8) 347 [36].

⁸⁷ *Ibid* 341 [6].

protests at the site of forestry operations in Tasmania.⁸⁸ The two plaintiffs were persons charged with offences relating to a protest that occurred at the site of a forestry operation. Furthermore, the term ‘business premises’ in the *Protesters Act* was defined to include ‘an area of land on which forestry operations are being carried out’.⁸⁹

A majority of the High Court found that the *Protesters Act* was constitutionally invalid for violating the implied freedom. The joint judgment of Kiefel CJ, Bell and Keane JJ held that it is legitimate for a law to protect the business activities of corporations and other entities from harm from protest activities.⁹⁰ However, certain provisions of the Act were declared invalid for failing to be rationally connected to this purpose.⁹¹ The prohibition on a person being in a business access area even where they did not present a threat of damage or disruption was, for example, declared invalid on this basis.⁹² The main provisions of the *Protesters Act* were declared invalid for not being reasonably necessary for the attainment of the Act’s purpose.⁹³ The principal provision — the prohibition in s 6 on protesters doing anything that prevents, hinders or obstructs business activities — was declared invalid on the basis that Tasmania failed to demonstrate why the provision was reasonably necessary given that there was existing legislation directed to the same purpose that imposed a lesser burden on political communication.⁹⁴ For Gageler J, the law also failed at this stage. As the restrictions were underinclusive and overreached,⁹⁵ the burden was greater than was reasonably necessary to protect forestry operations.⁹⁶ For Nettle J, the law failed at the last stage of proportionality analysis. The law was not adequate in its balance because the extent of the burden on political communication was ‘grossly disproportionate’ to the legislative purpose served by the measures.⁹⁷

The High Court’s decision in *Brown* set the stage for the challenge brought in *Clubb* and helps explain the narrow use of dignity as a distinguishing characteristic in that case. The plaintiffs’ success in invalidating the protest suppression laws in *Brown* made it all but inevitable that other protest suppression laws would be subject to constitutional challenge. Less than six months after the Court’s decision in *Brown*, the challenge in *Clubb* was initiated.⁹⁸ The case thus presented the Court with an acute difficulty. If it were to uphold Tasmania and

⁸⁸ Ibid 346–7 [32]–[33].

⁸⁹ *Protesters Act* (n 85) s 3.

⁹⁰ *Brown* (n 8) 363 [101]–[102]. All other judges but one agreed on this point: see ibid 393–4 [216]–[217] (Gageler J); 414–15 [275] (Nettle J); 460–61 [412]–[413] (Gordon J). Edelman J did not need to consider the matter because he held that the law imposed no additional burden on the freedom of political communication: 502–3 [557].

⁹¹ Ibid 371 [135]–[136].

⁹² Ibid 371 [135].

⁹³ Ibid 373 [146].

⁹⁴ Ibid 372 [140], [142], 373 [146].

⁹⁵ Ibid 394–7 [220]–[231].

⁹⁶ Ibid 397 [232].

⁹⁷ Ibid 422–3 [290].

⁹⁸ The Notice of Constitutional Matter in Mrs Clubb’s case was issued on 4 April 2018: High Court of Australia, ‘Notice of Constitutional Matter’, *Clubb v Edwards*, Case No M46/2018 <https://www.hcourt.gov.au/cases/case_m46-2018>.

Victoria's laws prohibiting protests outside of abortion facilities, it would need to find a basis for distinguishing these laws from the Tasmanian law prohibiting protests outside of forestry operations that it had invalidated in *Brown*. The High Court turned to dignity to make that distinction.

As mentioned above, in *Clubb* Kiefel CJ, Bell and Keane JJ note that, in contrast to the activities under examination in *Clubb*, '[t]he on-site protests against forest operations discussed in *Brown* did not involve an attack upon the privacy and dignity of other people as part of the sending of the activists' message.'⁹⁹ There is considerable merit in this use of dignity. It provides a legal means of determining and justifying conclusions about the second dimension of the corporate challenge. While it is legitimate for legislatures to burden political communication for the purpose of protecting corporations from harm, as the High Court confirmed in *Brown*, legislatures are entitled to impose greater burdens on political communication for the purpose of protecting natural persons from harm, as the Court held in *Clubb*. The reason is that natural persons have a characteristic that corporations do not — namely, dignity.¹⁰⁰ Natural persons are thus vulnerable to a type of harm that corporations are not — namely, threats to their dignity. Furthermore, threats to a natural person's dignity may lead to other forms of harm that are not relevant in the corporate context, as Kiefel CJ, Bell and Keane JJ note in *Clubb*. In response to the submission that the laws were directed to the prevention of no more than 'discomfit' or 'hurt feelings', their Honours said:

Suggestions to that effect may have some attraction in the context of public conflict between commercial or industrial rivals or in the context of a political debate between participants who choose to enter public controversy. But they have 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.¹⁰¹

Not only is dignity a persuasive legal means of distinguishing corporations from natural persons, it is a constitutionally justifiable one. Given that the object of the *Australian Constitution's* system of representative and responsible government is to secure the participation and representation of the Australian people in government, it is arguably appropriate to resolve difficult questions about the scope and limits of the implied freedom, which is a requirement of that system, by reference to values and principles consistent with that object.¹⁰² Dignity, when used in the narrow manner as a distinctive characteristic of natural persons that differentiates them from corporations, is one such value or principle. While dignity does not map perfectly on to this object (for example, non-Australians also have

⁹⁹ *Clubb* (n 6) 23–4 [82].

¹⁰⁰ While it is possible to argue that entities other than natural persons (eg, states) have some forms of dignity (eg, what Valentini calls 'status dignity'), the most common understanding of dignity is one that is inherent to natural persons ('inherent dignity'): Laura Valentini, 'Dignity and Human Rights: A Reconceptualisation' (2017) 37(4) *Oxford Journal of Legal Studies* 862.

¹⁰¹ *Clubb* (n 6) 19 [59].

¹⁰² On the use of values in constitutional interpretation in Australia, see Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018).

dignity), it is broadly consistent with this object. This is because it prioritises the interests of one group that seeks to participate in and be represented by government (that is, natural persons) over another group that seeks to participate in and be represented by government (that is, corporations) in circumstances where the *Australian Constitution* recognises the former group, but not the latter — when the *Constitution* speaks of ‘the people’ in ss 7 and 24, it is referring to natural persons, not corporations.

While the High Court’s invocation of dignity as a distinctive characteristic in *Clubb* is used to address the second dimension of the corporate challenge, it is possible to see how it could also be used in relation to the first dimension — that is, whether the political communications of corporations are entitled to protection under the implied freedom. Indeed, this understanding of dignity could provide a more cogent justification for the Court’s current approach. As argued above, the Court has struggled to find a legal, as opposed to a factual, means of determining and justifying the conclusions it has reached about the extent to which legislatures can regulate corporate political communication consistently with the implied freedom. Dignity as a distinctive characteristic could assist because there are some restrictions on political communication that amount to an affront to the dignity of natural persons, but not corporations, and, therefore, may be more justifiable in relation to corporations than natural persons.

Take, for example, the issue in *Unions NSW* and *McCloy*: political donations. A natural person’s ability to make donations to a political party or political cause is a way for that person to signal their support for the party or cause’s views. It is, in other words, a form of self-expression. The ability to engage in self-expression is essential to human flourishing and is thus an aspect of human dignity.¹⁰³ Corporations have no corresponding interest. Dignity would, therefore, provide a means of distinguishing the position of corporations and natural persons at law. It would be possible to hold, for example, that legislatures could restrict most or even all donations from corporations, but not natural persons, on the basis that natural persons must remain free to make at least small political donations because small donations are a form of self-expression — a way of expressing support for a cause or a political party’s views — and therefore an aspect of their dignity.¹⁰⁴

In sum, the narrow understanding of dignity as a distinctive characteristic is arguably a justifiable way of helping respond to the corporate challenge that has come into sharp focus in recent years. While the High Court has only used it to respond to the second dimension of the corporate challenge (that is, the extent to which legislatures can restrict political communication to protect corporations), the article has suggested that it could also be used to respond to the first dimension (that is, the extent to which legislatures can restrict the political communication of

¹⁰³ For a discussion of the connection between human flourishing and human dignity, see John Kleinig and Nicholas G Evans, ‘Human Flourishing, Human Dignity, and Human Rights’ (2013) 32(5) *Law & Philosophy* 539.

¹⁰⁴ This line of reasoning would not necessarily prevent legislatures from banning large political donations from both natural persons and corporations because the legislature’s interest in preventing corruption could justify the minimal impingement on dignity of banning natural persons from making large, but not small, donations.

corporations). To avoid any doubt, the argument is not that dignity is the *only* way of responding to these challenges; instead, it is that dignity is a relevant and defensible way of responding to these challenges. While dignity as a distinctive characteristic is, therefore, a potentially useful and justifiable one in the Australian constitutional context, the other understanding of dignity as a legitimate purpose faces a number of issues. The next part of the article considers these issues.

IV Dignity as a Legitimate Purpose

It will be remembered that, in *Clubb*, the High Court also uses dignity in a broad manner as one legitimate purpose or reason a law can have for burdening freedom of political communication. The Court characterised the legislation in *Clubb* as being for the purpose of, inter alia, protecting the dignity of persons accessing abortion services or, more broadly, the dignity of the sovereign people.¹⁰⁵ It then held that this purpose is compatible with the constitutionally prescribed system of representative and responsible government.¹⁰⁶ The particular aspect of dignity that was relevant in *Clubb* was, according to the Court, the proposition that it is inconsistent with a person's dignity to force an unwanted message upon them.¹⁰⁷ This part of the article considers two sets of issues that arise with this broad understanding of dignity as a legitimate purpose. First, there are the issues arising from uncertainty associated with the meaning of dignity. Second, there are the issues arising from uncertainty associated with the use of dignity.

The objective of this part of the article is not to establish that no case can be made in favour of using dignity in this broad manner. To the contrary, recognising dignity as a legitimate purpose might yield important benefits. For example, it might help attach an appropriate level of importance and weight to particular categories of government action. It allowed the High Court in *Clubb* to recognise the full significance of the interests that were being protected by the Victoria and Tasmania legislatures. One might even be able to make the argument that the constitutionally prescribed system of representative and responsible government *requires* the protection of dignity in order for the people to be able to fulfil their roles set out in ss 7, 24 and 128 of the *Australian Constitution* in a meaningful way.¹⁰⁸ The objective of this part of the article is, instead, to highlight two issues that the Court will need to address if it continues to use dignity as a legitimate purpose and to demonstrate that there are no straightforward responses to those issues.

A *The Meaning of Dignity*

One challenge with using dignity in a broad manner as a legitimate purpose is to determine what is actually meant by the term. Dignity as a distinctive characteristic uses the term to perform a specific function — that is, to distinguish natural

¹⁰⁵ *Clubb* (n 6) 27 [98]–[99].

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid* 17 [51].

¹⁰⁸ If, however, the Court continues to confine the scope of the implied freedom to what the text and structure of the *Australian Constitution* require, it will be difficult to make this argument.

persons from corporations. In comparison, dignity as a legitimate purpose potentially encompasses a wide range of understandings of the term. In *Clubb*, Kiefel CJ, Bell and Keane JJ said, ‘to force upon another person a political message is inconsistent with the human dignity of that person’.¹⁰⁹ However, it appears their Honours understood that meaning of dignity to be simply one instance of a wider concept. They go on to state: ‘As Barak said, “[h]uman dignity regards a human being as an end, not as a means to achieve the ends of others”’.¹¹⁰ This broader understanding of dignity is even more apparent in the judgments of Nettle J, who describes the legitimate purpose as being ‘[t]he protection of the safety, wellbeing, privacy and dignity of the people of Victoria’,¹¹¹ and Edelman J, who describes the legitimate purpose as being the provision of the ‘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”’.¹¹²

The challenge is that dignity can refer to a range of ideas and interests, some of which are mutually inconsistent.¹¹³ This definitional challenge has long been recognised. In 1983, Schachter noted that dignity’s ‘intrinsic meaning has been left to intuitive understanding’ and that a lack of clarity about its meaning is apt to cause problems: ‘Without a reasonably clear general idea of its meaning, we cannot easily reject a specious use of the concept, nor can we without understanding its meaning draw specific implications for relevant conduct.’¹¹⁴ Little progress has been made since the 1980s. Writing in 2008, McCrudden’s extensive survey of the use of dignity in adjudication around the world revealed that:

In practice, very different outcomes are derived from the application of dignity arguments. This is startlingly apparent when we look at the differing role that dignity has played in different jurisdictions in several quite similar factual contexts: abortion, incitement to racial hatred, obscenity, and socio-economic rights. In each, the dignity argument is often to be found on both sides of the argument, and in different jurisdictions supporting opposite conclusions.¹¹⁵

Recognising dignity as a legitimate purpose is going to present the High Court with many difficult questions about the precise meaning of dignity. Can a law restricting freedom of political communication for the purpose of suppressing offensive speech be characterised as a law that has the protection of dignity as its

¹⁰⁹ *Clubb* (n 6) 17 [51].

¹¹⁰ *Ibid* (citations omitted). Kiefel CJ, Bell and Keane JJ’s discussion of ‘the dignity of members of the sovereign people’ at 27 [99] might also be evidence of a broader invocation of the concept.

¹¹¹ *Ibid* 67 [258].

¹¹² *Ibid* 131 [497].

¹¹³ See, eg, McCrudden (n 1); George Kateb, *Human Dignity* (Harvard University Press, 2011); Jeremy Waldron, ‘Is Dignity the Foundation of Human Rights?’ in Rowan Cruft, S Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press, 2015) 117; Valentini (n 100).

¹¹⁴ Oscar Schachter, ‘Human Dignity as a Normative Concept’ (1983) 77(4) *American Journal of International Law* 848, 849.

¹¹⁵ McCrudden (n 1) 698.

purpose?¹¹⁶ What about a law restricting freedom of political communication for the purpose of promoting racial equality? Or one for the purpose of respecting religion? The Court already struggles with determining what is and is not a legitimate purpose,¹¹⁷ and the recognition of dignity arguably adds another layer of complexity to that task given its ambiguity. Since dignity is, as McCrudden notes, used ‘in different jurisdictions supporting opposite conclusions’,¹¹⁸ comparative materials will be of limited assistance in resolving this issue.

One response might be to take a capacious view of dignity. If a law can be plausibly understood as being for the purpose of protecting dignity, a court should conclude that the law has a legitimate purpose and focus its analysis on determining whether the other aspects of the structured proportionality analysis are satisfied. However, this response will not suffice in the Australian constitutional context because not every pursuit of dignity is compatible with the constitutionally prescribed system of representative and responsible government. Take the aspect of dignity at issue in *Clubb* as an example. The High Court held that the laws were for the purpose of protecting dignity because the laws were directed to protecting people from having unwanted messages forced upon them. However, almost *every* political protest has the effect of forcing an unwanted message upon other people — upon people walking past the protest in the street, upon persons entering the legislative building, and so on. But a law that had the purpose of suppressing political protest per se would, without more (for example, without being limited to the suppression of *violent* protest), be incompatible with the constitutionally prescribed system of representative and responsible government. Due to the limited scope of the implied freedom, it is not possible to adopt a capacious definition of dignity — it has to be refined and narrowed. The protection of people from unwanted messages is not always a legitimate purpose because that would include laws that have as their purpose the suppression of all political protest. It is only legitimate for a law to have that purpose when it is directed to protecting *particular* people from *particular* unwanted messages in *particular* circumstances. The High Court will need to specify what it means by dignity before it can be usefully employed to help identify when a law has a legitimate purpose and when it does not, and that will be no easy task.

B *The Use of Dignity*

Uncertainties also exist with respect to the way in which dignity is used in rights and freedoms adjudication. 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. In other words, dignity is relevant to both sides of the equation. Take political communication as

¹¹⁶ In other words, does the recognition of dignity as a legitimate purpose render the decision in *Coleman* (n 16) incorrect? In that case, a majority of the High Court held that the suppression of offensive speech is not a legitimate purpose.

¹¹⁷ Compare *Coleman* (n 16) with *Monis* (n 24).

¹¹⁸ McCrudden (n 1) 698.

an example.¹¹⁹ The ability to express one's views about political matters is protected in part on the basis that self-expression is essential to one's dignity.¹²⁰ At the same time, restrictions on the expression of political views are justified in part by the idea that certain forms of political communication threaten the dignity of other people.¹²¹ In these circumstances, there are a number of different ways in which a court might respond. It could place the concept of dignity to one side and focus on other criteria for resolving the dispute. It could weigh the competing dignity interests and resolve the dispute in favour of the side with the strongest dignity interest. Or it could deem some dignity interests to be worthy of constitutional protection, but not others.

One response might be to say that, in the Australian constitutional context, this issue does not arise because dignity can only be used on one side of the equation — as a justification for restrictions on political communication (that is, as a legitimate purpose) — for two, related reasons. First, for a purpose to be legitimate, it merely has to be *compatible* with the constitutionally prescribed system of representative and responsible government. However, for dignity to be used on the other side of the equation — as a justification for the protection of political communication — it would need to have some basis in the text and structure of the *Australian Constitution*. The reason being that the implied freedom is an implication derived from the constitutional text and structure and therefore the scope of its protection extends only as far as the text and structure require.¹²² As there is little in the *Constitution's* text and structure to support the proposition that the protection of dignity is an essential feature of the system of government,¹²³ the protection of dignity cannot be a justification for the constitutional protection of political communication. Second, 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. As the joint judgment stated in *Unions NSW*,

it is important to bear in mind that what the Constitution protects is not a personal right. A legislative prohibition or restriction on the freedom is not to be understood as affecting a person's right or freedom to engage in political communication, but as affecting communication on those subjects more generally. The freedom is to be understood as addressed to legislative

¹¹⁹ Waldron and Seglow, for example, see dignity as lying on both sides of the debate about hate speech. Waldron thinks that the dignity interests in favour of restricting hate speech are stronger than those in favour of allowing it: Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2014) 139–43. Seglow thinks that the dignity interests in favour of allowing hate speech are stronger than Waldron suggests: Jonathan Seglow, 'Hate Speech, Dignity and Self-Respect' (2016) 19(5) *Ethical Theory and Moral Practice* 1103, 1107–8.

¹²⁰ See, eg, the Supreme Court of Canada's articulation of the connection between freedom of expression and dignity: *Irwin Toy Ltd v Quebec* [1989] 1 SCR 927, 976.

¹²¹ Indeed, this is exactly what occurred in *Clubb* (n 6).

¹²² See, eg, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

¹²³ One possible argument is that a system of representative and responsible government requires protection of the dignity of the people, but 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).

power, not rights, and as effecting a restriction on that power. Thus *the question is not whether a person is limited in the way that he or she can express himself or herself*, although identification of that limiting effect may be necessary to an understanding of the operation of a statutory provision upon the freedom more generally. The central question is: how does the impugned law affect the freedom?¹²⁴

As dignity attaches to individuals and the focus of analysis is not on individuals, dignity is not relevant to the analysis of a law's effect on freedom of political communication.

There are two, related problems with this set of responses about the use of dignity in adjudication. The first problem is that using dignity only on one side of the equation creates a partial and distorted conception of dignity. In international and comparative theory and practice, it is well accepted that dignity is relevant to the justifications for both the protection of rights and freedoms and for the imposition of limitations on rights and freedoms.¹²⁵ Indeed, the very person that Kiefel CJ, Bell and Keane JJ cite in *Clubb* to elucidate the concept of dignity shares this view. In his book on human dignity, Barak states that dignity is a concept that, first and foremost, justifies the recognition of human rights¹²⁶ before going on to acknowledge its relevance as a justification for limitations on rights too.¹²⁷ He concludes:

the general purpose of human dignity in a particular right (e.g. the right to free speech), might oppose the particular purpose in another right (e.g. the right to privacy). Thus, when two independent constitutional rights conflict, *the constitutional value of human dignity might find itself on both sides of the scales*.¹²⁸

To use dignity on only one side of the equation is a particularly distorted use of the concept because it overlooks an essential characteristic of dignity — *all* humans have it. As both listeners and speakers have dignity,¹²⁹ it would be particularly misleading to invoke dignity in a manner that only considers the dignity of some natural persons (listeners) and disregards the dignity of other natural persons (speakers).

¹²⁴ *Unions NSW* (n 11) 554 [36] (emphasis added). For a critique of this understanding of the implied freedom, see Adrienne Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25(2) *Melbourne University Law Review* 374.

¹²⁵ See the Waldron/Seglow debate above n 119; McCrudden (n 1) 698, 702, 717, 719. For an analogous claim about other values that underpin free speech such as equality, see Adrienne Stone, 'Canadian Constitutional Law and Freedom of Expression' in Richard Albert and David R Cameron (eds), *Canada in the World: Comparative Perspectives on the Canadian Constitution* (Cambridge University Press, 2017) 245, 260–62.

¹²⁶ See, especially, Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge University Press, 2015) 104–5.

¹²⁷ *Ibid* 112–13.

¹²⁸ *Ibid* 122 (emphasis added).

¹²⁹ To avoid any doubt, the claim is not that listeners and speakers necessarily have dignity interests of the same strength or value (eg, the dignity interests of listeners may outweigh the dignity interests of speakers in the context of hate speech). For a discussion of this issue, see Adrienne Stone, 'Viewpoint Discrimination, Hate Speech Laws, and the Double-Sided Nature of Freedom of Speech' (2017) 32(3) *Constitutional Commentary* 687. Instead, the claim is that it is a mistake to ignore the dignity interests of one side in their entirety.

The second problem with this set of responses is that it reverses the principal objective of dignity. Whatever disagreements may exist about the precise role of dignity, there is broad agreement that its principal objective is to assist in the recognition and protection of fundamental rights and freedoms — whether that is as a justification for their existence, as a freestanding right, or as an aid in the interpretation of rights and freedoms.¹³⁰ To use dignity only as a justification for the imposition of limitations on political communication risks turning the concept solely into a vehicle for restricting rights and freedoms. It shifts dignity from a concept that is associated with the protection of fundamental rights and freedoms to a concept that is associated with their limitation. In practice, it means that dignity may amount to no more than an additional reason for the executive and legislature to restrict political communication. To avoid any doubt, the argument is not that the protection of dignity is unable to justify restricting political communication — indeed, the facts of *Clubb* illustrate one such instance where the protection of dignity provides a cogent reason for restricting political communication. The protection of dignity will sometimes — and, perhaps, even often — require the imposition of limitations on the rights and freedoms of others. Instead, the argument is that the use of the protection of dignity *solely* as a justification for the imposition of limitations on rights and freedoms flips the principal objective of dignity on its head, which is to recognise and protect them, not limit them. What this means in the Australian constitutional context is that dignity becomes a concept that operates to erode what is already a limited protection for political communication. Edelman J expressly pointed to the implied freedom's confined operation in *Clubb*, stating:

a restrained approach to each stage [of proportionality analysis] is required because the freedom of political communication is *a limited implication* from the *Constitution* that applies only where it is necessary to ensure the existence and effective operation of the scheme of representative and responsible government protected by the terms of the *Constitution*.¹³¹

The object of this part of the article is not to put forward a view on the merits of having an expansive or a limited protection for freedom of political communication. Instead, it is to argue that it is highly unusual, and arguably misleading, to use the concept of dignity to help create such a limited protection for political communication. In international and comparative constitutional law and scholarship, dignity is understood, first and foremost, as a justification for the existence of fundamental rights and freedoms, not as a justification for their abrogation.

What the foregoing suggests is that, if dignity is to be used in a broad manner as a legitimate reason for restricting political communication, its relevance to the *protection* of political communication should also be recognised. To do otherwise would be to adopt a partial and distorted conception of dignity that flips its objective on its head. While judicial and other actors regularly re-engineer

¹³⁰ See McCrudden (n 1); Waldron (n 113); Barak (n 126).

¹³¹ *Clubb* (n 6) 105 [408] (emphasis added).

constitutional concepts from other jurisdictions,¹³² it is arguable that reconceptualising dignity to serve only as a justification for limiting freedom of political communication would make it borderline unrecognisable from a comparative perspective, and therefore call into question the appropriateness of using a well-established transnational and international concept at all.

V Conclusion

While the invocation of dignity in *Clubb* might be seen as another way in which the High Court is increasingly coming to engage with comparative constitutional ideas, it is also apparent that this engagement will acquire a special local flavour — in much the same way as the Court's invocation of structured proportionality analysis.¹³³ However, the Court should, this article argues, be careful about the ways in which it engages with the concept. The invocation of dignity in a narrow manner — as a distinctive characteristic of natural persons and thus a way of differentiating them from corporations under the implied freedom of political communication — is useful and justifiable. More challenges arise with its invocation in a broad manner — as a means of identifying one possible purpose that a law might pursue that is compatible with the implied freedom. While this latter invocation is what most clearly emerges from the judgment in *Clubb* and may be ultimately defensible, the article demonstrates that it requires engagement with two difficult issues: the meaning of dignity and the use of dignity. Importantly, it argues that there are no straightforward ways of resolving these issues. Questions about dignity's meaning cannot be circumvented by adopting a capacious definition and questions about its use cannot be circumvented by limiting its relevance to identifying a law's legitimate purpose. There is, in short, great complexity lurking underneath what, at first glance, might appear to be a relatively innocuous invocation of the concept.

¹³² On the concept of constitutional reengineering, see Scott Stephenson, 'Constitutional Reengineering: Dialogue's Migration from Canada to Australia' (2013) 11(4) *International Journal of Constitutional Law* 870, 873–8.

¹³³ On the Court's engagement with structured proportionality analysis, see Stone (n 19).

Three Recent Royal Commissions: The Failure to Prevent Harms and Attributions of Organisational Liability


Penny Crofts*

Abstract

There is increasing international recognition of the widespread harms caused by large organisations (including corporations) and the seeming absence of attributions of criminal liability to those organisations. Recent Australian Royal Commissions have shown long-term systemic harms and crimes inflicted within and by large organisations and yet the criminal law's account of responsibility within and of organisations remains weak. Criminal legal doctrine has failed to develop a coherent, persuasive and pragmatic means of attributing culpability for harms caused by large organisations. This failure is due to a failure to conceive of organisations as responsible in and of themselves. To examine the weakness of the criminal legal response, this article focuses on recent reforms by the United Kingdom ('UK') and proposed reforms in Australia to develop a form of omissions liability by criminalising organisational failure to prevent. The UK model focuses on a specific predicate offence (such as bribery), but this article argues that the predicate offence can and should be extended more broadly to systemic failure to prevent breach of duty of care. To this end, this article considers the findings of three different Australian Royal Commissions to argue how and why the failure to prevent can be sufficiently blameworthy to justify and require the attribution of criminal liability and sanctions.

I Introduction

Criminologists have long pointed to the financial and physical harms caused by large organisations and the relative dearth of attributions of criminal liability to those organisations.¹ Recent Australian Royal Commissions have shown long-term

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¹ Edwin H Sutherland, *White Collar Crime* (Dryden, 1949); Cedric Michel, John Cochran and Kathleen Heide, 'Public Knowledge about White-Collar Crime: An Exploratory Study' (2016) 65(1–2) *Crime, Law and Social Change* 67; Steve Tombs and David Whyte, *The Corporate*

systemic harms and crimes inflicted within and by large organisations.² Despite widespread condemnation of these organisations and the harms that they have inflicted, a criminal legal response to organisational failures has been largely absent.³ It is only since the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry ('Banking Royal Commission') that regulators have shown greater willingness to pursue criminal actions against banking organisations.⁴ Although the Royal Commission into Institutional Responses to Child Sexual Abuse ('Child Sexual Abuse Royal Commission') was tasked with investigating *institutional* responses, no reforms were suggested for the prosecution of institutional failings,⁵ and there has been no criminal legal response to organisational failures to protect and prevent the abuse of children. Similarly, despite a scathing assessment in the interim report of the Royal Commission into Aged Care Quality and Safety ('Aged Care Royal Commission'), there was no consideration of the role of the legal system in aged care.⁶ This absence of a structural criminal legal response reflects academic literature that has long pointed to the disjunction between social and moral denunciation of organisational malfeasance and the ostensible criminal legal impunity of these organisations.⁷

The absence of any criminal legal response to organisational malfeasance is in accordance with long-term academic recognition about problems the criminal justice system has in conceptualising and imposing corporate responsibility.⁸ The

Criminal: Why Corporations Must Be Abolished (Taylor and Francis, 2015); Mihailis E Diamantis, 'Functional Corporate Knowledge' (2019) 61(2) *William & Mary Law Review* 319, 324.

² This article focuses on a broad range of harms caused by large organisations including child sexual abuse, elder abuse and financial crimes. There is some ambiguity about whether some of the organisational harms, such as elder abuse and financial malfeasance, are necessarily criminal — reflecting and reinforcing the absence of prosecution in this area.

³ To avoid legal technicalities of the definition of the 'corporation' and also in recognition of the culpability of organisations which are not by definition corporations, this article refers to 'organisations' throughout to include not only legal 'corporations' but also institutions in constructions of organisational criminal liability.

⁴ The Australian Securities and Investments Commission ('ASIC') has signalled a willingness to prosecute for corporate malfeasance since the Banking Royal Commission, but has not as yet met with success: see, eg, Sean Hughes (ASIC Commissioner), 'ASIC's Approach to Enforcement after the Royal Commission' (Speech, 36th Annual Conference of the Banking and Financial Services Law Association, 30 August 2019) <<https://asic.gov.au/about-asic/news-centre/speeches/asic-s-approach-to-enforcement-after-the-royal-commission/>>.

⁵ Penny Crofts, 'Legal Irresponsibility and Institutional Responses to Child Sex Abuse' (2016) 34(2) *Law in Context* 79.

⁶ *Royal Commission into Aged Care Quality and Safety, Interim Report: Neglect* (Interim Report, October 2019) ('Aged Care Royal Commission Interim Report'); Joseph Ibrahim and David Ranson, 'Neglect in Aged Care — A Role for the Justice System?' (2019) 27(2) *Journal of Law and Medicine* 254, 254.

⁷ See, eg, John HC Colvin and James Argent, 'Corporate and Personal Liability for "Culture" in Corporations?' (2016) 34(1) *Company and Securities Law Journal* 30. See also Michel, Cochran and Heide (n 1), who have argued that the public lack (accurate) knowledge of white-collar crime and criminal legal responses. Widespread media reporting of Royal Commissions contribute to public knowledge about the extent of harms caused by large organisations and the lack of a criminal legal response.

⁸ See, eg, Brent Fisse and John Braithwaite, 'The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability' (1988) 11(3) *Sydney Law Review* 468 ('The Allocation of Responsibility for Corporate Crime'); Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press, 1993); Gregory Gilchrist,

findings of the Royal Commissions have given stark insight into Veitch's argument about the legally structured irresponsibility of organisations — the larger an organisation, the more capable it is of causing systemic harms, and yet the less likely it is to be held criminally liable.⁹ Criminal legal doctrine has failed to develop a coherent, persuasive and effective means of attributing responsibility for harms caused by large organisations at a time when we are increasingly dependent upon them.¹⁰ The Royal Commissions have repeatedly shown large organisations causing widespread, on-going, systemic harms and a failure of the criminal justice system to adequately respond, demonstrating the acute need to construct a persuasive and pragmatic account of corporate liability.

This article focuses on the United Kingdom's ('UK') development of a form of omissions liability by criminalising the failure to prevent. Under the UK model, the offence occurs if the organisation fails to prevent a bribery or tax evasion offence by an employee and cannot show it had in place adequate procedures to prevent the bribery or tax evasion.¹¹ That is, the UK model requires a specific predicate offence (of bribery or tax evasion) as the foundation for organisational culpability. An offence modelled on the UK bribery offence was introduced into the Australian Senate in December 2019 under the Crimes Legislation Amendment (Combating Corporate Crime) Bill 2019 (Cth) ('CLACCC Bill 2019').¹² This article proposes extending the UK model of failure to prevent so that instead of requiring proof of a specific predicate offence, an organisation can and should be liable for the systemic failure to prevent breach of legal duty of care. To this end, the article considers the findings of three different Australian Royal Commissions to argue how and why the failure to prevent can be sufficiently blameworthy to justify and require the imposition of criminal sanctions. This approach is partly based on the pragmatic recognition, voiced by Fisse in relation to corporate criminal law reform, that 'criminal liability based on blameworthiness is more likely to induce respect for the

'The Expressive Cost of Corporate Immunity' (2012–2013) 64(1) *Hastings Law Journal* 1; Neil Gunningham, 'Negotiated Non-Compliance: A Case Study of Regulatory Failure' (1987) 9(1) *Law and Policy* 69; Celia Wells, *Corporations and Criminal Responsibility* (Oxford University Press, 2nd ed, 2001); Jonathon Clough, 'Bridging the Theoretical Gap: The Search for a Realist Model of Corporate Criminal Liability' (2007) 18(3–4) *Criminal Law Forum* 267; Eli Lederman, 'Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation towards Aggregation and the Search for Self-Identity' (2000) 4(1) *Buffalo Criminal Law Review* 641.

⁹ Scott Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering* (Routledge-Cavendish, 2007) 2.

¹⁰ Celia Wells, 'Corporate Responsibility and Compliance Programs in the United Kingdom' in Stefano Manacorda, Gabrio Forti and Francesco Centonze (eds), *Preventing Corporate Corruption: The Anti Bribery Compliance Model* (Springer, 2014) 505.

¹¹ See *Criminal Finances Act 2017* (UK) ss 45–6.

