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articles

Bargaining in the Shadow of the Folk Law: Expanding the
Concept of the Shadow of the Law in Family Dispute Resolution
– *Jonathan Crowe, Rachael Field, Lisa Toohey, Helen Partridge
and Lynn McAllister* 319

Prosecuting Child Offenders: Factors Relevant to Rebutting
the Presumption of *Doli Incapax*
– *Thomas Crofts* 339

Government-funded Health Research Contracts in Australia:
A Critical Assessment of Transparency
– *Nola M Ries and Kypros Kypri* 367

before the high court

Abortion Protests and the Limits of Freedom of Political
Communication: *Clubb v Edwards; Preston v Avery*
– *Shireen Morris and Adrienne Stone* 395

case note

"All Necessary Measures" to Avoid Fragmentation:
Reflections on the UK Supreme Court's 2017 *Al-Waheed* Decision
– *Alyssa Glass* 411

review essay

The Future of Private Property
– *Paul Babie* 433

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Bargaining in the Shadow of the Folk Law: Expanding the Concept of the Shadow of the Law in Family Dispute Resolution

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and Lynn McAllister[¶]

Abstract

The idea that parties bargain in the shadow of the law has been highly influential in research on dispute resolution and family law. Critics have questioned the utility and coherence of the concept, but it continues to be widely accepted. This article draws on an empirical study of access to legal information in a post-separation context to argue for a broader and more realistic understanding of how the shadow of the law influences parties' expectations and strategies in family law matters. Family dispute resolution, we suggest, does not take place in the shadow of the positive law (the law contained in statutes, case law and other formal legal sources), so much as the shadow of the folk law (the law as depicted in informal sources such as online materials and popular media). It follows that there is not just one shadow of the law; rather, there are multiple shadows. These findings hold important implications for government agencies, family dispute resolution providers and others involved in providing information and advice on post-separation issues.

I Introduction

We are said to live in the age of information.¹ At no time in the past have people been able so readily to access information about the law. Initiatives like the

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¹ See, eg, Manuel Castells, *The Information Age: Economy, Society, and Culture* (3 vols, Blackwell, 1996–98).

Australasian Legal Information Institute ('AustLII') website² and similar open-access online repositories have made it possible for anyone with an internet connection to access statutes, case law and secondary legal materials. Government agencies and non-governmental organisations have also made available a huge range of fact sheets, guidebooks and other information to help non-experts understand how the law might apply to their situation. This is especially the case in family law, an area of acute legal need for millions of Australians.

While it is widely acknowledged that informed participation in the legal system is integral to a democratic society, relatively little is actually known about the information use of people during times of legal need.³ Consequently, government agencies, law firms and community groups supporting the legal information needs of individuals and families have a limited evidence-base to inform the design and delivery of support and services. Further, legal service providers — including, for example, lawyers and mediators — also have limited understanding of the sources of information informing their client base.

This article reports on an empirical study of access to legal information in a post-separation context. The study built upon the small, but growing, body of work that explores people's experiences of accessing legal information. Legal information experiences can be considered a subset of legal needs research. Studies in this area have tended to focus on the ways law students⁴ and lawyers⁵ access legal information. The present research extends this body of work to explore legal information experiences from the consumer perspective. The research builds upon the few existing Australian studies in this area, such as Scott's work on how people use the internet to access legal information⁶ and Edwards and Fontana's literature review into the legal information needs of older people.⁷ The study explored the information experiences of callers to the Family Relationship Advice Line, a national telephone service operated by Relationships Australia. The study's focus was not on the outcomes or content of advice that callers received, but rather their experience of identifying and interpreting sources of legal information prior to accessing the service.

The literature on informal dispute resolution and family law has long recognised the influence of what has come to be known as 'the shadow of the law'

² Australasian Legal Information Institute, AustLII <<http://www.austlii.edu.au/>>.

³ Cf Stephanie Davidson, 'Way Beyond Legal Research: Understanding the Research Habits of Legal Scholars' (2010) 102(4) *Law Library Journal* 561; Susan Edwards and Antonia Fontana, *Legal Information Needs of Older People* (Law and Justice Foundation of New South Wales, 2004); Yolanda P Jones, '*Just the Facts, Ma'am?*': A Contextual Approach to the Legal Information Use Environment (PhD Thesis, Information Science and Technology, Drexel University, 2008); Gillian Kerins, Ronan Madden and Crystal Fulton, 'Information Seeking and Students Studying for Professional Careers: The Cases of Engineering and Law Students in Ireland' (2004) 10(1) *Information Research* 208; S Makri, *A Study of Lawyers' Information Behaviour Leading to the Development of Two Methods for Evaluating Electronic Resources* (PhD Thesis, School of Informatics, University College London, 2008); Sue Scott, 'Law Online: How Do People Access and Use Legal Information on the Internet?' (2000) 25(1) *Alternative Law Journal* 24.

⁴ See, eg, Kerins et al, above n 3; Jones, above n 3.

⁵ See, eg, Davidson, above n 3; Makri, above n 3.

⁶ Scott, above n 3.

⁷ Edwards and Fontana, above n 3.

on legal option generation and negotiations outside the courtroom. The term was first coined by Mnookin and Kornhauser in an influential 1979 article in the *Yale Law Journal*.⁸ They used it to refer to the impact of substantive law on informal negotiations and dispute resolution processes, with particular emphasis on family law matters. As Mnookin and Kornhauser observed, one of the primary roles of family law is to provide ‘a framework within which divorcing couples can themselves determine their ... rights and responsibilities’.⁹ This means that, even in informal dispute resolution contexts, the law still provides the implicit backdrop and framework for negotiations. For example, parties are likely to evaluate proposals based at least partly on whether they feel the law entitles them to a more favourable outcome, or whether they would receive a better outcome in court.

Later authors have added sophistication and depth to Mnookin and Kornhauser’s analysis.¹⁰ For example, Jacob points to the importance of the ‘articulation of rights using a legal vocabulary’ and highlights the importance of intervening parties such as lawyers and personal networks in framing family matters as disputes about the law.¹¹ More recently, Batagol and Brown have examined the influence of law on family dispute resolution in Australia, noting the range of factors that frame dispute resolution processes and cautioning against the temptation to overstate the influence of legal principles.¹² Two of the present authors have also recently argued that the influence of law on Australian family dispute resolution needs to be understood through reference to its role in shaping the implicit norms and conventions that constrain and guide the mediation process.¹³

None of this research, however, directly answers the question of how participants in family dispute resolution in the current age of ubiquitous digital information source their information prior to entering the process and use that information to evaluate their options. The world of information available to disputants has changed substantially since Jacob’s work in 1992 and even since Batagol and Brown’s research in 2011. A number of other studies have investigated the sources of legal information used by consumers in family law contexts, but

⁸ Robert H Mnookin and Lewis Kornhauser, ‘Bargaining in the Shadow of the Law: The Case of Divorce’ (1979) 88(5) *Yale Law Journal* 950.

⁹ *Ibid* 950.

¹⁰ The literature on the shadow of the law in family dispute resolution is extensive, but examples include: Becky Batagol and Thea Brown, *Bargaining in the Shadow of the Law: The Case of Family Mediation* (Federation Press, 2011); John Dewar and Stephen Parker, ‘The Impact of the New Part VII Family Law Act 1975’ (1999) 13(2) *Australian Journal of Family Law* 1; Jeremy Feigenbaum, ‘Bargaining in the Shadow of the “Law?” — The Case of Same-Sex Divorce’ (2015) 20 *Harvard Negotiation Law Review* 245; Herbert Jacob, ‘The Elusive Shadow of the Law’ (1992) 26(3) *Law and Society Review* 565; Ray D Madoff, ‘Lurking in the Shadow: The Unseen Hand of Doctrine in Dispute Resolution’ (2002) 76(1) *Southern California Law Review* 161; Marygold S Melli, Howard S Erlanger and Elizabeth Chambliss, ‘The Process of Negotiation: An Exploratory Investigation in the Context of No-Fault Divorce’ (1988) 40(4) *Rutgers Law Review* 1133; Michael J Trebilcock and Rosemin Keshvani, ‘The Role of Private Ordering in Family Law: A Law and Economics Perspective’ (1991) 41(4) *University of Toronto Law Journal* 533; John Wade, ‘Forever Bargaining in the Shadow of the Law — Who Sells Solid Shadows? (Who Advises What, How and When?)’ (1998) 12(3) *Australian Journal of Family Law* 256.

¹¹ Jacob, above n 10, 568.

¹² Batagol and Brown, above n 10, 56–62.

¹³ Rachael Field and Jonathan Crowe, ‘Playing the Language Game of Family Mediation: Implications for Mediator Ethics’ (2017) 35(1) *Law in Context* 84.

without looking in detail at the surrounding information experiences.¹⁴ There is therefore a lack of understanding in the existing literature about exactly how legal information influences negotiations about family matters in the contemporary context. The study reported here aimed to fill this gap by generating primary empirical research about the legal information experiences of participants in family dispute resolution. The information gathered through this research then helps us better to understand the sense in which family dispute resolution may be said to take place in the shadow of the law.

Our analysis of the study data exposes the current conception of the shadow of the law in the family dispute resolution literature as incomplete and insufficient. In particular, our results show that individuals acquire legal information of varying levels of reliability and credibility by relying on a range of formal and informal sources. Online sources are particularly influential in shaping parties' understanding of the legal framework, while discussions with family and friends also play an important role. Professional legal advice, by contrast, plays a relatively minor role for many participants. A significant proportion of parties do not or cannot access professional legal advice, while those who do access such advice do not necessarily regard it as the more important factor in guiding their perceptions of the law. The upshot is that while parties' perceptions of the law play an important role in framing their expectations, these perceptions are primarily based on informal sources.

This article therefore argues for a broader understanding of the concept of the shadow of the law and a more realistic conception of how that shadow influences the decision-making of parties in family law disputes. Family dispute resolution, we suggest, does not take place in the shadow of the positive law (the law contained in statutes, case law and other formal legal sources), so much as the shadow of the folk law (the law as depicted in informal sources such as online materials and popular media). Furthermore, there is not just one shadow of the law, reflecting the current state of the positive legal materials; rather, there are multiple shadows, depending on from where the parties are gaining their information. Positive law, as generally understood, is a monistic concept; the folk law, however, is pluralistic, raising the prospect that significantly different understandings of the law may exist for parties from distinct socio-economic or cultural backgrounds.

The article begins by discussing the concept of the shadow of the law, how it has been developed to date and some of the shortcomings of the current literature. We then explain the methodology and design of the empirical research project that forms the foundation for this article, before analysing and discussing the project data as it relates to the participants' experiences of identifying and accessing legal information about their dispute. We conclude that a broader conception of the shadow of the law is needed to reflect how parties to family dispute resolution access and use information. These findings hold important implications for government

¹⁴ See, eg, Rae Kaspiew et al, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, 2009) app C1, 10. Similarly, Bagshaw et al in their 2011 study identify the sources of information used by those experiencing family violence, in order to evaluate user satisfaction with those services: Dale Bagshaw et al, 'The Effect of Family Violence on Post-Separation Parenting Arrangements: The Experiences and Views of Children and Adults from Families Who Separated Post-1995 and Post-2006' (2011) 86 *Family Matters* 49.

agencies and family dispute resolution providers, as well as others who provide information about post-separation arrangements.

II The Shadow of the Law

The notion of the shadow of the law is important to understanding how parties to family matters access and use legal information in the course of their dispute.¹⁵ As noted above, the concept was introduced by Mnookin and Kornhauser as part of an investigation into how substantive legal doctrine impacts the bargaining behaviour of divorcing couples; in other words, how legal information and advice influences decision-making about family arrangements. Mnookin and Kornhauser posit, first, that '[d]ivorcing parents do not bargain over the division of family wealth and custodial prerogatives in a vacuum; they bargain in the shadow of the law';¹⁶ and, second, that the parties' understanding of the law itself, along with their access to predictive advice about their prospects in court, provide each party with implicit expectations and potential bargaining chips in out-of-court negotiations.¹⁷

Mnookin and Kornhauser develop a bargaining model to illustrate the influence of the shadow of the law on the parties' decision-making in family dispute resolution.¹⁸ The model consists of five elements: (1) the parties' preferences; (2) the bargaining chips created by the law and predictive advice about the parties' prospects if the matter went to court; (3) the degree of uncertainty concerning the legal outcome if the parties go to court, which is linked to the parties' attitudes towards risk; (4) transaction costs and the parties' respective abilities to bear them; and (5) strategic behaviour.

The conception of the shadow of the law advanced by Mnookin and Kornhauser relies primarily upon the predicted outcome that would be imposed by a court if a judge were asked to decide the matter according to the law. However, legal rules are often complicated, ambiguous or discretionary and this provides 'a bargaining backdrop clouded by uncertainty'.¹⁹ The uncertainty of the law means that the bargaining influence of the shadow of the law is fluid. For example, uncertain discretionary standards affect the relative bargaining position of each party because their respective attitudes to risk and their capacity to bear transaction costs may be different. In this way, the shadow of the law can work to highlight the parties' different bargaining strengths and weaknesses in terms of how they weigh up the risks and opportunities presented by the potential of their matter going to court. Mnookin and Kornhauser suggested that for this reason the model must be taken as a whole if it is to illuminate how the legal shadow influences the parties and their approach to assessing various options for resolution of their dispute.²⁰

¹⁵ For discussion, see Laurence Boule and Rachael Field, *Australian Dispute Resolution Law and Practice* (LexisNexis, 2017) ch 11; Olivia Rundle, 'Barking Dogs: Lawyer Attitudes Towards Direct Disputant Participation in Court-Connected Mediation of General Civil Cases' (2008) 8 *Queensland University of Technology Law and Justice Journal* 77, 87.

¹⁶ Mnookin and Kornhauser, above n 8, 968.

¹⁷ *Ibid.*

¹⁸ *Ibid* 966.

¹⁹ *Ibid* 969.

²⁰ *Ibid* 970.

Importantly, the bargaining model suggested by Mnookin and Kornhauser was not intended to be a complete or definitive theory. The concept of the shadow of the law has entered the dispute resolution vernacular in a range of settings beyond family law, but the authors' intentions were more modest. Mnookin and Kornhauser's primary aim was to offer a predictive theory of family dispute resolution, enabling 'a broader analysis of the probable consequences' of legal rules and procedures in informal bargaining contexts.²¹ References to the shadow of the law in the dispute resolution and family law literature have tended to extend its significance beyond this original predictive and probabilistic context, viewing it as a general theory of the role of law in informal bargaining.²²

More recently, however, this generalised conception of the shadow of the law has been subject to critique based on its accuracy and usefulness as a model of family dispute resolution. First, it has been argued that this understanding of the theory overstates the salience of the law in informal dispute resolution contexts. Second, it has been argued that the theory incorrectly assumes that the parties can reach a determinate or accurate understanding of what a court would do. The remainder of this section considers each of these criticisms in turn. Our aim in what follows is to problematise the notion that prevailing conceptions of the shadow of the law provide an accurate understanding of the expectations and strategies of the parties in dispute resolution. The remainder of the article then sets the foundations for a more realistic and useful account of the concept.

A *The Salience of the Law*

A number of authors have suggested that the concept of the shadow of the law places too great an emphasis on the role of the law by assuming that the law is relevant in all negotiations.²³ In other words, the central role given to the law in private negotiations has been challenged. Certainly, the law plays a significant part in many negotiations and particularly in contractual or commercial matters where the dispute is framed in an explicitly legal way. However, the importance of the law and the relative emphasis that it may be given in the minds of the negotiating parties is plausibly influenced by a range of other factors, such as the parties' respective needs and interests; any differences in negotiating power;²⁴ any unwillingness a party may have to resort to court; ambiguities in the law; moral principles and values; issues of blame and fault; and the role of gender.²⁵

²¹ Ibid 996.

²² Cf Margaret Thornton, 'Sex Discrimination, Courts and Corporate Power' (2008) 36(1) *Federal Law Review* 31; Ruth Charlton, 'Shared Parenting Laws See Subtle Changes in Mediation Dynamics' (2007) 45(3) *Law Society Journal* 30.

²³ See, eg, Batagol and Brown, above n 10, 56–8; Melli, Erlanger and Chambliss, above n 10, 1147; Jacob, above n 10, 566; Wade, above n 10, 290.

²⁴ Cf Rachael M Field, 'Mediation and the Art of Power (Im)Balancing' (1996) 12 *Queensland University of Technology Law Journal* 264; Rachael Field and Jonathan Crowe, 'The Construction of Rationality in Australian Family Dispute Resolution: A Feminist Analysis' (2007) 27 *Australian Feminist Law Journal* 97.

²⁵ Cf Rachael Field, 'Family Law Mediation: Process Imbalances Women Should be Aware of Before They Take Part' (1998) 14 *Queensland University of Technology Law Journal* 23; Patricia A Gwartney-Gibbs and Denise H Lach, 'Gender and Workplace Dispute Resolution: A Conceptual and

For example, Batagol and Brown found that the content of the positive law had a limited impact on mediated agreements in family matters, and that the shadow of the law was most relevant where legal proceedings were imminent or where legal advice had been received.²⁶ In family disputes where lawyers are not involved and the parties do not contemplate going to court, the shadow of the law may therefore be outweighed by other social, cultural and economic factors. Wade has likewise suggested that the shadow of the law is not relevant to parties who are not working within a directly applicable statutory framework and who do not seek to add judicial effect to their agreements.²⁷

Mnookin and Kornhauser, as we saw above, developed their original model of the shadow of the law in the context of family dispute resolution. However, small commercial or contractual disputes may not have any realistic prospect of getting to court and lawyers may not be consulted. Parties may therefore not pay any significant attention to the content of the law, preferring to reach a pragmatic business-oriented or interest-based outcome. A similar point could apply to family or other disputes where the parties are motivated to a significant degree by personal, religious or cultural values. For example, parents who are both from a devout religious background may view the law as relatively unimportant in resolving their dispute. Consequently, parties who rely upon moral, commercial or interest-based agreements may choose not to bargain in the shadow of the law.