¹² The proposed amendments under the Crimes Legislation Amendment (Combating Corporate Crime) Bill 2019 (Cth) ('CLACCC Bill 2019') to various Commonwealth Acts are broadly similar to those proposed under the Crimes Legislation Amendment (Combating Corporate Crime) Bill 2017 (Cth), which lapsed in 2019. A major difference between the UK bribery offence and the proposed Australian offence is that the Australian offence's broader definition of 'associate' of the company draws the liability net more widely than the UK offence: Mark Lewis, 'Criminalising Corporate Failures to Prevent: Foreign Bribery by Non-Controlled Associates — A Net Cast Too Wide' (2020) 44 *Criminal Law Journal* 80, 83–5.

law and willingness to comply',¹³ and by extension, is more likely to induce regulators to investigate, prosecute and enforce. There is also a normative argument that criminal law requires culpability. It is a distinctively moral institution that expresses right and wrong, backed by governmental sanctions.¹⁴ This is in accordance with an expressive account of criminal law, whereby state actions communicate values about what society values and condemns.¹⁵ On this account, the failure of the criminal justice system to prosecute organisations for systemic harms communicates that these harms are just a cost, albeit unfortunate, of doing business.

The three Royal Commissions considered in this article examined very different industries. The terms of reference for each Royal Commission include a requirement to consider systemic issues and responses to any findings of systemic failings.¹⁶ The Child Sexual Abuse Royal Commission commenced in 2013 and continued until the end of 2017.¹⁷ The Royal Commission's final report detailed serious long-term systemic failures to prevent and adequately respond to child sexual abuse by many different types of institutions that have contact with children. The Banking Royal Commission commenced in December 2017 and the final report of Commissioner Hayne was tabled in Parliament in February 2019.¹⁸ The terms of reference included investigation of conduct, practices, behaviour or business activities by financial services entities which might have amounted to misconduct or fallen below community standards and expectations.¹⁹ The Commission was also tasked with investigating the adequacy of existing laws and policies of the Commonwealth, internal systems and forms of industry self-regulation, and regulators to identify, regulate and address misconduct and to meet community standards.²⁰ The Banking Royal Commission found widespread evidence of criminality and malfeasance.²¹ The Aged Care Royal Commission was established in October 2018 and is due to provide a final report by late February 2021. The Terms of Reference of the Aged Care Royal Commission include an

¹³ Brent Fisse, 'Penal Designs and Corporate Conduct: Test Results from Fault and Sanctions in Australian Cartel Law' (2019) 40(1) *Adelaide Law Review* 285, 287.

¹⁴ W Robert Thomas, 'Making Sense of Corporate Criminals: A Tentative Taxonomy' (2019) 17(SI) *Georgetown Journal of Law & Public Policy* 775, 792–3.

¹⁵ Elizabeth S Anderson and Richard H Pildes, 'Expressive Theories of Law: A General Restatement' (2000) 148(5) *University of Pennsylvania Law Review* 1503; Mihailis E Diamantis, 'Corporate Criminal Minds' (2016) 91(5) *Notre Dame Law Review* 2049, 2062.

¹⁶ 'Terms of Reference: Letters Patent', *Royal Commission into Institutional Responses to Child Sexual Abuse* (Web Page, 13 November 2014) <<https://www.childabuseroyalcommission.gov.au/terms-reference>> ('Child Sexual Abuse Royal Commission TOR'); Letter from Sir Peter Cosgrove to Kenneth Madison Hayne (Register of Patents No 52 Page 67, 14 December 2017) 2–3 <<https://financialservices.royalcommission.gov.au/Documents/Signed-Letters-Patent-Financial-Services-Royal-Commission.pdf>> ('Banking Royal Commission TOR'); 'Terms of Reference', *Royal Commission into Aged Care Quality and Safety* (Web Page, 6 December 2018) <<https://agedcare.royalcommission.gov.au/about/terms-reference>> ('Aged Care Royal Commission TOR').

¹⁷ Child Sexual Abuse Royal Commission TOR (n 16); *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, December 2017) ('*Child Sexual Abuse Royal Commission Final Report*').

¹⁸ *Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry* (Final Report, February 2019) ('*Banking Royal Commission Final Report*').

¹⁹ Banking Royal Commission TOR (n 16).

²⁰ Ibid.

²¹ *Banking Royal Commission Final Report* (n 18) vol 1, ch 1.

inquiry into the quality of aged care services, the extent of substandard care being provided, ‘the causes of any systemic failures, and any actions that should be taken in response’.²² The Aged Care Royal Commission published an interim report in October 2019 entitled *Neglect*.²³

The idea of combining the findings of these three different Royal Commissions for the purpose of analysis is unusual. Corporate law reform and scholarship frequently focus on discrete areas. For example, the Child Sexual Abuse and Banking Royal Commissions have proposed reforms specific to their topic areas. The inquiry of the Australian Law Reform Commission (‘ALRC’) into Australia’s corporate criminal responsibility regime primarily focused on financial crimes, as shown by the commissions and inquiries to which it referred, the examples of offences and the proposed law reform.²⁴ Likewise, although the proposed CLACCC Bill 2019 is aimed at ‘combatting corporate crime’, its target is financial crimes. Many physical harms are primarily considered through the lens of health and safety law,²⁵ while environmental harms form their own niche.²⁶ There are difficulties in combining these disparate areas, particularly the risk of trivialising harms through superficial analysis by attempting to cover too much ground. However, this approach is highly original and has the advantage of avoiding piecemeal reforms and instead focuses on a commonality that links organisations operating across the spectrum — that is, harms caused by organisational breach of legal duty. It contributes to the conceptualisation of organisations as legal agents that can and should be held responsible for harms caused.

All three Royal Commissions discussed in this article emphasise the long-term, systemic harms caused by organisations across time. Each provided reports or pointed to the sheer number of inquiries that have previously unearthed and reported harms caused in the same areas and yet the same harms have continued to be inflicted in the same areas.²⁷ Their findings show a historic failure by regulators

²² Aged Care Royal Commission TOR (n 16).

²³ *Aged Care Royal Commission Interim Report* (n 6). The Commission will provide a Final Report by 26 February 2021.

²⁴ Australian Law Reform Commission (‘ALRC’), *Discussion Paper: Corporate Criminal Responsibility* (Discussion Paper No 87, November 2019) <<https://www.alrc.gov.au/publication/discussion-paper-87/>>; ALRC, *Corporate Criminal Responsibility* (Report 136, April 2020) 29–30 <<https://www.alrc.gov.au/publication/corporate-criminal-responsibility/>>.

²⁵ Work safety is regulated by Commonwealth and state legislation such as the *Work Health and Safety Act 2011* (Cth). Many health and safety offences have a similar structure to the proposed failure to prevent a breach of duty offence in the CLACCC Bill 2019 (n 12). For example, under s 32 of the *Work Health and Safety Act 2011* (Cth) an organisation can be charged with a category two offence for ‘failure to comply with a health and safety duty’.

²⁶ The Commonwealth’s key environmental legislation is the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

²⁷ See, eg, Shurlee Swain, ‘History of Australian Inquiries Reviewing Institutions Providing Care for Children’ (Research Report, Australian Catholic University, October 2014). The UK is currently undertaking an Independent Inquiry into Child Sexual Abuse: see *Independent Inquiry into Child Sexual Abuse* (Web Page) <<https://www.iicsa.org.uk/>>. For a summary of aged care inquiries, see House of Representatives Standing Committee on Health, Aged Care and Sport, Parliament of Australia, *Report on the Inquiry into the Quality of Care in Residential Aged Care Facilities in Australia* (Report, October 2018) ch 1. See also ‘The Royal Commission into Aged Care Quality and Safety: A Quick Guide’, *Parliament of Australia* (Web Page, 18 September 2019)

and the criminal justice system to adequately protect against, and respond to, harms or offences in and by organisations. The harms have also occurred against a backdrop of weak, underfunded, overworked regulators — which, in turn, has led to a lack of criminal prosecution at the peak of the regulatory pyramid.²⁸

This article draws upon the reports of the Child Sexual Abuse, Banking and Aged Care Royal Commissions to show that systemic failures of institutions to protect against, and respond adequately to, harms or offences in institutions are culpable and egregious failures in their own right that are worthy of criminal sanctions. It is not a matter of chance that offenders are able to perpetrate crimes many times over many years in specific institutions — they are enabled, or at least not prevented, by the systems, policies and reactions of that specific institution. These institutions can be described as criminogenic — they cause or are likely to cause criminal behaviour, by encouraging, tolerating or turning a blind eye to criminal behaviour.²⁹ Accordingly, the findings of the Royal Commissions demonstrate the urgent need for an extension of models of responsibility beyond those of individual perpetrators to consider the responsibility of the criminogenic organisation itself in inflicting and sustaining crimes. These Royal Commissions, like other public inquiries, encourage and require reflection upon the unsatisfactory criminal legal response to organisational harms. This is particularly so because particular events provide a catalyst for corporate criminal law reform.³⁰ The failure of the criminal justice system to respond to systemic failures of large organisations requires us to think imaginatively and broadly about organisational culpability. The absence of a general theory of corporate liability has long been recognised — the corporate law theorist Celia Wells has pointed to the lack of any ‘blueprint or underpinning design’³¹ of corporate criminal liability. This article aims to contribute to a general theory of corporate liability that recognises organisations (including corporations) as specific legal subjects of the 21st century. In order to analyse the efficacy of this general approach, this article will explore two key themes throughout: first, the enforceability of the proposed failure-to-prevent offence (a pragmatic account); and second, whether the offence establishes the blameworthiness of the organisation (a normative account). This article draws upon philosophies of wickedness to argue that systemic failure can and should be regarded as sufficiently culpable to justify criminal sanctions.

Part II of this article outlines contemporary models of corporate liability, that of nominalism and realism, to situate the UK failure-to-prevent offence. Part III applies the requirement of a foundational offence in the UK failure-to-prevent offence to findings of the Child Sexual Abuse, Banking and Aged Care Royal Commissions. Part IV draws on Royal Commission findings to demonstrate

<https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1920/Quick_Guides/RoyalCommissionAgedCare>.

²⁸ Fisse and Braithwaite, *Corporations, Crime and Accountability* (n 8). It is beyond the scope of this article to consider the shortcomings of the regulators in this area, but the cultures of the regulators are key, as is a failure to unite the different sectors and consider corporate wrongdoing as a whole.

²⁹ See below nn 147–50 and accompanying text.

³⁰ See, eg, Victoria Roper, ‘The Corporate Manslaughter and Corporate Homicide Act 2007 — A 10 Year Review’ (2018) 82(1) *The Journal of Criminal Law* 48, 48.

³¹ Wells (n 10) 506.

the ways in which organisations are sites of specific risk and the failure to develop reasonable procedures to prevent breach of legal duty can be attributed to organisational or systemic failure. Part V argues that the offence of failure to prevent satisfies both the practical and normative tests.

II Contemporary Models of Corporate Criminal Liability

Despite the lack of any general theory, for the purpose of analysis, approaches to corporate criminal liability can be divided according to whether the corporation is viewed as a collective in name only (that is, nominalist) or whether the corporation is regarded as an autonomous legal agent (that is, realist). This section outlines the different models and associated legal doctrine in Australia as a way of contextualising the failure-to-prevent offence in the UK and the proposed failure to prevent bribery offence in the CLACCC Bill 2019.

A The Nominalist Approach to Corporate Criminal Liability

The dominant model of corporate criminal liability, nominalism, dates from the 19th century and privileges the classic criminal legal subject — the flesh and blood individual.³² On this account, corporations are artificial entities made up of nothing more than a collective of individuals and, as such, can only act through living persons.³³ This is a form of ‘methodological individualism’ as it is based on the assumption that all social action can only be explained through the actions of individuals — that is, corporations do not commit crimes, people do.³⁴ According to the nominalist account, it is farcical to suggest that corporations are capable of acting and/or having intentions except through the natural persons who constitute the corporate enterprise.³⁵ To this end, various approaches have been adopted to attribute the actions and intentions of individuals to the corporation. One approach that the courts have adopted is the ascription of corporate responsibility for the actions of an employee through the concept of vicarious liability.³⁶ Under this principle, a corporation can be liable for actions or omissions committed by an agent in the course, or during the scope, of employment. In Australia and the UK, there has been limited application of vicarious liability, compared with the United States.³⁷

³² Max Radin, ‘The Endless Problem of Corporate Personality’ (1932) 32(4) *Columbia Law Review* 643.

³³ Eric Colvin, ‘Corporate Personality and Criminal Liability’ (1995) 6(1) *Criminal Law Forum* 1; Meir Dan-Cohen, *Rights, Persons, and Organizations: A Legal Theory for Bureaucratic Society* (University of California Press, 1986). Fatal robots are arguably a way in which corporations can act without humans: see, eg, SM Solaiman, ‘Corporate Manslaughter by Industrial Robots at Work: Who Should Go on Trial under the Principle of Common Law in Australia’ (2016) 35(1) *Journal of Law and Commerce* 21.

³⁴ Fisse (n 13); Jennifer G Hill, ‘Corporate Criminal Liability in Australia: An Evolving Corporate Governance Technique?’ (Law and Economics Research Paper No 03-10, Vanderbilt Law School, 2003).

³⁵ Amy J Sepinwall, ‘Corporate Moral Responsibility’ (2016) 11(1) *Philosophy Compass* 3, 3.

³⁶ *R v Australasian Films Ltd* (1921) 29 CLR 195.

³⁷ See *New York Central and Hudson River Railroad Co v United States* 212 US 481 (1909). For an analysis of the problematic foundations of vicarious liability, see the civil case of *Prince Alfred College Incorporated v ADC* (2016) 258 CLR 134. Fisse has argued that Australian cartel law is a

The dominant approach for ascribing corporate criminal liability in Australia is through identification theory, which requires proof that the ‘directing mind’ of the corporation has acted with the requisite fault, as expounded in *Tesco Supermarkets Ltd v Natrass*.³⁸ This approach is based on an anthropomorphic conception of the company, where only those persons invested by proper authority with managerial powers and responsibility are regarded as the head or brains of the company. The ‘state of mind’ of this ‘directing mind’ is treated by law as the state of mind of the organisation, which enables criminal liability to be imposed on a corporation for offences that require mens rea. The principle requires that the prosecution prove that the directing mind of a corporation knew of the criminal actions and possessed the necessary mens rea.³⁹

Identification theory has not met with much practical success, to the extent that it has been labelled an ‘obstacle’ to corporate conviction.⁴⁰ It is highly restrictive and artificial, and fails to grapple with the reality of contemporary corporations.⁴¹ Specifically, the theory works better with small, owner-managed companies, but tends to insulate large corporations from criminal liability. The ‘directing mind’ model distorts decision-making in large corporations as it is difficult to determine who the directing mind is, and whether they are in command of what the organisation does.⁴² This is because modern corporations distribute authority in many ways that generate more than one directing mind and will. The identification principle specifies that only staff and officers who are very high up in the corporate hierarchy can represent the directing mind of the corporation. Such a person or people must be responsible for the supervision of corporate activities and the design of corporate policies at the highest level.⁴³ Larger organisations are capable of inflicting greater systemic harms, and yet the larger an organisation is,

species of vicarious liability: see Fisse (n 13). For vicarious liability in the United States, see Lucian E Dervan, ‘Corporate Criminal Liability, Moral Culpability, and the Yates Memo’ (2016) 46(1) *Stetson Law Review* 111.

³⁸ [1972] AC 153 (*Tesco v Natrass*) cited in *Hamilton v Whitehead* (1988) 166 CLR 121, 127. The UK has largely reaffirmed the directing mind approach in *Attorney-General’s Reference (No 2 of 1999)* [2000] QB 796. The test was tempered somewhat by the Privy Council expanding the people whose actions and state of mind are attributed to the company in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500.

³⁹ The directing mind can be more than one person acting collectively, such as a board of directors: see James Chalmers, ‘Corporate Culpable Homicide: *Transco Plc v HM Advocate*’ (2004) 8(2) *Edinburgh Law Review* 262. For an analysis of the common law position see Olivia Dixon, ‘Corporate Criminal Liability: The Influence of Corporate Culture’ in Justin O’Brien and George Gilligan (eds), *Integrity, Risk and Accountability in Capital Markets: Regulating Culture* (Hart Publishing, 2013) 251.

⁴⁰ Solaiman (n 33) 51.

⁴¹ For judicial criticisms, see *Meridian Global Funds Management Asia Limited v Securities Commission* [1995] 2 AC 500, 506–7, 511–12 (Lord Hoffmann); *Canadian Dredge & Dock Co v The Queen* [1985] 1 SCR 662, 693 (Estey J); *Moulin Global Eyecare Trading Ltd v Commissioner of Inland Revenue* [2014] HKCFA 22 [67] (Lord Walker of Gestingthorpe). See also Stefan HC Lo, ‘Context and Purpose in Corporate Attribution: Can the “Directing Mind” Be Laid to Rest?’ (2017) 4(2) *Journal of International and Comparative Law* 349.

⁴² Liz Campbell, ‘Corporate Liability and the Criminalisation of Failure’ (2018) 12(2) *Law and Financial Markets Review* 57, 59.

⁴³ *Tesco v Natrass* (n 38).

the more difficult it is to establish the directing mind and that they had the necessary mens rea.⁴⁴

Nominalist theories of corporate criminal liability also fail to reflect organisational culpability. These approaches require proof of fault of a representative of the corporation, but they do not establish organisational fault, only that a particular representative was at fault.⁴⁵ Identification theory fails to capture circumstances where there is no underlying individual fault, but there is corporate culpability.⁴⁶ Nominalist accounts focus on individuals' actions or omissions and are unable to conceptualise *organisational* failure. For example, the *Herald of Free Enterprise* public court of inquiry found that there was a 'disease of sloppiness' at every level of the corporate hierarchy,⁴⁷ but charges of corporate negligence against the directors and of corporate manslaughter against the company (P&O) failed because no one individual was negligent.⁴⁸

Nominalist accounts fail to engage with the most common way in which organisations cause harm; namely due to failure by the organisation as a whole, rather than individual culpability, particularly at the executive level. This is shown in each of the Child Sexual Abuse, Banking and Aged Care Royal Commission reports, which all too commonly highlight a lack of knowledge or care, despite being recognised as sites of risk for particular offences. Organisations can be structured in such a way that malfeasance, and concerns about it, are unlikely to reach upper management — this means that the directing mind will lack the necessary criminal intent. This entrenched ignorance may be by design in order to avoid culpability under existing common law doctrine, but may also be a practical result of the diffusion of responsibility and authority in large, complex organisations.⁴⁹

This weakness of identification doctrine is demonstrated in the Banking Royal Commission case-study analysis of Rabobank's loans to the Brauers.⁵⁰ In summary, the Brauers owned a farm and had been customers of Rabobank since 2004 and had a credit limit of \$1 million with Rabobank. In 2009, the Brauers had rented out their property and relocated overseas. They were emailed by their loan manager who advised them that a neighbouring property was on the market. Although the Brauers had not previously been looking to purchase, they expressed interest and the loan manager valued the property. He then advised the Brauers that they could borrow extra money and later use undrawn funds from their original

⁴⁴ Campbell (n 42) 58.

⁴⁵ Brent Fisse, 'Consumer Protection and Corporate Criminal Responsibility — A Critique of *Tesco Supermarkets Ltd v Natrass*' (1971) 4(1) *Adelaide Law Review* 113; Margaret Gilbert, 'Who's to Blame? Collective Moral Responsibility and Its Implications for Group Members' (2006) 30(1) *Midwest Studies in Philosophy* 94; Lo (n 41).

⁴⁶ Colvin (n 33).

⁴⁷ Department of Transport (UK), *The Merchant Shipping Act 1894: MV Herald of Free Enterprise* (Report of Court No 8074 Formal Investigation, September 1987) 10.

⁴⁸ *R v P&O European Ferries (Dover) Ltd* (1990) 93 Cr App R 72.

⁴⁹ Diamantis (n 1) 328.

⁵⁰ This is a summary from *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry: Interim Report* (28 September 2018) ('Banking Royal Commission Interim Report') vol 2, 388–404.

loan to stock the farms with cattle on their return. The loan manager prepared a credit submission to Rabobank's credit department. In September 2009, a representative from the credit department emailed the loan manager flagging problems with the credit submission, including that the proposed gearing was high and that 'serviceability was very hard to get a grip on'.⁵¹ The credit report also noted that the assumptions about cattle numbers and prices were either wrong or debateable and no allowance had been made for living expenses. The loan manager emailed the Brauers that day, but did not communicate the concerns of the credit department as to whether they would be able to meet the debt. The Brauers accepted the loan and purchased the neighbouring property. Upon their return the Brauers were introduced to a different Rabobank employee who was to be their new loan manager, Mr Brady, who in contrast with email communications by their previous loan manager, stated that finance to restock the farm would only be available if the Brauers repaid \$3 million within two years. After their property flooded and the Australian Government banned live export of cattle to Indonesia, the Brauers were unable to repay the \$3 million and their interest rate was increased by 4% above the standard rate. After mediation, the Brauers sold the farm, but lost more than \$1 million in the process.

Although the regional manager, Mr James, initially asserted that Rabobank had not engaged in any misconduct, upon reflection he agreed that contrary to the written terms of the loan, the loan manager's emails gave an impression that further funds would be available for livestock purchases. The bank also had not revealed the credit department's concerns to the Brauers that they would be unable to service the debt even in the best of circumstances. There were no internal systems requiring the communication of the credit department's concerns to the customers. Nor were there any policies or systems in place to ensure that credit department queries or concerns were attended to prior to loan approval. The Royal Commission found that in the Brauers' case, the loan should not have been approved.⁵² Rabobank also did not have systems to militate against conflicts of interest. There was no separation of internal appraisal of property values from the function of loan origination and security valuation. These tasks were accomplished by the loan manager who was 'incentivised' to write loans,⁵³ and there was no internal appraisal of his or her assessments. Moreover, Rabobank employees who undertook valuations had not been specifically trained. The Australian Prudential Regulation Authority ('APRA') and Ernst and Young (as auditors) made recommendations in 2009 and 2011, requesting Rabobank to review its valuation policies and to separate loan valuations from the loan originator, as there was a risk of overvaluation by the loan originator, whether deliberately or in error. Despite recommendations by Ernst and Young and APRA, Rabobank did not separate loan origination from security valuation until 2014.

This case study shows the deficiencies of identification theory. The Brauers' loan manager would not be sufficiently senior to be regarded as the 'brain

⁵¹ *Banking Royal Commission Interim Report* (n 50) vol 2, 392.

⁵² *Ibid* 401.

⁵³ *Ibid* 403.

and nerve centre' of the bank.⁵⁴ The absence of any oversight or review of the loan manager's practices — from loan origination, to valuation, and email promises — militated against more senior staff, the directing mind, becoming aware of systemic issues. Rabobank's senior executives were physically and mentally remote from the operations that created the opportunity for malfeasance. The Rabobank example demonstrates how identification doctrine may lead an organisation to have an ambivalent relationship with knowledge — the more that they know about their practices and procedures the more able they will be to predict and prevent misconduct, but also the more likely a prosecution will be successful.⁵⁵ Identification theory may actually have the perverse consequence of discouraging auditing — the less executives know, the better in terms of common law doctrine. The Royal Commission found that Rabobank had inadequate systems and procedures and 'difficulties in internal controls and management systems'.⁵⁶ Drawing on the findings of the Royal Commission, I would argue that Rabobank had a responsibility to put procedures in place to train staff in valuations, ensure valuations were independent, and that credit department recommendations were addressed and communicated to customers. This lack of procedures, training and auditing meant that Rabobank had failed to discharge its legal duty of care to customers and also ensured that senior executives (and staff) were unaware of any problems with the lending process. This failure was not due to specific individuals, rather it was the very policies and systems (or lack thereof) in place that militated against awareness or knowledge, in and of themselves reflecting a lack of care by the organisation.

B *Alternative Model: The Realist Approach*

In contrast to the dominant nominalist approach, realist theories assert that corporations are more than just the sum of their parts⁵⁷ and that they are capable of being autonomous legal actors.⁵⁸ This realist approach is reflected in the Child Sexual Abuse, Banking and Aged Care Royal Commissions, where the Royal Commissions and media referred to harms caused and malfeasance by specific organisations such as AMP (financial services company), the National Australia Bank ('NAB'), the Oakden Facility (a nursing home), and the Catholic Church.⁵⁹ It might be argued that labelling corporations in this way is simply a matter of linguistic convenience, but does not reflect the reality of organisational

⁵⁴ *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159, 172 (Lord Denning). See also *R v AC Hatrick Chemical Pty Ltd* (1995) 152 A Crim R 384.

⁵⁵ *Diamantis* (n 1) 330.

⁵⁶ *Banking Royal Commission Interim Report* (n 50) vol 2, 402.

⁵⁷ See, eg, Susanna M Kim, 'Characteristics of Soulless Persons: The Applicability of the Character Evidence Rule to Corporations' (2000) 2000(3) *University of Illinois Law Review* 763; Dan-Cohen (n 33).

⁵⁸ *Hill* (n 34).

⁵⁹ See, eg, *Banking Royal Commission Final Report* (n 18) vol 2, 47–62, 151–9; *Aged Care Royal Commission Interim Report* (n 6) vol 1, 62–3, vol 2, 7–8; *Royal Commission into Institutional Responses to Child Sexual Abuse: The Experiences of Four Survivors with the Towards Healing Process* (Report of Case Study No 4, January 2015) on the Catholic Church and its responses to abuse.

responsibility.⁶⁰ However, realist theorists assert that an organisation can have its own discrete responsibility, beyond the aggregation of the responsibility of individuals.⁶¹ The realist approach is informed by studies of collectives and organisational behaviour that show organisations and collectives often develop an identity that is independent of, and transcends, the specific individuals who control or work within the organisation.⁶²

Offences informed by realist theories have been introduced by statute to address perceived shortcomings of the common law in Australia. Australian corporate culture provisions in the *Criminal Code Act 1995* (Cth) sch 1 ('*Criminal Code*') pt 2.5 reflect a realist approach.⁶³ The Code applies to bodies corporate in the same way as it applies to individuals, but modifications have been developed to reflect differences between corporations and individuals.⁶⁴ Section 12.3(1) of the *Criminal Code* states that 'if intention, knowledge or recklessness is a fault element of an offence, that fault element must be attributed to the body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence'.⁶⁵ Subsections 12.3(2)(c)–(d) are radical in their conceptualisation and attribution of fault elements for offences committed by corporations based on the concept of corporate culture. Body corporate authorisation or permission can be established expressly or through a 'corporate culture' that tolerated or led to the commission of the offence or failure to create or maintain a 'corporate culture' that would not tolerate or would lead to the commission of the offence.⁶⁶ Corporate culture is defined in the *Criminal Code* s 12.3(6) as 'an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place'. 'Corporate culture' is intended to encompass situations where the actual practices of an organisation differ from its formal or written rules.⁶⁷

⁶⁰ John Hasnas, 'Reflections on Corporate Moral Responsibility and the Problem Solving Technique of Alexander the Great' (2012) 107(2) *Journal of Business Ethics* 183.

⁶¹ Fisse (n 13). See also Alice Belcher, 'Imagining How a Company Thinks: What is Corporate Culture?' (2006) 11(2) *Deakin Law Review* 1.

⁶² For example, Gilbert has argued that collective attitudes are distinct from, and cannot be analysed in terms of, an aggregate or sum of individual attitudes: see Margaret Gilbert, *Sociality and Responsibility: New Essays in Plural Subject Theory* (Rowman & Littlefield Publishers, 2000); Gilbert (n 45). See also John Searle, 'Collective Intentions and Actions' in Philip R Cohen, Jerry Morgan, and Martha E Pollack (eds), *Intentions in Communication* (MIT Press, 1990) 401; Marion Smiley, 'From Moral Agency to Collective Wrongs: Rethinking Collective Moral Responsibility' (2010) 19(1) *Journal of Law and Policy* 171, 201.

⁶³ *Criminal Code Act 1995* (Cth) sch 1 ('*Criminal Code*').

⁶⁴ *Ibid* s 12.1(1).

⁶⁵ *Ibid* ss 12.3 (2)(a) and (b) reflect identification theory from *Tesco v Natrass* (n 38), with traditional agency provisions for attributing the state of mind of the 'directing mind' to the corporation, while the definition of high managerial agent is consistent with the approach of *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500. Where conduct is that of a high managerial agent, an organisation can defend itself on the basis that it is able to show that it had adequate corporate management, control or supervision of the conduct per s 12.4(3). See Tahnee Woolf, 'The *Criminal Code Act 1995* (Cth) — Towards a Realist Vision of Corporate Criminal Liability' (1997) 21(5) *Criminal Law Journal* 257, 269–70.

⁶⁶ *Criminal Code* (n 63) ss 12.3(2)(c)–(d).

⁶⁷ Clough (n 8) 283.

The corporate culture provisions are widely regarded as ‘innovative’,⁶⁸ and providing ‘arguably the most sophisticated model of corporate criminal liability in the world’.⁶⁹ The provisions reflect a realist or ‘holistic’ approach aiming to capture the blameworthiness of the corporation as an entity — it does not rely on the actions or omissions of an individual, but instead considers the organisation as a whole.⁷⁰ While the corporate culture provisions are successful in terms of providing a realist normative account, in practice the concept of corporate culture has rarely been employed in corporate prosecutions.⁷¹ Colvin and Argent have summarised some of the criticisms of corporate culture that have militated against its success, such as the failure of the regulations to reflect a more nuanced understanding of corporate culture from an organisational theory perspective, and ask whether corporate culture can ever be regulated.⁷² The provisions are specifically excluded from operating in other corporate legislation including the *Corporations Act 2001* (Cth) and the *Competition and Consumer Act 2010* (Cth), greatly reducing the likelihood of prosecution and, accordingly, judicial interpretation of the provisions.⁷³

The UK has introduced an alternative (but related) realist approach to corporate liability, that of failure-to-prevent offences.⁷⁴ The *Bribery Act 2010* (UK) (*Bribery Act* (UK)) provides that an organisation will be guilty of a failure-to-prevent offence unless it can prove that it had adequate procedures to prevent bribery.⁷⁵ The UK followed up with a failure to prevent facilitation of tax evasion offence in the *Criminal Finances Act 2017* (UK), with a defence of ‘reasonable’ procedures to prevent the conduct.⁷⁶ The Joint Committee on Human Rights has

⁶⁸ John C Coffee, ‘Corporate Criminal Liability: An Introduction and Comparative Survey’ in Albin Eser, Günter Heine and Barbara Huber (eds), *Criminal Responsibility of Legal and Collective Entities* (Edition Iuscrim, 1999) 9, 20.

⁶⁹ Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (Oxford University Press, 2002) 138.

⁷⁰ Karen Wheelwright, ‘Goodbye Directing Mind and Will, Hello Management Failure: A Brief Critique of Some New Models of Corporate Criminal Liability’ (2006) 19(3) *Australian Journal of Corporate Law* 287.

⁷¹ The ALRC has identified one prosecution in which the culture provisions have been relied upon: ALRC, *Corporate Criminal Responsibility* (n 24) 245–6 citing *R v Potter* (2015) 25 Tas R 213. Lewis argues that compliance culture has been a ‘long-standing area of investigation and enforcement’, demonstrated, for example, by *Trade Practices Commission v CSR Ltd* (1991) ATPR 41076, 52, 152; Lewis (n 12) 93. For an analysis of the limitations of the corporate culture provisions with regard to foreign subsidiaries, see Radha Ivory and Anna John, ‘Holding Companies Responsible: The Criminal Liability of Australian Corporations for Extraterritorial Human Rights Violations’ (2017) 40(3) *University of New South Wales (UNSW) Law Journal* 1175.

⁷² Colvin and Argent (n 7). See also Caron Beaton-Wells and Brent Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (Cambridge University Press, 2011). Cf many theorists who argue that organisational culture is a key driver of corporate crime and misconduct: see, eg, Jamie-Lee Campbell and Aja Goritz, ‘Culture Corrupts! A Qualitative Study of Organizational Culture in Corrupt Organizations’ (2014) 120(3) *Journal of Business Ethics* 291.

⁷³ It is beyond the scope of this article to consider whether corporate culture should be retained and expanded more broadly or jettisoned, as recommended recently by the ALRC: see ALRC, *Corporate Criminal Responsibility* (n 24) 14 (Recommendation 7).

⁷⁴ The proposed Australian offence of failure to prevent bribery is modelled on the UK offence: see CLACCC Bill 2019 (n 12).

⁷⁵ *Bribery Act 2010* (UK) s 7 (*Bribery Act* (UK)). See also Wells (n 10) 508.

⁷⁶ *Criminal Finances Act 2017* (UK) (n 11) ss 45(1), (2)(a).

since recommended a new corporate offence of failure to prevent human rights abuses⁷⁷ and the Ministry of Justice has argued in favour of creating a new corporate offence of failure to prevent economic crime.⁷⁸ The failure to prevent bribery offence has enjoyed some practical success. As at 1 March 2020, seven corporations had been prosecuted by the Serious Fraud Office under s 7 of the *Bribery Act* (UK).⁷⁹ Of these, one pleaded guilty,⁸⁰ five involved Deferred Prosecution Agreements⁸¹ and one was contested (resulting in the conviction of the dormant company of failing to prevent bribery).⁸²

In March 2019, the Select Committee on the Bribery Act 2010 tabled a report to the House of Lords.⁸³ The Select Committee has argued that the offence is ‘remarkably successful’ in terms of prosecution but also encourages the prevention of harms by those most capable of preventing it — the organisation itself (that is, by deterrence).⁸⁴ The practical success (in terms of prosecution) of the failure-to-prevent offence in the UK reflects the reality that many of the harms caused by large organisations are due to omissions; that is, the failure to prevent harms or breaches of legal duty.⁸⁵ I will now consider the failure-to-prevent offence in Australia in relation to the Child Sexual Abuse, Banking and Aged Care Royal Commissions in terms of how the offences might work in practice, but also how and why the offence establishes culpability of the organisation.

⁷⁷ Joint Committee on Human Rights, *Human Rights and Business 2017: Promoting Responsibility and Ensuring Accountability* (House of Lords Paper No 153, House of Commons Paper No 443, Session 2016–17) [191]–[193] <<https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/443.pdf>>. See also Ivory and John (n 71).

⁷⁸ Celia Wells, ‘Corporate Failure to Prevent Economic Crime — A Proposal’ (2017) 6 *Crim LR* 426, 427. Wells argues in favour of extending the failure to prevent offence to other economic crimes.

⁷⁹ ‘Freedom of Information: 2020-040 – Bribery Act 2010’, Serious Fraud Office (UK) (Web Page, 1 March 2020) <<https://www.sfo.gov.uk/foi-request/2020-040-bribery-act-2010/>>.

⁸⁰ *R v Sweett Group plc* (Unreported, Southwark Crown Court, 19 February 2016).

⁸¹ Deferred Prosecution Agreements (‘DPAs’) are agreements reached between the prosecutor and a corporate entity that could be prosecuted for a crime. In the UK, DPAs must be approved by a judge who is persuaded that the DPA is ‘in the interests of justice’ and that its terms are ‘fair, reasonable and proportionate’: see *Crime and Courts Act 2013* (UK) sch 17 ss 7–8; ‘Deferred Prosecution Agreements’, Serious Fraud Office (UK) (Web Page) <<https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/>>. For approved DPAs, see, eg, *Serious Fraud Office v Airbus SE* (Unreported, Southwark Crown Court, 31 January 2020); *Serious Fraud Office v Güralp Systems Ltd* (Unreported, Royal Courts of Justice, 22 October 2019); *Serious Fraud Office v Sarclad Ltd* [2016] 7 WLUK 211; *Serious Fraud Office v Standard Bank plc* [2015] 11 WLUK 804; *Serious Fraud Office v XYZ Limited* (Unreported, Royal Courts of Justice, 8 July 2016); *Serious Fraud Office v Rolls Royce* [2017] 1 WLUK 189.

⁸² *R v Skansen Interiors Ltd* (Unreported, Southwark Crown Court, 21 February 2018); Select Committee on the Bribery Act 2010, *The Bribery Act 2010: Post-Legislative Scrutiny* (House of Lords Paper No 303, Session 2017–19, 14 March 2019) <<https://publications.parliament.uk/pa/ld201719/ldselect/ldbriact/303/303.pdf>>.

⁸³ Select Committee on the Bribery Act 2010 (n 82).

⁸⁴ *Ibid* 52 [171].

⁸⁵ Lewis has recently argued that ‘there is still no evidence that it [the bribery offence] has been effective in reducing the prevalence of foreign bribery or improving corporate compliance culture’: Lewis (n 12) 92. He points to the recent Airbus settlement (n 81), which covered extensive bribery that occurred after the enactment of the new failure-to-prevent offence.

III Failure to Prevent a Foundational Offence or a Breach of Legal Duty?

The failure-to-prevent offence in the UK requires the individual commission of a specific substantive, predicate or foundational offence.⁸⁶ In the UK, this requires that an employee or agent associated with the corporation committed bribery or facilitated the evasion of taxes. For those harms analysed by the Child Sexual Abuse Royal Commission, the foundational offence committed by an employee or agent associated with the institution would draw upon the cohort of existing child sex offences — including underage sex, grooming and failure to report.⁸⁷ Given that institutions that care for children are recognised as sites of risk for child sexual abuse, there are already guidelines in place and mandatory reporting of grooming and underage sex.⁸⁸ Fulfilment of legal duties of care is (ostensibly) attached to accreditation and funding (although the Royal Commission noted the relative absence of enforcement).⁸⁹

Likewise, aged care providers that receive government funding must comply with duties and responsibilities under the *Aged Care Act 1997* (Cth). The foundational offence could include a breach of the existing legal duty of care that should be provided to consumers. Alternatively, a standalone offence of failure to prevent elder abuse could be created. The World Health Organization has defined elder abuse as ‘a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person’ that may be ‘financial, physical, psychological and sexual... [and] can also be the result of intentional or unintentional neglect.’⁹⁰ The *Aged Care Royal Commission Interim Report* found many quality and safety issues that would amount to elder abuse including inadequate prevention and management of wounds, poor continence management, dreadful food and hydration, high incidence of assaults, and common use of restraints.⁹¹ For the purpose of this analysis, I will focus on the use of restraints as an example of elder abuse as the foundational offence. There are different definitions of restraints within Australia reflecting the ‘challenges in conceptualising and identifying restraint in practice’.⁹² New national standards were introduced from July 2019, defining restraint as any practice, device or action that interferes with a consumer’s ability to make a decision or restricts a consumer’s free movement.⁹³ Despite a

⁸⁶ It is argued that the foundational offence supplements intentionality: Ian B Lee, ‘Corporate Criminal Responsibility as Team Member Responsibility’ (2011) 31(4) *Oxford Journal of Legal Studies* 755, 760–61.

⁸⁷ The offences of child sexual abuse and grooming are considered in depth in the *Child Sexual Abuse Royal Commission Final Report* (n 17) 194–206.

⁸⁸ *Ibid* 202.

⁸⁹ *Ibid* 139.

⁹⁰ World Health Organization, ‘Elder Abuse,’ *Ageing and Life-course* (Web Page) <http://www.who.int/ageing/projects/elder_abuse/en/>.

⁹¹ *Aged Care Royal Commission Interim Report* (n 6) 4–7.

⁹² *Royal Commission into Aged Care Quality and Safety: Restrictive Practices in Residential Aged Care in Australia* (Background Paper 4, May 2019) 5.

⁹³ *Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019* sch 1, 1 (definition of ‘restraint’).

global trend promoting ‘restraint free’ environments in aged care,⁹⁴ the *Aged Care Royal Commission Interim Report* notes that ‘restrictive practices are common in Australia.’⁹⁵ Examples of physical restraint include the removal of a mobility aid for ‘safety’,⁹⁶ claspings a person’s hands or feet to stop them moving, applying restraints or lap belts, locking over-bed or chair tray tables, seating residents in chairs with deep seats that the resident cannot stand up from, and confining a person.⁹⁷ Chemical restriction is the prescription of psychotropic medication exceeding reasonably expected clinical needs of the people receiving care. Aged care facilities are recognised as sites of risk for elder abuse including restraint.⁹⁸ There is a legal duty of care and mandatory reporting — from July 2019 it has been mandatory for residential care service providers to provide data on three quality indicators including physical restraints to the Australian Government Department of Health.⁹⁹ In addition, psychotropic medicines are prescribed and/or controlled. Despite this, the organisational breach of legal duty of care has not been enforced in the criminal justice system.

The Banking Royal Commission highlighted a great deal of malfeasance and criminality by financial institutions such as home loans that people could not afford, fees for no service, sale of ‘zombie’ (or worthless) insurance, and charging fees to people who have died.¹⁰⁰ For the purpose of this analysis, I will focus on fees for no service as an example of banking criminality. Fees for no service is the charging of fees for financial advice that is not provided or not provided in full and, on a basic interpretation, fees for no service are fraud.¹⁰¹ Commissioner Hayne stated that fees for no service could be prosecuted under s 1041G of the *Corporations Act* which specifies that it is a civil and criminal offence for a company, or individual within it, to engage in ‘dishonest conduct’ relating to a financial product or service.¹⁰² Financial institutions are recognised as sites of risk for financial malfeasance and crime. As with the other Royal Commissions, guidelines, duties of care and mandatory reporting are already in place, they just do not seem to be enforced.¹⁰³

A practical issue in relation to the development of a failure-to-prevent offence in Australia is that it requires a predicate offence if the UK prototype is followed. All three Royal Commissions highlighted widespread wrongdoing. There are advantages to having specific offences as these put organisations on

⁹⁴ Janet Timmins, ‘Compliance with Best Practice: Implementing the Best Available Evidence in the Use of Physical Restraint in Residential Aged Care’ (2008) 6(3) *International Journal of Evidence-Based Healthcare* 345.

⁹⁵ *Aged Care Royal Commission Interim Report* (n 6) vol 1, 193.

⁹⁶ *Ibid* 196.

⁹⁷ *Ibid* 194.

⁹⁸ Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report 131, 14 June 2017) 11.

⁹⁹ *Aged Care Royal Commission Interim Report* (n 6) vol 1, 74.

¹⁰⁰ *Banking Royal Commission Final Report* (n 18) vol 1, 9–10.

¹⁰¹ The *Criminal Code* defines obtaining property by deception as ‘the person, by a deception, dishonestly obtains property belonging to another with the intention of permanently depriving the other of the property’: *Criminal Code* (n 63) s 134.1(1)(a).

¹⁰² *Banking Royal Commission Final Report* (n 18) vol 1, 154.

¹⁰³ These duties of care are summarised in *Banking Royal Commission Final Report* (n 18) vol 1, 9–11.

notice to develop policies and practices in response to specific risks. Creating a standalone offence, like the failure to prevent bribery, expresses that certain offences are sufficiently wrongful in and of themselves that organisations have a legal responsibility to prevent them, and the failure to have adequate procedures in place to prevent specific offences is culpable. However, leaving aside the Child Sexual Abuse Royal Commission, which was specifically focused on sexual abuse and grooming, it is difficult to isolate the offences uncovered by the other Royal Commissions. The malfeasance unveiled in the Aged Care and Banking Royal Commissions is broad and varied. An alternative route would be to base the predicate offence upon breaches of (organisational) legal duty. In all of the examples above, organisations had pre-existing legal duties of care with regard to specific risks and mandatory reporting of breaches of these legal duties. There are clear ways in which organisations can transgress the law; that is, by failing to fulfil a legal duty. Accordingly, an offence of failure to prevent a breach of legal duty by organisations could be created. While basing the failure-to-prevent offence on a breach of legal duty may appear to draw the offence too broadly, the organisation would then have an opportunity to argue a defence (considered below in Part IV).

IV Sites of Risk and the Absence of Reasonable Procedures

The key way in which the offence of failure to prevent incorporates notions of organisational blameworthiness (or lack thereof) is by giving an organisation the opportunity to defend itself.¹⁰⁴ The defence allows an organisation to establish a lack of culpability; that is, that the failure to prevent the offence was not due to an absence of reasonable or adequate procedures on the organisation's part. Under the *Bribery Act* (UK), it is a defence for an organisation to prove that it had in place adequate prevention procedures.¹⁰⁵ The *Criminal Finances Act 2017* (UK) provides a defence that, when the UK tax evasion facilitation offence was committed, it had in place reasonable prevention procedures.¹⁰⁶ Unlike with the *Bribery Act* (UK) there is no need for the organisation to receive, or be intended to receive, benefit. Proof of benefit, or the intention of benefit, would confirm a link between the associated person's actions and the corporation. However, in light of the findings by the Royal Commissions, I would argue in favour of removing the benefit requirement in relation to failure-to-prevent offences. For example, child sexual abuse is not in the interest of an organisation caring for children. In relation to elder abuse, there may be indirect ways in which elder abuse is to the benefit of an organisation, for example, malnutrition or understaffing to save money, but it is more straightforward to argue that malnutrition and understaffing is due to organisational failure rather than attempting to identify and prove nefarious

¹⁰⁴ In its *Corporate Criminal Responsibility* report, the ALRC has proposed a defence of due diligence as comparable to the reasonable/adequate procedure defence in the UK: see ALRC, *Corporate Criminal Responsibility* (n 24) 259–66.

¹⁰⁵ *Bribery Act* (UK) (n 75) s 7(2).

¹⁰⁶ This is a slightly different wording of the *Bribery Act* (UK) (n 75) and *Criminal Finances Act 2017* (UK) (n 11) defences. Campbell has stated that though 'one could question why the defences were not standardised, it seems to be the case that lobbying from financial institutions provided the driver to adopt reasonableness, as apparently the less onerous standard': Campbell (n 42) 61.

motives by management. The Banking Royal Commission highlighted wrongdoing that was for the benefit of the organisation (such as fees for no service and financial advisers acting against the interests of clients in favour of selling in-house products),¹⁰⁷ but other malfeasance was not in the interests of the bank (bribery, minimal deposits in children's bank accounts, and many fees for no service were of benefit to the financial adviser, not the bank). Accordingly, the requirement of benefit to the organisation is tangential to, or misleading from, the key question of whether the organisation itself was culpable.

Guidance about the new offences and the types of risk-based procedures that a company can put in place to limit the risk of representatives criminally bribing or facilitating tax evasion has been published for both UK offences, using the same principles for both offences ('UK Guidelines').¹⁰⁸ The requirements of the six principles are considered and explained in some detail and they are followed by case studies explaining how the principles might apply in different hypothetical situations.¹⁰⁹ The UK Guidelines specify that an organisation should establish proportionate procedures, top-level commitment, risk assessment, due diligence, communication and monitoring and review.¹¹⁰ The Guidelines are consistent with a situational crime prevention approach, which recognises that situations can influence or provide an opportunity for criminal behaviour, but also provide behavioural cues and structures to discourage criminal behaviour.¹¹¹ This accords with arguments by realists that corporate culture or ethos can have a major impact on how employees behave — encouraging and discouraging, rewarding and punishing.¹¹²

The UK Guidelines and concepts of situational crime prevention are consistent with the arguments of the Select Committee on the Bribery Act 2010 that the failure-to-prevent offence puts the onus of responsibility on those most capable of preventing the harms.¹¹³ The defence provides organisations with an

¹⁰⁷ See above n 100 and accompanying text.

¹⁰⁸ HM Revenue & Customs, *Tackling Tax Evasion: Government Guidance for the Corporate Offences of Failure to Prevent the Criminal Facilitation of Tax Evasion* (Government Guidance, 1 September 2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/672231/Tackling-tax-evasion-corporate-offences.pdf>. See also *Facilitation of Tax Evasion Offences (Guidance About Prevention) Regulations 2017* (UK) SI 2017/876. Guidelines would need to be developed if an Australian offence of failure to prevent breach of legal duty was to be introduced. The Australian Government has also released draft guidance relating to bribery of foreign public officials and the proposed Australian CLACCC Bill 2019: Attorney-General's Department (Cth), *Draft Guidance on the Steps a Body Corporate Can Take to Prevent an Associate from Bribing Foreign Public Officials* (Consultation Draft, November 2019) <<https://www.ag.gov.au/sites/default/files/2020-03/Draft-guidance-on-adequate-procedures-to-prevent-the-commission-of-foreign-bribery.pdf>>.

¹⁰⁹ The Select Committee on the Bribery Act 2010 recommended clarification of the Guidance — particularly taking into account different sizes of companies and also the issue of reasonable as opposed to adequate procedures: see Select Committee on the Bribery Act 2010 (n 82).

¹¹⁰ See above n 108.

¹¹¹ The literature in this area is prolific, but a good summary in application to white collar crime is Michael L Benson, Tamara D Madensen and John E Eck, 'White-Collar Crime from an Opportunity Perspective' in Sally S Simpson and David Weisburd (eds), *The Criminology of White-Collar Crime* (Springer, 2009) 175.

¹¹² Pamela H Bucy, 'Corporate Ethos: A Standard for Imposing Corporate Criminal Liability' (1991) 75(4) *Minnesota Law Review* 1095.

¹¹³ Select Committee on the Bribery Act 2010 (n 82) 52.

incentive and opportunity to avoid criminal liability by implementing appropriate internal procedures and policies and embedding risk assessment in their organisations.¹¹⁴ The Child Sexual Abuse, Banking and Aged Care Royal Commissions have each highlighted the relevance of the UK Guidelines to meeting duties of care and preventing offences. As noted above, in all three Royal Commissions, the organisations had already been recognised as sites of risk for particular crimes and malfeasance.¹¹⁵ In addition, specific duties that had already been imposed on these organisations were not met.

The Child Sexual Abuse Royal Commission published reports about findings at specific organisations and also summarised various institutional failings in response to child sexual abuse.¹¹⁶ For example, in terms of the failure-to-prevent defence UK Guidelines, the Royal Commission commented on the lack of top-level commitment to preventing child sexual abuse in schools, stating that failure to respond adequately was due to ‘poor leadership and governance’.¹¹⁷ This was reflected particularly in cultures that prioritised protecting the school’s reputation, financial interests or particular colleagues over the safety of children. There was an absence of proportionate procedures. The Royal Commission pointed to poor human resource management, which allowed sex offenders to be employed due to the failure to follow internal procedures for recruitment, any of which would have resulted in the offender not having been employed in the first place.¹¹⁸ The failure to respond adequately, which facilitated ongoing abuse, was due to inadequate complaints processes, investigations and disciplinary actions, which also led to staff failing to meet their obligations to report suspected abuse to external authorities. This was exacerbated by poor recordkeeping and sharing of information. There was frequently also a lack of communication in the form of an absence or lack of implementation of policies and procedures, which failed to provide staff with adequate training as to how to recognise grooming behaviours and child sexual abuse and what to do in response.¹¹⁹ The Royal Commission reports also pointed to other failures of basic child protection procedures, including the failure to scrutinise suspicious behaviour¹²⁰ and permitting unsupervised contact with children.¹²¹

¹¹⁴ Dervan (n 37).

¹¹⁵ See Part III. See, eg, John Braithwaite, ‘The Nursing Home Industry’ (1993) 18 *Crime and Justice: A Review of Research* 11.

¹¹⁶ For a detailed case study of failings, see Crofts (n 5).

¹¹⁷ *Child Sexual Abuse Royal Commission Final Report* (n 17) vol 13 (*Schools*) 13, 132.

¹¹⁸ For example, management failed to follow recruitment procedures such as contacting referees and undertaking police checks: see *Royal Commission into Institutional Responses to Child Sexual Abuse: The Responses of the Catholic Archdiocese of Adelaide, and the South Australian Police, to Allegations of Child Sexual Abuse at St Ann’s Special School* (Report of Case Study No 9, 4 June 2015) (‘*Report of Case Study No 9*’).

¹¹⁹ *Ibid.*

¹²⁰ For example, the driver of a school bus for children with disabilities was frequently late in dropping off children. It was during this time that he offended against the children: see *Report of Case Study No 9* (n 118).

¹²¹ For example, Swimming Australia and Swimming Queensland allowed unsupervised access to children by swimming coach Scott Volkens even after sexual abuse allegations had been made: see *Royal Commission into Institutional Responses to Child Sexual Abuse: Response of Swimming Institutions, the Queensland and NSW Officers of the DPP and the Queensland Commission for Children and Young People and Child Guardian to Allegations of Child Sexual Abuse by*

Similarities in systemic failure have also been highlighted in the ongoing Aged Care Royal Commission. All available literature emphasises that the failure to prevent overuse of restraint is a structural issue:

The reduction of physical restraint requires an operational policy. Elements of such a policy would include: adaptation to environmental factors — for example, architecture, choice of materials; appointment of resource persons; an interdisciplinary approach (including the older persons and their relatives); registration of the use of physical restraint; communication about the policy pursued, and so on.¹²²

The emphasis upon operational policy is consistent with the UK Guidelines, requiring top level commitment in terms of architecture, adoption of a prevention policy, training staff in alternatives, monitoring the use of restraints and the regular and targeted review of residents taking psychotropic medication. Physical and social care environments must be designed to be beneficial for people with dementia.¹²³ Organisational policies and medical reviews need to be implemented and communicated,¹²⁴ based on evidence for the management of the behavioural and psychological symptoms of dementia.¹²⁵ The use of physical restraints is a collective issue that is usually visible to other staff (and residents) and the use of chemical restraints is prescribed by doctors and administered by staff. The commitment to reduce the use of restraint requires a collective undertaking that facilitates and encourages caregivers to challenge one another about the use of restraint.¹²⁶ As with the failure to recognise and report grooming and child sexual abuse, training is key.¹²⁷ Workload (another organisational issue) is also key. Even if staff have received training, they may use restraint as a means to manage their workload as alternatives to restraint require skill, time and patience.¹²⁸ The overuse of restraint is not solely an individual issue — rather, it is likely to be due to structural and collective reasons that can primarily be addressed at the organisational level. The failure to address the overuse of restraint at the organisational level is criminogenic; that is, it perpetuates crimes of elder abuse.

Likewise, the Banking Royal Commission highlighted systemic failures. It was clear that organisations such as AMP, NAB, the Commonwealth Bank of Australia ('CBA'), Westpac (bank and financial services provider), and MLC (financial services provider) had charged members fees for no service and had

Swimming Coaches (Report of Case Study No 15, 14 December 2015). Note that in March 2020 charges against Volkens were permanently stayed: George Roberts and Ashleigh Stevenson, 'Charges against Swim Coach Scott Volkens Permanently Stayed', ABC News (online, 11 March 2020) <<https://www.abc.net.au/news/2020-03-10/scott-volkens-charges-dropped/12041886>>.

¹²² C Gastmans and K Milisen, 'Use of Physical Restraint in Nursing Homes: Clinical-Ethical Considerations' (2006) 32(3) *Journal of Medical Ethics* 148, 151.

¹²³ Genise Marquardt, Kathrin Bueter and Tom Motzek, 'Impact of the Design of the Built Environment on People with Dementia: An Evidence-Based Review' (2014) 8(1) *Health Environments Research & Design Journal* 127.

¹²⁴ Juanita L Westbury et al, 'RedUse: Reducing Antipsychotic and Benzodiazepine Prescribing in Residential Aged Care Facilities' (2018) 208(9) *Medical Journal of Australia* 398.

¹²⁵ Gavin J Andrews and Elizabeth Peter, 'Moral Geographies of Restraint in Nursing Homes' (2006) 3(1) *Worldviews on Evidence-Based Nursing* 2.

¹²⁶ Gastmans and Milisen (n 122).

¹²⁷ *Aged Care Royal Commission Interim Report* (n 6) vol 1, 205.

¹²⁸ *Ibid* 207.

remuneration models that created conflicts of interest.¹²⁹ Despite the risk of dishonesty, there was: an absence of processes to prevent and detect misconduct; failure by the entity to respond in a timely and sufficient way to misconduct; and slow/false mandated reporting of the offending.¹³⁰ Almost all of these systemic failures worked to the benefit of the banks and financial service providers. Fees for no service was endemic and undetected and/or not adequately responded to by the organisations for many years.¹³¹ For example, it was not until the Banking Royal Commission that it became apparent that NAB had charged more than 200,000 customers millions of dollars in fees, even though it had not provided them with any advice.¹³² Many accounts were not linked to any advisor, but were still charged fees for advice.¹³³ Concerns about fees for no service were raised as early as August 2015, with NAB creating a risk event in its internal 'event management system' in September 2015 and noting that the Australian Securities and Investments Commission ('ASIC') and APRA should be notified of the breaches.¹³⁴ The Boards of NAB entities NULIS and MLC Nominees were advised that fees for no service were potential breaches in December 2015.¹³⁵ In December 2017, a paper was presented at the NULIS Board meeting entitled *Risk Review of ASF Controls*.¹³⁶ The paper found that controls to prevent, monitor and review fees for no service were ineffective overall and at times non-existent.¹³⁷ The paper proposed that a top-level commitment to prevent fees for no service was required, and that executive management should remediate the control environment.¹³⁸ This expression of the need for organisational reform from the top-down is consistent with the UK Guidelines on the defence of reasonable procedures.

One important aspect of the defence of reasonable procedures is that it broadens the timeframe of analysis to consider not only past practice, but also how the corporation responds to wrongdoing.¹³⁹ What kind of program of reform, compensation and discipline does the organisation implement in response to discovering malfeasance? For example, the Banking Royal Commission found that despite a legal duty to do so, NAB demonstrated a failure to respond in an effective and timely manner. There was a failure to report breaches to ASIC in a timely and accurate manner. In addition:

Rather than remediate promptly at that time, management and senior executives took steps to negotiate an outcome with ASIC that would

¹²⁹ *Banking Royal Commission Interim Report* (n 50) vol 1, 108–12.

¹³⁰ *Ibid* 131.

¹³¹ *Ibid* 126–31.

¹³² *Ibid* 111.

¹³³ *Banking Royal Commission Final Report* (n 18) vol 2, 13, 28.

¹³⁴ *Ibid* 15–16.

¹³⁵ *Ibid* 16–17.

¹³⁶ *Ibid* 34.

¹³⁷ *Ibid* 34–5. In September 2020, the Federal Court of Australia determined the ASIC penalty payable by NULIS and MLC Nominees in relation to fees for no service: *Australian Securities and Investments Commission v MLC Nominees Pty Ltd* [2020] FCA 1306.

¹³⁸ *Ibid* 35.

¹³⁹ Fisse and Braithwaite, 'The Allocation of Responsibility for Corporate Crime' (n 8) 505.

minimise the financial and reputational fall-out for the NAB Group. NAB was unwilling to acknowledge that this behaviour was wrong.¹⁴⁰

NAB also tried to minimise any amounts that it would have to repay.¹⁴¹

The same could apply to other types of harms. Indicators of organisational failure would include long-term harms and the nature of the response of the organisation to those harms. For example, Knox Grammar School was the subject of a scathing report in the Child Sexual Abuse Royal Commission due to its failure to adequately respond to allegations of abuse from the 1970s until 2012.¹⁴² At the time, child sexual abuse was covered up and not reported to police, and offending staff were retained and protected or given positive references when they left the school.¹⁴³ In contrast, according to media reports, in 2019 a staff member who was found with child abuse material on his phone was reported to the headmaster who immediately contacted the police and stated to parents: 'We will not hesitate to contact police and remove staff who fail to follow our code of conduct and the law.'¹⁴⁴ This response can be compared to the report in the media of the headmaster of a different private school who expressed no support for children who reported grooming offences, choosing instead to give a favourable character reference for the offender (while the Royal Commission was ongoing).¹⁴⁵ This shows a clear difference in organisational responses. One seeks to prevent child sexual offences, while the other has the effect of facilitating or condoning child sexual abuse.¹⁴⁶

This analysis highlights the ways in which an organisation can be criminogenic in its failure to prevent or discourage crime.¹⁴⁷ Good corporate culture in the form of policies and procedures can discourage and prevent wrongdoing, while bad corporate culture might tolerate, permit or encourage malfeasance.¹⁴⁸ In each institution that was examined by the Royal Commissions,

¹⁴⁰ *Banking Royal Commission Final Report* (n 18) vol 2, 60.

¹⁴¹ *Ibid* 47.

¹⁴² *Royal Commission into Institutional Responses to Child Sexual Abuse: The Response of Knox Grammar School and the Uniting Church of Australia to Allegations of Child Sexual Abuse at Knox Grammar School in Wahroonga, New South Wales* (Report of Case Study No 23, 13 September 2016) 69–73.

¹⁴³ *Ibid* 71.

¹⁴⁴ Nick Dole, 'Knox Swimming Teacher Charged with Possessing Child Abuse Material', *ABC News* (online, 6 August 2019) <<https://www.abc.net.au/news/2019-08-06/knox-grammar-teacher-arrested-child-abuse-material/11386954>>.

¹⁴⁵ Louise Milligan, Mary Fallon and Lauren Day, 'How St Kevin's College Supported a Child Sex Offender Coach to the Horror of his Student Victim', *ABC News* (online, 17 February 2020) <<https://www.abc.net.au/news/2020-02-17/st-kevins-college-supported-sex-offender-over-student-victim/11957510>>.

¹⁴⁶ This analysis shows that part of the problem is a failure to report child sex offending. This led to the Royal Commission recommending the creation of an offence of failure to report. The Royal Commission also recommended a failure-to-protect offence by a person in authority: see *Royal Commission into Institutional Responses to Child Abuse: Criminal Justice Report — Executive Summary and Parts I-II* (Report, 14 August 2017) 50 (Recommendation 33), 56 (Recommendation 36).

¹⁴⁷ Donald Palmer and Celia Moore, 'Social Networks and Organizational Wrongdoing in Context' in Donald Palmer, Kristin Smith-Crowe and Royston Greenwood (eds), *Organizational Wrongdoing: Key Perspectives and New Directions* (Cambridge University Press, 2016) 203.

¹⁴⁸ See Gilchrist (n 8); Donald Palmer, *Normal Organizational Wrongdoing: A Critical Analysis of Theories of Misconduct in and by Organizations* (Oxford University Press, 2012).

it is not an accident that offending behaviour occurred for long periods of time in specific organisations (and not in others). The offences were not one-off tragic ‘accidents’ but were due to the structural failures for which an institution can and should be responsible.¹⁴⁹ A failure by an organisation to meet the requirements of the UK Guidelines establishes the ways in which the organisation is criminogenic.¹⁵⁰

An essential factor in the likelihood of success of prosecution of the failure-to-prevent offence is that it imposes a ‘reverse burden defence’.¹⁵¹ That is, the harm caused would be treated as an offence committed by the organisation unless and until the organisation proved otherwise.¹⁵² This approach was recommended as long ago as 1993 by Fisse and Braithwaite based on the concept of ‘reactive fault’.¹⁵³ It assists with the likelihood of successful prosecutions because it circumvents evidentiary challenges.¹⁵⁴ The defence requires corporations to prove that it had existing or had developed adequate or reasonable or proportionate measures to prevent the commission of the crime.¹⁵⁵ The difficulty is that the reverse burden defence undermines a key tenet of the criminal law — the presumption of innocence.¹⁵⁶ In a series of decisions, the UK and Canadian courts have held that the presumption of innocence is infringed in such a case, but that the infringement may be justified or proportionate, depending on the circumstances.¹⁵⁷ A cogent argument can be made that there is no need for mechanistic application to organisations of rules and procedures that were constructed around natural persons.¹⁵⁸ Procedural protections such as the requirement that the prosecution negate defences beyond a reasonable doubt were constructed to protect individuals from the arbitrary exercise of power of the State, and there are defences at common law and under statute that individuals accused are required to prove on the balance of probabilities.¹⁵⁹ The argument about the power dynamic of the State against individuals does not apply, particularly to large organisations, some of which have

¹⁴⁹ Steven Bittle and Lauren Snider, ‘From Manslaughter to Preventable Accident: Shaping Corporate Criminal Liability’ (2006) 28(4) *Law and Policy* 470.

¹⁵⁰ Robert Apel and Raymond Paternoster, ‘Understanding “Criminogenic” Corporate Culture; What White-Collar Crime Research Can Learn from Studies of the Adolescent Employment-Crime Relationship’ in Sally S Simpson and David Weisburd (eds), *The Criminology of White Collar Crime* (Springer, 2009) 15; Tombs and Whyte (n 1); Penny Green and Tony Ward, *State Crime: Governments, Violence and Corruption* (Pluto Press, 2004).

¹⁵¹ The *Criminal Code* does not impose a reverse onus of proof on corporations because it would be unfair, particularly where a corporation had been charged with the most serious offences: Explanatory Memorandum, Criminal Code Bill 1994 (Cth) 45.

¹⁵² Fisse and Braithwaite, ‘The Allocation of Responsibility for Corporate Crime’ (n 8) 511–12.

¹⁵³ *Ibid* 505–7.

¹⁵⁴ Wells (n 78) 435.

¹⁵⁵ Fisse and Braithwaite, *Corporations, Crime and Accountability* (n 8).

¹⁵⁶ See Andrew Ashworth and Lucia Zedner, ‘Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions’ (2008) 2(1) *Criminal Law and Philosophy* 21, 47–8. See also *Davies v Health and Safety Executive* [2002] EWCA Crim 2949 (‘Davies’).

¹⁵⁷ See, eg, *R v Lambert* [2002] 2 AC 545; *R v Oakes* [1986] 1 SCR 103.

¹⁵⁸ *Lo* (n 41) 367.

¹⁵⁹ For example, the defence of mental illness is a common law defence that the accused must prove on the balance of probabilities: *M’Naghten’s Case* (1843) 10 Cl & Fin 200; 8 ER 718. In New South Wales (‘NSW’), the accused must also prove the defence of substantial impairment of the mind at the time of the act causing death: *Crimes Act 1900* (NSW) s 23A(4).

profits greater than state gross domestic products. In addition, organisations cannot be imprisoned¹⁶⁰ and, unlike human beings, have no inherent rights to exist.¹⁶¹ The defence of adequate or reasonable procedures affords a defence to organisations,¹⁶² gives them fair opportunity to avoid causing harms,¹⁶³ and provides strong encouragement to organisations to monitor and review their policies, procedures and responses to serious risks identified in their undertakings.¹⁶⁴ It does not require defendant organisations to prove lack of guilt, only the presence and use of adequate/reasonable procedures. It also allows organisations to exonerate themselves by pointing to their compliance procedures and policies: given the opacity of organisations,¹⁶⁵ it is more appropriate for the organisation than for the prosecution to collect such information and to prove details of internal policies and procedures and substantive practices within the organisation.¹⁶⁶ Accordingly, the reverse onus of proof imposes a compliance incentive upon organisations that operate in areas that are recognised as generating specific risks, that they can and should attempt to prevent.

V Sufficient Culpability to Justify Attribution of Criminal Sanctions

The foregoing section has outlined the ways in which the failure-to-prevent offence achieves the potential for practical success in responding to the types of offences most commonly committed by large organisations — those due to omission or failure. The key question I will explore now is whether the failure-to-prevent offence satisfies a normative account; that is, is an organisation sufficiently blameworthy for failing to prevent harm?

Two related arguments can be marshalled to justify the criminalisation of failure to prevent: the harmful consequences and the blameworthiness of the failure/s. A key justification for imposing a legal duty is to protect against the harms potentially caused by the breach.¹⁶⁷ The harm principle, as famously stated by JS Mill, provides a basis for limiting and permitting state intervention: ‘The only purpose for which power can rightfully be exercised over any member of a civilized community, against his will, is to prevent harm to others.’¹⁶⁸ On this

¹⁶⁰ John C Coffee Jr, ‘No Soul to Damn: No Body to Kick: An Unscandalised Inquiry into the Problem of Corporate Punishment’ (1981) 79(3) *Michigan Law Review* 386.

¹⁶¹ Kim (n 57).

¹⁶² Ellen S Podgor, ‘A New Corporate World Mandates a “Good Faith” Affirmative Defense’ (2007) 44(4) *American Criminal Law Review* 1537, 1538.