B *The Uncertainty of the Law*

The concept of the shadow of the law proposed by Mnookin and Kornhauser has also been criticised for being too rigid and for failing to recognise the uncertainty and plurality of the law.²⁸ This criticism is focused on the way in which the shadow of the law theory takes for granted that there is one interpretation of the law that can be provided with certainty. As almost every practising lawyer will attest, the reality is that the law is far more contingent. This is because, for example, the law is often discretionary; legal sources often require interpretation and different interpretations are possible; legal outcomes (particularly in family matters) are often situational and depend upon the decision-maker's view of the facts; and legal advice is often a synthesis of a range of different sources, making it a somewhat probabilistic and uncertain exercise.

The parties' understanding of the law can also be influenced by a lack of access to legal representation and information, as well as by popular perceptions or the media. Indeed, this situation seems to be the norm for participants in family dispute resolution, rather than the exception, as we suggest later in this article. A further contributor to the uncertainty of the law therefore lies in the parties' level of understanding or misunderstanding of the legal framework. People can only bargain

Theoretical Model' (1994) 28(2) *Law and Society Review* 265; Leigh Goodmark, 'Alternative Dispute Resolution and the Potential for Gender Bias' (2000) 39(2) *The Judges' Journal* 21.

²⁶ Batagol and Brown, above n 10, 192–4.

²⁷ Wade, above n 10, 290.

²⁸ See, eg, Batagol and Brown, above n 10, 58–62; Melli, Erlanger and Chambliss, above n 10, 1143–7; Trebilcock and Keshvani, above n 10, 551.

effectively in the shadow of the law if the law creates a reliable and predictable shadow for them. The influence of the law's shadow (as both a bargaining chip and a baseline for negotiations) is therefore of most benefit to parties who have access to sound legal advice, while others may find that the shadow cast by the law means they are bargaining in the dark.²⁹ Consequently, power imbalances, lack of access to legal information, an inability to afford lawyers, and inexperience in negotiation all affect the ability of a party to bargain effectively and strategically in the shadow of the law.

Additionally, Melli, Erlanger and Chambliss question whether court orders actually constitute the shadow of the law for informal dispute resolution.³⁰ For example, in the context of mandatory mediation in various legal settings,³¹ and increases in private settlement, an additional and alternative shadow is cast by the private agreements of the parties. Of course, the obvious issue with this shadow is that private settlements are often confidential and so its influence is limited to legal and dispute resolution practitioners (and the parties, if they are repeat participants) referring to their knowledge of past cases. Nevertheless, it is worth considering that the shadow of the law concept may need further development to recognise that multiple shadows may arise from multiple perspectives. This suggestion is explored in further depth in the final section of this article.

III Study Design and Methodology

We saw in the previous section that the notion of the shadow of the law has moved a significant way beyond what was originally envisaged by Mnookin and Kornhauser. There are credible challenges to the concept of the shadow of the law, and the term itself is contested and capable of different interpretations. However, much of the literature on dispute resolution and family law continues to assume the relevance and coherence of the concept. New understandings of the shadow of the law are therefore important to dispute resolution theory and practice, and these new understandings must be explicitly articulated so the term can be used with meaning and clarity. Our aim in the remainder of this article is to draw upon empirical data from a study of parties in family dispute resolution to inform a more nuanced and layered understanding of the concept.

The empirical research that forms the basis for our analysis was gained through an exploration of the information experiences of family dispute resolution participants. Funding for the project was provided by a grant from the Australian Institute of Judicial Administration. An interdisciplinary project team was formed, with researchers from both law and information science disciplines. As explained below, the information experience approach, pioneered by some of the team

²⁹ Cf Rachael Field, 'Participation in Pre-Trial Legal Negotiations of Family Law Disputes: Some Issues for Women' (1998) 12(3) *Australian Journal of Family Law* 240, 244.

³⁰ Melli, Erlanger and Chambliss, above n 10, 1143–7.

³¹ See, eg, *Family Law Act 1975* (Cth) s 60I; *Family Law Rules 2004* (Cth) sch 1 pt 2. For further discussion, see Melissa Hanks, 'Perspectives on Mandatory Mediation' (2012) 35(3) *University of New South Wales Law Journal* 929; Vicki Waye, 'Mandatory Mediation in Australia's Civil Justice System' (2016) 45(2–3) *Common Law World Review* 214.

members themselves in previous work,³² was chosen for the unique analytical perspective it brings to the concept of legal information. Information experience has emerged as a distinctive domain of research from the discipline of the information sciences. As Bruce and Partridge observe, it adopts a ‘holistic approach to understanding peoples’ engagement with information’, taking ‘into account the interrelations between people and their broader environments in a manner which considers people and their world as inseparable’.³³

The purpose of this study was to explore and understand the ways people experience a particular phenomenon. Consequently, a qualitative and interpretive research approach was employed. In-depth interviews seek to understand the world from the participants’ perspective and to reveal the meaning of these experiences from the participants’ point of view.³⁴ Kvale described interviews as ‘a conversation that has a structure and a purpose determined by the one party — the interviewer’.³⁵ Through this conversation, the interviewer has a ‘unique opportunity to uncover rich and complex information’,³⁶ and the participants can express their story using their own words. In-depth interviews were identified as the most appropriate approach for the study because of their suitability in obtaining data about people’s views, opinions, ideas and experiences.³⁷

Participants were drawn from people who had called the Family Relationship Advice Line, a national telephone service funded by the Federal Government and operated by Relationships Australia.³⁸ The Advice Line is a source of telephone advice for families on relationship issues, particularly at the time of separation. It is not designed to provide legal advice, but rather it can offer: general information about the family law system; advice on the process of separation; support and advice about how to approach post-separation parenting; and referrals to other providers such as telephone dispute resolution, Family Relationship Centres and other social support services.³⁹ The participants were screened to ensure that all were adults and currently involved in the negotiation of post-separation parenting arrangements.

³² See, eg, Christine Bruce and Helen Partridge, ‘Identifying and Delineating Information Experience as a Research Domain: A Discussion Paper’ (Social Media and Information Practices Workshop, University of Borås, Sweden, 10–11 November 2011) <<http://eprints.qut.edu.au/47204/>>; Sharon Bunce, Helen Partridge and Kate Davis, ‘Exploring Information Experience Using Social Media during the 2011 Queensland Floods: A Pilot Study’ (2012) 61(1) *Australian Library Journal* 34; Christine Yates, Helen Partridge and Christine Bruce, ‘Exploring Information Experiences through Phenomenography’ (2012) 36(112) *Library and Information Research* 96; Christine Yates et al, ‘Exploring Health Information Use by Older Australians within Everyday Life’ (2012) 60(3) *Library Trends* 460.

³³ Bruce and Partridge, above n 32, 1.

³⁴ Steinar Kvale and Svend Brinkmann, *InterViews: Learning the Craft of Qualitative Research Interviewing* (SAGE, 2nd ed, 2009) 327.

³⁵ Steinar Kvale, *Doing Interviews* (SAGE, 2007) 7.

³⁶ Robert Y Cavana, Brian L Delahaye and Uma Sekaran, *Applied Business Research: Qualitative and Quantitative Methods* (Wiley, 2001) 138.

³⁷ Hilary Arksey and Peter Knight, *Interviewing for Social Scientists* (SAGE, 1999) 32–3.

³⁸ Relationships Australia is a community-based, not-for-profit Australian organisation that provides relationship support services for individuals, families and communities through service providers in each Australian state and territory: Relationships Australia, *Welcome to Relationships Australia* (2017) <<https://www.relationships.org.au/>>.

³⁹ Australian Government, *Family Relationship Advice Line* <<https://www.familyrelationships.gov.au/talk-someone/advice-line>>.

There was no requirement that legal proceedings be anticipated or on foot, which was important to uncover a range of different information experiences.

After receiving advice from the Family Relationship Advice Line, callers were asked about their willingness to participate in a research project and, if they agreed, were transferred by phone to a member of the research team for the interview or to arrange a later call-back time. Interviews were anonymous and participants were offered a small gift voucher as an acknowledgement of their time spent taking part in the interview. Ethical clearance was obtained through the Queensland University of Technology and the project was reviewed internally through the processes of the project partner.⁴⁰

Participants were selected based on their interest in proceeding, rather than any demographic criteria. The resulting sample comprised twenty participants, including thirteen men and seven women. Six of the interviewees had accessed a mediation service. A sample size of twenty participants is a standard-to-large sample size for a thematic analysis. However, in keeping with the literature on qualitative research, the focus was on obtaining data saturation rather than achieving a defined number.⁴¹ Data was collected through semi-structured interviews. Kvale and Brinkmann define the semi-structured interview as a ‘planned and flexible interview with the purpose of obtaining descriptions of the life world of the interviewee with respect to interpreting the meaning of the described phenomena’.⁴² Interviews were conducted by telephone and were audio-recorded. One research team member undertook all interviews to minimise variations in the interview process. Most of the interviews were conducted immediately following the warm transfer from the advice-line personnel, with only three being rescheduled to suit the interviewees. The duration of interviews ranged from 20 to 50 minutes.

A pre-defined set of questions was developed to stimulate discussion, but the questions were altered dynamically to facilitate the conversation in keeping with semi-structured interview guidelines.⁴³ Questions were asked to better understand what sources of information participants had used to assist in post-separation parenting arrangements; what they found useful or not useful; what they knew about post-separation parenting arrangements before they started looking for information; and what types of information they think might have better assisted them. A second tranche of questions was created for participants who had used a mediation service, asking specifically for their experiences in relation to that process. Questions were asked to mediation participants to better understand what sources of information they accessed in the lead up to the mediation process; what they found useful or not useful when engaging in the process; and what other information they would have liked to have. In addition, follow-up and probing questions were used to explore the participant’s responses and experiences. These included: ‘Could you explain that further?’, ‘Could you tell me more about that?’ and ‘Could you please give me an example?’

⁴⁰ Queensland University of Technology, University Human Research Ethics Committee, Approval Number 1300000834.

⁴¹ For discussion of sample size, see John W Cresswell, *Qualitative Inquiry and Research Design: Choosing among Five Approaches* (SAGE, 3rd ed, 2013) 157.

⁴² Kvale and Brinkmann, above n 34, 327.

⁴³ *Ibid* ch 7.

The recorded data was de-identified (with a pseudonym being assigned to each participant) and transcribed verbatim for thematic analysis. Thematic analysis is a method for identifying and analysing patterns or themes within the data that are considered to be important to the description of the phenomenon being studied.⁴⁴ Cavana, Delahaye and Sekaran note that thematic analysis is undertaken to ‘identify the underlying themes, insights and relationship within the phenomenon being researched’.⁴⁵ The data analysis process was an iterative one, constantly grounded in the interview data. The researchers spent time listening to the audio-recordings, coding and reviewing the transcripts, with the aim of identifying the emerging themes. Additionally, coding was used to determine the similarities, differences and potential connections among keywords, phrases and concepts within and among each interview. This included concepts and themes directly and indirectly revealed by the interviews. For example, Rubin and Rubin note that researchers ‘may discover themes by looking at the tension between what people say and the emotion they express’.⁴⁶

Data was analysed using first and second cycle coding methods. In the first cycle, structural coding was used to allocate basic labels to the data that would provide a topic inventory.⁴⁷ In the second cycle, focused coding was used to categorise the data according to thematic or conceptual similarity, and eventually to develop the most prominent or significant categories from the data.⁴⁸ A codebook was developed and maintained during data analysis, which contained a list of all the codes that had been created, together with their descriptive meaning. As new codes emerged during the analysis, these were added as necessary following discussion among the research team members.

The findings presented in the following section focus specifically on aspects of the interviews that are salient to the participants’ experiences of finding and accessing information about the law in the course of negotiating post-separation parenting arrangements. The interview transcripts revealed a range of distinctive information experiences described by the participants, but a number of recurring themes were identified. These themes, considered together, cast doubt on traditional understandings of the shadow of the law, instead suggesting a more pluralistic and socially grounded picture of how post-separation parties experience the search for legal information.

IV The Nature and Sources of Legal Information

The interview transcripts revealed three distinct themes concerning the participants’ experiences of finding and accessing legal information in a post-separation parenting context. The first theme concerns the complexity and ambiguity of the informational sources available. Far from seeing the law as a monistic structure yielding a single

⁴⁴ Virginia Braun and Victoria Clark, ‘Using Thematic Analysis in Psychology’ (2006) 3(2) *Qualitative Research in Psychology* 77.

⁴⁵ Cavana, Delahaye and Sekaran, above n 36, 69.

⁴⁶ Herbert J Rubin and Irene S Rubin, *Qualitative Interviewing: The Art of Hearing Data* (SAGE, 2nd ed, 2005) 210.

⁴⁷ Johnny Saldaña, *The Coding Manual for Qualitative Researchers* (SAGE, 2nd ed, 2013) ch 3.

⁴⁸ *Ibid* ch 5.

right answer, parties spoke about the quest for legal information as a process of engagement with a plurality of ambiguous and often conflicting sources. A second theme concerned the importance of informal sources in the quest for legal information. Participants reported relying heavily on friends, family, online sources and popular media as ways to access legal understanding. These sources were preferred to more formal and traditional methods of gaining legal advice due to their accessibility, immediacy and familiarity.

A third and related theme concerned the relatively low importance that participants placed on formal sources of legal advice in relation to their situation. A consistent theme in the interviews was that parties either did not obtain legal advice or did not heavily rely on it in identifying and evaluating their options. Participants gave a range of explanations for not accessing or relying on legal advice, including cost, waiting times or dissatisfaction with their experiences. Even where parties obtained legal advice, they often viewed it as merely one source of information along other informal sources. A number of participants reported discounting legal advice in favour of more accessible, digestible or trusted sources of legal information. A common experience of legal information, as revealed by this research, is not determinate and reliable advice from a lawyer, but rather dynamic and ambiguous data drawn from a diverse range of social sources.

A *Complexity and Source Selection*

Several participants in the study depicted the search for information as a journey or quest where a range of conflicting or confusing sources presented a challenge to obtaining a clear picture. Almost all participants reported beginning their quest for information with an internet search, either alone or in conjunction with other informal sources. Some participants were satisfied with the levels of online information and reported relying on it almost exclusively, such as Noel, who commented:

I found more than enough on the internet ... I virtually had everything I really needed. In between the Family Care Centre, my solicitor, and the internet, I found all my answers really ... There's more than enough information out there, there's more than enough sorts of people to help you out there, there's more than enough.

More commonly, however, participants reported feeling confused or overwhelmed by the quantity of online materials. For example, Fran recounted that:

I went on the Family Law Court website ... it came up with a phone number so that's why I called them ... I really couldn't find what I was searching for. To be perfectly honest, I find those websites extremely difficult to navigate ... I find them really hard to work out.

Ingrid described a similarly confusing search for information:

I had spoken to Legal Aid but then I was recommended on a website, and also by someone who's been through something similar, that speaking to Family Relationships actually helped them move forward better than anything else did ... they're going to have someone call me with regards to what I need to

do legally, which has been good. ... I think I did Google early on to what was necessary ... I found a lot of it wasn't really clear.

Conflicting sources of information led several participants to feel stressed, tired or overwhelmed. Ingrid reported that 'also, they gave me the number of the Family Mediation Council which I was going to ring today, but then because I've only just done the other thing today, I felt like I needed a bit of a breather'. Bobby similarly observed that 'I've been asking people and it's just been confusing and people are saying different things'. Darius reported a similar experience, reflecting that:

I couldn't decide which one is not useful and which one is useful — because so many information, I'm currently kind of overwhelmed, you know? I have so many issues that I have to deal with, and I still couldn't figure out which information is helpful and which information is not.

The confusing and overwhelming nature of the sources often led participants to fall back on more personalised sources of advice in an attempt to obtain clarity or reassurance. Bobby expressed this desire directly:

I haven't really understood a great deal of everything. And I guess that I sort of have to sit down with someone, face-to-face and sort of understand my rights with child support, child custody and my financial ... you know, what I'm entitled to with money. So if someone just sat with me face-to-face, I think I could understand a lot more. But as I said before, I'm not really understanding a lot from the internet.

Subsequently, Bobby described the reassurance she felt when receiving telephone advice from a Family Relationships Centre:

I'm sort of really not understanding a lot of what I'm reading ... But the lady that I spoke to yesterday from the Family Centre, she was quite thorough with what she was telling me, so I could sort of understand a little bit more as to what I was reading on the internet ... I was quite terribly relieved that I had someone that was going to call me back in a week or two and sort of guide me and advise me as to what my rights are.

Ethan also reported that he felt a strong desire for personal interaction, both to obtain more concrete information and for human contact:

I just found a phone number and called ... I just knew I needed to call someone and I just wanted to find a phone number to be honest. I didn't really care about the information ... I'm in the military so we have easy access to legal advisors. So all I have to do is just ring them up ... I've just got to ring them up and they'll give me the appropriate information.

B *The Importance of Informal Sources*

The search for relatable and concrete information led participants to rely on the advice of friends, family and community leaders, particularly those who had undergone similar experiences. Darius recounted that:

I used Google search ... I talked to my friends ... he advised me to make some calls ... and advised me to seek information online and from government

website ... It's always nice to have somebody who you actually feel close to, to talk about all these issues.