¹⁶³ TM Scanlon, *The Difficulty of Tolerance: Essays in Political Philosophy* (Cambridge University Press, 2003) 231–2.

¹⁶⁴ See, eg, *Davies* (n 156).

¹⁶⁵ Hill (n 34).

¹⁶⁶ Roger Shiner, ‘Corporations and the Presumption of Innocence’ (2014) 8(2) *Criminal Law and Philosophy* 485; Jeremy Horder, ‘Bureaucratic “Criminal” Law: Too Much of a Bad Thing?’ in RA Duff et al (eds), *Criminalization: The Political Morality of the Criminal Law* (Oxford University Press, 2014) 101, 124.

¹⁶⁷ Joel Feinberg, *Moral Limits of the Criminal Law Volume 1: Harm to Others* (Oxford University Press, 1987); Claudia Card, *The Atrocity Paradigm: A Theory of Evil* (Oxford University Press, 2002).

¹⁶⁸ John Stuart Mill, *On Liberty* (The Floating Press, 1909) 18.

basis, criminalisation is justified through the (potential) harmful consequences. Harmful consequences remain a foundation for many offences including regulatory offences (such as food adulteration and dangerous driving), but also those with serious penalties such as involuntary manslaughter where legal culpability is due to causing death, with minimal to no intentional wrongdoing required for culpability.¹⁶⁹ Feinberg defines ‘harm’ as a lasting or significant set-back to a person’s interests.¹⁷⁰ There is no doubt that the breach of duties of care highlighted in the Child Sexual Abuse, Banking and Aged Care Royal Commissions were harmful. The Child Sexual Abuse Royal Commission devoted a great deal of time to recording the devastatingly harmful consequences of child sexual abuse and grooming.¹⁷¹ In terms of physical and chemical restraint of the elderly, all the evidence asserts that it does more harm than benefit.¹⁷² The use of restraints not only breaches fundamental rights of the elderly but can seriously undermine physical and psychological health.¹⁷³ Restraints increase agitation, discomfort and anxiety. Meanwhile, fraud by the banks resulted not only in material loss to many customers, but also in stress, suicides, and loss of retirement plans.¹⁷⁴ Commissioner Hayne also argued that malfeasance by the banks was harmful to the economy as it undermined trust in financial institutions.¹⁷⁵ The corporate law theorist David Uhlmann has, accordingly, argued that conviction communicates the State’s intolerance of incidences of massive harms.¹⁷⁶ The flipside is that the failure to convict communicates tolerance by the State of these harms, as if the harms were an unfortunate part of doing business.

While the pattern of blameworthiness of harmful consequences provides a powerful foundation for criminalisation, it seems counterintuitive to hold a person (or an organisation) responsible for something that they failed to do, because the dominant model of culpability is that a person cannot, and should not, be held

¹⁶⁹ George Fletcher, *Rethinking Criminal Law* (Little Brown, 1978) ch 4. Manslaughter by unlawful and dangerous act requires only the mens rea to commit the foundational offence. Manslaughter by criminal negligence requires only that the act or omission was criminally negligent. Both these offences have objective parameters, with the prosecution required to prove, in the case of manslaughter by unlawful and dangerous act, that a reasonable person in his or her position would have realised that his or her act was exposing the victim to an appreciable risk of serious injury: *Wilson v The Queen* (1992) 174 CLR 313. In manslaughter by criminal negligence, the prosecution must prove that the accused’s conduct constituted such a great falling short of the standard of care that a reasonable person would have exercised and carried such a high risk of death or grievous bodily harm as to merit criminal punishment: *R v Lavender* (2005) 222 CLR 67. Because these are objective standards there is no requirement of knowledge or intention on the part of the accused.

¹⁷⁰ Feinberg (n 167) 31–64.

¹⁷¹ See, eg, *Child Sexual Abuse Royal Commission Final Report* (n 17) vol 9 (*Advocacy, Support, and Therapeutic Treatment Services*).

¹⁷² Gastmans and Milisen (n 122).

¹⁷³ Emma N Bellenger et al, ‘The Nature and Extent of Physical Restraint-Related Deaths in Nursing Homes: A Systematic Review’ (2018) 30(7) *Journal of Aging and Health* 1042, 1043.

¹⁷⁴ Adele Ferguson provides an overview of the many different harms caused by banks over the last few decades. See Adele Ferguson, *Banking Bad* (HarperCollins Publishers Australia, 2019).

¹⁷⁵ *Banking Royal Commission Final Report* (n 18).

¹⁷⁶ David M Uhlmann, ‘The Pendulum Swings: Reconsidering Corporate Criminal Prosecution’ (2016) 49(4) *UC Davis Law Review* 1235, 1253.

responsible unless they intentionally or knowingly did the wrong thing.¹⁷⁷ The moral philosopher, Mary Midgley, has labelled this the ‘positive model’ of wickedness.¹⁷⁸ There are two aspects to this model of wickedness: first, action; and second, intention or knowledge. The emphasis that only positive action can be culpable is reflected in concerns voiced by critics that organisations should not be held criminally liable for failure to prevent.¹⁷⁹ This is based on arguments that criminal legal doctrine generally is reluctant to criminalise omissions — whether by individuals or organisations. Despite these arguments, an accused can be held liable for omissions in the majority of criminal offences, provided a legal duty to act has been established.¹⁸⁰ All the institutions considered in case studies in the Child Sexual Abuse, Banking and Aged Care Royal Commissions had legal duties to protect the people in their care, and to act with honesty and in the best interests of their members, and, in most of the case studies, the organisations failed to fulfil these duties in the long term. The criminalisation of omissions is particularly appropriate for organisations that choose to work in areas that are regulated.¹⁸¹ Moreover, criminal responsibility for the breach of legal duties is a common trope of corporate law.¹⁸² Directors owe a legal duty to the company, and the breach of this duty may result in criminal liability.¹⁸³ Specific legislative schemes impose duties upon corporations and directors including occupational health and safety, environmental and tax duties. In all of these offences, liability derives from a failure to meet a duty of care — a duty of care that the corporation is subject to as a consequence of undertaking the provision of specific goods and services.

The second assumption of the positive model of wickedness is that a person acted intentionally or knowingly. Criminal legal doctrine reflects this ‘positive account’ of wickedness in its assertion of the dominance of subjectivist accounts of culpability to establish fault.¹⁸⁴ Indeed, the High Court of Australia has held in favour of an assumption of mens rea or subjective blameworthiness as a general principle of criminal law doctrine.¹⁸⁵ This model of culpability aims to ensure that outcomes that were accidental or unintended are not criminalised.¹⁸⁶ The High

¹⁷⁷ See, eg, Mary Midgley, *Wickedness: A Philosophical Essay* (Routledge, 2nd ed, 2001) 13; Susan Neiman, *Evil in Modern Thought: An Alternative History of Philosophy* (Princeton University Press, 2002).

¹⁷⁸ Midgley (n 177).

¹⁷⁹ See Glanville Williams, ‘Criminal Omissions — The Conventional View’ (1991) 107(1) *Law Quarterly Review* 86.

¹⁸⁰ Andrew Ashworth, *Positive Obligations in Criminal Law* (Hart Publishing, 2013).

¹⁸¹ See Davies (n 156).

¹⁸² Jennifer G Hill and Matthew Conaglen, ‘Director’s Duties and Legal Safe Harbours: A Comparative Analysis’ in DG Smith and Andrew S Gold (eds), *Research Handbook of Fiduciary Law* (Edward Elgar Publishing, 2018) 305; Jason Harris and Anil Hargovan, ‘Still a Sleepy Hollow? Directors’ Liability and the Business Judgment Rule’ (2017) 31(3) *Australian Journal of Corporate Law* 319.

¹⁸³ See *Corporations Act 2001* (Cth) pt 2D.1.

¹⁸⁴ It has been argued that although subjectivism is claimed as the ideal in criminal law, the exceptions to the rule far outnumber the rule itself: see Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (Cambridge University Press, 2014).

¹⁸⁵ *He Kaw Teh v The Queen* (1985) 157 CLR 523, 528 (Gibbs CJ) approving the statement in *Sherras v De Rutzen* [1895] 1 QB 918, 921.

¹⁸⁶ Andrew Ashworth, ‘Taking the Consequence’ in Stephen Shute, John Gardner and Jeremy Horder (eds), *Action and Value in Criminal Law* (Clarendon Press, 1993) 107, 123.

Court argued against holding legal subjects liable in the absence of subjective culpability due to a concern for ‘luckless victims’ and the perceived severity of convicting an accused in the absence of any ‘fault’ on his or her part.¹⁸⁷ The difficulty is that in many contemporary organisations, particularly large, complex, multinationals, knowledge is diffused. Organisational structures may themselves militate against any capacity to prove knowledge or intention. In fact, as argued above, nominalism may encourage organisations to diffuse knowledge in order to avoid corporate liability.¹⁸⁸ The positive model of wickedness fails to adequately deal with the ways in which organisations are most likely to cause harm. We need to draw upon alternative models of wickedness to recalibrate the accidents, collateral damage and harms that organisations are the most capable of preventing as failings which are sufficiently blameworthy to justify criminal sanctions.

There are alternative accounts of wickedness that assert that failure or absence can be sufficiently blameworthy. In fact, despite passionate judicial statements asserting the requirement of subjective culpability, there are many offences at common law and under statute that do not require or impose minimal requirements of subjective culpability.¹⁸⁹ This reflects Kirby J’s assertion that subjective intention does not enjoy a ‘monopoly on moral culpability’.¹⁹⁰ Philosophies of wickedness point to alternative models of culpability. Midgley has argued that we should resuscitate the classic model of wickedness — a negative account.¹⁹¹ The subjective model of culpability remains necessary — there are corporations that have criminal models of business. However, the positive model is insufficient to cope with the likely causes of harm by large organisations in the 21st century. In many cases of systemic harms, it is the lack of knowledge and care, and/or the failure of policies and procedures, that is culpable. The negative account provides an alternative model of wickedness. The theologian Augustine stated ‘Evil has no positive nature; but the loss of good has received the name “evil”’.¹⁹² For Augustine, evil is not a ‘thing’, but a corruption and warping of that which is good.¹⁹³ The negative account conceives of evil as privation, something missing, dearth or failure. The negative model of wickedness provides a philosophical foundation for the conception of organisational failure as culpable. Organisations are most likely to inflict systemic harms due to a failure to prevent and a failure to adequately respond to harms. The negative model of culpability provides a means to redefine ‘responsibility practices’,¹⁹⁴ emphasising that it is this failure to act that

¹⁸⁷ *He Kaw Teh* (n 185) 530, 534 (Gibbs CJ), 568 (Brennan J).

¹⁸⁸ *Diamantis* (n 15).

¹⁸⁹ Examples in NSW include dangerous driving causing death (*Crimes Act 1900* (NSW) s 52A), the majority of drug offences and the involuntary manslaughter offences discussed above: see above n 169 and accompanying text.

¹⁹⁰ *R v Lavender* (n 169) 107 [127]. Many criminal law theorists have sought to debunk the dominance of subjective culpability: see, eg, AP Simester, ‘Can Negligence Be Culpable?’ in Jeremy Horder (ed), *Oxford Essays in Jurisprudence: Fourth Series* (Oxford University Press, 2000) 85; Penny Crofts, *Wickedness and Crime: Laws of Homicide and Malice* (Routledge, 2013); HLA Hart, *Punishment and Responsibility* (Clarendon Press, 1968).

¹⁹¹ Midgley (n 177).

¹⁹² Aurelius Augustine, *The City of God*, (Project Gutenberg eBook, 2014) XI ch 9. See also, Midgley (n 177), who draws upon Aristotle for a secular account of the negative model of wickedness.

¹⁹³ Aurelius Augustine, *The Confessions of St Augustine* (Edward Pusey trans, Collier, 1961) VI iii 4.

¹⁹⁴ Peter Cane, *Responsibility in Law and Morality* (Hart Publishing, 2002) 179.

has caused the systemic harms, and it precisely this failure that is culpable. The defence of reasonable procedures provides organisations with an opportunity to prove that the harmful consequences caused by (agents of) the organisation were not due to the failures of the organisation. As shown above, the institutions that were subjects of each of the Child Sexual Abuse, Banking and Aged Care Royal Commissions would not have been able to point to reasonable procedures to protect against those harms for which they had a legal duty of care. These organisations were not ‘luckless victims’ and under the classic model of wickedness their failures would be sufficiently culpable to justify and require criminal sanctions.

VI Conclusion

The findings of each of the Child Sexual Abuse, Banking and Aged Care Royal Commissions demonstrate that a realist approach to corporate criminal accountability is vital. Despite the widespread harms recorded in each of the Royal Commissions, the criminal justice system has failed to engage with organisational fault. In light of the increasing dominance of, and reliance upon, large, complex organisations, reframing our notions of organisations and attributions of culpability is an urgent challenge for the 21st century. Rather than regarding harms as sad accidents, collateral damage or tragedies, criminal law needs to recalibrate these harms as crimes that could and should have been prevented. All the evidence from the Royal Commissions highlight that particular harms occurred with impunity within specific organisations, often for years at a time. These organisations can and should be regarded as criminogenic — by encouraging, permitting, facilitating or failing to prevent crimes. The criminal justice system needs to develop a realistic account of the organisation as a legal actor.

This article has proposed that the UK offence of failure to prevent should be extended broadly to a failure to prevent breach of legal duties by organisations. The failure-to-prevent model enshrines existing legal duties of care at the centre of organisational models to ensure that the responsibility for meeting these duties of care is an integral part of doing business. Corporate law theorists have long argued that corporations are externalising machines, where only certain costs and benefits are taken into account, while others are excluded.¹⁹⁵ Criminalising corporate conduct and failures repudiates false valuations embodied in corporate wrongdoing, whereby harms are regarded as an unfortunate and unlucky side effect of doing business.¹⁹⁶ Holding organisations responsible for failures to prevent clarifies for what harms we expect corporations to be responsible.¹⁹⁷ The Child Sexual Abuse, Banking and Aged Care Royal Commissions have highlighted that existing legal duties of care and mandatory reporting have not resulted in reform to corporate practices. There are difficulties associated with the failure-to-prevent offence. The

¹⁹⁵ Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Simon and Schuster, 2004).

¹⁹⁶ Dan M Kahan, ‘Social Meaning and the Economic Analysis of Crime’ (1998) 27(2 – Part 2) *Journal of Legal Studies* 609.

¹⁹⁷ See Fisse and Braithwaite, *Corporations, Crime and Accountability* (n 8). See also Paul Almond, *Corporate Manslaughter and Regulatory Reform* (Palgrave Macmillan, 2013).

offence does not resolve the myriad ways in which corporations can and do inflict harm. However, it goes some way towards recognising the systemic breach of legal duty by many corporations causing widespread harms in a way which is practical and also justifies and requires attributions of criminal blameworthiness.

The Hidden Sexual Offence: The (Mis)Information of Fraudulent Sex Criminalisation in Australian Universities

Jianlin Chen*

Abstract

In response to sexual assault on campus, most Australian universities have websites that educate the university community on sexual consent and policies that deal with sexual misconduct. This article systematically examines the websites and policies of 42 Australian universities to catalogue the prevalence and manifestation of legal errors regarding fraudulent sex criminalisation. In finding that problematic legal errors are the norm, the article discusses possible reforms to university governance. The findings are also situated within feminist legal literature on the persistence of rape myths. Regrettably, the findings are yet another example of how societal attitudes towards sexual assault remain frustratingly disconnected with progressive legislative changes.

I Introduction

Consider this scenario:

A statutory provision states: ‘A person who engages in conduct X, Y or Z commits the crime A’.

A university website that is meant to educate the university community on crime A states: ‘It is a criminal offence to engage in conduct X and Y.’ Similar omission of conduct Z is found in the university’s policy on the reporting of, and disciplinary procedure for, complaints of crime A.

One would assume that such a scenario is rare. Universities, like any other public and private entities, are obviously not immune to legal errors in the conduct of their activities. However, it would be surprising for universities to make legal errors in the manner and context outlined in the scenario above. The error of omitting conduct Z is readily apparent by a quick reference to the statutory provision. And referring

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to the relevant statutory provision relating to crime A has to be the bare minimum due diligence that a university should undertake when designing an educative website or formulating a policy on crime A. Such legal errors are also undesirable. Failure to include that conduct Z constitutes crime A will undermine the educative goals of the website and distort the implementation of the policy.¹

This surprising and undesirable state of affairs is, unfortunately, the norm in Australian universities when it comes to sexual assault.

In 2017, the Australian Human Rights Commission released the *Change the Course: National Report on Sexual Assault and Sexual Harassment at Australian Universities*.² The Report revealed a disturbingly high level of sexual assault in university settings and low incidence of reporting of those assaults.³ Pursuant to the recommendations in the Report, most Australian universities have set up websites that educate the university community on sexual consent.⁴ In addition, many Australian universities have also enacted specific policies to deal with sexual assault, among other sexual misconduct.⁵

These developments represent a positive step forward. However, many of these websites and policies suffer from glaring legal errors in relation to fraudulent sex (that is, the obtaining of sexual acts through deception). All Australian states and territories have a statutory definition of sexual consent, which expressly stipulates that consent may be vitiated by certain types of fraud. In addition, five states have a provision that criminalises the procurement⁶ of sex through any fraud ('procurement offence') as a distinct sexual offence.⁷ Yet, when the university websites and policies define what constitutes sexual consent and/or sexual assault, they often either fail to include any mention of the criminal nature of fraudulent sex, or only selectively mention the statutorily stipulated consent-vitiating frauds.⁸

This article surveys and comprehensively catalogues the prevalence and nature of legal errors relating to fraudulent sex in the websites and policies of 42 Australian universities. The results are startling. Among websites and policies that had definitions on sexual assault, only 16.7% have presented legally accurate information. Even after excluding legal errors that may be less problematic (for example, minor inaccuracies; defining standards higher than the law requires),

¹ See below Part V(A).

² Australian Human Rights Commission ('AHRC'), *Change the Course: National Report on Sexual Assault and Sexual Harassment at Australian Universities* (Report, 2017) ('*Change the Course Report*').

³ Ibid 3–4.

⁴ AHRC, *Audit of University Responses to the Change the Course Report: Snapshot of Progress* (Report, August 2018) ('*Snapshot of Progress*').

⁵ Tertiary Education Quality and Standards Agency, *Report to the Minister for Education: Higher Education Sector Response to the Issue of Sexual Assault and Sexual Harassment* (2019) 3 ('*TEQSA Report*').

⁶ See *Criminal Code Act 1899* (Qld) sch 1 s 218(4) ('*Criminal Code* (Qld)'): 'procure means knowingly entice or recruit for the purposes of sexual exploitation'. In the English textbooks, 'procure' in this context is understood as producing by endeavour (ie, obtaining or bringing about): see, eg, Richard Card, *Card, Cross & Jones Criminal Law* (Oxford University Press, 20th ed, 2012) 732.

⁷ See below Part II(A).

⁸ See below Part IV(C).

a large number of the websites and policies (48.3%) were nevertheless found to contain serious legal errors similar to that depicted in the scenario above.

Building on these findings, this article highlights a dire reform impetus to correct the serious and unjustifiable legal errors in the offending websites and/or policies. The prevalence of these legal errors also points to the necessity to review university governance processes so as to avoid the recurrence of such legal errors, whether in the context of sexual offences or for other crimes and illegal conduct. This article recommends that there should be mandatory engagement of legal experts when the universities are formulating documents and communications that clearly implicate legal issues.

More broadly, this article situates the case study within feminist legal scholarship on the limits of legislative reform in addressing the injustices of sexual assault. Similar to the well-documented persistence of ‘rape myths’ in courtrooms and law enforcement,⁹ this article argues that the failure of universities’ websites and policies to reflect the explicit statutory language on fraudulent sex is yet another example of law’s weakness in changing underlying society’s attitudes towards sexual assault.

This article is organised into seven parts. Part II outlines, by way of background, fraudulent sex criminalisation and campus sexual assault in Australia. Part III explains the methodology of the case study. Part IV presents the findings. Part V identifies the severe problems in the current state of affairs and addresses implications for reform. Part VI discusses how this case study exemplifies the persistence of rape myths. Part VII concludes.

A quick note on reference. For brevity, the various universities will be referred to by their abbreviations, as set out in Appendix I. Appendix I also serves as a reference list detailing the relevant websites and policies of each university. For example, ‘ANU Website’ refers to the website link of the Australian National University (‘ANU’) that is set out in Appendix I.

II Background

This Part first charts the varied level of fraudulent sex criminalisation across Australia before setting out the context around campus sexual assault and corresponding responses by universities.

A *Fraudulent Sex Criminalisation*

Notwithstanding the limited success of the Model Criminal Code project in achieving a broad consistency of criminal laws in Australia,¹⁰ commentators such as Larcombe have observed that ‘[t]here has been a strong degree of convergence in

⁹ See below Part VI.

¹⁰ Miriam Gani, ‘Codifying the Criminal Law: Implications for Interpretation’ (2005) 29(5) *Criminal Law Journal* 264, 265–6.

the criminal provisions governing sexual offences.’¹¹ This echoed the observation by the Model Criminal Code Officers Committee that there are ‘even stronger arguments for a national approach’ with regard to sexual offences.¹²

Nonetheless, there is a divergence in the scope of fraudulent sex criminalisation in Australia. Dyer¹³ and Crowe¹⁴ have carefully documented the different statutory definitions of sexual consent vis-à-vis fraud in Australia. In addition, a majority of states and territories currently criminalises the procurement of sex through fraud as a sexual offence distinct from rape (that is, the procurement offence).¹⁵ In a recent article, I juxtaposed the statutory definitions of sexual consent alongside their respective procurement offences.¹⁶ Using three scenarios based on the facts of actual Australian cases, I demonstrated the stark divergences in criminal liability for fraudulent sex — ranging from rape (or its equivalent), a lesser sexual offence, or no criminal liability altogether.¹⁷ The three scenarios upon which criminal liability was assessed are as follows:

- **Scenario 1** is a fraud as to consideration of a financial nature: woman agreed to have sexual intercourse with man after he told her that he would pay her a sum of money for the sexual service. Man had no intention to pay woman.¹⁸
- **Scenario 2** is a fraud as to consideration of a non-financial nature: woman agreed to have sexual intercourse with man after he told her that he would marry her. Man had no intention to marry woman.¹⁹
- **Scenario 3** is a fraud as to a non-medical purpose: woman, who wanted to join the mafia, agreed to have sexual intercourse with man after he told her that sexual intercourse is part of a mafia initiation ritual. Man was not a mafia member and he was not conducting a mafia initiation ritual.²⁰

¹¹ Wendy Larcombe, ‘Rethinking Rape Law Reform: Challenges and Possibilities’ in Ron Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press, 2017) 143, 151. See also Bronitt and McSherry observing how rape, together with murder, are often central in law school curricula given the perceived universality of the offence across legal cultures: Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook, 4th ed, 2017) 578–9.

¹² Model Criminal Code Officers Committee, *Model Criminal Code, Chapter 5: Sexual Offences against the Person* (Report, 1999) 2.

¹³ Andrew Dyer, ‘Mistakes that Negate Apparent Consent’ (2019) 43(3) *Criminal Law Journal* 159, 169–72.

¹⁴ Jonathan Crowe, ‘Fraud and Consent in Australian Rape Law’ (2014) 38(4) *Criminal Law Journal* 236, 239.

¹⁵ *Criminal Code* (Qld) (n 6) s 218; *Criminal Law Consolidation Act 1935* (SA) s 60; *Criminal Code Act 1924* (Tas) sch 1 s 129 (‘*Criminal Code* (Tas)’); *Crimes Act 1958* (Vic) s 45; *Criminal Code Act Compilation Act 1913* (WA) sch s 192 (‘*Criminal Code* (WA)’). For discussion of the procurement offence in other common law jurisdictions, see Jianlin Chen, ‘Lying about God (and Love?) to Get Laid: The Case Study of Criminalizing Sex under Religious False Pretense in Hong Kong’ (2018) 51(3) *Cornell International Law Journal* 553, 564–70.

¹⁶ Jianlin Chen, ‘Fraudulent Sex Criminalisation in Australia: Disparity, Disarray and the Underrated Procurement Offence’ (2020) 43(2) *University of New South Wales (UNSW) Law Journal* 581, 591–7 (‘Fraudulent Sex Criminalisation in Australia’).

¹⁷ *Ibid.*

¹⁸ *R v Livas* [2015] ACTSC 50 (‘*Livas*’); *R v Rajakaruna* (2004) 8 VR 340.

¹⁹ *R v McKelvey* [1914] St R Qd 42.

²⁰ *Macfie v The Queen* [2012] VSCA 314.

Table A (below) sets out the variations on fraudulent sex criminalisation across Australia.²¹ The criminal liability is subject to two complications posed by judicial interpretations. First, courts may choose to adopt a restrictive interpretation that is contrary to the plain wording of the provision. For example, Heenan AJA in *Michael v Western Australia* held that ‘any fraudulent means’ in the Western Australian provision should only be applicable to

those frauds or misrepresentations which deprived the person concerned of a full comprehension of the nature and purpose of the proposed activity or his or her legal status of the person as a spouse, or his or her identity as an acceptable sexual partner.²²

Second, the statutory prescriptions for consent-vitiating circumstances are non-exhaustive and are usually preceded with an overarching definitional requirement that the consent has to be ‘freely’ given (or in some cases, ‘freely’ and ‘voluntarily’).²³ Thus, it is possible that fraud that does not fall within the stipulated consent-vitiating circumstances could still vitiate consent where a court deems that consent has *not* been ‘freely’ given. For example, in the 2011 Queensland case of *R v Winchester*, Muir JA and Fryberg J opined that a false promise of a horse in return for sexual intercourse might vitiate the consent after taking into account factors such as the physical, psychological or emotional state of the victim.²⁴

Part IV(B) will discuss how such judicial interpretation may aggravate or mitigate the legal inaccuracies of the websites and policies.

²¹ Chen, ‘Fraudulent Sex Criminalisation in Australia’ (n 16) 597.

²² *Michael v Western Australia* (2008) 183 A Crim R 348, 433 [376] (‘*Michael*’).

²³ Crowe (n 14) 238.

²⁴ *R v Winchester* [2014] 1 Qd R 44, 68 [86]–[87], 80 [135].

Table A: Fraudulent sex criminalisation in Australia

State/Territory ²⁵	ACT	NSW	NT	Qld	SA	Tas	Vic	WA
Rape includes:								
any fraud	*					*		*
fraud as to any purpose (in addition to medical/hygienic purpose)			*	*				
fraud as to identity of any person (in addition to sexual partner)		*	*		*		*	
fraud as to marital status		*						
Maximum penalty (years)	14	14	life	life	life	- ²⁶	25	14
Procurement offence:				*	*	*	*	*
Maximum penalty (years)				14	7	-	5	2
Criminal Liability								
Scenario 1 (sexual service)	rape	property	property	procure	procure	rape or procure	procure	rape ²⁷
Scenario 2 (marriage promise)	rape	nil	nil	procure	procure	rape or procure	procure	rape or procure
Scenario 3 (mafia initiation)	rape	nil	rape	rape or procure	procure	rape or procure	procure	rape or procure

²⁵ State/Territory abbreviations: ACT = Australian Capital Territory; NSW = New South Wales; NT = Northern Territory; Qld = Queensland; SA = South Australia; Tas = Tasmania; Vic = Victoria; WA = Western Australia.

²⁶ A peculiarity of the *Criminal Code* (Tas) is that it does not set out the penalty for each offence. The default maximum penalty for a non-summary offence is 21 years' imprisonment: *Criminal Code* (Tas) (n 15) s 389(3). For discussion of the legislative background behind this reform, see John Blackwood and Kate Warner, *Tasmanian Criminal Law: Text and Cases* (University of Tasmania Law Press, 1993) vol 1, 6–7.

²⁷ The procurement offence in WA is not applicable where the defrauded person is a 'common prostitute or of known immoral character': *Criminal Code* (WA) (n 15) s 192(1)(b). This morality requirement is due to the fact that when the prototype procurement offence was first enacted in England in 1885, the underlying legislative objective was to address the exploitation of women and girls for the purposes of prostitution: Peter Alldridge, 'Sex, Lies and the Criminal Law' (1993) 44(3) *Northern Ireland Legal Quarterly* 250, 265. This requirement of victim's morality has been abolished in the other states that still have the procurement offence: Chen, 'Fraudulent Sex Criminalisation in Australia' (n 16) 590.

B *Campus Sexual Assault and Universities Responses*

The issue of campus sexual assault has been in the spotlight around the world.²⁸ The real risks and severe harm of sexual assault has prompted various government interventions and universities policies,²⁹ which in turn generated considerable literature examining the efficacy and other normative considerations of these responses.³⁰ Universities have civic and educational responsibilities to prevent sexual assault on campus,³¹ especially when they are uniquely positioned vis-à-vis shaping and regulating students' behaviour.³² Unsurprisingly, a particular area of inquiry is on the various measures that might be undertaken by the university, which range from preventative programs aimed at raising awareness and modifying behaviour, to reporting and adjudicating procedures to provide redress for sexual assaults that have occurred.³³

In Australia, the issue was reinvigorated by the *Change the Course Report* in 2017, which revealed a disturbingly high level of sexual assault in university settings.³⁴ The Report defined sexual assault as 'when a person is forced, coerced or tricked into sexual acts against their will or without their consent, including when they have withdrawn their consent'.³⁵ Under this definition, 6.9% of the surveyed students reported being sexually assaulted on at least one occasion in 2015 or 2016,

²⁸ Melanie A Beres, Gareth J Treharne and Zoran Stojanov, 'A Whole Campus Approach to Sexual Violence: The University of Otago Model' (2019) 41(6) *Journal of Higher Education Policy and Management* 646, 646.

²⁹ See Michele Landis Dauber and Meghan O Warner, 'Legal and Political Responses to Campus Sexual Assault' (2019) 15 *Annual Review of Law and Social Science* 311, 320–5 (discussing the various legal and administrative responses in the United States ('US')).

³⁰ 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, 734 (finding some preliminary evidence that adoption of an affirmative consent standard in sexual assault prevention programming and initiatives on college campuses has some effect in improving college students' intentions to engage in affirmative sexual consent communication); Shannon Duncan et al, 'Caught in a Web of Confusion: Assessing the Readability of University Webpages for Victims of Sexual Assault' (2019) 15(1) *Journal of Forensic Nursing* 4, 5–7 (analysing the ease of understanding of university webpages on sexual assault); Beres, Treharne and Stojanov (n 28) 652 (questioning whether sexual assault is indeed the result of a lack of understanding of sexual consent).

³¹ Graham Towl, 'Tackling Sexual Violence at UK Universities: A Case Study' (2016) 11(4) *Contemporary Social Science* 432, 433–4. See also Universities Australia, *Guidelines for Universities Responses to Sexual Assault and Sexual Harassment* (2018) 6 <<https://www.universitiesaustralia.edu.au/wp-content/uploads/2018/10/UA-Guidelines-5.pdf>>: 'Universities have a range of legal and regulatory obligations to proactively promote and foster a safe environment for their staff and students, both on campus and online.'

³² Randolph D Hubach et al, '“What Should Sex Look Like?” Students' Desires for Expanding University Sexual Assault Prevention Programs to Include Comprehensive Sex Education' (2019) 29(13) *Qualitative Health Research* 1967, 1968.

³³ Dauber and Warner (n 29) 320–5.

³⁴ The AHRC, *Change the Course Report* (n 3) 22, 224 defined university setting as incidents which occurred on the university campus, while travelling to or from university, at an off-campus event organised by or endorsed by the university, at university employment, or, for technology-based harassment, where some or all of the perpetrators were students, teachers or other people associated with the university.

³⁵ Ibid 57.

with 1.6% reporting that the sexual assault occurred in a university setting.³⁶ The Report included several recommendations to address the issue holistically. The recommendations not only deal with broader institutional governance reform (such as leadership, monitoring and evaluation), but also involve measures that have direct engagement with and impact on the relevant university community.³⁷ These include education initiatives designed to change attitude and behaviour, and victim-centric responses such as supporting measures and reporting procedures.³⁸

There have been some critical queries as to whether the prevalence of sexual assault and sexual harassment was indeed as severe as reported in the 2017 *Change the Course Report*.³⁹ Nonetheless, the Report prompted peak university bodies like Universities Australia to introduce policy guidelines and educational programs to address the issue.⁴⁰ Individual universities also undertook various initiatives, including the commissioning of independent, expert-led reviews on their institutional responses.⁴¹

A 2018 audit of universities' responses conducted by the Australian Human Rights Commission found that 'all 39 universities reported implementing, or a commitment to implementing, training and education in relation to sexual assault, sexual harassment and respectful relationships to some or all of their students'.⁴² The 2019 Tertiary Education Quality and Standards Agency report also found that the various recommendations by the *Change the Course Report* had been largely adopted by the universities, with near universal implementation of a sexual assault and sexual harassment policy, and offering training and education.⁴³

Notably, while the aforementioned 2018 audit and 2019 report provide important quantification as to the state of reform among Australian universities, the audit and report did not delve into the qualitative aspect. As will be demonstrated below, not all policies and websites are created equal, at least with respect to the accuracy of information relating to fraudulent sex criminalisation.

III Methodology

This Part presents the methodology by explaining how the dataset was constructed and the variables used in the analysis.

³⁶ Ibid 49.

³⁷ Ibid 9–16.

³⁸ Ibid 11–12.

³⁹ See discussion on critiques of the Report's methodology, especially whether the survey is empirically representative: Calla Wahlquist, 'Student Sexual Assault and Harassment Survey "Not Representative"', *The Guardian* (online, 7 October 2017) <<https://www.theguardian.com/australia-news/2017/oct/07/student-sexual-assault-harassment-survey-not-representative>>.