According to Ethan, friends and acquaintances were an important source of information, enabling him to bypass the complexity of other sources:

[P]retty much word-of-mouth from other people, asking people and all that sort of stuff, those that have been through this stuff before ... mainly people who've gone through this before, just what I'm entitled to and, I don't know, just all the other stuff I suppose. I just asked them — there's people at work, people I know from friends, and I'd ask people. I'd find someone that's going through this, so then I'd go and approach them. ... They've done the research and I've just listened to them because they've obviously researched it and they've just passed it on to me.

Kerry similarly recounted relying on friends and family for relatable information:

Friends are vital, you know, because they've been through it and there's no doubt, you take a great deal of information through them. ... [M]y brother has been through it as well many, many years ago and you know, you take notice of what they have to say.

Some participants reported relying on information from friends or family which included substantive (and potentially unsound) advice about legal options or strategies. For example, Vinnie reported initially consulting websites 'like the Centrelink website and the Child Support', but found they contained similar information, leading him to rely on informal advice from someone with prior experience:

I mean they're all linked pretty closely together so they had some pretty good articles on there. ... [B]ut I had advice from a friend of mine who is a mortgage broker to just go through and document that we want to share 50/50 custody of our son ... I'm in the middle of organising to see, probably, I think to see a mediator to draw up a parenting plan. I'm pretty sure that's through Relationships Australia.

Friends and family were influential sources of information for many participants, but other community sources also played a role. Noel reported that:

I believe first and foremost, I went to my solicitor when this happened and we just had a good old chat ... And then I think from there, I researched on the internet, 'Mediation Centres' near me. And from memory, the Catholic Care Centre popped up and some others as well, but I picked up one that was close to me. And being a Christian, I thought I'd go to a Catholic one, it's a good idea, so why not. And it went from there. ... [T]here was a receptionist was quite handy at the Catholic Care Centre, and that's what I've asked ... I asked her a couple of questions, I said 'Look, how does this work? What's it all about?' and she gave me some pointers on how it works.

Similarly, Darius related that '[a]ctually initially, I talked to my pastor. ... My pastor actually referred me to the Church Counselling Service ... after three [free?] counselling service ... he actually offered me some information and suggestions.'

A further source of information reported by multiple participants was news reports or other popular media. According to Tina:

I think it was on the television or ... I know it's a media ... I think it's on television that there are a couple that separate and then she doesn't know what to do. So, it was introduced to her by a best friend about the Family Relationships. So yeah, that's what I saw ... that's how I saw Family Relationships. That's how I started searching through the website. And the Family Relationships was ... I think they arranged me to call ... someone to call me about the legal side.

Ethan also reported forming beliefs about his legal options and position based on a combination of observing other people's experiences with the process and drawing on television or media depictions:

I knew that I was entitled to my son. And as for involvement, I knew I had to pay child support for the times that he wasn't with me, which is fair enough. That's pretty much about it ... seeing other people's relationships ... through what other people's relationships went through and learn from them, and just stuff you see on the TV or, I don't know, you read about it online or in the paper ... I kind of had a clear-cut picture of what I had to do ... I know there is information out there, there's plenty of websites, you know, dads' rights websites — I know they exist.

C *The Role of Legal Advice*

Participants reported not obtaining formal legal advice for a variety of reasons, including lack of financial resources and timeframes. For example, Bobby said 'I haven't spoken to any solicitors as yet ... they require money which I don't have. So mainly it's been information from friends and also the internet'. Steve reported: 'I did get some advice through a solicitor, but in the end Legal Aid was rejected. Um, however I'd spoken to enough people and called enough helplines and things to know where I stood. So I represented myself.' Elle expressed frustration with the waiting times, saying: 'I need some legal advice but I have to wait for the lawyer to call me, so it's just the timeframe.'

Other participants reported seeking formal legal advice at some point in the process. Darren, for example, reported that:

I've spoken to a lawyer, um I've made some enquiries through Relationships Australia um and ended up at the Family Health Centre, or whatever it is, um, which is where I got put onto you. That's sort of the only information I've gathered so far.

This reliance on legal advice as merely one source among others was reported by several participants. This may reflect the limited time and attention that lawyers can devote to each matter, particularly in a Legal Aid context. David, for example, reported on relying on advice from Legal Aid alongside other sources:

I've called Legal Aid and I have called a few like help ... men's helplines and stuff like that and they have given me a bit of information ... It has given me an understanding of what I need to do because this is the first time ... so everything so far has been really useful. ... I had to look for it and like call

up, like certain phone numbers like men's helplines and stuff to put me in the right direction.

Tom also recounted a similar experience:

Just the internet, and I just started Googling stuff. And then I did speak to a friend who actually works for Legal Aid, he's a lawyer for Legal Aid and I gave him a call and asked him for advice ... I couldn't get onto him first actually, but yeah, I tried to get onto him and then I called the ... what was the original place, Family Relationships, yeah, yeah, that — I called that line and then they've put me onto the place at Tweed, they gave me their number to make an appointment for a mediation time.

It is notable that formal legal advice, where obtained, was often not regarded as the single or most authoritative source of information. In some cases, participants reported discounting or overriding legal advice based on what they viewed as more helpful or concrete advice from other sources. Steve reported becoming frustrated with formal legal advice and turning to informal sources (with questionable results):

I, again, wasted a lot of time with this Legal Aid solicitor until I spoke to my cousin, who um had been in a similar situation and she, she basically advised me to not waste time, that it's ... that it is quite easy and acceptable to represent yourself.

Kel also reported representing herself due to dissatisfaction with her lawyer:

My lawyer was a total a-hole and he was horrible, and he like ... but I had to pay him up 'til ... 'cause I applied for Legal Aid, so I actually had to pay him money to represent me and ... well me, because the father had our eldest child and he wouldn't return him back into my care. So I was fighting to get my son back. ... And, yeah, he was just an a-hole, so yeah, I represented myself after I told him to go jump.

A similar story was told by Vinnie, who sought legal advice, but found himself dissatisfied with his lawyer's adversarial outlook:

A few weeks ago, I did go and see a lawyer and I guess he was trying to get the best outcome for me. But I found the whole ... I don't know, like table banging 'We'll get this for you, we'll get that for you', that probably wasn't really what I was looking for ... I was seeing a private lawyer company. I didn't find that helpful, but all the government-type helplines have been very, very helpful. I've only been in contact with Relationships Australia this week so yeah, I haven't had ... didn't receive any pamphlets or information packs or anything.

V Bargaining in the Shadow of the Folk Law

The traditional conception of the shadow of the law suggests that parties enter into family mediation with some awareness of the applicable legal rules. These rules then supply the implicit framework for the conduct of the negotiations. However, the interview responses analysed above present a more complex picture. First, parties to family dispute resolution often lack a clear conception of the options open to them due to a multiplicity of conflicting or overlapping sources. This tends to lead to choices to rely on a particular source over others — based not necessarily on its

reliability, but on its accessibility or clarity in the advice provided. Several participants reported a preference for telephone or face-to-face advice over more impersonal sources of information.

Second, and relatedly, participants in family dispute resolution do not bargain in the shadow of the law so much as in the shadow of the folk law: that is, popular or informal understandings of the law that may or may not reflect the positive legal rules. The role of informal sources, such as websites, friends and family, religious or community leaders, and popular media is more prominent for many participants than formal legal advice. Even where legal advice is sought, it is often viewed as another source of information alongside more informal avenues, rather than a single authoritative point of contact. This suggests that the concept of the shadow of the law, insofar as it applies to family dispute resolution, is more complex and polycentric than is sometimes thought.

Participants in the study consistently expressed a desire to gain information about the legal framework for their dispute, but there was a marked inconsistency and complexity in the methods used to gain this information. Websites, friends and family, community sources, and popular media all played a role. Legal advice was sought in a number of cases, but it was rarely the single most authoritative source of advice. Rather, participants seem to have built up a general understanding of the legal framework by piecing together information from a range of formal and informal sources. This information backdrop then provides the context for their participation in family dispute resolution.

It is therefore not the case that participants in family dispute resolution bargain in the shadow of the law, at least if this is understood as meaning that the positive law provides the implicit baseline for negotiations. Nor does the positive law serve as a meaningful bargaining chip for many parties. Rather, parties bargain in the shadow of the folk law — being an understanding of the law that they gain from a multiplicity of formal and informal sources. This has a number of significant consequences. First, different parties may have access to different sources of information, meaning that the folk law is not univocal. There may be multiple shadows being cast on different parties, who may therefore approach the process with contrasting or conflicting expectations.⁴⁹

Second, the socio-economic, cultural or religious backgrounds of the parties may make a difference to their lived information experiences and therefore their expectations for post-separation arrangements. This has the potential to amplify the role of cultural or other differences in the family dispute resolution process.⁵⁰ As two of the present authors have argued elsewhere, it also has the potential to create or exacerbate power imbalances in family dispute resolution, where the expectations of one party lie closer than those of the other party to the implicit values and

⁴⁹ Cf Field and Crowe, above n 13, 89–91.

⁵⁰ See generally Morgan Brigg, 'Mediation, Power, and Cultural Difference' (2003) 20(3) *Conflict Resolution Quarterly* 287; Samantha Hardy and Olivia Rundle, 'Applying the Inclusive Model of Ethical Decision Making to Mediation' (2012) 19 *James Cook University Law Review* 70; Siew Fang Law, 'Culturally Sensitive Mediation: The Importance of Culture in Mediation Accreditation' (2009) 20(3) *Australasian Dispute Resolution Journal* 162.

expectations of the mediator.⁵¹ For example, where the mediator is a trained lawyer, a party whose expectations reflect the shadow of the positive law may appear better prepared, more realistic or more rational than a party whose expectations reflect a different range of information experiences. This creates the potential for implicit or unconscious bias to infiltrate the process.

Third, where popular understandings of the law differ from the law itself, it is the popular understandings and not the positive law that provide the framework for the dispute.⁵² This is particularly significant where popular discourse reflects an outdated or inaccurate view of the legal framework. For example, several participants in the study used outdated language such as ‘child custody’, ‘shared custody’ or ‘visitation rights’ to describe the legal framework applicable to post-separation parenting matters.⁵³ This provides an example of popular discourse lagging behind the terms of the *Family Law Act 1975* (Cth), which refers to concepts such as ‘parenting orders’ and ‘shared parental responsibility’.⁵⁴ Several participants also referred to their ‘rights’ or ‘entitlements’ in terms of access to children,⁵⁵ using language at odds with the current child-centred legislative framework.⁵⁶

This suggests that legal amendments aimed at shifting the focus of family law matters towards the best interests of the child, as opposed to the rights or entitlements of the parents, may have limited effect on the way that family dispute resolution is framed or understood by the parties. Participants also misnamed key services that they consulted, further showing the lack of uptake of formal terms and language within popular discourse.⁵⁷ Interestingly, however, other specialised legal terms arising from legislation, such as ‘child support’,⁵⁸ seem to be reflected in popular understandings to a much greater extent. This may reflect the intuitive appeal and longevity of the terms, but also their uptake and use by advice lines or government services — for example, a number of participants reported being exposed to a dedicated child support advice service or helpline.⁵⁹

VI Conclusion

The concept of the shadow of the law has been hugely influential in research on dispute resolution and family law. Contemporary references go far beyond Mnookin and Kornhauser’s original project of offering a predictive tool for post-separation

⁵¹ Field and Crowe, above n 13, 92–6.

⁵² For further discussion, see Jonathan Crowe, ‘Natural Law in Jurisprudence and Politics’ (2007) 27(4) *Oxford Journal of Legal Studies* 775, 786–8; Jonathan Crowe, ‘Normativity, Coordination and Authority in Finnis’s Philosophy of Law’ in Mark Sayers and Aladin Rahemtula (eds), *Jurisprudence as Practical Reason: A Celebration of the Collected Essays of John Finnis* (Supreme Court Library Queensland, 2013) 95.

⁵³ Bobby, Carl, David, Malcolm.

⁵⁴ See, eg, *Family Law Act 1975* (Cth) s 61DA.

⁵⁵ David, Ethan, Fran, Kerry.

⁵⁶ See, eg, *Family Law Act 1975* (Cth) s 60CA. For discussion, see Jonathan Crowe and Lisa Toohey, ‘From Good Intentions to Ethical Outcomes: The Paramountcy of Children’s Interests in the *Family Law Act*’ (2009) 33(2) *Melbourne University Law Review* 391.

⁵⁷ Noel, Bobby, Darren.

⁵⁸ See, eg, *Child Support (Assessment) Act 1989* (Cth).

⁵⁹ Darius, Ethan, Kel, Kerry.

negotiations. Critics have questioned the utility of the concept from a number of angles. This article, by contrast, has drawn on empirical research to extend and deepen the concept. We have suggested that family dispute resolution does, in a meaningful sense, occur within the shadow of the law. However, the law in question is not only (or even primarily) the positive law contained in statutes and judicial decisions. Rather, it is the folk law that parties absorb from online materials, friends and family, and the popular media. This folk law significantly shapes people's knowledge and expectations when entering into family dispute resolution. It is also likely to be used as an anchor or bargaining chip by at least some parties.

Shifting the focus of the shadow of the law concept from bargaining in the shadow of the positive law to bargaining in the shadow of the folk law has a number of important implications. Perhaps most significantly, it means that there is not just one shadow of the law; rather, there are many shadows, which may differ from dispute to dispute or party to party. The shadow of the law, in this sense, is pluralistic and potentially ambiguous, rather than monistic or univocal. Different parties draw upon different discourses or sources of information. These different ideas and expectations hold the potential to amplify existing cultural differences or power imbalances between the parties. They may also hinder efforts to reform the legal framework if the changes are not mirrored in social discourse.

The picture of the shadow of the law advanced in this article diverges significantly from the account advanced by Mnookin and Kornhauser. Mnookin and Kornhauser emphasised how legal standards can serve as a bargaining chip based on parties' predictions of how they would fare in court.⁶⁰ The interview responses discussed above, however, show that parties to post-separation disputes are far less focused on predicting potential outcomes of litigation than on interpreting and reconciling informal sources of legal information. Critics of Mnookin and Kornhauser's theory have argued that it risks overemphasising the role of the law and understating the complexity and ambiguity of legal sources.⁶¹ However, these criticisms stop short of challenging Mnookin and Kornhauser's focus on positive law as providing the content of the shadow of the law concept. The revised understanding of the shadow of the law suggested in this article retains the explanatory power of the idea, while avoiding some of the important criticisms found in the literature.

A further possible implication of this research is that the traditional concept of the shadow of the law relies upon a legal positivist conception of law that is undermined by empirical evidence. Legal positivism holds that the only necessary factor in determining whether something counts as law is its recognition by authoritative social sources.⁶² However, the interview responses discussed in this article indicate that authoritative sources of law play, at best, a subsidiary role in determining how the content of legal obligations are understood by members of the community. The law that people follow in their everyday lives bears more resemblance to what we call the folk law than to the positive law found in statutes and cases. This potentially bolsters critiques of legal positivism, according to which

⁶⁰ Mnookin and Kornhauser, above n 8, 968.

⁶¹ For discussion, see Batagol and Brown, above n 10, 56–62.

⁶² Jonathan Crowe, 'Natural Law Theories' (2016) 11(2) *Philosophy Compass* 91, 92–3.

a positivist understanding of law fails to explain the law-following behaviour of ordinary citizens.⁶³

Government agencies, mediation providers and others involved in providing post-separation advice and information need to be aware of the influence that the folk law exerts on parties' expectations. For government agencies, there is a need to provide straightforward, accessible and digestible information about post-separation options, recognising that this information is likely to be accessed alongside a multiplicity of other sources. The continuing prevalence of positional and adversarial language about post-separation parenting, in particular, suggests that a concerted effort is needed to promote awareness and understanding of the child-centred legislative framework. Similar considerations apply for others involved in providing advice about post-separation arrangements. Family lawyers, for example, will often be well aware that parties may come to them with a pre-existing understanding of the law gained from informal sources, which is likely to influence, and perhaps displace, the advice that is provided. Seeking to understand this context is therefore important in providing advice that is digestible, salient and helpful to the parties.

Mediators, likewise, need to be mindful that parties to family dispute resolution may come to the process with divergent understandings of the legal framework relevant to their dispute. The pluralistic and ambiguous nature of the folk law poses a potentially significant challenge to mediation ethics, with its traditional focus on the notions of mediator neutrality and impartiality.⁶⁴ There is increasing awareness in the literature on mediation ethics of the need to take account of cultural differences and power imbalances between the parties.⁶⁵ The research presented here further suggests that mediators should be alive to the prospect of divergent legal shadows influencing the parties' expectations and strategies. In particular, mediators may need to reflect upon their own understandings of the law in order to avoid implicitly favouring parties with similar worldviews.⁶⁶ The pluralistic nature of the shadow of the law therefore does not undermine the usefulness of the concept for mediation theory and practice. If anything, it reinforces the concept's importance in understanding the assumptions parties may bring to the dispute resolution process, and the challenges these may pose to the neutrality and impartiality of the mediator.

⁶³ Ibid 93–4.

⁶⁴ For further discussion, see Hilary Astor, 'Mediator Neutrality: Making Sense of Theory and Practice' (2007) 16(2) *Social and Legal Studies* 221; Hilary Astor, 'Rethinking Neutrality: A Theory to Inform Practice — Part I' (2000) 11(2) *Australasian Dispute Resolution Journal* 73; Hilary Astor, 'Rethinking Neutrality: A Theory to Inform Practice — Part II' (2000) 11(3) *Australasian Dispute Resolution Journal* 145; Field and Crowe, above n 13; Field and Crowe, above n 24.

⁶⁵ See, eg, Brigg, above n 50; Hardy and Rundle, above n 50; Law, above n 50; Field, above n 24; Field, above n 25; Field and Crowe, above n 13; Field and Crowe, above n 24.

⁶⁶ Cf Field and Crowe, above n 13, 92–6.

Prosecuting Child Offenders: Factors Relevant to Rebutting the Presumption of *Doli Incapax*

Thomas Crofts*

Abstract

Despite existing since ancient times the presumption of *doli incapax* — that is, the presumption that children lack the moral and intellectual development to have the capacity to be guilty of crime — appears to be a relatively nebulous concept. Criticisms that the presumption is both over- and under-protective of children reveal diverse views and uncertainty about exactly how the presumption (and its legislative equivalents) does, and should, operate. This article takes the occasion of the recent High Court of Australia case of *RP v The Queen* (2016) 259 CLR 641 as a prompt to address this lack of clarity. It comprehensively reviews current case law to critically evaluate the sort of factors that have been used to establish that a child is sufficiently developed to be found criminally responsible.

I Introduction

The principle that children who commit wrongs should generally not be treated in the same way as adults has existed at common law in some form since ancient times. According, for example, to the Laws of King Aethelstan (925–35) a child under 12 years of age was not to be punished under certain conditions, such as that they stole under a certain amount, or did not attempt to flee.¹ Over time, presumably around the time Roman Law began to influence common law in the 12th and 13th centuries, this protection developed at common law into a presumption that children lack sufficient capacity to be guilty of a crime. This presumption broke down into an absolute presumption of criminal incapacity for children under seven years (often referred to as the minimum age of criminal responsibility) and a rebuttable presumption of criminal incapacity (*doli incapax*) for children from the age of seven until the age of 14. Once fixed the minimum age of criminal responsibility did not change until the mid- to late-20th century when it was raised to the age of 10 in England and Wales and throughout all Australian criminal jurisdictions.² In contrast,

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¹ 'Laws of King Aethelstan (Council of Greatanlea)' reproduced in Wiley B Sanders (ed), *Juvenile Offenders for a Thousand Years: Selected Readings from Anglo-Saxon Times to 1900* (University of North Carolina Press, 1970) 3. For further discussion of the history of criminal responsibility of children, see A W G Kean, 'The History of the Criminal Liability of Children' (1937) 53(3) *Law Quarterly Review* 364; Thomas Crofts, *The Criminal Responsibility of Children and Young Persons* (Ashgate, 2002) 5–35.

² See Thomas Crofts, 'The Common Law Influence over the Age of Criminal Responsibility — Australia' (2016) 67(3) *Northern Ireland Legal Quarterly* 283.

the upper age level and rebuttable presumption of *doli incapax* have remained stable throughout Australia, applying now to children aged from the age of 10 until their 14th birthday. Following much criticism, particularly in the wake of the Bulger case,³ this rebuttable form of the presumption was abolished in England in 1998.⁴

Given its long existence, it is perhaps not surprising that the presumption of *doli incapax* has, every so often, encountered a degree of criticism.⁵ Particularly over the last two decades there have been expressions of somewhat contradictory concerns in Australia that the rebuttable presumption of *doli incapax* is both over-protective of children, by preventing them from being prosecuted, and under-protective by being too easily rebutted.⁶ Views have also been expressed that the presumption is in need of abolition, reformulation or reversal.⁷ While noting some of these criticisms, but not addressing them in any detail, the High Court of Australia confirmed the value of the presumption in its 2016 decision of *RP v The Queen*.⁸ The plurality judgment stated, in a measured and supportive tone: ‘In the case of an accused who is a child ... it is not self-evident that the policy of the law is outmoded in requiring that the prosecution prove the child understood the moral wrongness of the conduct.’⁹

This article does not revisit criticisms of the presumption or extensively evaluate the purpose of the presumption. It is sufficient to note that the presumption of *doli incapax* is one of the key gateways to young people entering the criminal justice system.¹⁰ It is based on the fundamental premise of criminal law that unless a person has the capacity to freely choose to do something they understand to be wrong they should not be liable to conviction and punishment in criminal

³ See, eg, Michael Freeman, ‘The James Bulger Tragedy: Childish Innocence and the Construction of Guilt’ in Anne McGillivray (ed), *Governing Childhood* (Dartmouth, 1997) 115. See also *R v Secretary of State for the Home Department; Ex parte Venables and Thompson* [1998] AC 407.

⁴ *Crime and Disorder Act 1998* (UK) s 34. For recent discussion see Kate Fitz-Gibbon, ‘Protections for Children Before the Law: An Empirical Analysis of the Age of Criminal Responsibility, the Abolition of *Doli Incapax* and the Merits of a Developmental Immaturity Defence in England and Wales’ (2016) 16(4) *Criminology & Criminal Justice* 391.

⁵ For instance, as early as 1883, Sir James Fitzjames Stephen criticised that ‘[I]ike most other presumptions of law, this rule is practically inoperative, or at all events operates seldom and capriciously’: Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (Macmillan, 1883) vol 2, 98.

⁶ See, eg, Australian Law Reform Commission and Human Rights and Equal Opportunities Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) [18.19].

⁷ For recent criticism see, eg, *GW v The Queen* (2015) 20 DCLR (NSW) 236, 244–5 [41]–[46] (Lerve DCJ). For further discussion see Crofts, above n 2.

⁸ (2016) 259 CLR 641. See also below n 10 regarding Recommendation 27.1 of the Royal Commission into the Protection and Detention of Children in the Northern Territory.

⁹ *Ibid* 650 [10] (Kiefel, Bell, Keane and Gordon JJ).

¹⁰ Recently the Royal Commission into the Protection and Detention of Children in the Northern Territory (‘NT’) recommended that the minimum age level of criminal responsibility be raised to 12 on the basis that this would reduce the number of children brought before the courts and it would better reflect current understanding of brain development: NT, Royal Commission into the Protection and Detention of Children in the Northern Territory, *Final Report* (2017) vol 2B, 420 (Recommendation 27.1). The Commission also recommended retention of the rebuttable presumption of *doli incapax* for those aged 12–14: vol 2B, 417–18.

proceedings.¹¹ It is normal that children lack this ability,¹² but gradually develop it as they grow up. For this reason the law prevents prosecution of young children (under 10 years), but allows prosecution of older children where there is proof that they are developed enough to understand the wrongfulness of their behaviour.

In *RP v The Queen*, the High Court faced the question of whether sufficient proof had been brought to rebut the presumption of *doli incapax* in a case involving a boy aged 11 and a half accused of committing sexual offences against his younger brother.¹³ In finding that there had not been sufficient proof, the Court made some important observations about the operation of the presumption which will be discussed alongside other relevant case law throughout this article. This article will reveal that the divergent views on the presumption of *doli incapax* do not necessarily represent deep differences in opinion about the value of the presumption. Instead, they are largely a product of the lack of clarity and coherency, despite the presumption's longevity, over how the presumption should operate and what evidence should be sufficient to rebut it. Elucidating what the presumption requires and clarifying how it can be rebutted will help contextualise criticisms of the presumption. Furthermore, this will show that if appropriate attention is given to the function of the presumption and evidence necessary to rebut it, then it provides an appropriate mechanism for determining whether a child should be held criminally responsible.

II What Needs to be Proved?

The rebuttable presumption of *doli incapax* for children aged 10 but not yet 14 remains a common law presumption in New South Wales ('NSW'), South Australia and Victoria despite a 1997 recommendation that the presumption should be retained and placed on a statutory footing in all Australian jurisdictions.¹⁴ In all other jurisdictions, the presumption has been placed on a statutory footing.¹⁵ Ancient laws, as already noted, generally provided an exemption from punishment for children, dependent on the circumstances of the act and the child's behaviour, but they did not pronounce any broad test for when a child should not be punished. According to Sir Matthew Hale it was around the time of King Edward III (1327–77)

¹¹ See Sir Matthew Hale, *The History of the Pleas of the Crown* (London, 1736) vol 1, 14–15. For more contemporary views, see H L A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press, 1968) 218; Nicola Lacey, 'In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory' (2001) 64(3) *Modern Law Review* 350, 353.

¹² Herein lies the difference to the defence of insanity where mental impairment is not something that every person experiences. As such it is an exception explaining why there is a presumption of sanity and why the burden is on the accused to establish that he or she lacks the capacity to understand the nature of the act and its wrongfulness.

¹³ The appeal concerned two counts of sexual intercourse with an under 10-year-old.

¹⁴ Australian Law Reform Commission and Human Rights and Equal Opportunities Commission, above n 6, [18.20].

¹⁵ The presumption is legislatively embedded in all the 'code' criminal jurisdictions of Australia: *Criminal Code 2002* (ACT) s 26; *Criminal Code Act 1995* (Cth) sch 1 ('*Criminal Code* (Cth)') s 7.2; *Criminal Code Act 1983* (NT) sch 1 ('*Criminal Code* (NT)') s 38(2); *Criminal Code Act 1899* (Qld) sch 1 ('*Criminal Code* (Qld)') s 29(2); *Criminal Code Act 1924* (Tas) sch 1 ('*Criminal Code* (Tas)') s 18(2); *Criminal Code Act Compilation Act 1913* (WA) sch ('*Criminal Code* (WA)') s 29 para 2.

that ‘the Common law received a greater perfection, not by the change of the Common law, as some have thought ...; but men grew to greater learning, judgment and experience’.¹⁶ Legal writers, such as Lambard (1581), Dalton (1619) and Hale (1736), referred to cases from that early period which articulated the presumption that children under 14 years could not be guilty of crime.¹⁷ These cases also expressed the basis upon which the presumption could be rebutted. Rebuttal required proof that the child could discern between, or had knowledge of, good and evil.¹⁸ This was not a requirement of some abstract ability to discern good from evil, rather, it was linked to the ability to understand the wrongfulness of the *actual* offence committed. For instance, Dalton spoke of the child having ‘knowledge of good and evil, and of the perill and danger of that offence’.¹⁹ Similarly, Hale detailed cases that stated that the presumption of *doli incapax* could be rebutted by proof that the child ‘could discern between good and evil at the time of the offence committed’.²⁰ He also noted that to convict a child there must be evidence ‘to make it appear he understood what he did’.²¹

The requirement that there be proof of ‘malicious intent’ or ‘malice’ can also be found in some cases in the 19th century.²² However, this did not require proof that the child had acted maliciously. Rather, the concern was whether the child knew that what he or she was doing was wrong. This was revealed by the case of *R v Smith*, in which ‘malicious intent’ was described as ‘a guilty knowledge that he was doing wrong’.²³ Around the early 20th century there was further explanation of what sort of understanding was required to rebut the presumption. In 1919, it was said in *R v Gorrie* that there must be proof that the child had ‘mischievous discretion’,²⁴ an expression that a commentator at the time found to be ‘certainly uncommon and one not often met with in ordinary parlance. But like many old English legal phrases it is wonderfully graphic and concise’.²⁵ This necessitated that the prosecution ‘must satisfy the jury that when the boy did this he knew that he was doing what was wrong — not merely what was wrong, but what was gravely wrong, seriously wrong’.²⁶

In *R v M*, the question of the nature and degree of knowledge of wrongfulness that needed to be proved to rebut the presumption was addressed by the Supreme Court of South Australia.²⁷ Chief Justice Bray explored whether this meant contrary to law or something else. His Honour noted that the term ‘knowledge of wrong’ was

¹⁶ Hale, above n 11, 24–5.

¹⁷ Although there was some doubt for a period about whether the presumption of *doli incapax* applied from seven years to the age of 12 or to the age of 14: see Kean, above n 1, 368; Crofts, above n 1, 9. Some early authors also divided this age into seven to under 12, and 12 to under 14: see, eg, Hale, above n 11, 26–8. A similar approach can be found in Roman Law (distinguishing *infantes*, *impuberes infantiae proximi* and *impuberes pubertati proximi*): see Crofts, above n 1, 94.

¹⁸ William Lambard, *Eirenarcha: or, of the Office of the Justices of Peace* (London, 1581) 218; Michael Dalton, *The Countrey Justice* (London, 1618) 223–4; Hale, above n 11, 24–8.

¹⁹ Dalton, above n 18, 223–4.

²⁰ Hale, above n 11, 26.

²¹ *Ibid.* 27.

²² See, eg, *R v Vamlew* (1862) 176 ER 234; *R v Smith* (1845) 1 Cox CC 260; *R v Owen* (1830) 172 ER 685. (1845) 1 Cox CC 260 (Erle J). See also *R v Owen* (1830) 172 ER 685.

²⁴ *R v Gorrie* (1919) 83 JP 136, 136 (Salter J).

²⁵ Commentary, ‘*R v Gorrie*’ (1919) 83 *Justice of the Peace Journal* 307.

²⁶ *R v Gorrie* (1919) 83 JP 136 (Salter J).

²⁷ (1977) 16 SASR 589.

familiar from the ‘*M’Naghten Rules*’ in relation to insanity.²⁸ Chief Justice Bray found that while in England the term had been interpreted as knowledge that the act was against the law,²⁹ the High Court of Australia had interpreted the test as knowledge that the act was wrong according to the ordinary standards of reasonable men.³⁰ His Honour found no reason not to interpret this phrase in the same way in relation to children.³¹ In explaining this further, Bray CJ deprecated the use of the term ‘understanding that it was something that adults would disapprove of’ because ‘[a]dults frequently disapprove of breaches of decorum and good manners on the part of children and of their lack of diligence or tidiness without regarding the acts or omissions in question as wrong in the relevant sense.’³² More recently, the Supreme Court of the ACT confirmed this view, stating in *R v JA* that it is: ‘not sufficient that the child knows that there would be “disapproval” of the act by a parent or even police’.³³

A question that also arose in *R v M* was whether the trial judge’s direction to the jury ‘lacked sufficient intensity’ because it referred only to proof that the child had knowledge of right and wrong, not knowledge that the act was ‘gravely wrong, seriously wrong’ as in *Gorrie*.³⁴ It was held that there was no authority to the effect that not using the adverbs ‘gravely or seriously’ would amount to a misdirection.³⁵ Nonetheless, understanding that the behaviour was ‘seriously wrong’ has become the standard formulation of what the prosecution must establish to rebut the presumption in Australia (and in England and Wales before it was abolished).

There was some criticism in the English case *C (A Minor) v Director of Public Prosecutions* (‘*C v DPP*’) that the term ‘seriously wrong’ is conceptually obscure.³⁶ On appeal to the House of Lords, Lord Lowry concluded, however, that its meaning is relatively clear when contrasted with mere naughtiness or mischievousness.³⁷ This distinction was also adopted in a number of Australian decisions that required proof that the child ‘knew it was seriously wrong, as distinct from an act of mere naughtiness or mischief’.³⁸ The High Court in *RP v The Queen* confirmed the approach, noting that aside from establishing that the child knew that the offence was seriously wrong in a moral sense, there was ‘the further dimension of proof of knowledge of serious wrongness as distinct from mere naughtiness’.³⁹

²⁸ *R v McNaghten* (1843) 8 ER 718. This case established that the defence of insanity applies when a person, at the time of the act, ‘was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong’: at 722.

²⁹ *R v Windle* [1952] 2 QB 826.

³⁰ *Stapleton v The Queen* (1952) 86 CLR 358.

³¹ *R v M* (1977) 16 SASR 589, 591. See also *R (A Child) v Whitty* (1993) 66 A Crim R 462; *R v JA* (2007) 161 ACTR 1.

³² *R v M* (1977) 16 SASR 589, 591.

³³ (2007) 161 ACTR 1, 11 [69].

³⁴ (1977) 16 SASR 589, 593.

³⁵ *Ibid.*

³⁶ [1995] 1 Cr App R 118. This was one of the reasons Laws J found that the presumption of *doli incapax* was a disservice to the law of England: at 125–6.

³⁷ *C (A Minor) v DPP* [1996] AC 1, 22.

³⁸ *BP v The Queen* [2006] NSWCCA 172 (1 June 2006) [27]. See also *RP v The Queen* (2016) 259 CLR 641; *R v JA* (2007) 161 ACTR 1; *R v ALH* (2003) 6 VR 276; *R v M* (1977) 16 SASR 589.

³⁹ (2016) 259 CLR 641, 650 [11].

There has been some criticism of making the contrast between understanding that the behaviour was seriously wrong as opposed to merely naughty. In the NSW Court of Criminal Appeal decision in *RP v The Queen*, Hamill J found this contrast to be

unhelpful and, in jury directions, could give rise to an erroneous process of reasoning whereby a finding that the act was more than naughty or mischievous may lead to a finding that the child knew that what they did was seriously or gravely wrong without proper attention being paid to that question. There is a vast chasm between something that is 'naughty' or 'mischievous' and something that is gravely or seriously wrong. The trouble with introducing the comparison is that it is easy to fall into the trap of thinking that if something is more than naughty, it must therefore satisfy the test. It does not.⁴⁰

There is some weight in this criticism, however, the formulation is useful. In making the contrast, the courts are aiming to explain, in clear terms, what sort of understanding the child must have in order to rebut the presumption. The term 'seriously' wrong does not mean that the offence itself must be one of a serious nature.⁴¹ Rather, the term serious relates to the nature and degree of the child's understanding. What the court is looking for is that the child knows that what they have done is not just something naughty that will be dealt with in the home or at school, but rather something that is so wrong, hence use of the term seriously wrong, that it will be dealt with outside the home. When explaining the concept of seriously wrong Lord Goodhart spoke about the child understanding the criminality of the act.⁴² His Lordship pointed out that a child may develop from very early on a concept of right and wrong, in the sense that the child learns that it is wrong to throw porridge on the floor if he or she does not want to eat it, or that it is wrong to grab a sibling's favourite toy and make them cry. However, this understanding of wrongfulness is more of an appreciation of the naughtiness of the behaviour and is not sufficient to make the child criminally responsible. The child must have an understanding of the criminality of the act, in the sense that he or she knows 'the difference between doing things which are naughty and for which you will be punished (it is to be hoped) by a parent, and doing things which are seriously wrong and liable to punishment by a court'.⁴³

The statutory equivalents to the common law presumption of *doli incapax* vary from each other and the common law. The Criminal Codes of the Australian Capital Territory and the Commonwealth are worded in a similar way to the common law, both providing that a child aged 10 but not yet 14 'can only be criminally responsible for an offence if the child knows that his or her conduct is wrong'.⁴⁴ In contrast, the Criminal Codes of the Northern Territory ('NT'), Queensland,

⁴⁰ *RP v the Queen* (2015) 90 NSWLR 234, 256 [129].