⁴⁰ Universities Australia (n 31); Allison Henry, 'Responses to Sexual Violence in Australian Universities' (2019) 28(3) *Human Rights Defender* 29, 30–1.

⁴¹ Ibid.

⁴² AHRC, *Snapshot of Progress* (n 4).

⁴³ *TEQSA Report* (n 5) 3.

A Dataset

The study examined the relevant websites and policies of all 42 universities listed on the 'List of Australian Universities' by the Australian Government 'Study in Australia' website.⁴⁴ The websites and policies were obtained by searching within each of the individual university's website. The reference date for the search was set at 22 April 2020 (that is, the policy and webpage are archived on that date as far as possible). The search terms used were 'sexual assault' and 'sexual misconduct'.

For websites, the search within each university's website sometimes returned multiple results. The precise site used for this analysis was selected based on the 'publicness' of the targeted audience. Namely, a website aimed at the general university community will be preferred, followed by a website aimed at students, and finally a website aimed at staff. The search yielded 39 results.⁴⁵

For policy, the search yielded 38 results. Twenty-five universities have policies dedicated to sexual assault, whether as a standalone policy or in conjunction with policies dealing with sexual harassment and/or general sexual misconduct. Nine universities have policies dedicated to sexual harassment but not sexual assault, with sexual assault usually briefly mentioned as a type of sexual harassment. Four universities deal with sexual assault as part of the general policy on misconduct. There were no relevant publicly accessible policies from four universities.⁴⁶

Appendix I sets out the specific websites and policies that were selected for this study.

B Variables

The central issue is how fraudulent sex is represented. This is usually done through the distinct definition of consent. Where a definition of consent is explicitly provided, it was selected as the primary data point, even if there were a discrepancy vis-à-vis the definition of sexual assault contained in the same document.⁴⁷ Nevertheless, this discrepancy was accounted for when isolating the most normatively problematic websites and policies in Part IV(C). Occasionally, there is

⁴⁴ Australian Government, 'List of Australian Universities', *Study in Australia* (Web Page, 2020) <<https://www.studyinaustralia.gov.au/English/Australian-Education/Universities-Higher-Education/list-of-australian-universities>>. The website stated that there are '43 universities with at least one university main campus based in each state or territory'. The number 43 is likely due to either double counting of Federation University of Australia (listed with main campuses in both Victoria and Queensland) or failure to update the number since the closure of University College London Australia (which was still listed on the 'Australian University Campuses Map' PDF file available from the website as at 30 December 2020).

⁴⁵ Divinity did not have a relevant website. QUT had a student-oriented website, with student login credentials required for access. Torrens has a publicly available sexual assault policy, but no independent website.

⁴⁶ Namely, Canberra, Murdoch, Charles Sturt and Swinburne.

⁴⁷ For example, there is no mention of fraud in ANU's consent definition, but there is for sexual assault, which is defined as including: 'any offence of a sexual nature committed on another person where a person is forced, coerced or tricked into sexual acts against their will or without their consent, including when they have withdrawn their consent, or they are unable to give consent': ANU Policy, Definitions.

no definition of consent, but there is a definition of sexual assault that incorporates the substance of a consent definition. For example, Torrens stated: 'Sexual assault: when a person is forced, coerced or tricked into sexual acts against their will or without their consent, or if a child or young person under 18 is exposed to sexual activities.'⁴⁸ In such a situation, the definition of sexual assault was selected as the data point.

The various approaches in the universities' websites and policies can be organised into four categories. These categories are set out below, with an illustrative example in each corresponding footnote.

- (1) '**No definition**', meaning there is no definition of sexual consent and/or sexual assault. For websites, this usually involves a linked reference to the institutional policy or external sources.⁴⁹ For policies, this may involve either a direct reference to the law,⁵⁰ or mentioning that sexual assault is part of sexual harassment, without defining sexual assault (or sexual consent) in that or other policy.⁵¹
- (2) '**No fraud**', meaning sexual consent and/or sexual assault is defined, but there is no mention that fraud may vitiate consent or otherwise constitute a sexual offence.⁵²
- (3) '**Fraud (all)**', meaning that fraud is mentioned as capable of vitiating consent and/or fraudulent sex is a sexual offence, and there are no explicit qualifications as to the type of frauds.⁵³
- (4) '**Fraud (qualified)**', involves mention of fraudulent sex, but with explicit qualifications as to the type of frauds. Most of the explicit qualifications reflect the consent-vitiating fraud explicitly recognised in the statutory definition of consent. For example, the websites or policies may state that there is no consent when the fraud relates to the nature and/or purpose of the act, and/or identity of the person.⁵⁴ Interestingly, some websites or policies qualify that the fraud has to be committed by someone who is in a position of trust or authority.⁵⁵

⁴⁸ Torrens Policy s 2.

⁴⁹ For example: 'The University takes incidents of sexual violence very seriously. View the University Policy on Sexual Misconduct.': Western Australia Website.

⁵⁰ For example: 'The University defines sexual assault, sexual harassment and consent in accordance with the relevant Australian state and federal legislation.': Newcastle Policy s 5.

⁵¹ For example: 'Sexual harassment also includes offences and crimes which are associated with unwelcome conduct of a sexual nature such as sexual assault, indecent exposure, stalking, obscene communications etc': RMIT Policy s 1.4.

⁵² For example: 'Sexual consent cannot be given by someone who is under the age of 16, forced or coerced, intoxicated, affected by drugs, asleep, unconscious, incapable of saying no or unable to understand what they are consenting to. Engaging in sexual activity with a person in any of these states is sexual assault.': Sydney Website.

⁵³ For example: 'If you have been tricked into agreeing, that isn't consent': Monash Website.

⁵⁴ For example: 'Under false or fraudulent representations about the nature or purpose of the act, or Under a mistaken belief that the offender was someone else (for example, their sexual partner)': James Cook Policy.

⁵⁵ For example: 'Consent cannot be given by people who are tricked or manipulated due to the person being in a position of trust into providing consent': Notre Dame Policy s 8.1.1.7.

The variety of substantive manifestations of ‘fraud (qualified)’ has been captured by the analysis as to its accuracy vis-à-vis the applicable law of each university’s main campus. The main campus stipulated on the Australian Government ‘Study in Australia’ website was used for this purpose.⁵⁶

The results for each university are tabulated in Appendix II. There are three columns in the data table to present the analysis on legal accuracy. The first column indicates whether the definition presented on the website is legally accurate: ‘Yes’, ‘No’ or ‘N/A.’ (that is, not applicable where there is no definition). The next two columns respectively set out the extent to which the definitions understate or overstate the impermissible fraudulent sex.

IV Findings

This Part presents the findings, with a particular focus on identifying the prevalence and manifestations of the most problematic legal errors.

A Overview

Beginning with a general overview of the findings, Table B (below) sets out the distribution of the basic variables as described above in Part III(B). Two aspects of Table B are worth noting.

First, Australian universities varied significantly in how they addressed the issue of fraudulent sex on their websites and in their policies. All the variables set out in Part III(B) are well represented across the data points. Even without further detailed breakdowns of the different manifestations of the ‘fraud (qualified)’ category, it is clear that there is no consensus among Australian universities on this issue.

Second, there are noticeably more policies than websites that do not have substantive definitions of sexual consent and/or sexual assault. As noted above in Part III(A), this is largely driven by universities having policies dedicated to sexual harassment but not sexual assault. For these universities, the lack of a definition is not an issue of those sexual harassment policies. Rather, this relates to the separate and broader question of whether universities should have policies that substantially deal with sexual assault or leaving the matter entirely to traditional law enforcement.⁵⁷

⁵⁶ The main campus for Federation is designated as Victoria (as opposed to Queensland), given its founding history: Australian Government (n 44).

⁵⁷ For a snapshot of the debate in the context of US, see Michelle J Anderson, ‘Campus Sexual Assault Adjudication and Resistance to Reform’ (2016) 125(7) *Yale Law Journal* 1969, 1981–97; Sarah L Swan, ‘Between Title IX and the Criminal Law: Bringing Tort Law to the Campus Sexual Assault Debate’ (2016) 64(4) *Kansas Law Review* 963, 966–8. The recommendation by Universities Australia is that university misconduct investigations and criminal investigations are not incompatible, especially with appropriate consultation with the reporting student and the police: Universities Australia (n 31) 17.

Table B: Overview of Australian universities' websites and policies on sexual misconduct involving fraud

	Website	Policy	Website + Policy
Total number	39	38	77
No definition	5 [12.8%]	12 [31.6%]	17 [22.1%]
No fraud	21 [53.8%]	6 [15.8%]	27 [35.1%]
Fraud (all)	6 [15.4%]	8 [21.1%]	14 [18.2%]
Fraud (qualified)	7 [17.9%]	12 [31.6%]	19 [24.7%]

B *Legal Inaccuracies*

At first glance, the lack of consensus among Australian universities on this issue might be explained by how the law on fraudulent sex differs significantly across Australia.⁵⁸ However, this explanation is undermined by the strikingly low proportion of legally correct definitions. As set out in Table C (below), only 16.7% of the relevant data points (that is, those universities whose websites and policies have a definition) contain a legally accurate definition.

What is less surprising is that the proportion of legally accurate definitions is noticeably higher for policies than for websites. Universities' policies are formal documents that have various internal and external legal effects,⁵⁹ and one would expect greater care in their drafting. Nonetheless, the proportion of legally accurate definitions is still far from the majority, at only 26.9%.

Table C: Legal accuracy of Australian universities' websites and policies on sexual misconduct involving fraud

	Website	Policy	Website + Policy
Total number (defined)	34	26	60
Legally accurate	3 [8.8%]	7 [26.9%]	10 [16.7%]

The significance of an erroneous definition differs based on the type of error. An inaccuracy arising from a definition that exceeds the statutorily stipulated consent-vitiating fraud is circumscribed by two features of the law relating to fraudulent sex criminalisation in Australia, as set out in Part II(A). First, the non-exhaustive statutory prescriptions for consent-vitiating circumstances leave open the possibility for courts to find that fraud that otherwise is not within the stipulated consent-vitiating circumstances could still vitiate consent.⁶⁰ Second, among jurisdictions that limit the types of consent-vitiating fraud, there is the procurement

⁵⁸ See above Part II(A).

⁵⁹ Patty Kamvounias and Sally Varnham, 'Legal Challenges to University Decisions Affecting Students in Australian Courts and Tribunals' (2010) 34(1) *Melbourne University Law Review* 140, 156–71.

⁶⁰ See above nn 23–4 and accompanying text.

offence that criminalised all types of fraudulent sex in Queensland, South Australia ('SA'), and Victoria. At worst, any overstatement of fraudulent sex as rape or sexual assault by universities in these three jurisdictions merely aggravates the severity of what is still a non-trivial criminal offence. Indeed, a case may be made that the benchmark for legal accuracy in these three jurisdictions should be the same as the Australian Capital Territory ('ACT'), Tasmania and Western Australia ('WA') (that is, all fraudulent sex is illegal).⁶¹ Notably, these two features only mitigate, but do not necessarily negate, the inaccuracy arising from overstatement. It remains far from certain that courts will use "free" consent to broaden the scope of fraudulent sex criminalisation, whether in individual cases or as a general precedent.⁶² There is no procurement offence in either New South Wales ('NSW') or the Northern Territory ('NT').

On the other hand, the statutorily prescribed categories of consent-vitiating fraud has to be the minimum threshold. The only mitigating factor for understatement is that courts may choose to adopt a restrictive interpretation that is contrary to the plain wording of the provision.⁶³ However, the restrictive interpretation by Heenan AJA does not justify understatement even in WA universities for two reasons. First, such restrictive jurisprudence is far from conclusive. In *Michael*, Heenan AJA was in dissent. The other two judges did not adopt a similarly restrictive interpretation.⁶⁴ In addition, courts in the ACT have consistently resisted the restrictive approach advocated by Heenan AJA.⁶⁵ Second, none of the understatements among the data points corresponded to any existing Australian jurisprudence (including Heenan AJA's dissent in *Michael*). Indeed, many of the understatement legal errors consist of no mention of fraud, which clearly is incorrect.

As set out in Table D (below), the overwhelming type of legal error for websites is understatement (80.6%). It is more evenly distributed for policies, with understatement constituting 52.6% of legal errors.

⁶¹ See below Table G (Part IV(C)).

⁶² Crowe (n 14) 246. In England, the courts have been more willing to use the positive definition of consent (ie, 'a person consents if he agrees by choice, and has the freedom and capacity to make that choice') to punish fraudulent sex. A notable and controversial example is deception as to gender: *R v McNally* [2014] QB 593 (CA); Alex Sharpe, 'Queering Judgment: The Case of Gender Identity Fraud' (2017) 81(5) *Journal of Criminal Law* 417, 432–4; Aeyal Gross, 'Rape By Deception and the Policing of Gender and Nationality Borders' (2015) 24 *Tulane Journal of Law & Sexuality* 1, 24–33.

⁶³ See above n 23 and accompanying text.

⁶⁴ *Michael* (n 22) 370–71 [88]–[89] (Steytler P), 385 [165]–[166] (Miller JA).

⁶⁵ *R v Tamawiwiy (No 2)* (2015) 11 ACTLR 82, 92 [55] ('*Tamawiwiy (No 2)*'); *Livas* (n 18) [34] (Penfold J). See Jianlin Chen, 'Two Is a Crowd: An Australian Case Study on Legislative Process, Law Reform Commissions and Dealing with Duplicate Offences' (2020) *Statute Law Review* (advance) <<https://doi.org/10.1093/slr/hmz027>> 10–15 (arguing that judicial interpretations in the ACT were facilitated by the repeal of the procurement offence when the statutory definition of sexual consent was expanded to include vitiation by 'a fraudulent misrepresentation of any fact').

Table D: Types of legal errors in Australian universities' websites and policies on sexual misconduct involving fraud

	Website	Policy	Website + Policy
Total number (errors)	31	19	50
Understatement	25 [80.6%]	10 [52.6%]	35 [70.0%]
Overstatement	5 [16.1%]	9 [47.4%]	14 [28.0%]
Understatement and overstatement	1 [3.2%]	0	1 [2.0%]

C *Understatements*

Table E (below) presents a more focused look at the problem of understatements among universities' websites and policies. Table E starts by noting the disturbing prevalence of understatement legal errors among data points that have a definition of consent (that is, universities' websites and policies without such definition are excluded from the denominator): an overall of 58.3%, and 73.5% and 38.5% respectively for website and policy. Table E then further breaks down these understatement errors into the most problematic cases.

First, a distinction is made between major and minor understatements. The latter might be more excusable. One example of minor understatement is made by Flinders University. In its definition of consent on both its website and policy, two fraud-related grounds are stated as capable of vitiating consent: respectively, 'a mistaken belief about the identity of the other person' and 'mistaken about the nature of the activity'.⁶⁶ This definition technically fails to mention that 'medical/hygienic' purpose is explicitly stated in the SA statutory provision as consent-vitiating. However, one might argue that 'medical/hygienic' purpose is a relatively a narrow set of circumstances that might not be particularly prevalent in a university setting. The removal of such minor understatement alleviates, if only slightly, the extent of understatements. A majority of relevant data points (55.0%) still contain non-minor understatements.

Table E next excludes cases where an understating definition of consent co-exists with a definition of sexual assault that is broader. An example is ANU's policy. There is no mention of fraud in ANU's consent definition, but there is for sexual assault, which is defined as 'any offence of a sexual nature committed on another person where a person is forced, coerced or *tricked* into sexual acts against their will or without their consent'.⁶⁷ As compared to the minor understatement discussed in the preceding paragraph, the normativity of inconsistency is more complicated. The uneasy co-existence suggests a genuine and innocuous oversight in drafting. However, the end product is confusion for the reader. Ultimately, this

⁶⁶ Flinders Policy s 5; Flinders Website.

⁶⁷ ANU Policy 2 (emphasis added).

article excludes these cases from the list of the most problematic offenders because there is at least an acknowledgement of the criminality of fraudulent sex. After the exclusion, the result is still far from ideal: 48.3% overall, and 61.8% and 30.8% respectively for website and policy. All these data points are flagged as ‘serious problems’ in Appendix II. As will be discussed in Part V(B), there is a particularly dire need for reform of these websites and policies.

Table E: Legal errors in Australian universities’ websites and policies on sexual misconduct involving fraud: Different degrees of understatement

	Website	Policy	Website + Policy
Total number (defined)	34	26	60
Understatement (all)	25 [73.5%]	10 [38.5%]	35 [58.3%]
Understatement (major)	24 [70.6%]	9 [34.6%]	33 [55.0%]
Understatement (major + no sexual assault)	21 [61.8%]	8 [30.8%]	29 [48.3%]

Having isolated the least excusable types of legal errors, the question becomes how these understatements manifested. As set out Table F (below), the vast majority of these understatements arose by virtue of a complete omission of fraud. This is especially so for websites, where 85.7% of the ‘serious’ understatements comprised no mention of fraud. The distribution is more even for policies, even if complete omission of a reference to fraud still constitutes the majority of serious understatements (62.5%).

Table F: Legal inaccuracies in Australian universities’ websites and policies on sexual misconduct involving fraud: Types of understatements

	Website	Policy	Website + Policy
Total number (‘serious’ understatement)	21	8	29
No fraud	18 [85.7%]	5 [62.5%]	23 [79.3%]
Fraud (qualified)	3 [14.3]	3 [37.5%]	6 [20.7%]

Normatively speaking, it is difficult to say which type of understatements is more problematic. On one hand, the magnitude of legal inaccuracy is greater for complete omission, with more criminalised activities not represented as being impermissible. On the other hand, understatement appears much more conscious and misleading where only certain types of fraud are reported.

This can be illustrated by the policy of Griffith University (‘Griffith’):

Consent must be freely and voluntarily given by a person with the cognitive capacity to do so. Consent is not freely and voluntarily given if a person is:

- forced to engage in the sexual act;

- unconscious or asleep;
- under the influence of drugs or alcohol;
- threatened or intimidated;
- in fear of bodily harm; or
- under a mistaken belief that the person was their sexual partner.⁶⁸

The relevant Queensland statutory provision expressly states that sexual consent is not only vitiated by mistaken identity of a sexual partner, but also by false representation as to the ‘nature and purpose of the act’.⁶⁹ It is highly curious, to put it mildly, that Griffith’s Policy chose to include a narrow ground⁷⁰ of consent-vitiating fraud to the exclusion of the much broader, and generally applicable, circumstances.

Before moving on to the analytical discussion, Table G (below) highlights how the prevalence of problematic understatements would be significantly increased if the legal benchmarks for Queensland, SA and Victoria were raised to include all forms of fraud on account of the existence of the procurement offence. The prevalence increased to 71.7%, up from 48.3%.

Table G: Legal errors in Australian universities’ websites and policies on sexual misconduct involving fraud: Procurement offence as benchmark

	Website	Policy	Website + Policy
Total number (defined)	34	26	60
Understatement (major + no sexual assault)	21 [61.8%]	8 [30.8%]	29 [48.3%]
Understatement (procurement) (major + no sexual assault)	26 [76.5%]	17 [65.4%]	43 [71.7%]

V Analysis

This Part explains how the current state of affairs is highly problematic, before proposing necessary reforms.

A *Undesirable Errors in Universities’ Websites and Policies*

Universities have an important, non-delegable, duty to ensure the safety of their campuses. A basic measure that can, and should, be undertaken by universities is educating those who attend university and/or university campuses whether as

⁶⁸ Griffith Policy s 3.1.

⁶⁹ *Criminal Code* (Qld) (n 6) s 348.

⁷⁰ It must be acknowledged that such fraudulent sex cases are not unheard of in Australia: see, eg, *R v Doolan* [2009] SADC 115; *R v Pryor* (2001) 124 A Crim R 22; *R v Gallienne* [1964] NSW 919.

students, staff or visitors. As recommended by the *Change the Course Report*, '[u]niversities [should] develop a plan ... [that] provides students and staff with education about: behaviour that constitute sexual assault and sexual harassment, [and] consent and respectful relationships'.⁷¹ It should go without saying that such education initiatives need to be 'present, easy to access, and *correct*'.⁷² There are debates in the United States ('US') as to whether the sexual consent articulated should be premised on the existing legal requirements, or based on more progressive standards. On one hand, a higher standard arguably has the benefit of better protecting sexual autonomy and promoting a more respectful sexual culture.⁷³ On the other hand, a definition of sexual consent that includes both existing legal requirements and non-legal moral ideals may give rise to confusion about the necessity of adherence and thus dilute any overall behaviour-modification effect of university standards and policies.⁷⁴

In the Australian context, there is an additional factor to account for when assessing overstatement of the law. In some universities' policies, the definition of sexual assault is caveated with '[f]or the purposes of this policy'.⁷⁵ This can be contrasted with other universities' policies that mention in the definitional provision that sexual assault is a 'crime' or 'criminal offence'.⁷⁶ Having benchmarked the definition with the legal standard, overstatement of the law in the latter definitions cannot be justified as reflecting a desire for a higher protective or moral standard for the university community. Where the conduct of an accused falls outside the actual legal standard, a finding of sexual assault by a university disciplinary committee under the policy's definitions prejudicially, and arguably illegally,⁷⁷ imputes the accused as committing a crime. Though in this regard, a provision in the university policy that explicitly stipulates the limited nature of a finding of sexual misconduct under university disciplinary proceedings⁷⁸ will help mitigate concerns arising from overstatement of the law.

⁷¹ AHRC, *Change the Course Report* (n 3) 11.

⁷² Catherine A Simmons and Joy A Clay, 'Sexual Assault Information Posted on College and University Websites: Size and Setting Matter' (2019) 25(10) *Violence Against Women* 1191, 1194 (emphasis added).

⁷³ Ortiz (n 30) 734; David DeMatteo et al, 'Sexual Assault on College Campuses: A 50-State Survey of Criminal Sexual Assault Statutes and Their Relevance to Campus Sexual Assault' (2015) 21(3) *Psychology, Public Policy, and Law* 227, 233–6.

⁷⁴ Melanie Ann Beres, 'The Proliferation of Consent-Focused Rape Prevention Social Marketing Materials' in Catherine Dale and Rosemary Overell (eds), *Orienting Feminism: Media, Activism and Cultural Representation* (Palgrave Macmillan, 2018) 181, 186–9.

⁷⁵ See, eg, Macquarie Policy s 4.4.4; Sydney Policy s 9.

⁷⁶ See, eg, Tasmania Policy s 5.8; Victoria Policy s 17.

⁷⁷ See below nn 97–99 and accompanying text.

⁷⁸ See, eg, Tasmania Policy s 6:

The University is only able to investigate whether a person has engaged in sexual misconduct in breach of this policy. We will not investigate or determine whether a civil wrong in the case of sexual harassment, or a criminal act, in the case of sexual assault, has occurred. These matters can only be determined by an external process.

See also Macquarie Policy s 4.11:

An investigation by the University will assess whether, on the balance of probabilities, the reported sexual harassment or sexual assault is a breach of the Student Discipline Rule. The University's investigation process is not a substitute for criminal processes.

In any event, it should be uncontroversial that the existing legal requirements should always be the minimum standard. The educational goals of universities in relation to sexual misconduct are undermined by existing Australian universities' websites that understate the law on sexual assault and consent. Indeed, the issue is not simply ignorance. The intended recipients are actively exposed to an erroneously narrow understanding of the law by a seemingly credible source of information. Significantly, understating the law may increase the chance of a student running afoul of the law. In the 2015 ACT case of *R v Tamawiwy (No 2)*, a university student, reportedly from University of Canberra,⁷⁹ was convicted of sexual intercourse without consent.⁸⁰ The defendant (a young man) posted as a fictitious young attractive woman to entice the victim (another young man) with the promise of sexual intercourse with her (the fictitious young woman) and her (fictitious) friend, on condition that the victim first had sex with the defendant. As rightly conceded by the defendant's lawyer during closing statement, the defendant's act was 'despicable'.⁸¹ However, the fraud employed is essentially a fraud as to consideration of a non-financial nature and thus would not constitute rape in the majority of Australian jurisdictions,⁸² or indeed around the world,⁸³ including Indonesia,⁸⁴ where the defendant was from.⁸⁵ Obviously, the defendant in the case could still well have engaged in the fraudulent sex even if he knew that it was a crime. Incidentally, he would not have known that from the University of Canberra's website surveyed in this study, which did not mention fraud when explaining sexual consent.⁸⁶ In any event, having universities correctly inform students about the extent of criminal law would, at least, have some marginal deterrent effect.⁸⁷ This is particularly so for universities in jurisdictions where there are no limitations to

⁷⁹ 'Canberra Uni Student Jailed for Raping Man He Lured through a Fake Female Facebook Account', *News Corp Australia Network* (online, 12 November 2015) <<https://www.news.com.au/national/crime/canberra-uni-student-jailed-for-raping-man-he-lured-through-a-fake-female-facebook-account/news-story/87825c42482f4804e6fcd24b3c335d3>>.

⁸⁰ *Tamawiwy (No 2)* (n 65) 94 [66]–[67]; *R v Tamawiwy (No 4)* [2015] ACTSC 371.

⁸¹ Christopher Knaus, 'Elaborate Ploy to Seduce Teenager', *Canberra Times* (25 September 2015) A003.

⁸² See Table A (Part II(A)). It is highly unlikely that the defendant would be convicted under the approach of Muir JA and Fryberg J in *R v Winchester*: see above n 24 and accompanying text. There was no pre-existing relationship — let alone a relationship of trust, dependency and/or power imbalance — between the defendant and the victim. The victim also did not appear to have any physical, intellectual, emotional or psychological vulnerabilities.

⁸³ Michael Bohlander, 'Mistaken Consent to Sex, Political Correctness and Correct Policy' (2007) 71(5) *Journal of Criminal Law* 412, 420–3.

⁸⁴ Choky R Ramadhan, 'Reforming Indonesian Rape Law: Adopting U.S. Rape Shield Law in Excluding Prejudicial Evidence' (2018) 8(1) *Indonesia Law Review* 63, 71–4. For a discussion of the limited criminalisation of fraudulent sex in another South-east Asia civil law jurisdiction, see Jianlin Chen and Phapit Triratan, 'Black Magic, Sex Rituals and the Law: A Case Study of Sexual Assault by Religious Fraud in Thailand' (2020) 37(1) *UCLA Pacific Basin Law Journal* 25, 34–46.

⁸⁵ Christopher Knaus, 'Man Who Exploited Facebook Profile for Sex Gets Jail Term', *Canberra Times* (12 November 2015) A005.

⁸⁶ See Appendix II.

⁸⁷ Patricia G Erickson, Mark Van Der Maas and Andrew D Hathaway, 'Revisiting Deterrence: Legal Knowledge, Use Context and Arrest Perception for Cannabis' (2013) 49(3) *Czech Sociological Review* 427, 442–3; Paul H Robinson and John M Darley, 'Does Criminal Law Deter? A Behavioural Science Investigation' (2004) 24(2) *Oxford Journal of Legal Studies* 173, 175–8. See also Williams and Erickson's research findings that 'individual perceptions of statutory or actual legal sanctions are not a function of knowledge of the "law", but are a function of shared beliefs about what ought to be done to criminal offenders': Kirk R Williams and Maynard L Erickson, 'Potential for Crime and Knowledge of Legal Sanctions' (1981) 2(3) *Deviant Behavior* 287, 301.

consent-vitiating fraud (that is, the ACT, Tasmania and WA). For these universities, the majority of out-of-state students (both domestic and international) are coming from jurisdictions where fraudulent sex criminalisation is more restricted.

Beyond the detriments to education and behaviour modifications, these understatement legal errors impede redress for sexual assaults that have been committed. The *Change the Course Report* identified that 87% of students who were sexually assaulted did not make a report or complaint to their university.⁸⁸ The understatement legal errors would aggravate the already formidable barriers to reporting.⁸⁹ There is now an increased chance that individuals who have an experience legally defined as sexual assault may not perceive their experience as such and thus do not seek redress and justice.⁹⁰ Such misperception may also increase self-blame among survivors of sexual assaults.⁹¹ A victim of fraudulent sex may blame one's naivety⁹² instead of recognising — as the law does — one's sexual autonomy has been impermissibly infringed by the offender's fraud.

The legal errors in policies are more severe considering the formal nature of policy formation. Indeed, Universities Australia's 2018 *Guidelines for University Responses to Sexual Assault and Sexual Harassment* recommended a standalone policy to address sexual assault and sexual harassment.⁹³ Unsurprisingly, a key basic requirement for such a policy is to both 'define sexual assault in alignment with the relevant jurisdictional criminal legislation' and 'explain consent as defined by relevant jurisdictional criminal legislation'.⁹⁴ Unfortunately, only a quarter of the policies meet this standard.⁹⁵

In addition to the adverse educational and practical implications discussed in relation to the websites, legally erroneous definitions may actually compromise the legal integrity of any disciplinary proceedings that flow out of these policies. This is especially so for the 37 public universities where disciplinary decisions are readily subjected to judicial review under accepted administrative law principles.⁹⁶ While most successful litigation by students challenging universities' decisions tends to be

⁸⁸ AHRC, *Change the Course Report* (n 3) 120.

⁸⁹ Common reasons proffered by surveyed students for not reporting include thinking that the incident was not serious enough, thinking that no help was needed, perceived evidential difficulty and lack of knowledge of reporting: *ibid* 129.

⁹⁰ Laurie M Graham, 'Sexual Assault Policies and Consent Definitions: A Nationally Representative Investigation of U.S. Colleges and Universities' (2017) 16(3) *Journal of School Violence* 243, 244.

⁹¹ Sapana D Donde, 'College Women's Attributions of Blame for Experiences of Sexual Assault' (2017) 32(22) *Journal of Interpersonal Violence* 3520, 3530.

⁹² For example, in a Victim Impact Statement submitted to court, the victim of fraudulent sexual assault said that 'she feels guilt that her "trusting nature was abused in such a way": *DPP (Vic) v Deepak Dhankar* [2015] VCC 189, [9] (Judge Patric).

⁹³ Universities Australia (n 31) 4, 10.

⁹⁴ *Ibid* 10.

⁹⁵ See above Table C (Part IV(B)).

⁹⁶ The right to judicial review is more complicated, though not necessarily foreclosed, for private universities: Pnina Levine and Michelle Evans, 'The Legalities of Revoking University Degrees for Misconduct: Recommendations for Australian Universities' (2018) 41(1) *University of New South Wales (UNSW) Law Journal* 185, 190–1. For discussion of the private law remedies that will be available to students of both private and public universities, see Bruce Lindsay, 'Complexity and Ambiguity in University Law: Negotiating the Legal Terrain of Student Challenges to University Decisions' (2007) 12(2) *Australia and New Zealand Journal of Law and Education* 7, 10–13.

premised on issues of procedural fairness,⁹⁷ a university's decision that is contrary to law would also be a ground for invalidating a decision.⁹⁸ A university disciplinary hearing that applies a definition that is explicitly benchmarked to the legal standard (that is, stipulating sexual assault is a 'crime' or 'criminal offence'), but that incorrectly states the law may thus be voided for an error of law under a challenge by the complainant student (that is, the understatement of law results in an 'acquittal') or the accused student (that is, the overstatement of law results in a 'conviction'). Legal complication remains likely if the university disciplinary committee chooses to depart from the definition contained in the policy and, instead, applies the actual legal definition. In this instance, the accused student might feel aggrieved by the shifting goalposts and launch a challenge based on procedural unfairness.⁹⁹

B *Reform Proposals*

There is a clear need for reform in many Australian universities in terms of how sexual consent is presented on websites and defined in policies. The reform impetus is particular strong in universities with serious understatements of law. These universities have been flagged 'yes' in the last column ('serious problem') of Appendix II. For these universities, the relevant language in the websites and policies should be immediately amended to reflect at least that of the legal standard. The precise legal standard would naturally be dependent on the jurisdiction in which the university is located.

This does introduce a complication for a university that has campuses across multiple states and jurisdictions. As discussed above in Part II(A), there is significant divergence in fraudulent sex criminalisation across Australian jurisdictions. More critically, the divergence has no relationship to geographical proximity. One of the starkest differences in law is between the ACT and NSW, notwithstanding that the ACT is completely surrounded by NSW. The law in NSW is also significantly different from neighbouring Victoria, Queensland and SA. Which jurisdiction's law should be the benchmark for universities like ACU (campuses in the ACT, NSW, Queensland, Victoria) or CQ (campuses in NSW, Queensland, SA, Victoria and WA)?

There are two possible responses. First, a separate website and policy for each jurisdiction in which that university has campuses. Second, a single website and policy benchmarked to the jurisdiction that has the broadest scope of fraudulent sex criminalisation. On balance, this article argues that the second approach is preferable. It will be unwieldy and difficult to administer multiple websites and policies. University administrations would have to familiarise themselves with the variations across the websites and policies. It is also likely to cause confusion among the university community, especially if there are frequent movements of staff and students across the different campuses. Indeed, university administrations would have to develop a set of doctrine and procedures — akin to the contested doctrines

⁹⁷ Kamvounias and Varnham (n 59) 156–71.

⁹⁸ Will Bateman and Leighton McDonald, 'The Normative Structure of Australian Administrative Law' (2017) 45(2) *Federal Law Review* 153, 158–9.

⁹⁹ Kamvounias and Varnham (n 59) 167.

relating to choice/conflict of law¹⁰⁰ — simply to resolve the question of applicable policy in situations involving individuals and/or conduct that are not confined within a single state/territory. For example, which policy should be applicable when a student from NSW campus and a student from an ACT campus interacts at a teaching seminar held in the Victoria campus? On the other hand, as discussed above, the legal and normative problems of overstatements are limited, especially if the definition used by the university is decoupled from the legal standard.

Insofar as this means that some universities will have to state that sexual consent would be vitiated by all types of fraud simply because they have a satellite campus in either the ACT, Tasmania or WA (that is, ACU and CQ mentioned above), it will be a positive development overall on account of the existence of the procurement offence. Indeed, save for universities that restrict their operations to within either NSW or the NT, this article recommends that the websites and policies should simply state that sexual consent would be vitiated by all types of fraud. While this language is not correct in the strict legal sense (that is, the correct language would be ‘sexual activity procured by all types of fraud is illegal’), it captures the central message that fraudulent sex is a serious sexual offence, whether as rape or the procurement offence.

Universities that should be making this change on account of the procurement offence are denoted ‘yes (procure)’ in the last column (‘serious problem’) of Appendix II.

Beyond immediate changes to the websites and policies, universities should also look to reform the procedures according to which policies and website content are formulated. This case study indicates a systematic flaw in university governance processes that, if unremedied, may lead to the recurrence of such legal errors, whether in the context of sexual offences or for other crimes and illegal conduct. Thus, university procedures should be amended to provide for mandatory engagement of legal experts when the universities are writing website content and university policies that clearly concern legal issues. The disturbing prevalence of problematic legal errors suggested that there is likely limited input by legal experts during the drafting process.¹⁰¹ This is especially unfortunate given that such legal errors should have been obvious to any criminal lawyer engaged to review the websites or documents. A criminal lawyer would be guilty of professional negligence if s/he did not ensure that any advice relating to sexual offences took into account of the statutory stipulated consent-vitiating fraud and the existence of the procurement offence.

This article is cognisant of the substantial cost and delay that arises from any engagement of legal experts. There is also a line-drawing problem as to what subject

¹⁰⁰ See Graeme Hill, ‘Resolving a True Conflict between State Laws: A Minimalist Approach’ (2005) 29(1) *Melbourne University Law Review* 39; Jeremy Kirk, ‘Conflicts and Choice of Law within the Australian Constitutional Context’ (2003) 31(2) *Federal Law Review* 247. For critical discussion of choice of law issues in the criminal law context, see Matthew Goode, ‘The Tortured Tale of Criminal Jurisdiction’ (1997) 21(2) *Melbourne University Law Review* 411, 437–46, 450–53.

¹⁰¹ This article assumes that the problematic legal errors are primarily due to ignorance and negligence. The rationale of this assumption and the assumption’s relationship with rape myth persistence is addressed in Part VI below: see below nn 122–3 and accompanying text.

matter ‘clearly’ implicates legal issues and thus requires the costly engagement of legal experts. Nonetheless, websites and policies dealing with sexual assault should be uncontroversial examples where professional legal scrutiny is warranted. More generally, websites or policies that include either a representation or definition as to what amounts to impermissible activities should be deemed as clearly concerning legal issues. In these instances, the dire and preventable harm arising from universities’ legal errors should more than justify the time and expense.

VI Persistence of Rape Myths

Hopefully, this article’s findings and reform proposals will remedy the existing problematic websites and policies, and help to avoid the recurrence of such legal errors. Still, the prevalence of understatement of the law among Australian universities must have been frustrating for anyone who hoped to bring about social change through law reform. Despite all the hard work committed to ensuring that the statutory changes survived the legislative process, the new statutory provisions remain ‘hidden’ in so many public and large private institutions. It is worth emphasising again that the legal inaccuracies in question are straightforward inconsistencies vis-a-vis statutory provisions, whose scope had not been authoritatively curtailed by the courts.¹⁰²

Notably, this is not a newly identified phenomenon. A rich literature, often propelled by feminist scholars, has demonstrated how legal changes have failed to bring about meaningful changes to the institutional responses to rape.¹⁰³ In particular, numerous studies globally have revealed the persistence of ‘rape myths’ within the legal system, despite explicit legislative changes to negate it. Culprits abound in this copious body of research. Police officers, prosecutors, judges and

¹⁰² See above nn 64–5 and accompanying text.

¹⁰³ For a concise literature review, see Yvette Russell, ‘Woman’s Voice/Law’s Logos: The Rape Trial and the Limits of Liberal Reform’ (2016) 42(2) *Australian Feminist Law Journal* 273, 277–8.

juries, whether in United Kingdom,¹⁰⁴ US,¹⁰⁵ continental Europe,¹⁰⁶ or Asia,¹⁰⁷ have all been shown continuously to adhere to the legally erroneous notions that ‘real’ rape is only committed by strangers using physical violence on woman who are not sexually promiscuous.¹⁰⁸

Unsurprisingly, similar findings have been made in the Australian context. For example, Powell and others engaged in a discourse analysis of 10 rape trials in Victoria and found that deeply entrenched societal myths about rape continue to pervade the courtrooms.¹⁰⁹ Henning examined all trial transcripts in cases of rape, aggravated sexual assault and indecent assault tried before the Supreme Court of Tasmania over a two-year period. She found that ‘although in theory the presence of physical resistance is not a legal requisite for the crime of rape, in practice it is’.¹¹⁰ Quilter made similar findings from an in-depth analysis of a rape trial in NSW.¹¹¹ Most recently, the thematic analysis of rape trial transcripts in Victoria by Burgin again found that despite the formal adoption of an affirmative consent standard for sexual assault, there remained a persisting narrative of force and resistance.¹¹²

This article’s empirical findings can be conceived and understood as yet another example of the persistence of rape myths. The systemic legal errors of understatements about fraudulent sex criminalisation corresponds to the pattern of

¹⁰⁴ See, eg, Anthony Murphy and Benjamin Hine, ‘Investigating the Demographic and Attitudinal Predictors of Rape Myth Acceptance in U.K. Police Officers: Developing an Evidence-Base for Training and Professional Development’ (2019) 25(1) *Psychology, Crime and Law* 69, 81–2; Sharon Cowan, ‘Sense and Sensibilities: A Feminist Critique of Legal Interventions against Sexual Violence’ (2019) 23(1) *Edinburgh Law Review* 22, 38–50; Olivia Smith, *Rape Trials in England and Wales: Observing Justice and Rethinking Rape Myths* (Palgrave Macmillan, 2018) 59–84; Jennifer Temkin, Jacqueline M Gray and Jastine Barrett, ‘Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study’ (2018) 13(2) *Feminist Criminology* 205, 209–21; Kayleigh A Parratt and Afroditi Pina, ‘From “Real Rape” to Real Justice: A Systematic Review of Police Officers’ Rape Myth Beliefs’ (2017) 34 *Aggression and Violent Behavior* 68, 78–9.

¹⁰⁵ See, eg, Alondra D Garza and Cortney A Franklin, ‘The Effect of Rape Myth Endorsement on Police Response to Sexual Assault Survivors’ (April 2020) *Violence Against Women*, 10–13 <<https://doi.org/10.1177%2F1077801220911460>>; Jessica Shaw et al, ‘Beyond Surveys and Scales: How Rape Myths Manifest in Sexual Assault Police Records’ (2017) 7(4) *Psychology of Violence* 602, 605–9.

¹⁰⁶ See, eg, Marisalva Fávero et al, ‘Rape Myth Acceptance of Police Officers in Portugal’ (2020) *Journal of Interpersonal Violence*, <<https://doi.org/10.1177%2F0886260520916282>>; Sokratis Dinos et al, ‘A Systematic Review of Juries’ Assessment of Rape Victims: Do Rape Myths Impact on Juror Decision-Making?’ (2015) 43(1) *International Journal of Law Crime and Justice* 36, 46–7; Ivana Radačić, ‘Rape Myths and Gender Stereotypes in Croatian Rape Laws and Judicial Practice’ (2014) 22(1) *Feminist Legal Studies* 67, 72–6.

¹⁰⁷ See, eg, Mally Shechory Bitton and Lea Jaeger, ‘“It Can’t Be Rape”: Female vs. Male Rape Myths among Israeli Police Officers’ (2020) 35(4) *Journal of Police and Criminal Psychology* <<https://doi.org/10.1007/s11896-019-09327-4>>; Chih-Chieh Lin, ‘Failing to Achieve the Goal: A Feminist Perspective on Why Rape Law Reform in Taiwan has been Unsuccessful’ (2010) 18(1) *Duke Journal of Gender Law & Policy* 163, 180–5.

¹⁰⁸ See generally Dinos et al (n 106) 46–7.

¹⁰⁹ Anastasia Powell et al, ‘Meanings of “Sex” and “Consent”: The Persistence of Rape Myths in Victorian Rape Law’ (2013) 22(2) *Griffith Law Review* 456, 476–7.

¹¹⁰ Terese Henning, ‘Consent in Sexual Offences Cases: The Continuing Construction’ [1997] (3) *Women Against Violence* 4, 6.

¹¹¹ Julia A Quilter, ‘Re-framing the Rape Trial: Insights from Critical Theory about the Limitations of Legislative Reform’ (2011) 35(1) *Australian Feminist Law Journal* 23, 32–49.

¹¹² Rachael Burgin, ‘Persistent Narratives of Force and Resistance: Affirmative Consent as Law Reform’ (2019) 59(2) *British Journal of Criminology* 296, 302–11.

continued adherence to an outmoded understanding of sexual offending despite statutory reform to the contrary.

In many ways, fraudulent sex is the antithesis to the ‘real’ rape espoused in rape myths. There is neither force nor threat, and the fraudster is, in most cases, not a stranger to the victim. Indeed, that fraudulent sex should not be regarded as rape is precisely the central thrust of Rubenfeld’s controversial article in 2013.¹¹³ Rubenfeld argued for a radical conception of rape that is not based on sexual autonomy protection, but is instead premised on self-possession and which seeks to reintroduce the force requirement.¹¹⁴ He underpinned his argument on a ‘riddle’:¹¹⁵ if rape law is indeed meant to protect sexual autonomy, then why did fraudulent sex remain largely not criminalised in existing law that has otherwise been subjected to decades of progressive law reforms purportedly premised on sexual autonomy protection?¹¹⁶ Rubenfeld’s rejection of sexual autonomy as the basis of rape law has, unsurprisingly, been heavily criticised by US scholars.¹¹⁷

Tellingly, Rubenfeld’s riddle is not in issue in Australia. All forms of fraudulent sex are criminalised — whether as rape, or a distinct sexual offence — in the clear majority of states and territories.¹¹⁸ In this regard, it is also worth noting that the NSW Law Reform Commission includes ‘the person participates in the sexual activity because of a fraudulent inducement’ in the list of consent-vitiating circumstances in its 2020 report on reforming consent relating sexual offences.¹¹⁹ If this addition is successfully enacted, the law relating to fraudulent sex criminalisation in NSW would no longer be the most permissive in Australia.¹²⁰ However, as much as the law in Australia is moving further away from the notion that sexual autonomy is not infringed by ‘mere’ fraud, many universities, apparently, have not yet taken notice or action.

Due to the lack of accessible and verifiable information on how each of these websites and policies came into being, this article did not attempt to meaningfully answer the otherwise important question regarding the reasons for these legal errors. As implied by the proposed reform of legal expert engagement in Part V above, this article assumes that the problematic legal errors are primarily due to ignorance and negligence. This assumption is adopted because there is currently no direct evidence to indicate that the relevant university administration actors are deliberately trying

¹¹³ Jed Rubenfeld, ‘The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy’ (2013) 122(6) *Yale Law Journal* 1372, 1423–42.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid* 1395.

¹¹⁶ *Ibid* 1392–8.

¹¹⁷ See, eg, Tom Dougherty, ‘No Way Around Consent: A Reply to Rubenfeld on “Rape-by-Deception”’ (2013) 123 *Yale Law Journal Online* 321, 331; Patricia J Falk, ‘Not Logic, But Experience: Drawing on Lessons from the Real World in Thinking about the Riddle-by-Fraud’ (2013) 123 *Yale Law Journal Online* 353, 365–6; Deborah Tuerkheimer, ‘Sex Without Consent’ (2013) 123 *Yale Law Journal Online* 335, 344–6. See also McJunkin arguing that the law’s reluctance to criminalise fraudulent sex reflects an underlying notion of seduction based on normative masculinity where men derive power and social status through sexual conquest: Ben A McJunkin, ‘Deconstructing Rape by Fraud’ (2014) 28(1) *Columbia Journal of Gender and Law* 1, 21–5.

¹¹⁸ See above Part II(A).

¹¹⁹ New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences: Report* (September 2020) 214, in relation to the proposed *Crimes Act 1900* (NSW) s 61HJ(1)(k).

¹²⁰ See above Part II(A).

to mislead the university community or curtail the scope of sexual misconduct policy vis-à-vis fraudulent sex. More importantly, the issue of causation is not critical for the purpose of demonstrating that these legal errors are manifestations of the persistence of rape myths. Obviously that persistence is readily apparent if the legal errors were deliberate, perhaps because the relevant university administration actor perceived fraudulent sex as not really 'criminal' when compared to sexual offences involving force, intimidation or abuse of authority.¹²¹ Nonetheless, if one's words and actions do reflect legally incorrect rape myths, then those myths have persisted even if the words and actions are due to mere ignorance of the law. This focus on the outward manifestation, rather than the subjective intention, is also the standard approach in the literature.¹²² In this regard, it is worth noting that insofar as a legal expert is engaged (perhaps pursuant to this article's proposal) and the legal expert has identified certain legal errors, then the continued existence of those legal errors will constitute evidence that those legal errors are deliberate.

Thus, this article's case study of Australian universities contributes to the rape myth literature in two ways. First, it introduces another character to the ever-growing list of state and societal actors that have been canvassed in the existing literature for not fulfilling their obligation to accurately reflect or apply the law.¹²³ As noted above, the empirical dimension of the literature has thus far focused on actors and institutions in the criminal justice system.¹²⁴ However, this article shows that, notwithstanding their legal and civic obligations, universities are as prone to ignoring reformed statutory provisions as police officers, prosecutors, judges and juries. This article provides a concrete empirical basis to spur further research on the persistence of rape myths in universities in other jurisdictions,¹²⁵ or on other aspects of university governance.

¹²¹ For an example of such attitudes, see Neil Morgan, 'Oppression, Fraud and Consent in Sexual Offences' (1996) 26(1) *University of Western Australia Law Review* 223, 231–4. In the context of the broad Western Australian provision on sexual consent, Morgan argued, on the one hand, that judges should let the jury decide — as a matter of factual finding — whether consent is negated by the defendant's oppressive behaviour that may otherwise not amount to threat or intimidation. On the other hand, for fraudulent sex, he argued that judges should adopt legal rules to limit the circumstances in which fraud would vitiate consent.

¹²² See, eg, Burgin (n 112) 302–11; Powell et al (n 109) 476–7; Henning (n 110) 6.

¹²³ There is a large body of literature on rape myth acceptance among students (especially college students); see, eg, Hanif Qureshi et al, 'Rape Myth Acceptance Among College Students in India: Prevalence and Predictors in a Changing Context' (2020) *Deviant Behavior* <<https://doi.org/10.1080/01639625.2020.1720935>>; Rita C Seabrook, Sarah McMahon and Julia O'Connor, 'A Longitudinal Study of Interest and Membership in a Fraternity, Rape Myth Acceptance, and Proclivity to Perpetrate Sexual Assault' (2018) 66(6) *Journal of American College Health* 510; Marjorie H Carroll et al, 'Rape Myth Acceptance: A Comparison of Military Service Academy and Civilian Fraternity and Sorority Students' (2016) 28(5) *Military Psychology* 306. The age and circumstances of students mean that their failure to know and apply the law correctly is more excusable when compared to the government bodies and universities. Cf Holland et al examining rape myths acceptance in undergraduate students who are serving as resident assistants and are thus the 'first responder' to resident in crisis: Kathryn J Holland et al, 'Supporting Survivors: The Roles of Rape Myths and Feminism in University Resident Assistants' Response to Sexual Assault Disclosure Scenarios' (2020) 82(3–4) *Sex Roles* 206.

¹²⁴ See above nn 105–8 and accompanying text.

¹²⁵ Similar legal errors have been detected in universities in Singapore: Jianlin Chen, 'Fraudulent Sex Criminalisation in Singapore: Haphazard Evolution and Accidental Success' (2020) *Singapore Journal of Legal Studies* (forthcoming).

The second contribution relates to how the rape myths manifest. Existing literature has engaged in sophisticated discourse and thematic analysis to tease out the underlying rape myths that, notwithstanding being contrary to the law, remain embedded in the language and decisions of the relevant actors.¹²⁶ This article shows that there could be much more open and direct expression of this phenomenon. The problems identified in this article do not require any advanced methodology to detect and establish. They are simply hiding in plain sight, on universities' publicly accessible websites and policies. This is hugely problematic. The public and explicit nature of these legal errors reinforces rape myths more detrimentally than the more subtle manifestations thus far identified in the literature. That these legal errors are found in documents designed to educate or protect only exacerbates the reinforcement of rape myths. Future research should be alert to these otherwise seemingly unthinkable manifestations of rape myth persistence.¹²⁷

VII Conclusion

Universities are large and influential institutions. They are in a unique position to educate and shape the worldview of a significant portion of a society's coming-of-age population. It is imperative that universities do not have legal errors in their communications and policies. The systemic misinformation of fraudulent sex criminalisation documented in this article highlights the acute necessity for many Australian universities to promptly remedy existing errors. Furthermore, general university governance processes should be reformed to ensure there is appropriate engagement with legal experts to detect and prevent future occurrences of such errors. In the final analysis, however, the present case study is a recurring tale of the societal and institutional barriers in actualising legislative changes in the realm of sexual offences. Vigilant awareness and conscientious efforts are required to overcome the persistence of rape myths.

¹²⁶ See above nn 107–10 and accompanying text.

¹²⁷ In the context of Australia, my preliminary research indicates that some law enforcement agencies are committing the same egregious errors as universities. An example is the 'Sexual Assault Information Fact Sheet' prepared by the Western Australian police. The fact sheet states:

Consent is not freely and voluntarily given if you:

- Are under force;
- Are unconscious or asleep;
- Are incapable of giving consent, for example if you are comatose or intoxicated;
- Are under threat or intimidation;
- Are in fear of bodily harm; or
- Have a mistaken belief that the offender was your sexual partner.

Western Australia Police Force, 'Your Safety' (Web Page, 2020) <<https://www.police.wa.gov.au/Your-Safety/Sexual-assault>> (fact sheet on file with author). This fact sheet is, like many universities' policies, a misleadingly selective statement of the law. Another example is the victim services website of the NSW Department of Communities and Justice: NSW Department of Communities and Justice, 'What Is Sexual Assault?', *Victims Services* (Web Page, 2 December 2016) <https://www.victimsservices.justice.nsw.gov.au/sexualassault/Pages/sexual_assault_victims.aspx>. The definition of consent provided on the webpage does not mention fraud, though the webpage does define sexual assault as occurring 'when a person is forced, coerced or tricked into sexual acts against their will or without their consent'.

Appendix I: Data Points

AUSTRALIAN CAPITAL TERRITORY

- Australian National University ('ANU')

Website: ANU, 'What is Sexual Assault & Sexual Harassment', *Current Students* (Web Page) <<https://www.anu.edu.au/students/health-safety-wellbeing/violence-sexual-assault-support/what-is-sexual-assault-sexual>>.

Policy: ANU, 'Policy: Sexual Misconduct', *Policy Library* (Web Page, 11 March 2020) <https://policies.anu.edu.au/ppl/document/ANUP_6059194>.

- University of Canberra ('Canberra')

Website: Canberra, 'Culture of Consent: Do You Want to?', *Health and Support* (Web Page) <<https://www.canberra.edu.au/on-campus/health-and-support/medical-counselling/consent,-safety-and-respect-on-campus>>.

Policy: Not available.

NEW SOUTH WALES

- Australian Catholic University ('ACU')

Website: ACU, 'Sexual Harassment Assault and Consent', *Staff* (Web Page, 23 January 2020) <https://staff.acu.edu.au/human_resources/working%20here/working%20well%20with%20others/dealing%20with%20discrimination%20harassment%20and%20bullying/sexual_harassment_assault_and_consent>.

Policy: ACU, 'Staff Sexual Misconduct', *Policies* (Web Page, 23 March 2020) <https://policies.acu.edu.au/human-resources/equal_opportunity/staff_sexual_misconduct>.

- Charles Sturt University ('Charles Sturt')

Website: Charles Sturt, 'Sexual Assault and Harassment', *Current Students* (Web Page, 2020) <<https://www.csu.edu.au/current-students/safety-wellbeing/your-safety/sexual-assault-harassment>>.

Policy: Not available

- Macquarie University ('Macquarie')

Website: Macquarie, 'Respect. Now. Always.', *Support* (Web Page) <<https://students.mq.edu.au/support/wellbeing/support>>.

Policy: Macquarie, 'Student Sexual Assault and Sexual Harassment Policy', *University Policies and Procedures* (Web Page, 9 May 2019) <<https://staff.mq.edu.au/work/strategy-planning-and-governance/university-policies-and-procedures/policies/student-sexual-assault-and-sexual-harassment>>.

- Southern Cross University ('Southern Cross')

Website: Southern Cross, 'Sexual Assault and Sexual Harassment', *Current Students* (Web Page) <<https://www.scu.edu.au/current-students/services-and-support/sexual-assault-and-sexual-harassment/>>.

Policy: Southern Cross, 'Harassment, Bullying and Discrimination Prevention', *Policies* (Web Page, 15 August 2017) <<https://policies.scu.edu.au/view.current.php?id=00039>>.

- University of New England ('New England')

Website: New England, 'What is Threatening, Unwanted or Inappropriate Behaviour?', *Respect. Now. Always.* (Web Page) <<https://www.une.edu.au/connect/respect-now-always/what-is-threatening-unwanted-or-inappropriate-behaviour>>.

Policy: New England, 'Sex-Based Harassment Policy', *UNE Policy Register System* (Web Page, 27 July 2015) <<https://policies.une.edu.au/document/view-current.php?id=138&version=1>>.

- University of New South Wales ('UNSW')

Website: UNSW, 'Sexual Assault & Misconduct', *ARC UNSW Student Life* (Web Page) <<https://www.arc.unsw.edu.au/help/legal-information/sexual-assault>>.

Policy: UNSW, 'Sexual Misconduct Prevention and Response Policy', *Policy* (Web Page, 4 October 2018) <<https://www.gs.unsw.edu.au/policy/documents/sexual-misconductpreventionandresponsepolicy.pdf>>.

- University of Newcastle ('Newcastle')

Website: Newcastle, 'Information about Sexual Misconduct', *Support* (Web Page, 2020) <<https://www.newcastle.edu.au/current-students/support/personal/sexual-assault-harrassment/information-about-sexual-misconduct>>.

Policy: Newcastle, 'Sexual Assault and Sexual Harassment Response Policy', *Policies* (Web Page, 4 March 2020) <<https://policies.newcastle.edu.au/document/view-current.php?id=44>>.

- University of Sydney ('Sydney')

Website: Sydney, 'Sexual Health and Consent', *Support and Services* (Web Page, 22 April 2020) <<https://www.sydney.edu.au/students/sexual-health-consent.html>>.

Policy: Sydney, 'Student Sexual Misconduct Policy 2018', *Policies* (Web Page, 11 November 2019) <<http://sydney.edu.au/policies/showdoc.aspx?recnum=PDOC2018/470&RendNum=0>>.

- University of Technology, Sydney ('UTS')

Website: UTS, 'What is Sexual Assault', *Current Students* (Web Page, 14 October 2019) <<https://www.uts.edu.au/current-students/support/when-things-go-wrong/sexual-assault-indecent-assault-and-sexual-harassment/what-sexual-assault>>.

Policy: UTS, 'Student Rules: Section 16 – Student Misconduct and Appeals', *Rules* (Web Page, 29 November 2019) <<https://gsu.uts.edu.au/rules/student/section-16.html>>.

- Western Sydney University ('Western Sydney')

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Website: Not available

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Appendix II: Data Table¹²⁸

State/ Territory	University		Presence	Info on fraudulent sex	Legally Accurate?	Inaccurate (Under)	Inaccurate (Over)	Serious Problem
<u>ACT</u>	ANU	Website	Yes	no fraud	No	all types of fraud		Yes
		Policy	Yes	no fraud^	No	all types of fraud		
	Canberra	Website	Yes	no fraud	No	all types of fraud		Yes
		Policy	No					
<u>NSW</u>	ACU	Website	Yes	no fraud	No	medical purpose; identity; marital status		Yes
		Policy	Yes	fraud (all)^	No		non-medical purposes; considerations	
	Charles Sturt	Website	Yes	fraud (all)^	No		non-medical purposes; considerations	
		Policy	No					

¹²⁸ Key: “*” = minor legal inaccuracies; “^” = presence of ‘Sexual assault occurs when a person is forced, coerced or tricked into sexual acts against their will or without their consent’ or similarly worded provision; N/A = not applicable.

State/ Territory	University		Presence	Info on fraudulent sex	Legally Accurate?	Inaccurate (Under)	Inaccurate (Over)	Serious Problem
NSW (cont.)	Macquarie	Website	Yes	no fraud	No	medical purpose; identity; marital status		Yes
		Policy	Yes	fraud (all)	No		non-medical purposes; considerations	
	Southern Cross	Website	Yes	no definition	N/A			
		Policy	Yes	no definition	N/A			
	New England	Website	Yes	fraud (all)	No		non-medical purposes; considerations	
		Policy	Yes	no definition	N/A			
	UNSW	Website	Yes	no fraud	No	medical purpose; identity; marital status		Yes
		Policy	Yes	fraud (qualified)	No	medical purpose; marital status		Yes
	Newcastle	Website	Yes	no fraud	No	medical purpose; identity; marital status		Yes

		Policy	Yes	no definition	N/A			
	Sydney	Website	Yes	no fraud	No	medical purpose; identity; marital status		Yes
		Policy	Yes	fraud (all)	No		non-medical purposes; considerations	
	UTS	Website	Yes	no definition	N/A			
		Policy	Yes	no definition	N/A			
	Western Sydney	Website	Yes	no fraud	No	medical purpose; identity; marital status		Yes
		Policy	Yes	no fraud	No	medical purpose; identity; marital status		Yes
	Wollongong	Website	Yes	no fraud ^	No	medical purpose; identity; marital status		
		Policy	Yes	no fraud	No	medical purpose; identity; marital status		Yes

State/ Territory	University		Presence	Info on fraudulent sex	Legally Accurate?	Inaccurate (Under)	Inaccurate (Over)	Serious Problem
<u>NT</u>	Charles Darwin	Website	Yes	no fraud	No	nature; purpose; identity		Yes
		Policy	Yes	no definition	N/A			
<u>Qld</u>	Bond	Website	Yes	no definition	N/A			
		Policy	Yes	fraud (qualified)	No*		identity (non-sexual partner)	Yes (Procure)
	CQ	Website	Yes	fraud (qualified)	No	nature; purpose		Yes
		Policy	Yes	no definition	N/A			
	Griffith	Website	Yes	fraud (qualified)	No	non-authority	identity (non-sexual partner); considerations	Yes (Procure)
		Policy	Yes	fraud (qualified)	No	nature; purpose		Yes
	James Cook	Website	Yes	fraud (qualified)	Yes			Yes (Procure)
		Policy	Yes	fraud (qualified)	Yes			Yes (Procure)

	QUT	Website	No					
		Policy	Yes	fraud (qualified)	No*		identity (non-sexual partner)	Yes (Procure)
	Queensland	Website	Yes	no fraud	No	nature; purpose; identity (sexual partner)		Yes
		Policy	Yes	fraud (qualified)	No*		identity (non-sexual partner)	Yes (Procure)
	Southern Queensland	Website	Yes	no fraud	No	nature; purpose; identity (sexual partner)		Yes
		Policy	Yes	no definition	N/A			
	Sunshine Coast	Website	Yes	fraud (all)	No		identity (non-sexual partner); considerations	Yes (Procure)
		Policy	Yes	no definition	N/A			
<u>SA</u>	Carnegie Mellon	Website	Yes	no definition	N/A			
		Policy	Yes	no fraud	No	nature; medical purpose; identity		Yes

State/ Territory	University		Presence	Info on fraudulent sex	Legally Accurate?	Inaccurate (Under)	Inaccurate (Over)	Serious Problem
<u>SA</u> (cont.)	Flinders	Website	Yes	fraud (qualified)	No*	medical purpose		Yes (Procure)
		Policy	Yes	fraud (qualified)	No*	medical purpose		Yes (Procure)
	Torrens	Website	No					
		Policy	Yes	fraud (all)^	No		non-medical purpose; considerations	
	Adelaide	Website	Yes	no fraud	No	nature; medical purpose; identity		Yes
		Policy	Yes	fraud (qualified)	Yes			Yes (Procure)
	South Australia	Website	Yes	no fraud	No	nature; medical purpose; identity		Yes
		Policy	Yes	fraud (qualified)	Yes			Yes (Procure)
<u>Tas</u>	Tasmania	Website	Yes	fraud (all)	Yes			
		Policy	Yes	fraud (all)	Yes			

<u>Vic</u>	Deakin	Website	Yes	no fraud	No	nature; medical purpose; identity		Yes
		Policy	Yes	fraud (qualified)	Yes			Yes (Procure)
	Federation	Website	Yes	fraud (qualified)	No	nature; medical purpose		Yes
		Policy	Yes	no definition	N/A			
	La Trobe	Website	Yes	no fraud	No	nature; medical purpose; identity		Yes
		Policy	Yes	no fraud	No	nature; medical purpose; identity		Yes
	Monash	Website	Yes	fraud (all)	No		non-medical purpose; considerations	
		Policy	Yes	fraud (qualified)	Yes			Yes (Procure)
	RMIT	Website	Yes	no fraud	No	nature; medical purpose; identity		Yes
		Policy	Yes	no definition	N/A			
	Swinburne	Website	Yes	no fraud	No	nature; medical purpose; identity		Yes
		Policy	No					

State/ Territory	University		Presence	Info on fraudulent sex	Legally Accurate?	Inaccurate (Under)	Inaccurate (Over)	Serious Problem
<u>Vic</u> (cont.)	Divinity	Website	No					
		Policy	Yes	no definition	N/A			
	Melbourne	Website	Yes	fraud (qualified)	Yes			Yes (Procure)
		Policy	Yes	fraud (all)^	No		non-medical purpose; considerations	
	Victoria	Website	Yes	fraud (all)	No		non-medical purpose; considerations	
		Policy	Yes	fraud (all)	No		non-medical purpose; considerations	
<u>WA</u>	Curtin	Website	Yes	no fraud ^	No	all types of fraud		
		Policy	Yes	fraud (all)	Yes			
	Edith Cowan	Website	Yes	no fraud	No	all types of fraud		Yes
		Policy	Yes	no definition	N/A			

	Murdoch	Website	Yes	no fraud ^	No	all types of fraud		
		Policy	No					
	Notre Dame	Website	Yes	fraud (qualified)	No	Non-position-of- trust		Yes
		Policy	Yes	fraud (qualified)	No	Non-position-of- trust		Yes
	Western Australia	Website	Yes	no definition	N/A			
		Policy	Yes	no fraud	No	all types of fraud		Yes

Review Essay

Judging the New by the Old in the Judicial Review of Executive Action

Interpreting Executive Power by Janina Boughey and Lisa Burton Crawford (eds) (2020), Federation Press, 268 pp, ISBN 9781760022341

Stephen Gageler AC*

Abstract

Contestation about the exercise and interpretation of executive power is a significant theme of contemporary legal scholarship. *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 provides a historical setting in which to examine many of the issues explored in *Interpreting Executive Power* (Federation Press, 2020), an excellent collection of essays edited by Janina Boughey and Lisa Burton Crawford.

I The Old and the New

Long before the principles informing judicial review of executive action became a topic of systematic academic attention under the rubrics of ‘administrative law’ and ‘interpreting executive power’, Australian courts in practice engaged regularly and extensively in judicial review of executive action. In doing so, the courts forged and refined stable and enduring principles applicable to Australian conditions. They applied those principles consistently across a range of discrete subject-matters. Prime among those subject-matters was industrial relations.

The High Court of Australia, in the exercise of its original jurisdiction to remedy ‘want’ or ‘excess’ of jurisdiction on the part of an industrial tribunal by writ of ‘mandamus’ or ‘prohibition’ scrutinised: the constitutional separation of Commonwealth legislative, executive and judicial powers; the limited scope for Commonwealth legislative power to be used to enact legislation regulating industrial relations; and the awkward fit within the three-fold constitutional classification of powers of the arbitral function legislatively conferred on industrial

* Justice of the High Court of Australia. My thanks to Anthony Hall and Katharine Brown for assisting in refining this essay for publication.

tribunals in innovative legislation enacted in the exercise of the limited legislative power. Those features of our federal constitutional structure, and of legislative choices made within it, combined with the political contentiousness and economic significance of industrial relations to give rise to hard-fought legal controversies of national significance throughout the 20th century. Judicial resolution of those controversies resulted in the development of a range of principles regarded as foundational to our emergent modern Australian understanding of judicial review of executive action.

Industrial relations was the source of early development of principles informing judicial review of executive action in Australia, as migration became the subject area that produced the later development of those principles.

One of the many important decisions of the High Court of Australia concerning judicial review of executive action made in the context of industrial relations was *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan*.¹ The circumstances giving rise to that decision, nearly 100 years ago, provide a useful historical setting in which to illustrate and critique the contemporary issues explored in *Interpreting Executive Power*,² an interesting collection of essays edited by two of Australia's leading innovative thinkers on judicial review of executive action, Janina Boughey and Lisa Burton Crawford.

II An Old Controversy

The historical circumstances of the decision in *Dignan* were these.³ The Commonwealth Parliament enacted the *Transport Workers Act 1928* (Cth)⁴ following a series of strikes in a long-running controversy between unions and employers over the method of hiring workers in the maritime and stevedoring industries during the Nationalist Party–Country Party Coalition Government of Stanley Bruce and Earle Page. The Act's single operative provision was expressed to confer power on the Governor-General to make regulations

with respect to the employment of transport workers, and in particular for regulating the engagement, service, and discharge of transport workers, and the licensing of persons as transport workers, and for regulating or prohibiting the employment of unlicensed persons as transport workers, and for the protection of transport workers.⁵

'Transport workers' were defined to mean 'persons offering for or engaged in work in or in connexion with the provision of services in the transport of persons or goods in relation to trade or commerce by sea with other countries or among the

¹ *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 ('*Dignan*').