⁴¹ As such the criticism in Glanville Williams, 'The Criminal Responsibility of Children' [1954] *Criminal Law Review* 493, 496, that '[i]t seems absurd to say that a child who indulges in a series of annoying peccadilloes can set the magistrates at defiance, for the reason that none of his acts is gravely wrong', is misplaced.

⁴² United Kingdom, *Parliamentary Debates*, House of Lords, 19 March 1998, vol 587, col 830 (Lord Goodhart).

⁴³ *Ibid.* For a discussion of similar issues in relation to the competency of a child to testify, see *R v GW* (2016) 258 CLR 108.

⁴⁴ *Criminal Code 2002* (ACT) s 26(1); *Criminal Code* (Cth) s 7.2(1).

Tasmania and Western Australia, refer to a child under the age of 14 not being criminally responsible ‘unless it is proved that at the time of doing the act or making the omission the person had capacity to know that the person ought not to do the act or make the omission’.⁴⁵ It does not, however, appear that Sir Samuel Griffith when drafting the Criminal Code of Queensland, on which the Criminal Codes of Western Australia, Tasmania and, to a lesser extent, the NT are all based, thought he was doing anything other than codifying the common law in relation to infancy. In his Draft Code, which details the source of his draft provisions, Griffith noted that the basis of s 31 (which then became s 29) is the common law.⁴⁶ There is no suggestion from other sources cited that Griffith intended to deviate from the common law position.

Different views have, however, been expressed in the courts of these jurisdictions about whether these provisions merely represent a codified form of the common law presumption and are thus to be interpreted in the same way, or whether something different is required. In *R v B*, Pincus JA took the view that the Queensland provision required something different from the common law presumption.⁴⁷ His Honour noted that:

We were referred to authorities which would if applied, attribute to the subsection which I have quoted a rather different meaning from that which its language appears to convey. For example, reference was made to *B v R* (1958) 44 Cr App R, an English case, in which speaking of an accused between the ages of 8 and 14 it was said that in order to rebut the presumption in favour of such a child ‘guilty knowledge must be proved and the evidence to that effect must be clear and beyond all possibility of doubt’. It is plain that this is not the law of Queensland. What the Code requires could hardly be more clearly stated: it must be proved that at the relevant time ‘the person had capacity’ (I emphasise capacity) ‘to know that the person ought not to do the act’. This is, of course, different from proving actual knowledge.⁴⁸

This approach could mean that it is easier to establish criminal responsibility in the traditional Code states, because there need only be proof that the child had the capacity to know that what he or she was doing was wrong at the time of the offence, regardless of whether he or she actually knew this.

In contrast, a number of other cases take the view that the Code provisions are restatements of the common law and thus, despite different wording, require the same proof. In the earlier Queensland case *R v B*, DM Campbell J noted that at common law there is a rebuttable presumption of *doli incapax* and that this presumption is expressed in s 29 of the *Criminal Code* (Qld).⁴⁹ Likewise, WB Campbell J cited common law sources as authorities on what must be established to

⁴⁵ *Criminal Code* (Qld) s 29(2). See also *Criminal Code* (NT) s 38(2); *Criminal Code* (WA) s 29 para 2. The *Criminal Code* (Tas) s 18(2) refers to sufficient capacity to know.

⁴⁶ Sir Samuel Walker Griffith, *Draft of a Code of Criminal Law* (29 October 1897) <http://ozcase.library.qut.edu.au/qlc/documents/GRIFFCC_Draft_1897.pdf>.

⁴⁷ [1997] QCA 486 (6 November 1997). See also *R v F, ex parte A-G (Qld)* (1999) 2 Qd R 157, where it was found that the trial judge had applied an erroneous test by requiring evidence that the child understood what he did rather than had the capacity to know.

⁴⁸ *R v B* [1997] QCA 486 (6 November 1997).

⁴⁹ [1979] Qd R 417, 421.

rebut the presumption.⁵⁰ The same approach can be found in Tasmania, where Neasey J stated in *M v J* that: ‘The subsection [s 18(2)] re-enacts the common law requirement usually stated in terms of presumptions concerning children under the age of 14 years.’⁵¹ His Honour went on to cite common law references and while noting that s 18(2) makes some changes to the common law rule in referring to the child having ‘sufficient capacity’ rather than knowledge, he continued: ‘I think the subsection was intended to reproduce the common law rule which equates capacity to know with actually knowing.’⁵² Justice Neasey also commented that the similar provision in Queensland has also been interpreted in line with the common law. Similarly, in the decision of the Queensland Court of Appeal, *R v T*, Fitzgerald P noted that the issue under s 29 of the Code was whether the appellant had the capacity to know that he ought not to ‘flick’ his lighted cigarette onto the paper under the counter.⁵³ However, his Honour’s conclusion on the matter referred to knowledge rather than capacity: ‘It is difficult to comprehend any basis for a submission that the appellant might not have known that it was wrong to “flick” a lighted cigarette onto paper in a shop ... and he would certainly have known that it was wrong to set fire to the shop.’⁵⁴ Because of the tendency to treat the common law and Code requirements as indistinct, the following discussion will proceed on the basis of the need for proof of actual knowledge. Having clarified the law relating to the presumption, the following Part will evaluate the types of evidence that have been used to rebut the presumption of *doli incapax*.

III Evidence Rebutting the Presumption

It is important to note that the presumption of *doli incapax* (and its statutory equivalents) is not a defence in the sense that it must neither be raised nor proven by the accused. Since early times, it has been established that the burden of rebutting the presumption is on the prosecution.⁵⁵ Accordingly, the prosecution must bring evidence to rebut the presumption alongside proof of all elements of the offence. It must do so with ‘very strong and pregnant evidence’;⁵⁶ that is, to the criminal standard of beyond reasonable doubt.⁵⁷ In *R v ALH*, Cummins AJA took the view that the prosecution should prove that a child understood that the act was seriously wrong as part of the mental element of the offence.⁵⁸ There is a danger that such a formulation can lead to confusion and the idea that establishing any required mens

⁵⁰ Butterworths, *Halsbury’s Laws of England*, vol 10 (3rd ed) Criminal Law and Procedure, ‘1 Principles of Criminal Liability’ [528], cited in *R v B* [1979] Qd R 417, 425; *B v The Queen* [1958] 44 Cr App R 1, 3, quoted in *R v B* [1979] Qd R 417, 425.

⁵¹ [1989] Tas R 212, 221.

⁵² *Ibid* 222.

⁵³ [1997] 1 Qd R 623, 626.

⁵⁴ *Ibid*.

⁵⁵ See, eg, Hale, above n 11, 27. See also *Criminal Code 2002* (ACT) s 26(3); *Criminal Code* (Cth) s 7.2(2), which specify that the burden of proving that the child knows that the conduct was wrong is on the prosecution.

⁵⁶ Hale, above n 11, 27.

⁵⁷ *AL v The Queen* [2017] NSWCCA 34 (22 March 2017) [120]; *RP v The Queen* (2015) 90 NSWLR 234, 238 [19]; *R v JA* (2007) 161 ACTR 1, 6 [32], 12 [82]; *C (A Minor) v DPP* [1996] AC 1, 29; *B v The Queen* [1958] 44 Cr App R 1, 3–4.

⁵⁸ (2003) 6 VR 276, 295 [75].

rea or mental element is the same thing as establishing that a child understood the behaviour to be seriously wrong. In reality, these are distinct concepts: being able to understand that an act is seriously wrong is different from forming a mental element in relation to the act. As correctly stated by Higgins CJ in *R v JA*, the decision by Cummins AJA ‘should not, however, be taken to establish that proof of the voluntary and intentional commission of the acts charged will constitute prima facie evidence of *doli capax*’.⁵⁹

A Age

It has been said, in many cases, that the closer the child is to 14 years — the age at which all children are assumed to have the capacity to be criminally responsible — the easier it will be to rebut the presumption.⁶⁰ This approach may, at first glance, appear to make sense. However, it has correctly been criticised by the High Court in *RP v The Queen* because it is ‘apt to suggest that children mature at a uniform rate’.⁶¹ The whole reason for a rebuttable presumption, rather than a blanket assumption of incapacity, is because it is well-established in research that children in this age period develop at different and inconsistent rates.⁶² This was acknowledged by Blackstone in 1769, when he commented that: ‘the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent’s understanding and judgment’.⁶³ Provided that these concerns are kept in mind and the age of the child is not approached rigidly, it is appropriate to treat it as a starting point, indicating how much further evidence may be needed. While being close to 14 years old might suggest that little evidence would be needed to confirm that the child had the requisite understanding, other factors (such as the type of offence, evidence of a low IQ, and so on) may indicate that it is not correct to make this assumption.

B Offence Committed

Similarly, in many cases it has been stated that the more obviously wrong the act, the easier it is to rebut the presumption.⁶⁴ Clearly, some acts are more obviously wrong than others and so the offence committed may be indicative of how much further evidence is needed. Children gradually develop an understanding of the wrongfulness of acts, depending on the age at which, and how, the child comes into contact with the norm forbidding the behaviour. They are more likely to understand the seriousness of offences that reflect values of which they have direct personal

⁵⁹ (2007) 161 ACTR 1, 12 [81].

⁶⁰ *RP v The Queen* (2015) 90 NSWLR 234; *RH v DPP (NSW)* [2013] NSWSC 520 (10 May 2013); *R v McCormick* [2002] QDC 343 (19 December 2002) [10]; *R (A Child) v Whitty* (1993) 66 A Crim R 462; *B v The Queen* [1958] 44 Cr App R 1, 3.

⁶¹ (2016) 259 CLR 641, 651 [12] (Kiefel, Bell, Keane and Gordon JJ).

⁶² See, eg, Elizabeth Cauffman and Laurence Steinberg, ‘(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable than Adults’ (2000) 18(6) *Behavioral Sciences & the Law* 741; Nicholas J Lennings and Chris J Lennings, ‘Assessing Serious Harm under the Doctrine of *Doli Incapax*: A Case Study’ (2014) 21(5) *Psychiatry, Psychology and Law* 791, 793.

⁶³ William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 4th ed, 1770) vol 4, 23.

⁶⁴ *C (A Minor) v DPP* [1996] AC 1, 39; *RH v DPP (NSW)* [2013] NSWSC 520 (10 May 2013) [12].

experience, or which are commonly discussed or modelled in the home or at school.⁶⁵ Some acts may also be more easily aligned with naughtiness, such as throwing stones and causing damage, or mischief that has turned to vandalism.⁶⁶ In contrast, acts of dishonesty, such as stealing, may be more likely to be understood to be seriously wrong.⁶⁷ But it is also not that simple, because a child may less easily understand the wrongfulness of acts of dishonesty that are based on complex social relations, such as forgery or fraud. As pointed out by Donaldson LJ in the case of *JBH (A Minor) v O'Connell*: 'if, for example, children between the ages of 10 and 14 were charged with forgery, it might require a considerable body of evidence before magistrates were satisfied that they knew that what they were doing was wrong'.⁶⁸ It is clear, then, that the starting point is the type of offence committed and the type of interest that it protects, rather than whether the offence itself is serious or not. The statement by Lord Lowry in *C (A Minor) v Director of Public Prosecutions* that the 'more obviously heinous'⁶⁹ the offence, the easier it will be to rebut the presumption, is therefore problematic. A child's understanding of wrongfulness is not inexorably related to the seriousness or heinousness of the offence.⁷⁰

An important point to remember here is that it has long been held that the child's knowledge 'must be proved by the evidence, and cannot be presumed from the mere commission of the act'.⁷¹ Not allowing proof of the acts that comprise the offence alone to rebut the presumption is designed to stop the prosecution and the court from simply inferring that the child understood the wrongfulness of the act as an adult would have done in the circumstances.⁷² The correctness of this approach was questioned in *R v ALH*, where Callaway JA commented that authorities suggesting that the acts constituting the offence cannot alone be drawn on to prove understanding 'are wrong in principle and should not be followed'.⁷³ Similarly, Cummins AJA felt that some acts are so 'serious, harmful or wrong' that they establish the required understanding, while others are less obvious and so may be equivocal or insufficient to establish the understanding.⁷⁴ His Honour therefore took the view that, provided adult judgments are not attributed to children, 'there is no reason in logic or experience why the proof of the act charged is not capable of proving requisite knowledge'.⁷⁵ The danger with this approach, as with age (discussed above in Part IIIA), is that it becomes objective or nomothetic, with the

⁶⁵ See, eg, *R v McCormick* [2002] QDC 343 (19 December 2002); *C v DPP* [1995] 1 Cr App R 118, 121.

⁶⁶ *R v McCormick* [2002] QDC 343 (19 December 2002) [10].

⁶⁷ This contrast was made in the Divisional Court decision in *C v DPP* [1995] 1 Cr App R 118, 121 to distinguish the case of *A v DPP* [1992] Crim LR 34.

⁶⁸ [1981] Crim LR 632, quoted in *C (A Minor) v DPP* [1996] AC 1, 30.

⁶⁹ [1996] AC 1, 33.

⁷⁰ Fortin expressed particular concern at the preparedness of courts to accept that children are normally developed and thus criminally responsible when charged with a serious offence: Jane Fortin, *Children's Rights and the Developing Law* (Butterworths, 1998) 444. In exactly these cases, Fortin argues, there is a high likelihood that psychologically the child is not normally developed.

⁷¹ *R v Smith* (1845) 1 Cox CC 260 (Erle J), quoted in *C (A Minor) v DPP* [1996] AC 1, 38 (Lord Lowry).

⁷² Glanville Williams, *Criminal Law: The General Part* (Stevens, 2nd ed, 1961) 815.

⁷³ (2003) 6 VR 276, 281 [20]. This criticism and the fact that it was at odds with the earlier law was noted in *BP v The Queen* [2006] NSWCCA 172 (1 June 2006). However, the Court did not feel it necessary to resolve the conflicting views of whether the acts constituting the offence could alone establish sufficient understanding.

⁷⁴ *R v ALH* (2003) 6 VR 276, 298 [86].

⁷⁵ *Ibid.*

focus on generalised assumptions about what children should understand (often based on common sense claims, often from an adult perspective), rather than paying attention to the understanding of the actual child in question and what factors may affect that child's ability in the concrete circumstances of the crime.

There are several cases where the prosecution had not gathered any or much evidence that went beyond that which established the commission of the offence itself.⁷⁶ This approach appears to have been a particular problem in the case of *RP v The Queen* where the majority of the High Court noted that aside from inferences drawn from the circumstances of the offence, the only evidence adduced was a Job Capacity Assessment Report and a clinical psychologist's report (issued when RP was 17 and 18 respectively and neither in relation to these charges).⁷⁷ Both reports showed that RP was in the borderline range of intellectual functioning, yet despite this, the prosecution brought no further evidence. Perhaps one of the most significant aspects of *RP v The Queen* is therefore the subtle, yet pointed, comment that the prosecution's submissions were 'apt to overlook' the fact that the starting point is the presumption that children lack sufficient intellectual and moral development to be found *doli capax*.⁷⁸ This is a reminder that the onus is placed squarely on the prosecution to bring evidence to rebut that presumption to the criminal standard and that it would subvert the presumption if the prosecution did not bring adequate evidence.

This bar on allowing the presumption to be rebutted by inferences only from evidence establishing the offence seems to be largely responsible for the diametrically opposed criticisms of the presumption of *doli incapax*. According to van Krieken, those cases that apply the presumption strictly and require evidence beyond that proving commission of the wrongful acts ('high hurdle' cases) are the ones where courts have been most critical of the presumption of *doli incapax*.⁷⁹ This is particularly so where courts feel that the act was so evidently wrong that every child should know this and therefore that there should be no, or little, need for extra evidence to establish understanding. Such criticisms align with the view that the presumption is over-protective, by standing in the way of prosecuting children. In contrast, van Krieken argues that in those cases where the rule is approached less strictly ('low hurdle' cases), there is less criticism of the operation of the presumption by the courts.⁸⁰ However, cases where the presumption has been rebutted based on generalisations and inferences from the evidence establishing the offence have also led to arguments that the presumption provides little or inconsistent protection for children. To some extent, the decision in *RP v The Queen* should bring some clarity here by confirming the correctness of the former approach: 'No matter how obviously wrong the act or acts constituting the offence may be, the presumption cannot be rebutted merely as an inference from the doing of that act or

⁷⁶ See, eg, *R v LAH* [2016] QCA 82 (5 April 2016).

⁷⁷ (2016) 259 CLR 641, 652 [16], 657 [32].

⁷⁸ Ibid 657 [32] (Kiefel, Bell, Keane and Gordon JJ).

⁷⁹ Robert van Krieken, 'Frech oder schuldig. Wie das Recht über die Strafmündigkeit der Kinder denkt in England, Deutschland und Australien' in Doris Bühler-Niederberger (ed), *Die Macht der Unschuld: das Kind als Chiffre* (Leske & Budrich, 2004) 185 [trans at: SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2319773>].

⁸⁰ Ibid 16.

those acts.⁸¹ Settling on this approach could leave open criticisms about the difficulty of rebutting the presumption. The remainder of Part III therefore aims to allay such criticism by bringing greater clarity to the types of evidence that are appropriate to rebut the presumption.

C *Circumstances Surrounding the Act*

While the evidence establishing the offence itself cannot alone be used to rebut the presumption it is widely accepted that evidence of the circumstances surrounding the offence can be called on.⁸² The sort of evidence of surrounding circumstances which has been used to support a finding that the child understood that what he or she had done was seriously wrong includes: evidence of careful planning of the crime, particularly sophisticated or devious methods of carrying out the act; assertion of a false alibi; making efforts to conceal the act or divert blame; and running away from police.⁸³ In *R v Sheldon*, an almost 14-year-old boy told his 10-year-old cousin that he knew a place where people were making a sundial in order to lure her to a secluded place.⁸⁴ Once there, he attacked her, made her unconscious by squeezing her neck and then sexually assaulted her. Following the attack, he returned to his friends looking distressed and telling them he had found a body, which he then showed them before calling emergency services. When later accused of committing these acts, he denied them, maintaining that he found his cousin laying there by chance, and also gave a description of someone he claimed to have seen running away from the scene. The conduct of the boy leading up to the act, ‘the relatively sophisticated subterfuge practised by the appellant to lure [his cousin] Joanne to the scene’,⁸⁵ and his behaviour after the act were thought to clearly indicate that he understood that his act was seriously wrong.

Running away from the police has also been accepted in several cases as proof of an appreciation that the act was seriously wrong.⁸⁶ As noted by Lord Lowry in *C (A Minor) v Director of Public Prosecutions*, there may be cases ‘where running away would indicate guilty knowledge, where an act is either wrong or innocent and there is no room for mere naughtiness. An example might be selling drugs at a street corner and fleeing at the sight of a policeman.’⁸⁷ However, it has also been noted that children may well run away just because they think they have done something naughty or, indeed, simply because they are afraid of the police.⁸⁸ The context of running away is therefore important.⁸⁹

⁸¹ (2016) 259 CLR 641, 649 [9] (Kiefel, Bell, Keane and Gordon JJ), 659 [38] (Gageler J).

⁸² *RH v DPP (NSW)* [2013] NSWSC 520 (10 May 2013) [30]; *BP v The Queen* [2006] NSWCCA 172 (1 June 2006) [29]–[30]; *R v F, ex parte A-G (Qld)* (1999) 2 Qd R 157; *C (A Minor) v DPP* [1996] AC 1, 39.

⁸³ *R v F, ex parte A-G (Qld)* (1999) 2 Qd R 157; *RH v DPP (NSW)* [2013] NSWSC 520 (10 May 2013) [28].

⁸⁴ [1996] 2 Cr App R 50.

⁸⁵ *Ibid* 53 (Simon Brown LJ).

⁸⁶ See, eg, *A v DPP* [1992] Crim LR 34; *JM v Runeckles* (1984) 79 Cr App R 255, 258.

⁸⁷ [1996] AC 1, 39, quoted in *L v DPP* [1996] 2 Cr App R 501, 504.

⁸⁸ See *R v JA* (2007) 161 ACTR 1, 11 [76], quoting *C (A Minor) v DPP* [1996] AC 1, 39; *A v DPP* [1992] Crim LR 34, 35.

⁸⁹ See, eg, *L v DPP*, which involved a bullying incident leading to assault occasioning actual bodily harm and false imprisonment: [1996] 2 Cr App R 501, 513. Factors found to suggest that the act of running away was unlikely to be considered equivocal were that: the incident took place at a time

The type of place where an offence was committed and the manner in which it was committed may also indicate understanding of wrongfulness. In *RH v Director of Public Prosecutions (NSW)*,⁹⁰ a 12-year-old child forcibly broke into a fire station with the use of a jemmy, ‘ransacked’ it, and stole some items. It was argued by the defence that because these matters merely proved the acts that constituted the offence, they could not be taken into account, as established in *C v DPP*.⁹¹ Hoeben CJ at CL disagreed and stated:

The importance of the object of the break-in being a fire station was that it would have been appreciated by the plaintiff that the fire station existed for a specific purpose and that he was not meant to be there. That he was aware of this fact, emerges from statements which he made to CK [his cousin]. Of more significance is the use of a jemmy to break open the padlock. ... This was an obviously wrongful act which required some planning, ie, having a jemmy available.⁹²

In reaching this conclusion Hoeben CJ at CL noted that there had been conflicting views in earlier cases about whether evidence establishing the offence itself could be sufficient to rebut the presumption. His Honour took the view that according to *C v DPP*, such evidence could be used as long as it was not the only evidence used.⁹³ His Honour went further and suggested, in agreement with Hodgson JA in *BP v The Queen*, that the Court should not take a narrow view of the sort of circumstances that could be taken into account.⁹⁴ In *BP v The Queen*, evidence that the victim was crying, screaming, and struggling while BP digitally penetrated her and the fact that he asked SW, who was also present, to stop the victim crying (which he did by placing his hand over her mouth) were held to be circumstances surrounding the offence that could be taken into account to establish both boys understood that what they were doing was seriously wrong.⁹⁵ Similarly, in *A v Director of Public Prosecutions*,⁹⁶ a 12-year-old boy and another child took a girl to the chute room in a block of flats and forced her to commit sexual acts under threats of violence. Upon hearing adults outside on the landing, the boys fled. The Court found that the threats, the obviousness of the victim’s distress, taking the girl to a place where detection was unlikely, and running away on the appearance of adults were all factors which, although closely associated with the act, could be used to indicate an understanding of the seriousness of the act.⁹⁷

In *RP v The Queen*, the NSW Court of Criminal Appeal also took the view that factors, similar to those in *BP v The Queen* and *A v DPP* such as placing a hand over the mouth of the victim, and the victim crying and being in evident distress, did establish that he understood that he was doing something seriously wrong.⁹⁸

and place where there would be no help for the victim; the appellants admitted they were aware of the victim’s evident distress; the appellants tried to dissociate themselves from the attack; and each appellant blatantly tried to blame the others.

⁹⁰ [2013] NSWSC 520 (10 May 2013).

⁹¹ *Ibid* [26].

⁹² *Ibid* [28].

⁹³ *Ibid* [27].

⁹⁴ *Ibid*; *BP v The Queen* [2006] NSWCCA 172 (1 June 2006) [30].

⁹⁵ [2006] NSWCCA 172 (1 June 2006) [30].

⁹⁶ [1997] Crim LR 125.

⁹⁷ *Ibid* 126.

⁹⁸ *RP v The Queen* (2015) 90 NSWLR 234, 249 [78], 258 [140].

However, the High Court disagreed and held that, in the face of the available evidence about the boy's mental development, the circumstances of the offence did not show that he understood the moral wrongfulness of his actions.⁹⁹ The Court noted that it is common for children to engage in sexual play and want to keep this secret because they think it is naughty. Even though in this case RP's behaviour went far beyond ordinary experimentation, the Court opined that this, on its own, did not lead to 'a conclusion that he understood his conduct was seriously wrong in a moral sense, as distinct from it being rude or naughty'.¹⁰⁰ The Court took the view that it could not be assumed that a child aged 11 and a half years 'understands that the infliction of hurt and distress on a younger sibling involves serious wrongdoing'.¹⁰¹ Similarly, RP placing his hand over the mouth of his brother to silence him and thus avoid detection was found to be 'equally consistent with naughtiness or wrong behaviour short of being seriously or gravely wrong'.¹⁰²

More recently, in *AL v The Queen*, a boy aged between 12 and 13 sexually assaulted on several occasions a boy aged between 4 and 5 years old.¹⁰³ The offences, which involved the victim being forced to fellate AL, took place while the victim was visiting the house of AL. Factors introduced to indicate that AL understood that his acts were seriously wrong were that AL took steps to avoid detection similar to those discussed in the above cases, such as: making threats to ensure silence; taking the victim to the bathroom and locking the door; and ensuring the victim was composed before he could return to his siblings.¹⁰⁴ The NSW Court of Criminal Appeal rejected the defence's argument that the jury should have been warned of the 'significant shortcomings' in drawing conclusions from the circumstances surrounding the act,¹⁰⁵ as was found to be the case in *RP v The Queen*. The Court noted that *RP v The Queen* turned on its facts, and a significant factor in that case was that the inferences made from the evidence of circumstances surrounding the act needed to be weighed against evidence showing that RP was in the borderline range of intellectual disability, which was not the case in AL.¹⁰⁶

The use of the condom by RP when he penetrated his brother was also found by the plurality of the High Court to be a significant factor indicating a lack of understanding. The trial judge and Court of Criminal Appeal had erred in disregarding this evidence.¹⁰⁷ The plurality held that

[t]he fact that a child of 11 years and six months knew about anal intercourse, and to use a condom when engaging in it, was strongly suggestive of his exposure to inappropriate sexually explicit material or of having been himself the subject of sexual interference ...¹⁰⁸

⁹⁹ *RP v The Queen* (2016) 259 CLR 641, 658 [35]–[36] (Kiefel, Bell, Keane and Gordon JJ), 660 [42]–[43] (Gageler J).

¹⁰⁰ *Ibid* 657 [33].

¹⁰¹ *Ibid* 658 [35].

¹⁰² *RP v The Queen* (2015) 90 NSWLR 234, 246 [60].

¹⁰³ [2017] NSWCCA 34 (22 March 2017).

¹⁰⁴ *Ibid* [132].

¹⁰⁵ *Ibid* [135].

¹⁰⁶ *Ibid* [135]–[139]. In fact, in *AL* the Court found that there was evidence that AL was a diligent, well-mannered and educated student. The relevance of evidence from school is discussed further below.

¹⁰⁷ *RP v The Queen* (2016) 259 CLR 641, 657 [34].

¹⁰⁸ *Ibid*.

Such experiences could significantly affect the ability of the boy to understand the moral wrongfulness of the act. While not necessarily disagreeing with this premise, Gageler J found that it was right to set the evidence aside because: ‘Without greater context, I do not think that use of a condom alone suggests that RP had been exposed to influences that impeded the development of his capacity to tell right from wrong.’¹⁰⁹

The mode of committing the offence and level of involvement in the commission of the offence can also be indicative of whether a child understood its wrongfulness. For instance, it may be easier to understand the wrongfulness of an offence committed by positive action, rather than by omission. Similarly, a child participant in the offence of another may be less aware of the wrongfulness than a child who acts alone or who initiates the offence. Bandalli highlights this point using the case of *C (A Minor) v DPP*:¹¹⁰

Holding handlebars [of a motorbike] whilst watching someone else cause damage [by forcing the motorbike lock using a crowbar] could well be regarded as just naughty or even as non-involvement by anyone, especially a child, unacquainted with the principles of secondary participation.¹¹¹

In sum, it should be remembered that generalisations only serve as a starting point and that the inquiry is whether the actual child understood the wrongfulness of the particular act at the time and in the circumstances in which it was committed. Whether a child had the required understanding is dependent on many varied factors, including developmental factors.¹¹² As Gageler J pointed out in *RP v The Queen*, inferences drawn from the circumstances surrounding the act alone need to be placed in the context of other evidence about the child’s mental capacity.¹¹³ Given the difficulty in separating evidence that establishes the commission of the offence from evidence of circumstances surrounding the offence, and the importance of context, the best approach is to adduce further forms of evidence which can confirm any conclusions drawn from such evidence.

D Evidence of Normality

As already noted, some offences may be regarded as so obviously wrong that every child is taken to understand their wrongfulness. However, it is quite clear that this does not mean that the prosecution can disregard the presumption and not lead any evidence. In *R v LAH*, the prosecution relied on the argument that ‘[i]t was inevitable ... that the jury would have concluded that, in 1999, the 13 year old appellant who appeared of normal intelligence and attended school, would have the capacity to know he should not behave in this way’.¹¹⁴ While the Queensland Court of Criminal

¹⁰⁹ Ibid 659 [39].

¹¹⁰ [1996] AC 1.

¹¹¹ Sue Bandalli, ‘Abolition of the Presumption of *Doli Incapax* and the Criminalisation of Children’ (1998) 37(2) *Howard Journal of Criminal Justice* 114, 116.

¹¹² Michael E Lam and Megan P Y Sim, ‘Developmental Factors Affecting Children in Legal Contexts’ (2013) 13(2) *Youth Justice* 131.

¹¹³ (2016) 259 CLR 641, 660 [42]. See also *AL v The Queen* [2017] NSWCCA 34 (22 March 2017).

¹¹⁴ [2016] QCA 82 (5 April 2016) [50]. This again was a case where no evidence of the child’s understanding was led other than the evidence establishing commission of the offence.

Appeal found some appeal in this approach, it concluded that this is not in line with the clear wording of s 29(2) of the *Criminal Code* of Queensland.¹¹⁵ As stated in *R v B*:

One would expect a child as old as 12 to have the capacity to know that threatening a teacher with a knife is wrong, but this expectation does not affect the existence of the presumption; it only affects the strength of the evidence likely to be necessary to rebut it.¹¹⁶

Thus, the comment by Cummins AJA in *R v ALH* that some acts are so obviously wrong that a child *will* understand their wrongfulness at an early age,¹¹⁷ is problematic. While it may be thought that the offence is so obviously wrong that all children should understand this from an early age there may be factors — such as the child’s mental capacity, background or the context in which the act is committed — that may mean that this particular child did not understand the wrongfulness at the time of acting. Lennings and Lennings criticise a nomothetic approach rather than a personal approach to assessing the child’s understanding and highlight the difference between decision-making in ‘cold’ and ‘hot’ conditions. They comment that

[i]n hot conditions, where there is high emotional stimulation, adolescent immaturity becomes more pronounced. In hot conditions, the impact of developmental delays and vulnerabilities are stark and exert a significant impact on the maturity of decision-making. Tests of whether an action is seriously wrong must therefore require an understanding of the context in which the action took place (in the case of criminal offending, a hot condition mostly) as opposed to some nomothetic understanding of what is possible for young people to decide.¹¹⁸

To avoid the preclusion on using proof of the acts constituting the offence, some decisions have adopted the presumption of normality. Although this terminology stems from English cases and is not used in Australian cases, the logic underlying the presumption of normality has been applied in Australia. It functions in this way: the act is assumed to be so obviously seriously wrong that any normal child between the age of 10 and 14 would have known this; so, if there is proof that the child is normal, the child is presumed to have the requisite knowledge. *JBH (A Minor) v O’Connell* confirmed the operation of the presumption of normality provided that there was evidence that the ‘children were ordinary children with ordinary mental aptitudes’, as opposed to a mere assumption that the children were normal.¹¹⁹ Similarly, in *RH v Director of Public Prosecutions (NSW)* Hoeben CJ at CL held that the trial judge should not have assumed that the child was a normal 12-year-old without any evidence confirming this. However, his Honour then continued by saying that there was no need for a lot of evidence for the Court to be able to draw such an inference. His Honour noted that: ‘Evidence from the plaintiff’s mother concerning his performance at school or his behaviour generally, would have

¹¹⁵ *Ibid* [51].

¹¹⁶ [1997] QCA 486 (6 November 1997) (Pincus JA).

¹¹⁷ (2003) 6 VR 276, 298.

¹¹⁸ Lennings and Lennings, above n 62, 795.

¹¹⁹ [1981] Crim LR 632 (Donaldson LJ), quoted in *C v DPP* [1996] AC 1, 31; See also *RH v DPP (NSW)* [2013] NSWSC 520 (10 May 2013) [21].

been sufficient.¹²⁰ Evidence establishing that a child is ‘normally’ developed will often come from statements by teachers and school reports,¹²¹ but may also include things such as an analysis of the child’s handwriting.¹²² In contrast, a simple assumption that the child was normally developed on the basis of the child’s physical appearance is not sufficient.¹²³

It is understandable that the prosecution may consider the need to bring evidence of understanding to be inconvenient where the offence appears to be obviously seriously wrong. Nonetheless, an approach that assumes the child’s normality is problematic. The most obvious objection is that there is no examination of the child’s actual state of mind in relation to the specific act committed. Rather, there is reliance on assumptions about what children might generally understand, backed up by evidence of the child’s normal development. It is vital to remember that the test is ‘a subjective one and concerned the state of mind of the particular minor. It could not be applied on the basis of what a normal child of 12 would have known or thought.’¹²⁴ An even more fundamental objection to this approach is that using such evidence is incompatible with the presumption. It is illogical to allow evidence of normality to rebut a presumption that is based on the premise that children aged between 10 and 14 generally *do not* understand the wrongfulness of their actions. Proof of normality should actually confirm a lack of understanding, rather than be taken to prove the opposite.

E Expert Evidence

It is possible, but not necessary, to call an expert witness to give evidence on the child’s developmental state. This may take the form of a report by a psychologist or psychiatrist. Two factors that must be kept in mind when relying on reports are: what was the report produced for and when was it produced? Unless specifically prepared for the court, such evidence may only indicate a general level of understanding or typical behaviour and not whether the child actually understood that what he or she was doing was wrong at the time and in the circumstances of the offence. In *RP v The Queen*, for example, a Job Capacity Assessment and clinical psychologist’s report were relied on by the prosecution, even though neither were prepared for the proceedings.¹²⁵

Even where the report is specifically prepared for the court, a significant delay can severely compromise its accuracy and usefulness. In *R v LMW*, the psychiatrist’s report was rejected because it was based on an interview with LMW that took place 19 months after the incident.¹²⁶ The Court commented that

¹²⁰ *RH v DPP (NSW)* [2013] NSWSC 520 (10 May 2013) [24].