² Janina Boughey and Lisa Burton Crawford (eds), *Interpreting Executive Power* (Federation Press, 2020).

³ See generally Geoffrey Sawer, *Australian Federal Politics and Law 1901–1929* (Melbourne University Press, 1956) 265, 287–8, 306–7; Geoffrey Sawer, *Australian Federal Politics and Law 1929–1949* (Melbourne University Press, 1963) 4–5, 30–31, 37.

⁴ *Transport Workers Act 1928* (Cth) (No 37 of 1928).

⁵ *Ibid* s 3.

States.⁶ Regulations made under the provision were to have ‘the force of law’ ‘notwithstanding anything in any other Act’.⁷ Such Regulations were nevertheless to be subject to standard provisions of the *Acts Interpretation Act 1901* (Cth) and of the *Acts Interpretation Act 1904* (Cth), including those which required tabling of the Regulations in each of the House of Representatives and the Senate and allowed for their disallowance by resolution of either the House of Representatives or the Senate.

The Bruce–Page Government used the regulation-making power during the year after the enactment of the *Transport Workers Act 1928* (Cth) to introduce and fine-tune a detailed regulatory scheme in the *Transport Workers Regulations* which required every transport worker offering for or engaged in the loading and unloading of interstate and overseas ships to hold a licence. Licences could only be issued to individual workers on application by licensing officers. The licence issued to a worker could be cancelled by a licensing officer for a range of reasons which included that the worker had refused to comply with a lawful order or direction given in relation to their employment, had refused to work in accordance with the terms of a current applicable industrial award, had alone or in company with other persons exercised or attempted to exercise intimidation or violence in relation to any other waterside worker, or had used abusive language to any other waterside worker. The Bruce–Page Government used the licensing scheme to give preference in employment to members of a more moderate union over members of the militant Waterside Workers’ Federation. The *Transport Workers Act 1929* (Cth) was then enacted to amend the *Transport Workers Act 1928* (Cth) to incorporate the detail of the licensing scheme, without repealing the regulation-making power.

Both the *Transport Workers Act 1928* (Cth) and the *Transport Workers Act 1929* (Cth) had been fiercely opposed by the Labor Party in Opposition. The 1929 House of Representatives Election resulted in the defeat of the Bruce–Page Government and the formation of the Labor Government of James Scullin. As there was no Senate Election, the Nationalist Party and the Country Party continued to outnumber the Labor Party in the Senate.

Without the numbers in the Senate to be able to repeal the *Transport Workers Act*, the Scullin Government decided to use the existing regulation-making power conferred to promulgate the *Waterside Employment Regulations 1931* (Cth) (*‘Waterside Workers Regulations’*). The *Waterside Workers Regulations* were designed to achieve the exact opposite of what the Bruce–Page Government had managed to achieve through its design and administration of the licensing scheme by then incorporated into the *Transport Workers Act*. The new regulations required employers employing transport workers for the loading and unloading of interstate or overseas ships to give priority to members of the Waterside Workers’ Federation over everyone other than returned servicemen. They made failure on the part of an employer to give priority to a member of the Waterside Workers’ Federation a criminal offence.

⁶ Ibid s 2.

⁷ Ibid s 3.

Predictably, the Senate disallowed the *Waterside Workers Regulations*. The Scullin Government simply remade them. The pattern of disallowance and remaking was repeated on more than ten occasions over the two-year term of the Scullin Government.

During one of the periods when the *Waterside Workers Regulations* had been remade but not yet disallowed, the Victorian Stevedoring and General Contracting Co Pty Ltd and Mr Meakes were each convicted by a Magistrate of an offence of failing to give priority to a member of the Waterside Workers' Federation. They were convicted on the information of Inspector Dignan. At issue in *Dignan* were the constitutional validity of the regulation-making power conferred by the *Transport Workers Act* as well as the statutory validity of the *Waterside Workers Regulations*.

III The Old Chestnut of the New Doughnut

The issue about the constitutional validity of the regulation-making power conferred by the *Transport Workers Act* in *Dignan* starkly illustrates the question explored by Groves in his contribution to the collection of essays with reference to more recent migration cases.⁸ The question concerns the extent to which the constitutional separation of Commonwealth legislative, executive and judicial powers will tolerate the existence of the phenomenon Groves refers to as 'the (almost) absolute statutory discretion'.⁹ Adopting Dworkin's metaphorical description of discretion as the 'hole in a doughnut'¹⁰ of legality, the question Groves explores is: as the hole gets bigger, what becomes of the doughnut?

The discretion to make regulations 'with respect to the employment of transport workers' was held in *Dignan* not to be so extensive or vague as to run afoul of any constitutional limitation that might lurk in the separation of Commonwealth legislative, executive and judicial powers. As elaborated by Dixon J, the constitutional separation of legislative and executive power was not so strict as to prevent legislative authorisation of the making by the executive of subordinate legislation. The latter was to be understood to derive its force and effect as law not from the action of the executive, but from the continuing operation of the legislation authorising that action.¹¹ There would have been a difficulty had the discretion been of such width or uncertainty that the subject-matter of the discretionary power sought to be legislatively conferred on the executive was not confined within the limits of the scope of Commonwealth legislative power. That difficulty did not arise since the regulation-making power could be read down to apply only to the employment of transport workers engaged in loading and unloading interstate or overseas ships and was therefore within the scope of Commonwealth legislative power with respect to interstate and overseas trade and commerce. Although Dixon J hinted that 'the distribution of powers'

⁸ Matthew Groves, 'The Return of the (Almost) Absolute Statutory Discretion' in Boughey and Burton Crawford (n 2) ch 9.

⁹ Ibid 129.

¹⁰ Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) 31.

¹¹ *Dignan* (n 1) 101–2.

might in some other way supply ‘considerations of weight affecting the validity of an Act creating a legislative authority’,¹² the notion was taken no further.

Groves explains that the notion remains as elusive now as it was nearly a century ago. This is despite the High Court having more recently reiterated that ‘the notion of “unbridled discretion” has no place in the Australian universe of discourse’,¹³ and despite the notion having been taken up as the subject of argument and judicial analysis in several challenges to discretions conferred by migration legislation in the 21st century.¹⁴

IV Could the Old Statutory Provision do with a New Interpretative Approach?

The issue in *Dignan* about the statutory validity of the *Waterside Workers Regulations* was framed by counsel for the Victorian Stevedoring and General Contracting Co Pty Ltd and Mr Meakes in terms of ‘abuse of power’. That framing of the issue provoked the then orthodox response¹⁵ of Gavan Duffy CJ and Starke J that, if making the *Waterside Workers Regulations* had involved executive abuse or misuse of the regulation-making power conferred by the *Transport Workers Act*, ‘the only remedy [was] by political action’.¹⁶ The sole question for a court of law, their Honours explained, was whether the *Waterside Workers Regulations* were within the regulation-making power conferred by the *Transport Workers Act*.¹⁷

That question had already been answered in the affirmative by the High Court just months before, in the context of a challenge to one of the earlier iterations of the *Waterside Workers Regulations*, in *Huddart Parker Ltd v Commonwealth*.¹⁸ There the statutory expression ‘with respect to the employment of transport workers’ had been held to extend ‘to the determination of the persons who shall or may be employed’.¹⁹ There also it had been held not to be inconsistent with the elaborate statutory scheme providing for the licensing of transport workers ‘to invest some of those licensed ... with a right to be preferred to others of them in a competition for work’.²⁰ That was all that the *Waterside Workers Regulations* relevantly did.

Those were the arguments challenging the exercise of executive power that were put and rejected in relation to the making of the *Waterside Workers Regulations*. What might be the arguments now?

¹² Ibid 101.

¹³ *Wotton v Queensland* (2012) 246 CLR 1, 10 [10].

¹⁴ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 512–13 [100]–[102]; *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 252 CLR 336, 366–8 [85]–[89].

¹⁵ See later *R v Toohey*; *Ex parte Northern Land Council* (1981) 151 CLR 170; *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342.

¹⁶ *Dignan* (n 1) 84.

¹⁷ Ibid 84–5.

¹⁸ *Huddart Parker Ltd v Commonwealth* (1931) 44 CLR 492.

¹⁹ Ibid 509.

²⁰ Ibid 511.

Bruce Chen reminds us in his essay on 'Delegated Legislation and Rights-Based Interpretation' that whether subordinate legislation derives force and effect from the statutory provision under which the subordinate legislation was purported to be made is still commonly understood to turn on the outcome of a three-step inquiry.²¹ The inquiry involves: construing the statutory provision authorising the making of subordinate legislation; construing the subordinate legislation purportedly made under the provision; and deciding whether the subordinate legislation meets the description in the statutory provision.²² Chen also points out that the first of those steps, and in consequence the third, now has the potential to be affected by the unremitting creep of the pervasive and polymorphous interpretative principle often referred to as the 'principle of legality'.²³

Quite what is entailed within the so-called principle of legality is the topic of a thoughtful essay by Brendan Lim.²⁴ Lim has previously argued that two broad competing conceptions of the principle have emerged in the Australian context:

- one treating the principle as an *empirical presumption* to the effect that a legislature does not ordinarily intend to interfere with fundamental rights, observance of which can assist a court in determining legislative intention; and
- the other treating the principle as a *normative rule*, observance of which authorises a court to protect fundamental rights from legislative interference where a legislature has not expressed its intention to interfere with those rights with adequate clarity.²⁵

Treating the principle as a normative rule, Lim now argues that the principle is best understood by looking beyond attempts to catalogue the *rights* that are sufficiently fundamental to engage it and looking instead to characterise the *infringements* of rights that are sufficient to engage it.²⁶ The infringements sufficient to engage the principle, he argues, are at least primarily those which occur outside the context in which courts characteristically strive to achieve equality in the protection of rights as in a contest between citizen and citizen. The relevant infringements are those that occur in the context of the asymmetrical contest that can exist between an executive officer who is the repository of a statutory power to affect rights or freedoms and a citizen who is the holder of the rights or freedoms that are vulnerable to an exercise of that power. He argues that the principle can be seen to authorise a court in that context to 'take sides' in the contest by construing the statute conferring the power in a manner that

²¹ Bruce Chen, 'Delegated Legislation and Rights-Based Interpretation' in Boughey and Burton Crawford (n 2) ch 7.

²² *South Australia v Tanner* (1989) 166 CLR 161, 173.

²³ Chen (n 21) 93–5.

²⁴ Brendan Lim, 'Executive Power and the Principle of Legality' in Boughey and Burton Crawford (n 2) ch 6.

²⁵ Brendan Lim, 'The Normativity of the Principle of Legality' (2013) 37(2) *Melbourne University Law Review* 372; Brendan Lim, 'The Rationales for the Principle of Legality' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 2.

²⁶ Lim (n 24) 79–80.

compensates for the asymmetry.²⁷ Hence, '[t]he central concern of the principle is what counts as sufficient positive authorisation for a lawful assertion of executive power'.²⁸

Lim does not proffer his argument as anything more than a tentative step in a work in progress attempting to propound a possible explanation for the emergence of the principle of legality as a normative rule. His presentation of the argument is in the nature of a scoping study, excluding or at least minimising application of the principle outside the context of a statutorily conferred capacity for an executive officer or agency to exercise power to affect individual rights or freedoms.

In his important examination of the more general subject of 'construing statutes conferring powers',²⁹ John Basten identifies the principle of legality (which he suggests might be more accurately described as 'the clear statement principle')³⁰ as one of a number of principles of statutory construction, the application of which involves courts bringing values external to a statute to a judicial process of statutory implication. He proceeds on the understanding that application of the particular principles of statutory construction, like judicial references to 'legislative intention' more generally, is an expression of 'the constitutional relationship between the courts and the legislature'.³¹

'When, exactly, do implied constraints operate to qualify executive powers in terms which find no express justification in the text?'³² That is the question to which any theoretical analysis must ultimately be directed.

Basten points out that providing an answer to that question requires engagement with two foundational elements of our constitutional system of representative and responsible government. One, sourced in the political conception of the rule of law, is that those who are represented are to be governed only by laws that are publicly promulgated and accessible to them. The other, sourced in the doctrine of separation of powers, denies to the judicial branch of government power to involve itself in making or remaking, as opposed to interpreting and enforcing, laws made by or under the authority of the representative legislature. Basten emphasises that the primacy of legislation over judge-made law

imposes a constraint on courts which seek to read down the legislation by reference to judge-made principles of interpretation: those principles demand justification if the courts are not to be seen to exceed their constitutional role in either restricting or expanding the ordinary or apparent meaning of a statutory conferral of power.³³

²⁷ Ibid 85.

²⁸ Ibid 89.

²⁹ John Basten, 'Construing Statutes Conferring Powers — A Process of Implication or Applying Values?' in Boughey and Burton Crawford (n 2) ch 5.

³⁰ Ibid 66.

³¹ *Singh v Commonwealth* (2004) 222 CLR 322, 336 [19] (Gleeson CJ). See also *Zheng v Cai* (2009) 239 CLR 446, 455–6 [28].

³² Basten (n 29) 74.

³³ Ibid 54.

Drawing on language of Sir Gerard Brennan, Basten suggests that the answer to his ‘when, exactly’ question lies in ‘underlying’ or ‘enduring’ values ‘which are not themselves enforceable’ but which ‘explain and constrain legal principles which are enforceable’.³⁴ The language of Sir Gerard Brennan drawn upon by Basten in pointing to that answer was expressed in the following statement in a public lecture given in August 1990:

In the long history of the common law, some values have been recognised as the enduring values of a free and democratic society and they are the values which inform the development of the common law and help to mould the meaning of statutes. These values include the dignity and integrity of every person, substantive equality before the law, the absence of unjustified discrimination, the peaceful possession of one’s property, the benefit of natural justice, and immunity from retrospective and unreasonable operation of laws. To ensure that effect is given to these values when they stand in the way of an exercise of power, especially the power of governments, a judiciary of unquestioned independence is essential. The judge stands in the lonely no-man’s-land between the government and the governed, between the wealthy and the poor, the strong and the weak. She or he can identify with neither, for partisanship robs the judge of the authority essential to discharge the judicial office.³⁵

Evidently, Sir Gerard Brennan did not perceive any tension between that extra-judicial explanation of the role of enduring values in moulding the meaning of statutes and his judicial explanation two months earlier in *Attorney-General (NSW) v Quin* of the ‘duty and jurisdiction of [a] court to review administrative action’³⁶ as not going ‘beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository’s power’.³⁷ The absence of tension is apparent in the explanation his Honour went on immediately to give in *Quin* that

[i]n Australia, the modern development and expansion of the law of judicial review of administrative action [had] been achieved by an increasingly sophisticated exposition of implied limitations on the extent or the exercise of statutory power.³⁸

Basten does not enter into the controversy earlier exposed by Lim as to whether the principle of legality is to be treated as an empirical presumption or a normative rule. For, so long as a court can feel confident in asserting that ‘the preferred construction by the court of the statute in question is reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy’,³⁹ the need to take sides in that controversy can be avoided. The more contentious the principle or constellation of principles applied by a court to arrive at its preferred construction within contemporary political discourse, the more difficult that attitude of avoidance is to maintain.

³⁴ Ibid 74.

³⁵ Gerard Brennan, ‘Courts, Democracy and the Law’ (1991) 65(1) *Australian Law Journal* 32, 40.

³⁶ *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35–6 (‘*Quin*’).

³⁷ Ibid 36.

³⁸ Ibid.

³⁹ *Zheng v Cai* (n 31) 455–6 [28] (French CJ, Gummow, Crennan, Kiefel and Bell J).

The unqualified terms of the statutory expression ‘with respect to the employment of transport workers’ by which the *Transport Workers Act* conferred its regulation-making power might be thought by a modern proponent of the principle of legality to lend themselves to being creatively read down to prevent, or at least minimise the extent of, infringement of common law rights. The statutory addition of the expansionary explanation (‘and in particular for regulating the engagement, service and discharge of transport workers, and for regulating or prohibiting the employment of unlicensed persons as transport workers, and for the protection of transport workers’) might make it difficult to argue that the regulation-making power should be read to prevent, or minimise the extent of interference with, freedom of contract.

However, it would not be beyond the wit of a creative modern lawyer to fashion an argument that the apparent generality of the grant of power to make regulations ‘with respect to the employment of transport workers’ should not be read so broadly as to empower the making of regulations which would compel unequal treatment or unjustifiable discrimination in the employment of transport workers. The values informing the development of the common law which would be protected from legislative incursion through the application of the principle of legality in that way, it might be argued, are those identified by Brennan as ‘substantive equality before the law’ and ‘the absence of unjustified discrimination’.⁴⁰

Against the background of the transport workers legislation having been enacted and amended in an atmosphere of extreme political hostility, and against the background of the regulation-making power conferred by the applicable statute having been exploited by both sides of the political divide in the pursuit of overtly partisan industrial agendas, should an appeal of that nature to the enduring value of equal protection of the law, if made, have prevailed?

You be the judge.

V Should it Matter Who Makes the Argument?

Inspector Dignan argued for an expansive interpretation of the regulation-making power conferred by the *Transport Workers Act* and for a literal interpretation of the *Waterside Workers Regulations*. Should his status as a governmental official charged with the responsibility for the administration of the legislation and the delegated legislation have meant that his arguments about the construction of the legislation and the delegated legislation carried more weight with the High Court than the arguments of the Victorian Stevedoring and General Contracting Co Pty Ltd and Mr Meakes? The orthodox answer: absolutely not!

Janina Boughey might be thought perhaps by some to challenge that orthodoxy in presenting ‘The Case for “Deference” to (Some) Executive Interpretations of Law’.⁴¹ Boughey advocates for the adoption in Australia of a

⁴⁰ Brennan (n 35) 40.

⁴¹ Janina Boughey, ‘The Case for “Deference” to (Some) Executive Interpretations of Law’ in Boughey and Burton Crawford (n 2) ch 4.

version of the United States ‘*Skidmore* deference’ according to which a court engaged in the interpretation of legislation or delegated legislation should ‘consider [an] administering agency’s preferred interpretation, and give weight to that interpretation depending on its persuasive force’.⁴²

Or perhaps not. Boughey explains that equivalent doctrines of deference to executive interpretations of law have been articulated and explained in the United States⁴³ and Canada⁴⁴ through the Supreme Courts of those countries stressing the importance of courts respecting, and learning from, executive agencies’ expertise and experience.⁴⁵ Giving weight to the interpretation of legislation or delegated legislation adopted by the executive agency which administers it, Boughey argues, can promote the accountability of the agency to the public and to political branches of government, enhance the ability of the public to rely on guidance given by the agency in organising their affairs, and promote coherence, workability and predictability in the administration of the law.

The consequentialist considerations to which Boughey points in favour of deference are all of a kind which have been recognised by the High Court to be appropriate to be weighed before departing from an interpretation of legislation or delegated legislation that has been relied on in practice.⁴⁶ To ascribe weight to an executive agency’s preferred interpretation of legislation or delegated legislation it administers merely because the interpretation is preferred by the agency, however, must surely go too far. Interpretation is a matter of opinion. The weight appropriately ascribed to an opinion by reference to the status of the holder of the opinion, as distinct from by reference to the cogency of the reasoning relied on to support the opinion, must at best be slight. As noted by Boughey, the weight appropriately ascribed to an opinion by reference to the status of the holder of the opinion must also vary having regard to the expertise and experience of the holder, having regard to the reputation of the holder for independence and impartiality and having regard to the nature and character of the interpretive question.

John McMillan,⁴⁷ who argues from an executive perspective for a measure of deference, puts his argument no higher than one which calls for courts engaged in statutory construction to do so with common sense and professionalism combined with a healthy dose of humility. Courts undoubtedly have the ultimate function of resolving disputes as to statutory meaning. Courts would perform that function better were they prepared to recognise the limits of their own knowledge and experience and were they prepared to learn from the practical wisdom of others. He argues for an attitudinal shift both on the part of courts, in recognising that they might profit from the experience and insight of executive agencies, and

⁴² Ibid 36 discussing *Skidmore v Swift & Co*, 323 US 134 (1944) (‘*Skidmore*’).

⁴³ *Skidmore* (n 42) 140. See also *Chevron USA Inc v Natural Resources Defense Council Inc*, 467 US 837 (1984); *Auer v Robbins*, 519 US 452 (1997); *Kisor v Wilkie*, 139 S Ct 2400 (2019).

⁴⁴ *Dunsmuir v New Brunswick* [2008] 1 SCR 190, 221–2 [49], quoting David J Mullan, ‘Establishing the Standard of Review: The Struggle for Complexity?’ (2004) 17(1) *Canadian Journal of Administrative Law & Practice* 59, 93.

⁴⁵ Brennan (n 35) 40.

⁴⁶ *R v Kirby; Ex parte Boiler-Makers’ Society of Australia* (1956) 94 CLR 254, 295–6.

⁴⁷ John McMillan, ‘Statutory Interpretation and Deference: An Executive Perspective’ in Boughey and Burton Crawford (n 2) ch 3.

on the part of executive agencies, in recognising that their preferred interpretation must be spelt out for the assistance of the court by some respectable process.⁴⁸

Where that leaves Inspector Dignan, I suspect, is that he is entitled to present his argument and to have that argument evaluated on its merits in precisely the same way as the Victorian Stevedoring and General Contracting Co Pty Ltd and Mr Meakes are entitled to present their arguments and to have their arguments evaluated.

VI What about the Change of Government and the Change of Policy?

Was the scope of the regulation-making power conferred by the *Transport Workers Act* set in stone at the time of its enactment? Or was its meaning capable of being affected, over time, by the manner of its utilisation first by the Bruce–Page Government and then by the Scullin Government? Questions of this nature are explored by Lisa Burton Crawford in her nuanced essay entitled ‘Between a Rock and a Hard Place: Executive Guidance in the Administrative State’.⁴⁹

There is a very practical and very obvious sense in which the answer to both questions is ‘yes’. The scope of the regulation-making power was to be determined by reference to the meaning of the statutory text by which the power was conferred by the Commonwealth Parliament in enacting the *Transport Workers Act* as authoritatively construed by the High Court. The text was fixed at the time of enactment. The authoritative construction of that text occurred later. To ignore what had occurred in the interim would have been to deny reality.

Just what the High Court was supposed to make of what had occurred in the interim for the purpose of construing the statutory text is another matter. Burton Crawford’s subtle analysis suggests that contemporary Australian jurisprudence leaves open the possibility that the meaning and effect of a statute as authoritatively construed by a court might, in some circumstances, be affected by action taken by the executive between the time of enactment and the time of construction, including through the provision of executive guidance.

The fate of the Bruce–Page Government, the stand-off between the Scullin Government and the Nationalist Party and Country Party controlled Senate, and then later the fate of the Scullin Government itself, all provide reason to be cautious about the relationship between statutory interpretation and democratic accountability. That relationship is explored by Sangeetha Pillai and Shreeya Smith.⁵⁰ They note that one of the rationales often proffered for the principle of legality is that it ‘means that Parliament must squarely confront what it is doing

⁴⁸ McMillan (n 47) 33.

⁴⁹ Lisa Burton Crawford, ‘Between a Rock and a Hard Place: Executive Guidance in the Administrative State’ in Boughey and Burton Crawford (n 2) ch 2.

⁵⁰ Sangeetha Pillai and Shreeya Smith, ‘Regional Processing of Asylum Seekers, Democratic Accountability and Statutory Interpretation’ in Boughey and Burton Crawford (n 2) ch 10.

and accept the political cost'.⁵¹ As Pillai and Smith note, however, deployment of a principle of statutory interpretation having that as its rationale is not the inevitable consequence of limitations on political accountability. More generally, as they explore in the migration context, an approach to statutory interpretation that seeks to constrain executive action within the narrowest of a range of potential meanings in the supposed interests of democratic accountability carries the risk of provoking legislative reactions that, in practice, weaken mechanisms both of judicial review and of political accountability.

Where mechanisms of democratic accountability are strong, and especially where political sentiment runs high, application by courts of a principle of statutory interpretation fashioned with a view to achieving judicial enhancement of the political process could be viewed as at best redundant and at worst counterproductive. The famous aphorism of Dixon CJ that '[t]here is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism'⁵² was uttered in the wake of *Australian Communist Party v Commonwealth*⁵³ (holding the *Communist Party Dissolution Act 1950* (Cth) invalid) and the subsequent failure at a national referendum of the *Constitution Alteration (Powers to Deal with Communists and Communism) 1951* (Cth) (seeking to amend the *Constitution* to confer legislative power on the Commonwealth Parliament sufficient to enable it to re-enact the *Communist Party Dissolution Act*). The wisdom of the aphorism lies in its linking of 'strict and complete legalism' to safe judicial conduct in making decisions in matters of 'great conflicts'.

VII The New and the Old

My focus on judicial review of broad discretions conferred by statute is not to be understood as intended to detract from the fine essays by Dominique Dalla-Pozza and Greg Weeks on the counterintuitive phenomenon of detailed legislative schemes operating to limit judicial scrutiny of executive action,⁵⁴ by Peta Stephenson on statutory displacement of non-statutory executive power,⁵⁵ by Amanda Sapienza on judicial review of non-statutory executive action,⁵⁶ by Anna Huggins on automated executive decision making and statutory interpretation,⁵⁷ and by Nick Seddon on whether Commonwealth executive contracting should be

⁵¹ Ibid 164, quoting *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131 (Hoffmann LJ).

⁵² 'Swearing in of Sir Owen Dixon as Chief Justice' (1952) 85 CLR, xiv.

⁵³ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

⁵⁴ Dominique Dalla-Pozza and Greg Weeks, 'A Statutory Shield of the Executive: To What Extent Does Legislation Help Administrative Action Evade Judicial Scrutiny?' in Boughey and Burton Crawford (n 2) ch 12.

⁵⁵ Peta Stephenson, 'Statutory Displacement of the Prerogative in Australia' in Boughey and Burton Crawford (n 2) ch 13.

⁵⁶ Amanda Sapienza, 'Interpreting the Limits of Non-Statutory Executive Action: What Role for Grounds of Judicial Review?' in Boughey and Burton Crawford (n 2) ch 14.

⁵⁷ Anna Huggins, 'Executive Power in the Digital Age: Automation, Statutory Interpretation and Administrative Law' in Boughey and Burton Crawford (n 2) ch 8.

understood to require Commonwealth legislative backing.⁵⁸ Each of those topics is worthy of its own review essay.

Nor is my reflection on a discrete episode in our distant past intended to detract from the novelty and creativity of the numerous essays to which I have referred. One of the strengths of our inherited common law methodology, which we apply to the interpretation of executive power as much as to the interpretation of other powers and duties and rights and freedoms, is the ability it gives us to upgrade our legal toolbox to maintain the strength of our legal structure in an ever-changing social and political climate. Being able to test and refine contemporary legal ideas by reference to concrete events of the past aids us in our quest to ensure that the legal tools we employ in the future will be fit for purpose.

⁵⁸ Nick Seddon, 'Statutory Backing of Commonwealth Government Contracts' in Boughey and Burton Crawford (n 2) ch 11.

Review Essay

Pioneers, Consolidators and Iconoclasts of Tort Law

Scholars of Tort Law by James Goudkamp and Donal Nolan (eds) (2019), Hart Publishing, 424 pp, ISBN 9781509910595


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Abstract

This essay reviews *Scholars of Tort Law*, a collection of essays edited and introduced by James Goudkamp and Donal Nolan. Twelve leading contemporary tort law scholars have written about the work and influence of leading tort scholars in the United States, England and the British Commonwealth working in the late 19th and 20th centuries during the formative period of tort law as a discrete field of legal scholarship. Essentially historical, the essays nevertheless discuss theories and contrasting approaches to tort law that remain just as relevant to legal educators and scholars of tort law today.

I Introduction: The Role and Impact of Tort Scholars

Scholars of Tort Law,¹ edited and introduced by James Goudkamp and Donal Nolan, is a collection of essays by leading contemporary tort scholars about 12 famous earlier tort scholars from the common law world of the United States ('US'), England and the British Commonwealth, spanning the late 19th and 20th centuries.² Peter Cane provides a concluding chapter on the changing role of tort scholars in the common law from *Glanvill*³ to today, contrasting the role of jurists

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¹ James Goudkamp and Donal Nolan (eds), *Scholars of Tort Law* (Hart Publishing, 2019) ('*Scholars of Tort Law*').

² While the absence of any French or German scholars is notable, a number of chapters refer to the influence of, or engagement with, European tort scholars. For example, Giliker's chapter on Tony Weir discusses his important comparative scholarship: Paula Giliker, 'Mr Tony Weir (1936–2011)' in *Scholars of Tort Law* (n 1) ch 12.

³ *Treatise on the Laws and Customs of the Kingdom of England Commonly Called Glanvill* [trans of *Tractatus de Legibus et Consuetudinibus Regni Angliae* (1187–89)].

in civil law countries and critically analysing a number of theories of tort law.⁴ The book provides the reader with fascinating accounts of influential tort scholarship, with insights that both humanise the authors whose work is already familiar and demystify work that may seem too voluminous or daunting to tackle.

The work of the selected scholars spans the founding theories and changing realities of tort: beginning in the 19th century (when tort law came into its own as a separate field of study in law, as distinctive and as multi-contextual as other fields) and through to the late 20th and early 21st centuries (when tort law was assailed by statutory reform and, in many jurisdictions, replaced or supplemented by compensation schemes).⁵ A common theme running through the volume is the tension between particular overarching theories of tort law and the various instances and details of tort liability found in the case law. Whether the case law is the source of the theory or must rather conform to a pre-determined theory depends on the approach of the scholar. Either way, theory and reality are not always aligned.

As such, the book invites broader reflection on the role of legal scholarship. It is axiomatic in a common law system that the law has been created and developed by the decisions of judges over centuries, unless and until supplemented or supplanted by statutes, themselves in turn interpreted and applied by judges. Thus, for students of law, litigants, practitioners, prosecutors, and judges alike, the fundamental tasks and functions of identifying, applying and analysing the law all have as their primary source the case law reports or the statute books, now databases, or a combination of the two.

Yet all of these functions would be near impossible to perform, or to perform properly, consistently and efficiently, without the law being recorded, characterised, categorised, organised, explained and analysed by reference to subject matter, context and principle. It is the legal scholars — drawn from practice, the judiciary, or the academy — who have provided this vital foundation. This essential role of legal scholarship deserves recognition. But legal scholars have also done so much more. As Patrick Atiyah wrote, ‘it seems certain that we have greatly underestimated the influence of academics on the development of the law in the past’.⁶

In *Scholars of Tort Law*, Goudkamp and Nolan note that following the quashing of the writ system by the *Judicature Act 1875*, there

emerged a reimagined legal landscape, populated by new categories, or subjects, such as contract and tort. And while the cases were the bricks and

⁴ Peter Cane, ‘Law, Fact and Process in Common Law Tort Scholarship’ in *Scholars of Tort Law* (n 1) ch 13.

⁵ The modern tort scholar cannot concentrate on the common law to the exclusion of statutes: see, eg, Mark Leeming, *The Statutory Foundations of Negligence* (Federation Press, 2019); TT Arvind and Jenny Steele (eds), *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Hart Publishing, 2013).

⁶ PS Atiyah, *Pragmatism and Theory in English Law* (Stevens and Sons, 1897) 180, quoted in James Goudkamp and Donal Nolan, ‘Pioneers, Consolidators and Iconoclasts: The Story of Tort Scholarship’ in *Scholars of Tort Law* (n 1) ch 1, 2.

mortar of the new superstructure, its architects were the scholars who wrote the books that both created and reflected the nascent taxonomy.⁷

Not all of the scholars in this book were, or were solely, academics: Oliver Wendell Holmes Jr wrote *The Common Law*⁸ in 1881 while still a practitioner, before being appointed a Justice of the Supreme Court of the United States where he held office for 30 years; Sir John Salmond moved from the academy to become Solicitor-General of New Zealand and later a judge.

It may seem somewhat immodest and self-serving for legal scholars to trumpet their own or their predecessors' contribution to the development of the law, and there may be some who feel that academic influence is overstated. However, the role and influence of academics is recognised both explicitly by the courts who cite them and implicitly by those who do not, but nevertheless take advantage of academic writing and commentary.⁹ It is not rare for an academic to recognise a certain argument or treatment in counsels' submissions or a judgment that bears an uncanny resemblance to the way he or she discussed the issue in a lecture or laboured over an article. While Atiyah was writing about the impact of academic writing on the law itself, by direct influence on judicial approaches and decisions and through submissions and advocacy on statutory law reform, there can be no doubt of the indirect influence of academics and scholars on generations of students who go on to become lawyers, judges, parliamentarians and policymakers, imbued with the structure of the law and the fundamental principles to which they have been exposed. Sometimes, it is the enthusiasm and skill of the academic that inspires a lifelong interest in a particular subject, even influencing the direction of a lawyer's career. Tort law, usually taught in the first year of law studies, is a good place to start.¹⁰

Percy Winfield, addressing the Society of the Public Teachers of Law as President in 1930, stated that '[t]he highest aim of legal education ought to be the inculcation of broad principles and of sound methods of thinking.'¹¹ Scholars, judges and lawmakers may still struggle to identify or pin down the role of tort law in society, and this book provides lessons from a long history of legal debate, against the background of ongoing legislative change to deal with societal needs and transformative pressures. As such, the themes discussed in these essays remain

⁷ Goudkamp and Nolan (n 6) 5. See also Cane on the impact of the Judicature reforms on the functions of scholars and jurists: Cane (n 4) 377–8.