¹²¹ See, eg, *AL v The Queen* [2017] NSWCCA 34 (22 March 2017) [139]–[141], [150]. For further discussion, see below Part III F.

¹²² See *JM v Runeckles* (1984) 79 Cr App R 255.

¹²³ *A v DPP* [1992] Crim LR 34, 34–5.

¹²⁴ *RH v DPP (NSW)* [2013] NSWSC 520 (10 May 2013) [22] (Hoeben CJ), quoted in *RH v DPP (NSW)* (2014) 244 A Crim R 221, 228 [30].

¹²⁵ (2016) 259 CLR 641, 652–3 [16]–[19]. The NSW Court of Criminal Appeal noted difficulties in relying on the report of a psychologist completed six years after the events complained of: *RP v The Queen* (2015) 90 NSWLR 234, 248 [67].

¹²⁶ [1999] NSWSC 1342 (25 November 1999).

[i]n that period not only had the accused grown older but much more importantly he had undergone very unhappy experiences resulting from the death of the deceased. He had experienced threats from those who obviously believed he was responsible for what had occurred, he had undergone the ordeal of proceedings in the Children's Court and he had been subject to much attention by the media.¹²⁷

An important question is whether expert testimony about the capacity of the child should be allowed or even required in every case. The United Nations Committee on the Rights of the Child has expressed concern about youth justice systems that require a positive finding that the child was criminally responsible, yet do not demand evidence from an expert, such as a psychologist.¹²⁸ The potential benefit of such evidence in some cases must, however, be weighed against the negative impact of routinely requiring expert testimony. There are practical considerations of the cost, availability, and expertise of the expert witness. The preparation of a report has the potential to prolong proceedings,¹²⁹ which can impact negatively on the child,¹³⁰ or, as noted in *R v LMW*, be of limited utility because a child's understanding may change after the event.¹³¹

Expert testimony is called on the basis that this can provide specialist knowledge that the magistrate, judge or jury does not possess.¹³² If there is a view that such evidence is routinely needed because the court does not have the requisite skills, there is the danger that the judge, magistrate, or jury 'will abdicate their duty to ascertain and weigh the facts and simply accept the experts' own opinion evidence'.¹³³ Such a view was expressed in *L (A Minor) v Director of Public Prosecutions*, where it was felt that requiring a psychiatric report could 'introduce an undesirable and unnecessary element into the prosecution process' by shifting the court's powers to others.¹³⁴ As Otton LJ noted: 'It is for the court to decide as a fact whether what the suspect did or said before or after the incident indicates his state of mind at the time of the offence and his appreciation of the seriousness of what he has done.'¹³⁵ As such, expert opinion is just one piece of evidence to be assessed by the fact finder in the context of all other evidence that might be available. This is highlighted by *R v EI*.¹³⁶ A psychiatrist had interviewed the boy and found that he could not understand the wrongfulness of what he had done. The trial judge weighed the psychiatrist's evidence against other factors (such as evidence from lay

¹²⁷ Ibid [11]. See also *RP v The Queen* (2015) 90 NSWLR 234, 248 [67].

¹²⁸ Committee on the Rights of the Child, *General Comment No 10 (2007): Children's Rights in Juvenile Justice*, 44th sess, UN Doc CRC/C/GC/10 (25 April 2007) para 30.

¹²⁹ Delays may also be caused if there are not enough specialists in the field available to provide a report: see Ann Skelton, 'Proposals for the Review of the Minimum Age of Criminal Responsibility' (2013) 26(3) *South African Journal of Criminal Justice* 257.

¹³⁰ For instance, the child may need some form of therapeutic help and a lengthening of proceedings means a lengthening of the time before the child gets the help he or she needs if it can only be given at the end of proceedings: see Freeman, above n 3, 119.

¹³¹ [1999] NSWSC 1342 (25 November 1999) [12].

¹³² Law Commission, *Expert Evidence in Criminal Proceedings in England and Wales*, Report No 325 (2011) [1.14].

¹³³ Ibid [1.9].

¹³⁴ [1996] 2 Cr App R 501, 505 (Otton LJ).

¹³⁵ Ibid.

¹³⁶ [2009] QCA 177 (19 June 2009).

witnesses, the content of the police interview, and the circumstances surrounding the act) to conclude that the boy did have the requisite capacity.¹³⁷

When the court is weighing expert evidence it is important to be cognisant of the limitations of any such report. Some experts in the field acknowledge that psychometric measuring instruments are still inadequately developed to allow health professionals to complete their reports with clarity and precision.¹³⁸ Unless this is made clear to the court, there is a danger that the court may overestimate the capacity of experts to determine a child's understanding.

A final point is that requiring expert evidence carries the danger of medicalising and pathologising the issue of criminal responsibility and making it appear that the fact finder is generally not in a position to assess the available evidence and lacks relevant experience. Thus, rather than routinely require expert testimony, the aim should be for the prosecution to gather as much evidence as is available from varied sources, in order to gain as full a picture as possible of the child's capacities in relation to the conduct at issue, and for the court to ensure it balances any such reports against other available evidence.¹³⁹

F *Home Background and School Life*

Home and school background profoundly affect a child's ability to understand the wrongfulness of behaviour. In these environments, the child first learns the difference between acceptable and unacceptable behaviour. If there are failings, particularly in the home, 'what is more likely than that a child is brought up without knowledge of right and wrong?'¹⁴⁰ Equally, evidence that a child is from a 'good home' and is well-educated can indicate that it is likely that he or she does have understanding of the wrongfulness of the act.¹⁴¹

¹³⁷ Ibid [18].

¹³⁸ Anthony L Pillay, 'Criminal Capacity in Children Accused of Murder: Challenges in the Forensic Mental Health Assessment' (2006) 18(1) *Journal of Child and Adolescent Mental Health* 17; Anthony L Pillay and Clive Willows, 'Assessing the Criminal Capacity of Children: A Challenge to the Capacity of Mental Health Professionals' (2015) 27(2) *Journal of Child and Adolescent Mental Health* 91; Skelton, above n 129.

¹³⁹ *R v EI* is an example of a case where the expert evidence that a child did not understand the wrongfulness of the act was rejected by the Court after balancing this evidence against the other available evidence: [2009] QCA 177 (19 June 2009).

¹⁴⁰ *F v Padwick* [1959] Crim LR 439 (Parker CJ), quoted in *R v B* (1979) 69 Cr App R 362, 365. Research clearly shows that there is a strong link between abuse, neglect and neurodevelopmental immaturity. See also Youth Justice Working Group, 'Rules of Engagement: Changing the Heart of Youth Justice' (Policy Report, The Centre for Social Justice, January 2012) 202 <http://www.centreforsocialjustice.org.uk/core/wp-content/uploads/2016/08/CSJ_Youth_Justice_Full_Report.pdf>; Elly Farmer, 'The Age of Criminal Responsibility: Developmental Science and Human Rights Perspectives' (2011) 6(2) *Journal of Children's Services* 86, 88–9.

¹⁴¹ See, eg, *AL v The Queen* [2017] NSWCCA 34 (22 March 2017) [150]. This led to the criticism in *C (A Minor) v DPP* [1996] AC 1, 11 (Laws J) that the presumption is divisive and perverse:

divisive, because it tends to attach criminal consequences to the acts of children coming from what used to be called good homes more readily than to the acts of others; perverse, because it tends to absolve from criminal responsibility the very children most likely to commit criminal acts.

In *C (A Minor) v DPP* Lowry J suggested that '[o]ne answer to this observation (not entirely satisfying, I agree) is that the presumption contemplated the conviction and punishment of children who, possibly by virtue of their superior upbringing, bore moral responsibility for their actions and

In *M v J*, a boy of 13 was charged with firearm offences for firing an air rifle.¹⁴² In that case, it was noted that ‘presumably the applicant knew that his father fired the air-rifle from time to time, assumed that it was not wrong for his father to do so, and probably assumed that it was not wrong for him to do so either’.¹⁴³ In *RP v The Queen*, it was argued that an upbringing where there was exposure to violence could mean that the child did not think that the force he or she used was significant.¹⁴⁴ This is in line with social learning theory, which explains ‘that maltreated children learn through modelling and reinforcement that aggressive behaviour is linked to more attention and status’.¹⁴⁵ As noted already, the fact that RP knew about anal sex and used a condom were thought by the plurality of the High Court to suggest exposure to indecent material or abuse.¹⁴⁶ This concern was reinforced by a psychiatrist’s report related to later offending that also raised the possibility that RP had been the victim of molestation and had been exposed to family violence and family disputes.¹⁴⁷ The High Court noted that despite concerns being raised about the possibility of abuse, the prosecution did not call on the father or anyone else to give evidence about the environment in which RP was raised.¹⁴⁸

In contrast, in *AL v The Queen* evidence that the child had a good home life, lived with both parents and siblings in an affluent environment and had a good school record were regarded as sufficient, along with other evidence, to allow a jury to be satisfied beyond reasonable doubt that the child understood the wrongfulness of his behaviour.¹⁴⁹ The NSW Court of Criminal Appeal found weight in the fact that the jury had evidence of the home background including ‘photographs of the applicant and his home from 2004’ from which it noted that: ‘Nothing in those images bespeaks disadvantage or deprivation; quite to the contrary.’¹⁵⁰ Such evidence of the home background, while useful, must be balanced against other available evidence given that the inquiry is about whether the child understood the behaviour to be seriously wrong at the time and in the circumstances in which the offence was committed.

Aside from expert evidence from psychologists and psychiatrists, several cases have accepted that evidence of a child’s understanding may come from someone who knows the child well, such as a schoolteacher, social worker or even a family member.¹⁵¹ In *R v JA*, a teacher gave evidence that concern had been expressed about the 11-year-old boy’s ‘problem behaviours’, especially ‘rough play’.¹⁵² This was taken to indicate that the boy did not understand that such

the exoneration of those who did not.’: [1996] AC 1, 35–6. See also Williams, *Criminal Law*, above n 72, 819.

¹⁴² [1989] Tas R 212.

¹⁴³ *Ibid* 223.

¹⁴⁴ (2016) 259 CLR 641, 652–3 [18]–[19]; *R v B* (1979) 69 Cr App R 362.

¹⁴⁵ Farmer, above n 140, 89, citing Albert Bandura, *Aggression: A Social Learning Analysis* (Prentice-Hall, 1973).

¹⁴⁶ *RP v The Queen* (2016) 259 CLR 641, 657–8 [34].

¹⁴⁷ *Ibid* 653 [19], 657–8 [34].

¹⁴⁸ *Ibid* 657–8 [34].

¹⁴⁹ [2017] NSWCCA 34 (22 March 2017) [150].

¹⁵⁰ *Ibid* [142].

¹⁵¹ *R v JA* (2007) 161 ACTR 1; *L v DPP* [1996] 2 Cr App R 501.

¹⁵² (2007) 161 ACTR 1, 13 [85].

behaviour was wrong in the relevant sense.¹⁵³ School reports also revealed that he was not ‘able to assess and apply adult standards’.¹⁵⁴ In *BP v The Queen*, a teacher gave evidence that it was almost a daily occurrence that she would need to speak to the boy about his behaviour and explain to him that what he was doing was wrong or unacceptable. She noted that when being counselled about his behaviour he appeared to accept what he was told and appeared remorseful.¹⁵⁵ By contrast, in *AL v The Queen* evidence from school reports that AL was well-mannered, cooperative and appeared to be a good student who complied with school rules was used to support the finding that AL did understand the wrongfulness of his behaviour.¹⁵⁶ In drawing inferences from such reports and statements from teachers, as with reports of psychiatrists or psychologists, it must be remembered that unless specifically prepared about the offence committed, they will usually only indicate an opinion about the child’s general level of understanding or typical behaviours. As such, they may be of limited use in determining whether the child actually understood at the time and in the circumstances of the offence that his or her actions were wrong. Care must therefore be taken to ensure that this evidence is balanced with any other forms of evidence that may be more directly related to the commission of the offence.

Some cases have questioned whether inferences could be drawn from the behaviour of the child and/or family in court. In *Ex parte N*, the appeals committee of Middlesex Sessions felt its conclusion that the boy had understood the wrongfulness of his act was ‘reinforced by the appearance and demeanour of the father and son in court: the boy appeared to be alert, to have good manners and to have a warm relationship with his father’.¹⁵⁷ On appeal, the Divisional Court held that it was dangerous to deduce anything from this.¹⁵⁸ Similarly, in the case of *CC v Director of Public Prosecutions* the fact that the boy’s mother was present in court supporting him was thought to be of little probative value.¹⁵⁹ Clearly such factors say very little about whether the child understood the wrongfulness of the act at the time of committing it, because they mainly indicate how the parent values the court appearance.¹⁶⁰ Where the trial takes place some time after the alleged offence, it is even more inappropriate to use the appearance and demeanour of the accused as indicative of their ability to understand the wrongfulness at the time they committed the offence. Therefore, the comment in *R v JJ; Ex parte Attorney-General (Qld)* that ‘the jury were in a position to form their own impressions from having seen him giving evidence in the witness box even if many years after the event’¹⁶¹ is highly problematic.

¹⁵³ Ibid 13 [86].

¹⁵⁴ Ibid 14 [94].

¹⁵⁵ *BP v The Queen* [2006] NSWCCA 172 (1 June 2006) [18].

¹⁵⁶ [2017] NSWCCA 34 (22 March 2017) [139]–[141], [150].

¹⁵⁷ *Ex parte N* [1959] Crim LR 523, 523.

¹⁵⁸ Ibid.

¹⁵⁹ [1996] 1 Cr App R 375, 377–8.

¹⁶⁰ While not useful alone, this factor may add weight to any conclusions drawn about how the child has been brought up.

¹⁶¹ [2005] QCA 153 (13 May 2005) [9].

G *Previous Record*

There are strict rules in relation to the admission of records of past criminal convictions in trials involving adults. This makes the use of the past criminal record of the child controversial, because it can place a child in a worse position than an adult.¹⁶² While British courts struggled with establishing when it was appropriate to accept such evidence, Australian courts have tended to be more open to the reception of such evidence. It has been held that it is admissible to establish capacity, even though it would not be allowed under the similar fact rule and so would not be admitted in the case of an adult.¹⁶³ This is thought acceptable because evidence of a previous finding of guilt is admitted only for the purpose of establishing whether the child knew the act was wrong, and not to establish commission of the crime.¹⁶⁴ In *GW v The Queen*, it was noted that where there is a danger that the prosecution is seeking to lead evidence of a prior record or finding of guilt, the court can use s 136 of the *Evidence Act 1995* (NSW) to avoid such prejudice and limit the evidence only to the issue of *doli incapax*.¹⁶⁵

It is evident that if the child has been found guilty of another similar offence, then he or she may well have come to understand that the behaviour was seriously wrong. This is also likely to be so where the child has been dealt with by the police, even if not found guilty. The usefulness of the record or finding of guilt is, however, dependant on whether the past criminal act was similar to the act under consideration. Evidence of a previous conviction says little if it is for a different type of offence. For instance, a conviction for assault does not mean that the child will understand the wrongfulness of an act of forgery. Furthermore, it is important to remember that there must be proof that the child understood the wrongfulness of the specific act committed at the time of committing it. While a previous finding of guilt may be highly suggestive of understanding, there may be evidence of other contextual factors which detract from this inference.

H *Statements by the Child to the Police*

Evidence of statements made by the child are particularly probative — in contrast to evidence inferred from factors such as the type of offence committed, the circumstances surrounding the offence, and the child’s upbringing. This type of evidence is preferable to inferential evidence because it comes directly from the child and refers directly to the child’s appreciation of the act. It is not drawn from a

¹⁶² In *C (A Minor) v DPP*, the House of Lords held that previous convictions were not to be admitted ‘unless they can be admitted under a generally applicable principle, for example, if he has put his character in issue or attacked the character of prosecution witnesses or if the earlier convictions come within the “similar facts” rule’: [1996] AC 1, 34.

¹⁶³ *R v M* (1977) 16 SASR 589, 594–5; *R v F*; *Ex parte A-G (Qld)* [1998] QCA 97 (19 May 1998); *GW v The Queen* (2015) 20 DCLR (NSW) 236, 240–1 [17]–[22]. See, eg, *Evidence Act 1995* (NSW) ss 97–8, 101.

¹⁶⁴ *GW v The Queen* (2015) 20 DCLR (NSW) 236, 240–1 [17]–[22]. Indeed, Lerve DCJ went further and recommended that there be a legislative change to establish that if a young person has previously been found guilty of an offence then the formal criminal history should in itself be admissible as evidence to rebut the presumption: 245 [46].

¹⁶⁵ *Ibid* 241 [21]–[22].

general analysis of the behaviour and personality of the child, nor is it drawn indirectly from the act or generalised expectations about the understanding of children in general.

There have been several cases where an admission by the child to the police that he or she knew that the act was wrong has been used to rebut the presumption. In *JM (A Minor) v Runeckles*,¹⁶⁶ a 13-year-old girl attacked another girl and stabbed her with a broken milk bottle. Evidence of her understanding was taken from the fact that she clearly and coherently described what had happened when she gave a statement under caution to the police shortly after her arrest. However, the use of statements made by a child must be approached with caution. In *IPH v Chief Constable of South Wales*, a boy accused of criminal damage admitted that he foresaw that pushing a van against a post would result in damage.¹⁶⁷ Lord Justice Woolf regarded this statement as showing that the boy knew the consequences of his act but not that he knew that his act was seriously wrong.¹⁶⁸

The methods used by police in conducting interviews with children have been the subject of discussion by academics and by the courts.¹⁶⁹ In *IPH v Chief Constable of South Wales*, Woolf LJ suggested, that in order to gather evidence about a child's understanding, the police should include some specifically formulated questions. His Lordship proposed direct questions, such as '[d]id you appreciate that what you were doing was seriously wrong?'¹⁷⁰ However, it is preferable to avoid such 'yes/no' questions because a 'yes' or 'no' does not explain how the child regarded the act or show whether the child knew that the act was seriously wrong, as opposed to naughty or mischievous.¹⁷¹ *R v EI* provides an example of more useful interview questions.¹⁷² Here the police officer put a number of hypothetical questions to the boy, asking whether what had occurred in each scenario presented was the right or wrong thing to do and why this was so.¹⁷³ A psychiatrist who had interviewed the boy gave evidence that he thought the boy was giving answers that he thought the police were

¹⁶⁶ (1984) 79 Cr App R 255.