⁸ OW Holmes, Jr, *The Common Law* (Belknap Press, first published 1881, 2009 ed), discussed in John CP Goldberg and Benjamin C Zipursky, 'Thomas McIntyre Cooley (1824–1898) and Oliver Wendell Holmes (1841–1935): The Arc of American Tort Theory' in *Scholars of Tort Law* (n 1) ch 2, 53ff.

⁹ On the judicial use and citation of academic writing, see Chief Justice Susan Kiefel, 'The Academy and the Courts: What Do They Mean to Each Other Today?' (Speech, Australian Academy of Law Patron's Address, 31 October 2019) <<https://www.hcourt.gov.au/publications/speeches/current/speeches-by-justice-kiefel>>.

¹⁰ The generational influence at Yale of Leon Green on Fleming James and James on Guido Calabresi is surely a good example: see Guido Calabresi, 'Professor Fleming James Jr (1904–1981)' in *Scholars of Tort Law* (n 1) ch 9.

¹¹ Quoted by Donal Nolan, 'Professor Sir Percy Winfield (1878–1953)' in *Scholars of Tort Law* (n 1) ch 6, 190.

as relevant to scholarly and policy debates today as when the original scholars discussed them.

II Choosing and Characterising Scholars

In the first chapter of *Scholars of Tort Law*, Goudkamp and Nolan provide a cohesive, thoughtful and illuminating overview of selected tort scholarship across more than 150 years. More than an introduction, it is well worth reading on its own. They place the 12 torts scholars into three categories ('Pioneers', 'Consolidators' and 'Iconoclasts'), although they note that some scholars could easily fit in more than one category.¹²

- The Pioneers were Thomas McIntyre Cooley (1824–1898), Oliver Wendell Holmes Jr (1841–1935) and Professor Sir Frederick Pollock (1845–1937).
- The Consolidators were Professor Sir John Salmond (1862–1924), Professor Francis Hermann Bohlen (1868–1942), Professor Sir Percy Winfield (1878–1953), Professor William Lloyd Prosser (1898–1972) and Professor John G Fleming (1919–1997).
- The Iconoclasts were Professor Leon Green (1888–1979), Professor Fleming James Jr (1904–1981), Professor Patrick Atiyah (1931–2018) and Tony Weir (1936–2011).

The contributors are themselves leading tort scholars of current generations, each with such mastery of the field that they are able to stand back and identify the distinctive contribution and influence of their particular subject at different points in time. Notably, one thing Goudkamp and Nolan do not attempt to do is to characterise the authors of each chapter into their descriptors, though the reader will quickly be able to discern who among them might be described as modern-day pioneers, consolidators or, especially, iconoclasts. Not all of the contributors resisted the temptation to 'use their discussion of past scholarship to fight the intellectual battles of the present'.¹³ Goudkamp and Nolan also note that the choice of the subject scholar was largely left to the contributor. One might wonder at the omission of Benjamin Cardozo from the American cast of tort scholars, although his work is discussed in the chapter by Goldberg and Zipursky on Cooley and Holmes.¹⁴ The book already runs to 400 pages and it does not profess to be an encyclopedia of tort scholarship.

As explained by Goudkamp and Nolan, tort law as a distinct legal category and subject for study dates back only to the second half of the 19th century.¹⁵ American Francis Hilliard and English Thomas Addison published the first treatises on the law of torts in 1859 and 1860 respectively. The first torts class was taught at Harvard in 1870, but it was not until 1890 that 'Tort' was examined at

¹² Goudkamp and Nolan (n 6) 4.

¹³ Ibid 3.

¹⁴ Goldberg and Zipursky (n 8).

¹⁵ Goudkamp and Nolan (n 6) 4.

Cambridge, and 1905 at Oxford.¹⁶ It is in this historical period that the three Pioneers worked. Scholarly journals also appeared in this period, such as the *Law Quarterly Review* in 1885 and the *Harvard Law Review* in 1887, providing a route to a wide audience for legal scholarship, although Goudkamp and Nolan note that the Pioneers were necessarily less constrained in seeking a positive reception from their audience than later scholars, who presumably had to fit in or break a mould of existing theory or doctrine.

III Three Pioneers

Frederick Pollock, it is said, persisted with a general theory of liability despite the courts' failure to adopt it. His influence can be seen in statements of general principle such as those advanced in *Heaven v Pender*¹⁷ in 1883 and finally reformulated in *Donoghue v Stevenson*¹⁸ in 1932.¹⁹ Robert Stevens, in typical style, dismisses Pollock as not worth reading at all.²⁰ Pollock's work, it is said, is descriptive and therefore outdated; Pollock was a 'truly terrible writer'; he was 'not very good'.²¹ But worse was Pollock's malign influence on the law, leading to chaos and confusion that has lived on in modern textbooks.²² Critical to this negative assessment was Pollock's adoption of the tripartite division of the law of torts formulated by Oliver Wendell Holmes Jr in an 1873 article, a 'division ... based upon degrees of moral culpability, not the individual rights the violation of which constitutes a civil wrong'.²³ Pollock's alleged analytical and normative errors are dissected, and his work confined to history.

On both sides of the Atlantic, it was the Pioneers who identified tort law as a distinct field, provided it with 'an overarching theoretical perspective', and transformed rules into doctrines and principles.²⁴ Mapping the new landscape, Oliver Wendell Holmes Jr advanced objective notions of fault and the tripartite classification of torts — intentional conduct, negligence and strict liability — that completely dominated later American tort scholarship²⁵ and have had a pervasive influence throughout the common law world. While Holmes' classification rested on the defendant's role and liability for *losses*, by contrast, Cooley, the first Pioneer, approached the subject from the perspective of the plaintiff's interests. He was concerned with appropriate redress for *wrongs*, for interferences with *rights*, influenced by William Blackstone's *Commentaries*, which Cooley had edited for

¹⁶ Ibid 5.

¹⁷ *Heaven v Pender* [1883] 11 QBD 503 (CA).

¹⁸ *Donoghue v Stevenson* [1932] AC 562.

¹⁹ Goudkamp and Nolan (n 6) 11.

²⁰ Robert Stevens, 'Professor Sir Frederick Pollock (1845–1937): Jurist as Mayfly' in *Scholars of Tort Law* (n 1) ch 3, 75.

²¹ Ibid 76.

²² Ibid.

²³ Ibid 79.

²⁴ Goudkamp and Nolan (n 6) 9, quoting GE White, *Tort Law in America: An Intellectual History* (Oxford University Press, expanded ed, 2003) 38.

²⁵ Goudkamp and Nolan (n 6) 11.

an American publisher in 1871.²⁶ Goldberg and Zipursky in their chapter on Cooley and Holmes note how influential Cooley's treatise was on Cardozo's tort judgments. The influence of these early Pioneers — and those who went before and after them — did not peter out: 'Our civil recourse theory of tort is a direct descendant of the work of Blackstone, Cooley and Cardozo'.²⁷ As Goudkamp and Nolan point out, the tension between a loss-caused-by-fault approach and a wrongs-to-rights approach is still familiar to 21st century torts scholars.²⁸

IV Five Consolidators

The Consolidators built on the frameworks posited by the Pioneers, but with their functions overlapping considerably. One of these is Salmond, surely the one and only legal scholar to have a legal test named after him, as first set out in his textbook.²⁹ This was the 'Salmond test' for whether an employee has acted in the course of employment for the purposes of attributing vicarious liability to his or her employer.³⁰ Salmond was only an academic for a short period, moving from a chair at the University of Adelaide to foundation Professor of Law at what was to become Victoria University, Wellington, New Zealand, before going into public service as Solicitor-General for New Zealand, then judge. Salmond's influence nevertheless rested on his textbook written in 1907 in that early period of his career, a work of 'practical utility'³¹ for students and practitioners alike, which ran to 21 editions until at least 70 years after his death.³² Rather than take a generalised or theoretical approach, it took a 'torts', rather than a 'tort', approach, perhaps more comprehensible and digestible to students. Goudkamp and Nolan note that, after *Donoghue v Stevenson*, 'his refusal to acknowledge negligence as a stand-alone cause of action put him on the wrong side of history',³³ but he earned his place nonetheless, particularly given the editors' previous warning³⁴ that scholars must be evaluated not only for their legacy, but for their influence in the historical context in which they were writing. In any event, the 'Salmond test' is itself a useful legacy and one whose utility has generally persisted, only recently and partially giving way in the context of the 21st century problem of how to hold an employer vicariously liable for the criminal conduct of an employee in assaulting a vulnerable person in the employer's institutional care: conduct that is diametrically opposed to the employee's duties.³⁵ Mark Lunney draws interesting contrasts

²⁶ William Blackstone and Thomas M Cooley (ed), *Commentaries on the Laws of England* (Callaghan and Co, 1871).

²⁷ Goldberg and Zipursky (n 8) 57.

²⁸ Goudkamp and Nolan (n 6) 7.

²⁹ JW Salmond, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries* (Stevens and Haynes, 1907).

³⁰ Cited, for example, in *New South Wales v Lepore* (2003) 212 CLR 511, 536 [42] (Gleeson CJ).

³¹ Goudkamp and Nolan (n 6) 12, quoting Salmond (n 29) v.

³² Mark Lunney, 'Professor Sir John Salmond (1862–1924): An Englishman Abroad' in *Scholars of Tort Law* (n 1) ch 4, 104.

³³ Goudkamp and Nolan (n 6) 13.

³⁴ Ibid 3.

³⁵ See *Prince Alfred College Inc v ADC* and English and Canadian authorities cited therein: (2016) 258 CLR 134, 153–4 [58]–[62].

between Salmond's rights-based analysis in his earlier 1902 work, *Jurisprudence*,³⁶ and the practical approach he took in the *Law of Torts*,³⁷ then proceeding to analyse Salmond's work on bases of liability. He concludes that though Salmond was a writer in a relatively remote and small former British dominion, he wrote a book for the common law world and succeeded in having a rare influence for a scholar on the actual practice of law.³⁸

The second scholar identified as a Consolidator was Francis Bohlen, editor of student casebooks and author of leading and still influential journal articles, but most notable as the Reporter for the first *Restatement of Torts* for the American Law Institute ('ALI') established in 1923. Writing in 1924, Benjamin Cardozo anticipated that a *Restatement* would be 'something less than a code and something more than a treatise'.³⁹ Bohlen generally brought clarity to issues marked by confusion, particularly where there was conflicting authority across the various States. The absence of a single final court of appeal on issues of the common law or of the interpretation of state legislation puts the US in particular need of an authoritative source, setting out the law, such as can be identified in the various states, for the ordinary and professional reader. Though, strictly speaking, only a secondary source, by the time it had gone through the decade-long debate and approval process by the distinguished members of the ALI, the *Restatement* was probably as authoritative in the 20th century as *Blackstone's Commentaries* had been in the late 18th century. Bohlen, a pragmatist, accepted that established doctrine had to meet social change. Times were changing in academia too, and Bohlen was able, Goudkamp and Nolan say, to strike a workable compromise between the doctrinal approach and realist or functional approaches, inspiring later torts scholars such as Prosser.⁴⁰ However, the first *Restatement* is unsurprisingly not perfect in today's eyes and with the undoubted benefit of hindsight.⁴¹ The imperfections in its treatment of some issues left a legacy that perpetuated confusion. No better choice could have been made than the respectful but plain-speaking Michael Green, a Reporter of the *Restatement (Third) of Torts*, to comment on Bohlen's immediate and lasting influence on the case law. Green concisely analyses Bohlen's *Restatement* on the risk-benefit approach to determining negligence, on factual cause and the confusion introduced by the 'substantial factor' test, and on legal (rather than 'proximate') cause. With respect to the last, he writes that Bohlen failed to explain legal cause in terms of the *scope* of liability, and that if he had brought greater clarity, it would have avoided confusion and incoherence as 'courts and treatises used a variety of plausible-sounding verbal articulations that turned out to be mostly nonsense'.⁴² Green's scathing assessment is a salutary lesson to scholars who may lose perspective about their own complex taxonomies and theories.

³⁶ John W Salmond, *Jurisprudence or the Theory of the Law* (Stevens and Haynes, 1902).

³⁷ Salmond (n 29).

³⁸ Lunney (n 32) 132.

³⁹ Goudkamp and Nolan (n 6) 36, quoting Benjamin N Cardozo, *The Growth of the Law* (Yale University Press, 1924) 9.

⁴⁰ Goudkamp and Nolan (n 6) 15.

⁴¹ Michael D Green, 'Professor Francis Hermann Bohlen (1868–1942)' in *Scholars of Tort Law* (n 1) 163.

⁴² *Ibid* 162.

Percy Winfield, described by Nolan as the most influential torts scholar of the 20th century,⁴³ is also classed as a Consolidator. Apart from describing Winfield's work, including its contemporaneous reception, Nolan identifies what made Winfield so influential: as pragmatist, rationalist, historian, comparativist and, last, as linguistic stylist both in his lectures and writings. The more discursive *The Province of the Law of Tort*,⁴⁴ published in 1931, its theoretical approach novel at that time in England, has maintained its place in history, even if the courts, proceeding cautiously, did not adopt Winfield's wide general theory of liability for loss caused to another in the absence of a lawful excuse.⁴⁵ His 1937 textbook was fundamental reading not just in England, but also in British Commonwealth countries such as Australia.⁴⁶ Winfield was not as conservative as some judges in his views of how causes of action could extend to new situations and was often well ahead of his time. He is described as simultaneously conservative, with deep respect for the doctrinal framework of the common law as set out by judges, and progressive, intellectually open-minded as to different approaches across the Atlantic, but above all believing that law should respond to community attitudes, mores and new social conditions.⁴⁷ One example was his article 'Privacy' in the *Law Quarterly Review*⁴⁸ cited by the dissenting judges, Rich and Evatt JJ, in support of upholding a nuisance claim in *Victoria Park Racing v Taylor*.⁴⁹ It is still persuasive for an expanded common law protection of privacy in Australia today. If Winfield was disapproving of the invasion of the Balham dentist's privacy by snooping neighbours, what would he be thinking of today's webcams and other remote surveillance mechanisms and the lag in common law protections?

William Prosser was Winfield's equivalent across the Atlantic, but perhaps more than anyone else, he best deserves the title of Consolidator, particularly in the multi-jurisdictional United States of America. John Goldberg has described Prosser as 'the most important American tort scholar of the twentieth century'.⁵⁰ Prosser's casebook, now in its 14th edition,⁵¹ ensures his continuing influence on academics and students alike, while his treatise, the *Handbook of the Law of Torts* was both monumental and highly readable. It ran to 1300 pages. The third edition cited 22,000 cases in lengthy footnotes accompanying concise text.⁵² His Berkeley

⁴³ Goudkamp and Nolan (n 6) 16; Nolan (n 11) 165.

⁴⁴ Percy H Winfield, *The Province of the Law of Tort* (Cambridge University Press, 1931).

⁴⁵ Courts insisted instead on the necessity for the plaintiff to bring its case within a recognised cause of action, fatal for the plaintiff in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 ('*Victoria Park Racing v Taylor*'), discussed by Mark Lunney, *A History of Australian Tort Law 1901–1945: England's Obedient Servant?* (Cambridge University Press, 2018) 270.

⁴⁶ PH Winfield, *A Text-Book of the Law of Tort* (Sweet & Maxwell, 1937). See also Lunney (n 32) 28, citing the Dean of Melbourne Law School, GW Paton, saying the Australian law student could read Winfield or Salmond without embarrassment, in GW Paton (ed), *The British Commonwealth, The Development of its Laws and Constitutions; Vol 2 Australia* (Stevens and Sons, 1952) 22.

⁴⁷ Goudkamp and Nolan (n 6) 15–16; Nolan (n 11) 189.

⁴⁸ Percy H Winfield, 'Privacy' (1931) 47 *Law Quarterly Review* 23.

⁴⁹ *Victoria Park Racing v Taylor* (n 45) 504 (Rich J), 520 (Evatt J).

⁵⁰ Christopher J Robinette, 'Professor William Lloyd Prosser (1898–1972)' in *Scholars of Tort Law* (n 1) ch 8, 229.

⁵¹ Victor E Schwartz, Kathryn Kelly and David F Partlett, *Prosser, Wade and Schwartz's Torts, Cases and Materials* (West Academic, 14th ed, 2020).

⁵² William L Prosser, *Handbook of the Law of Torts* (West Publishing Co, 3rd ed, 1964).

colleague John Fleming described Prosser as ‘combining an unusual gift for synthesis, with high literary artistry and ... an unfailing perception of contemporary legal values’.⁵³ Prosser was clearly a model for Fleming because that description can equally be applied to Fleming’s work, discussed below, as does the comment that Prosser was adept at spotting trends.⁵⁴ Prosser’s ability to give a clear concise doctrinal overview made him another suitable Reporter for the next Torts *Restatement*,⁵⁵ a role he fulfilled for a while. Like Winfield, Prosser was concerned with an emerging 20th century issue, the law of privacy. Prosser was both influential and prescient when he consolidated existing law relating to privacy into a formulation of four privacy torts. Prosser’s formulation is still the framework with which most modern analyses begin when assessing a country’s legal protection of privacy. Prosser was certainly one tort scholar who can be seen as having a *direct* influence on the development of the law by his writing: on strict liability for products; on privacy; and on liability for intentional infliction of emotional distress.⁵⁶ However, Christopher Robinette goes further than these immediate influences and discusses how later so-called ‘tort reform’ has clawed back many of the advances in tort law as a means of compensation and vindication that Prosser supported.⁵⁷

The final scholar identified as a Consolidator is John Fleming, although as the Goudkamp and Nolan point out, he could equally be seen as a Pioneer of legal scholarship in post-war Australia and, indeed, the British Commonwealth.⁵⁸ Writing from Berkeley for much of his later career, he was a truly comparative scholar, who could see the law against the backdrop of the very different social contexts of the various Commonwealth countries whose jurisprudence he cited. In his *The Law of Torts*, known eponymously as *Fleming*, which ran to nine editions in his lifetime, Fleming was the master of summing up a decade’s development in a sentence or paragraph. It was no introduction to the subject, but rather a commentary upon it. As tort historian Paul Mitchell writes, *Fleming* was ‘not for children’.⁵⁹ Its conciseness made the book suited only to the reader, whether student, academic or practitioner, who had already used a more descriptive or explanatory textbook to learn doctrine and work through case illustrations or statutory detail, and who needed this view of the law from a dispassionate distance. It was a book *about* tort law,⁶⁰ about where it had been, what movements it reflected and where it might or should go. Fleming could be biting in his disapproval, for example, dismissing in just a few words a tight allegiance to precedent in Australian courts in one context as a ‘misplaced cult of historicism’.⁶¹

⁵³ Goudkamp and Nolan (n 6) 17, quoting John G Fleming, ‘Book Notes: Prosser on Torts (3rd ed)’ (1964) 52(5) *California Law Review* 1068, 1068.

⁵⁴ Goudkamp and Nolan (n 6) 18.

⁵⁵ *Restatement Second, Torts* (American Law Institute, 1965).

⁵⁶ Robinette (n 50) 230.

⁵⁷ *Ibid* 231.

⁵⁸ Goudkamp and Nolan (n 6) 19–20.

⁵⁹ Paul Mitchell, ‘Professor John G Fleming (1919–1997): “A Sense of Fluidity”’ in *Scholars of Tort Law* (n 1) ch 10, 289.

⁶⁰ Goudkamp and Nolan (n 6) 19, quoting Peter Cane, ‘Fleming on Torts: A Short Intellectual History’ (1998) 6(3) *Torts Law Journal* 216, 228.

⁶¹ JG Fleming, *The Law of Torts* (Lawbook, 9th ed, 1998) 27 on Australian courts: first, maintaining negligent trespass as a cause of action, rather than following the English approach of restricting

Despite this, his work was extensively cited by judges at the highest levels as the leading scholarly authority, an authority only strengthened by the multi-jurisdictional sources of his commentary. As Goudkamp and Nolan remark, Fleming presented: 'what he saw as the "best law" to an elite international caste of jurists and judges more in need of ideas than exposition'.⁶²

From the background of his own mastery of history and comparative law, Mitchell analyses Fleming's opposition to legal formalism, to 'the orthodoxies of yesteryear',⁶³ such as a rigid demarcation between tort and contract, and to the rigid adherence to precedents from another age and place (usually England). Mitchell notes, by contrast, Fleming's opinionated, realist approach. One example was Fleming's double review of Australian Professor WL Morison's casebook on torts and that of American Cecil Wright.⁶⁴ This review was published just as Fleming was about to leave for Berkeley to join the New World in tort scholarship. Fleming contrasted what he saw as Morison's conservative concentration on legal reasoning in edited judgments, representing, to him, the wrong approach to legal education, with Wright's 'spirit of adventure',⁶⁵ placing court decisions in a wider context that showed how influences and factors outside the courtroom determined the outcome. '[Fleming] shared the realists' view that judicial reasoning never provided a complete account of the true motivations for a decision.'⁶⁶ Was it a fair assessment of Morison to imply, as Fleming did, that Morison was not interested in the broader context of judicial decision-making because he taught students about legal reasoning? Courts do, after all, have to deal with a legal problem by reference to legal principles contained in case law or statute. Many years later, the interest in tort law of this reviewer was first engaged in a small group class taught by Professor William Morison using the casebook method. Our first legal problem was modelled on Fuller's hypothetical 'Speluncean Explorers'⁶⁷ — incidentally a perfect example of the enduring influence of a leading scholar — which places judicial reasoning squarely in the context of the vagaries of human decision-making and ethics, if not external pragmatic factors. And, as Mitchell points out, while Fleming was a firm proponent of compensation schemes to replace the failure of tort law, he still confessed to 'a life-long addiction to the intellectual allures of traditional tort law'.⁶⁸

Goudkamp and Nolan identify a constant methodology among the Consolidators: a sound historical analysis blended with an exposition of the current law and proposals for reform. They see three further similarities among the Consolidators: all wrote for their audience — either students and practitioners, or

trespass to intentional wrongs; and second, leaving the onus of disproving fault in trespass cases on the defendant (except in highway cases). A similar approach in Canada shared the opprobrium: *ibid*.

⁶² Goudkamp and Nolan (n 6) 19, citing Cane (n 60) 232.

⁶³ Mitchell (n 59) 295.

⁶⁴ JG Fleming, 'Book Reviews: *Cases on Torts*, selected and edited by WL Morison (Law Book, 1955) and *Cases on the Law of Torts* by Cecil A Wright (Butterworth, 1954)' (1956) 2(1) *Sydney Law Review* 212.

⁶⁵ Mitchell (n 59) 299, quoting Fleming (n 64) 214.

⁶⁶ Mitchell (n 59) 300.

⁶⁷ Lon L Fuller, 'The Case of the Speluncean Explorers' (1949) 62(4) *Harvard Law Review* 616.

⁶⁸ Mitchell (n 59) 305, quoting John G Fleming, 'Comparative Law of Torts' (1984) 4(2) *Oxford Journal of Legal Studies* 235, 236.

judges and other scholars; all treaded ‘an intellectual tightrope’⁶⁹ between alternative academic approaches to tort law; and all were more interested in legal change than legal theory or taxonomy. Does that make them *derivative* rather than original thinkers, as the Goudkamp and Nolan suggest?⁷⁰ Perhaps so, but while they may not have been big thinkers with big ideas to change how we look at things, like the Iconoclasts who follow, one cannot help think that their contribution in making sense of the morass of human-made complexity that is the common law, not to mention the sometimes incomprehensible layers added by statute law, deserves recognition as law-making, albeit indirect (as Atiyah suggested in the quote above).⁷¹ Their influence owed much to the felicity of their writing style, such as Salmond’s ability to encapsulate doctrine into a neat verbal formula,⁷² which in turn reflected more generally their ability to make some practicable order out of intellectual disorder.

V Four Iconoclasts

This final category comprises the Iconoclasts. First, Leon Green, perhaps the most radical of the scholars collected in this book, who began his career as a trial lawyer in Texas, no doubt an experience in the ‘real world’ that would have informed his approach to tort law. His pragmatic and functional approach rejected the conventional way of teaching tort law as a body of law about wrongs and rights with underlying themes such as moral fault. Successively joining the law faculties at Texas, Yale, Northwestern, and again Texas, he organised his teaching and his casebook around functional categories, each with different policies driving the outcomes of the cases: workplace accidents; motor vehicle accidents; medical malpractice; dangerous products. At the same time he was convinced of the essential, constitutional, role of the jury in coming to the right decision in individual cases. Jenny Steele delves into Green’s work on the duty concept in negligence as a question of law, distinct from the breach question, how that married with earlier work by Holmes and how it has been understood by later scholars.⁷³

Fleming (‘Jimmy’) James Jr, a pupil of Green’s at Yale Law School, is described as ‘the dominant American tort lawyer of the 1940s and 1950s’ by those who focused on ideas rather than doctrine.⁷⁴ He was driven by finding the best practical way for tort law to *spread* the burden of compensating victims of accidental injury. Guido Calabresi, in turn a pupil of James’ at Yale, suggests in his chapter on James that James’ missionary upbringing in Shanghai may have influenced him in this direction, albeit as a social democrat.⁷⁵ Added to this was an

⁶⁹ Goudkamp and Nolan (n 6) 22, quoting Nolan (n 11) 187.

⁷⁰ Goudkamp and Nolan (n 6) 23.

⁷¹ See above n 6 and accompanying text.

⁷² Lunney (n 32) 125.

⁷³ Jenny Steele, ‘Professor Leon Green (1888–1979): Word Magic and the Regenerative Power of Law’ in *Scholars of Tort Law* (n 1) ch 7.

⁷⁴ Such as George L Priest, ‘The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law’ (1985) 14(3) *Journal of Legal Studies* 416, 470, quoted by Goudkamp and Nolan (n 6) 24.

⁷⁵ Calabresi (n 10) 260.

early career working as a defence lawyer during the Great Depression of the early 1930s for a railroad company whose operations were typically a source of plentiful accidents. The misery and poverty cast upon families by the injury or death of the breadwinner was a social problem that had a solution other than government welfare or charitable support; namely, the law of tort. Goudkamp and Nolan point out that James' work was the 'first serious challenge' to the Holmesian ethos of tort law based on notions of fault.⁷⁶ Unpersuaded by notions that liability acted as a deterrent and contributed to accident prevention, James concentrated on the capacity of defendants to absorb and pass on losses. The most obvious way to spread losses, except in the case of organisations with a massive customer or taxpayer base, was by insurance: James is most famous for a seminal article in 1948 on the impact of liability insurance on compensation for accidental injury.⁷⁷ The work is as relevant today as in 1948. Calabresi, at 86 years of age, gives a very personal and readable account of 'Jimmy' James who was both his teacher and later mentor, then goes on to a detailed analysis of many of James' arguments on various aspects of tort law. He attempts to reconcile those arguments, sometimes with difficulty, with James' larger views on loss spreading. Far from being overly theoretical, the chapter illustrates how specific tort doctrines are grounded in the functions of the law of tort. More generally, it demonstrates the way a teacher can set the foundation for groundbreaking work by his former student, such as that later published by Calabresi in *The Cost of Accidents*.⁷⁸

To the Commonwealth lawyer, the name of Patrick Atiyah readily stands out as an Iconoclast, as he provided new ways of thinking not just about the law, but about the social problems to which the law must respond — by statute or, in its absence, by the courts. Atiyah's legal interests were wide-ranging. Like the previous Iconoclasts, he was concerned mostly with personal injury when considering tort law. Atiyah first analysed tort law side-by-side with alternative compensation schemes. Then, in *The Damages Lottery*,⁷⁹ he advocated the abolition of tort law as the means, and fault as the basis, by which society provided compensation for accidental personal injury. James Goudkamp, in his chapter on Atiyah,⁸⁰ points out that Atiyah was consistent in his rejection of tort law as the appropriate mechanism for compensation. What changed, controversially, was his solution: first, a government run no-fault compensation system such as in New Zealand; second, for the main, first party insurance. His earlier view may have seen its model in the rise of welfare protection and the national health system in post-war Britain, social conditions so different then, as now, to those prevailing in the US. From the perspective of tort scholars and jurists, Atiyah saw no role for tort law as a unified subject: it could be broken up and studied in other subjects such as civil liberties (and, probably now, human rights law), land law and planning law, commercial law, personal property law, media law, employment law,

⁷⁶ Goudkamp and Nolan (n 6) 26.

⁷⁷ Fleming James Jr, 'Accident Liability Reconsidered: The Impact of Liability Insurance' (1948) 57(4) *Yale Law Journal* 549.

⁷⁸ Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (Yale University Press, 1970).

⁷⁹ PS Atiyah, *The Damages Lottery* (Hart Publishing, 1997).

⁸⁰ James Goudkamp, 'Professor Patrick Atiyah (1931–2018)' in *Scholars of Tort Law* (n 1) ch 11.

medical law, and so on.⁸¹ That tort law has survived and thrived in scholarship, as in practice, perhaps owes much to its expansion beyond personal injury into liability for pure economic loss and other interests such as the protection of autonomy and privacy — issues with which Atiyah was not concerned. This is no criticism: it is only when personal injury, loss of parental support and disability are properly dealt with by a society that it can move on to thinking about more sophisticated levels of financial or personal protection.

Tony Weir is the final Iconoclast in *Scholars of Tort Law*. Reading Goudkamp and Nolan's summing up, the reader might think that Weir should more aptly be described as a traditionalist. They also describe him as a conservative doctrinalist⁸² and it may be that in his time, when tort scholars were embracing either pragmatism or normative or abstract theories, this swimming against the tide made him seem radical instead of deeply conservative. To Weir, searching for theory was like adolescents searching for the meaning of life instead of experiencing it.⁸³ He was against or cuttingly dismissive of many modern developments: 'the European Union, the European Court of Human Rights, the Law Commission, the "compensation culture", private law theory, economists and economic analysis of law, just for starters'.⁸⁴ Added to that list were no-fault compensation schemes, and any attempt to harmonise the law of different cultures. He believed in 'individual responsibility'. At the same time, he is described as 'often pro-defendant'. Presumably, as with others who espouse this notion, he placed individual responsibility for risks primarily on the plaintiff and lessened a defendant's responsibility for others. Weir was a prolific but concise writer on tort law, with a casebook published in ten editions, dozens of pithy case notes, and acerbic commentary such as this on *White v Jones*: 'While Lord Goff opted for a pocket of liability, regardless of principles, Lord Browne-Wilkinson produced a principle out of his pocket and Lord Mustill found the pocket irreconcilable with any principle.'⁸⁵

As a commentator then, he may not have earned the recognition of direct development of the law that Atiyah identified as academic influence, but it seems that he did perform a role that is rarely acknowledged for legal scholars: that of holding the judiciary to account, not by reference to ill-understood slogans such as 'judicial activism', but by reference to logic, consistency, and coherence of legal principle. The fact that this was done with unusual 'wit and brilliance'⁸⁶, no matter often in the form of withering criticism, does not deflect from its impact. Paula Giliker writes an affectionate account of Weir's scholarship, ranging from his idiosyncratic, provocative case notes, to his casebook and lastly to his work as translator from French, German and Latin texts as a comparative tort lawyer. Giliker says, 'Where would comparative law scholarship be without Weir's

⁸¹ Goudkamp and Nolan (n 6) 28.

⁸² Ibid 32.

⁸³ Ibid.

⁸⁴ Ibid 29, citing Giliker (n 2).

⁸⁵ Tony Weir, *A Casebook on Tort* (Sweet & Maxwell, 10th ed, 2004) 71, commenting on *White v Jones* [1995] 2 AC 207 (HL), quoted by Goudkamp and Nolan (n 6) 30.

⁸⁶ Goudkamp and Nolan (n 6) 30.

excellent translation of Zweigert and Kotz?’⁸⁷ We could go further and ask, ‘Where would the study of tort law be without Weir’s excellent translation?’ There is no doubt that, although he was against modern trends towards harmonisations of law, Weir’s knowledge of comparative law was encyclopaedic and contributed enormously to our knowledge and understanding of the law of other cultures.

What the Iconoclasts had in common was their use of journal articles and monographs, rather than textbooks, to promote their views. Their audience was other scholars, providing a model for the private law scholars of the late 20th and early 21st centuries, particularly in developing fields of law such as the law of restitution or unjust enrichment, which, like tort law in the late 19th century, has itself become a separate subject of study in universities, with its own overarching theories and themes to explain a wide range of disparate instances. Cane, in his overview chapter on legal scholarship,⁸⁸ notes the recent birth of a new substantive area of law during his lifetime, where the theoretical role of scholars such as Robert Goff, Gareth Jones and Peter Birks was pioneering, as well as consolidating and, to some (particularly some judges), iconoclastic. By contrast, the Iconoclasts discussed in *Scholars of Tort Law* were mostly deeply pragmatic, and shared a lack of interest in overarching, abstract theories.⁸⁹

VI Conclusion

Scholars of Tort Law is a book for scholars, whether academics or students, and jurists. It is a book to delve into, whether the reader is interested in specific aspects of the law of torts or a more general analysis, and whether from a jurisprudential, doctrinal, historical or pragmatic viewpoint. The reader will test his or her own approach to legal education and scholarship: what is the role of the academic today when teaching tort law or writing about it? How has it changed from that of the scholar in earlier times? What continuing emphasis should be placed on competing theories of the common law when so much of tort law today involves ‘tort reform’ statutes and their judicial interpretation; that is, working out what the law *is* on a particular issue. Interpretation is an often-frustrating task that nevertheless should not replace the invaluable role of the tort scholar and educator in debating with the lawyers of both the present and the future what the law *should* be. It may reinforce the varied roles of academic scholars and the point of putting pen to paper. At the very least they are needed to make sense of the law as it stands, but perhaps also for a longer lasting role of having some influence on the future application and direction of the law. Certainly, this book will inspire modern tort scholars to aim high, whether as pioneers, consolidators, or iconoclasts.

⁸⁷ Giliker (n 2) 355.

⁸⁸ Cane (n 4).

⁸⁹ Goudkamp and Nolan (n 6) 32.