¹⁶⁷ [1987] Crim LR 42.

¹⁶⁸ *Ibid* 43.

¹⁶⁹ Research has found that even where police officers have training in child development they do not apply that knowledge when questioning children and treat them the same as adults: Jessica R Meyer and N Dickon Reppucci, 'Police Practices and Perceptions Regarding Juvenile Interrogation and Interrogative Suggestibility' (2007) 25(6) *Behavioral Sciences & the Law* 757. It should, however, be noted that this research was undertaken in the United States, so the findings are not inexorably transferable to Australia.

¹⁷⁰ *IPH v Chief Constable of South Wales* [1987] Crim LR 42, 43.

¹⁷¹ See Birch, who in general agrees with direct questioning but feels that 'yes/no' questions should be avoided: Diane Birch, 'Commentary on *IPH v Chief Constable of South Wales*' [1987] Crim LR 42, 43. See also Lennings and Lennings, who note the advantages of using an interview protocol, such as that developed by Apler, which avoids leading questions and yes/no answers, and encourages the child to provide reasons for their answers and explores the dimension of moral reasoning: above n 62, 793, citing Alex Apler, 'Naughty or Bad? The Role of Expert Evidence in Rebuttal of the *doli incapax* Presumption' (2000) 7(2) *Psychiatry, Psychology and Law* 206.

¹⁷² [2009] QCA 177 (19 June 2009).

¹⁷³ For instance, he was presented with a scenario where a boy went into a shop, took a (chocolate) Mars Bar and walked out. He was then asked if he could 'pick out what he's done wrong?' and why it was wrong. Other scenarios he was asked about included picking up lost property, taking drugs, damaging property and touching people without permission: *R v EI* [2009] QCA 177 (19 June 2009) [12].

expecting.¹⁷⁴ Nonetheless, it was found that the boy's answers contained some explanations indicating that he had an understanding of right and wrong and had the capacity at the time of the offence to know that he ought not to do acts of the kind involved in the offences.¹⁷⁵

Leading questions, such as 'so you knew stealing it was wrong?', can suggest the answer that the person questioning wishes to hear.¹⁷⁶ Research shows that young people are more suggestible and compliant than adults, and more likely to make false confessions.¹⁷⁷ There is, thus, the danger that a child may agree with a question and '[i]n this set of circumstances suspects may appear to admit to the offence without accepting that they have done anything wrong'.¹⁷⁸ This was an issue in *R v McCormick*,¹⁷⁹ where a boy had been inside an aviary and, amongst other things, left a door open leading to some birds escaping and dying. The officer began the questioning by asking: 'Did you know that it's — it was seriously wrong to go into those aviaries?'¹⁸⁰ District Court Judge Wilson felt that the child's answers could not assist in determining whether he had the requisite capacity at the time of the offence because the proposition that his behaviour was wrong had already been put to him. Therefore, Wilson DCJ did not feel 'confident that the child, having been alerted to what the policeman considers to be wrong, did not merely provide the answer that he believed would appease the officer'.¹⁸¹

In contrast to those cases where the admission of an offence has been used to rebut the presumption are those cases where the requisite understanding was drawn from the fact that the child falsely denied committing the offence.¹⁸² In *T v Director of Public Prosecutions*,¹⁸³ a child was questioned by the police about stealing a first aid kit from an ambulance. The fact that the child said 'it ain't nothing to do with me, I didn't steal it' was regarded as revealing that the child had a good level of understanding.¹⁸⁴ Similarly, the child trying to disassociate himself or herself from the act and blame others may indicate that he or she appreciated the wrongfulness of the act and this was exactly why he or she tried to blame others.¹⁸⁵ In the case of *L v Director of Public Prosecutions*,¹⁸⁶ a child, upon being apprehended, denied having possession of a CS gas canister that he had been seen to throw down. It was held that the fact that 'when confronted at the scene he told a deliberate and blatant lie' could have been taken into account to establish the child's understanding.¹⁸⁷ However, whether the denial can be taken to suggest that a child understood the wrongfulness

¹⁷⁴ Ibid [15].

¹⁷⁵ Ibid [20].

¹⁷⁶ Lord Justice Otton warned against asking such leading questions: *L v DPP* [1996] 2 Cr App R 501, 505.

¹⁷⁷ Farmer, above n 140, 88.

¹⁷⁸ Roger Evans, 'The Conduct of Police Interviews with Juveniles' (Research Study No 8, Great Britain, The Royal Commission on Criminal Justice, 1993) 48.

¹⁷⁹ [2002] QDC 343 (19 December 2002).

¹⁸⁰ Ibid [20].

¹⁸¹ Ibid [21].

¹⁸² See, eg, *R v F; Ex parte A-G (Qld)* [1998] QCA 97 (19 May 1998).

¹⁸³ [1989] Crim LR 498.

¹⁸⁴ Ibid 498.

¹⁸⁵ See, eg, *L v DPP* [1996] 2 Cr App R 501, 513; *R v Sheldon* [1996] 2 Cr App R 50.

¹⁸⁶ [1996] 2 Cr App R 501.

¹⁸⁷ Ibid 507.

of the act depends on the circumstances and the accusation that is being denied. In *R v McCormick*, the prosecution sought to rebut the presumption on the basis of a false denial when the boy answered ‘no’ to the question of ‘[d]o you realise you killed a lot of small birds?’¹⁸⁸ District Court Judge Wilson rejected that this denial established sufficient understanding because the question related to whether the young person realised the existence of the state of things. There was evidence that he had been at the aviary with other boys, but there was no evidence that he had actually killed the birds. Furthermore, the fact that the boy made no reply to a similar question and looked shocked was taken by Wilson DCJ as signalling nothing more than that the boy was visibly affected by the realisation that his actions could have led to the death of the birds.¹⁸⁹

It is therefore vital that care is taken in how young people are questioned. It should also be remembered that the child must have known that the act was wrong at the time of committing it. For instance, in *R v EI* the psychiatrist found that the boy may have believed the behaviour to be wrong because the police officer told him or implied it was so.¹⁹⁰ However, the psychiatrist found that the boy did not have any inner sense of why the behaviours were right or wrong and did not understand the implications of his behaviour for the victims.¹⁹¹ Thus, the possibility must be considered that the child did not appreciate the wrongfulness of the act at that time, but came to realise that it was seriously wrong as a direct result of being questioned by the police or other adults.¹⁹² On this point the usefulness of statements made at a much later date is doubtful. In *AL v The Queen*, the NSW Court of Criminal Appeal accepted that a recollection by AL of his level of understanding at the age of 12, made during cross-examination between 11 and 13 years after the offence, was relevant and admissible to ascertaining whether he had understood the wrongfulness of his behaviour.¹⁹³ This is troubling because it seems that this is not drawing on a memory about what he understood when he was 12 years old, but rather it is an expression of an opinion (which is generally not admissible) about what he might have understood back then.¹⁹⁴ As the defence argued, AL was asked as a grown man to give an answer looking back to the relevant period, which does not provide evidence of his actual understanding at that time.¹⁹⁵

I *Statements Made by the Child during or after the Offence*

Statements made during the commission of the crime can be indicative of the child’s understanding. In *R v JA*, an 11-year-old boy was charged with threatening actual bodily harm with the intent to engage in sexual intercourse and committing an act of

¹⁸⁸ [2002] QDC 343 (19 December 2002) [15]. This question was posed when the boy was found on the property by Mr Brown (not a police officer).

¹⁸⁹ *Ibid* [18].

¹⁹⁰ [2009] QCA 177 (19 June 2009) [14]–[15].

¹⁹¹ *Ibid*.

¹⁹² *BP v The Queen* [2006] NSWCCA 172 (1 June 2006) [38].

¹⁹³ [2017] NSWCCA 34 (22 March 2017) [147]. He was asked in cross examination: ‘I suppose ... you would have known back then when you were 12 or 13 that it would have been seriously wrong to put your penis into a young boy’s mouth, wouldn’t you?’ To which he replied: ‘I suppose’: at [132].

¹⁹⁴ *Evidence Act 1995* (NSW) s 76.

¹⁹⁵ *AL v The Queen* [2017] NSWCCA 34 (22 March 2017) [133].

indecenty on a 12-year-old girl.¹⁹⁶ It was found that the language used to induce the girl to comply with his demands (‘talking about gangs, gang rules and killing his family’) revealed that he was acting out a fantasy, rather than appreciating that he was engaging in criminal activity.¹⁹⁷ In contrast, in *R v JJ; Ex parte Attorney-General (Qld)*,¹⁹⁸ a case involving a brother raping his sister, McPherson JA found that there was sufficient evidence of JJ’s understanding from the things he said to his victim. When his sister told him she was too young and that because he was her brother ‘you don’t do that to me’, he replied: ‘he could do this’ and told her not to ‘tell Mum or Dad, or I’ll hurt you’.¹⁹⁹ This uncontradicted evidence was taken to have been sufficient to satisfy a jury that the boy had the capacity to know he ought not to rape his sister.²⁰⁰

Utterances made to others not in the context of questioning, but following the offence, may also be a useful source of evidence. In *RH v Director of Public Prosecutions (NSW)*,²⁰¹ after breaking into a fire station and stealing property, RH went to his cousin’s house at night to tell him what he had done. He told his cousin, ‘I got drinks and that here, I got them from the fire station, I broke in there, ... I was searching looking for money. I found drinks and balloons and rulers. Me and S got “em”’.²⁰² Chief Judge Hoeben found that these words had the character of boasting about what RH had done and that the actual words used, particularly in relation to breaking in and searching for money, made it clear that RH knew that what he was doing was seriously wrong and not acts of mischief.²⁰³ Such statements may be more reliable because they are not made in response to direct questioning by a person in a position of authority and, thus, the child is less likely to be led to give a certain answer. There is, however, the danger that such statements may amount to showing off to peers or others and not truly reflect an understanding of the wrongfulness of the act.

IV Conclusion

Despite its longevity, the presumption of *doli incapax* remains a relatively nebulous concept with a lack of clarity over how it is rebutted. Criticisms of the presumption have tended to stem from perceptions of how easy or difficult it is to rebut it. Some find that the presumption is too easily rebutted with little evidence and, as such, it provides little protection. Others consider that the rules around evidence are too rigid and make the presumption too protective of children. Much confusion and frustration seems to stem particularly from those cases where it is thought that the act was so obviously wrong that every normal child would understand this. From this follows the argument that it is absurd to require proof of understanding beyond making inferences from the evidence establishing commission of the offence. The High

¹⁹⁶ (2007) 161 ACTR 1.

¹⁹⁷ *Ibid* 13 [83].

¹⁹⁸ [2005] QCA 153 (13 May 2005).

¹⁹⁹ *Ibid* [9].

²⁰⁰ *Ibid*.

²⁰¹ [2013] NSWSC 520 (10 May 2013).

²⁰² *Ibid* [32].

²⁰³ *Ibid* [31]–[34]; *RH v DPP (NSW)* (2014) 244 A Crim R 221, 223–4 [10]–[11].

Court in *RP v The Queen* has now brought some clarity about rebuttal of the presumption. It has confirmed the traditional position that evidence of the acts constituting the offence cannot alone be used to rebut the presumption. This is appropriate to ensure that adult judgements are not attributed to the child. It has also made clear that the prosecution has the onus of rebutting the presumption and must, therefore, gather sufficient evidence to support rebuttal, rather than merely relying on inferences and generalisations. This has the potential to increase criticism that the presumption is absurd in presuming children do not understand the wrongfulness of acts which are evidently wrong.

This article should go some way to stemming such concerns by assessing the sort of evidence that is appropriate to rebut the presumption. As stated in *AL v The Queen*: ‘There is no prescribed formula for evidence sufficient to rebut the presumption; that will depend upon the circumstances in individual cases.’²⁰⁴ However, this does not mean that there cannot be clarification of what forms of evidence should be relied on by the prosecution and how these different forms of evidence might interact with one another. It has been shown that the best approach is to collect as much evidence as possible, starting with the age of the child and the type of act committed. If the child is close to 14 years old and the act is obviously wrong, then it may take little further evidence to satisfy a court that the child understood the act to be seriously wrong. But where such inferences are drawn from the age and type of offence committed, other evidence should be called upon to confirm or reject the inferences. Information about the child’s mental and moral development may, for example, suggest that general assumptions should not be made. This was the case in *RP v The Queen*, where it was found that RP was in the borderline category of intellectual disability.²⁰⁵ Evidence of the child’s level of understanding generally (for example, from the home, school and social background) may also reveal whether the child was so developed that they should have been able to understand the wrongfulness of the act. Such evidence ought then to be assessed in the context of the concrete act (for example, what the child said and how they behaved before, during and after the act) to reveal whether, in the actual situation, the child understood that what they had done was seriously wrong. The more indicators that are assessed, the clearer the picture will be of a child’s understanding. When approached in this way, the presumption of *doli incapax* provides appropriate protection for children. It allows a child to be prosecuted when the prosecution can bring evidence that they understood the act to be seriously wrong as opposed to naughty or mischievous. Where such evidence is not forthcoming, the child should not be prosecuted.

²⁰⁴ [2017] NSWCCA 34 (22 March 2017) [149].

²⁰⁵ (2016) 259 CLR 641, 658 [35]–[36].

Government-funded Health Research Contracts in Australia: A Critical Assessment of Transparency

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Abstract

Australian governments claim to be committed to improving transparency and democratic accountability. Yet they are increasingly contracting out research to external consultants, ‘think tanks’ and universities and the contractual relationships formed can, in fact, promote secrecy and undermine the goals of transparency and public scrutiny of government actions. This article reports on a first-in-kind study of research contracts between Commonwealth and New South Wales Government entities and external providers. Our analysis reveals that ‘control clauses’ are prevalent: contractually, governments can insist on the rights to determine whether, when and how the results of research are publicly disseminated, to claim intellectual property rights over work produced, and to terminate contractual relationships at will and without cause. These findings have troubling implications for government openness and accountability, for academic freedom when university researchers face restrictions on publication, and for evidence-informed policymaking. We propose solutions for proactive information disclosure to ensure that government transparency promises are realised in practice. We advocate for comprehensive public release of contract details and urge governments to publish the findings of contract research in an online repository.

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Information is a valuable resource. The right information at the right time can expand knowledge, enable innovation, boost productivity, and even save lives. Unlike other valuable resources information is not diminished by use. Indeed, the value of information can be enhanced when it is openly accessible and reused frequently.¹

Missing or buried research represents a democratic deficit. It feeds cynicism and has no place in any honest and well-conducted administration.²

It is a sad day when Australian researchers talk about suppression of scientific studies and their findings.³

I Introduction

A growing international movement seeks to advance openness and transparency in government activities. Globally, the Open Government Partnership program, of which Australia is a member, wants governments to become ‘more transparent, more accountable, and more responsive to their own citizens, with the ultimate goal of improving the quality of governance, as well as the quality of services that citizens receive’.⁴ In its first Open Government National Action Plan, released in December 2016, the Government of Australia promised ‘ambitious action’ to improve: transparency, accountability and public sector integrity, especially in contracting practices; access to government information, including more open datasets; and meaningful public participation in policy development and delivery of services.⁵ In March 2017, the Government announced its adoption of the International Open Data Charter, a further commitment to improving openness and citizen engagement.⁶

¹ Office of the Australian Information Commissioner (Cth), *Understanding the Value of Public Sector Information in Australia: Issues Paper 2* (November 2011) 2 <<http://apo.org.au/system/files/27576/apo-nid27576-99411.pdf>>.

² Nick Ross, ‘Foreword’ in Sir Stephen Sedley, *Missing Evidence: An Inquiry into the Delayed Publication of Government-Commissioned Research* (Sense about Science, June 2016) <<https://researchinquiry.org/inquiry-report/>> (‘*Sedley Report*’).

³ Anne McKenzie et al ‘Response to “A Survey of Suppression of Public Health Information by Australian Governments”’ (2008) 32(1) *Australian and New Zealand Journal of Public Health* 90.

⁴ Open Government Partnership, *Improving Public Services: Guidance for Developing OGP Commitments*, 2 <https://www.opengovpartnership.org/sites/default/files/OGP_public-service-guidance.pdf>.

⁵ Department of the Prime Minister and Cabinet (Cth), *Australia’s First Open Government National Action Plan 2016–18* (December 2016) 3 <<http://ogpau.pmc.gov.au/australias-first-open-government-national-action-plan-2016-18>>. Plans are underway for Australia’s Second Open Government National Action Plan 2018–20: <<https://ogpau.pmc.gov.au/consultations-australias-second-open-government-national-action-plan-2018-20>>.

⁶ Angus Taylor, Assistant Minister for Cities and Digital Transformation (Cth), ‘Australia’s Adoption of the Open Data Charter’ (Statement, 27 March 2017) cited by Samira Hassan, *Australia Adopts the International Open Data Charter* (7 April 2017) <<https://blog.data.gov.au/news-media/blog/australia-adopts-international-open-data-charter>>. The Open Data Charter has six principles: (1) government data should be open by default; (2) access should be provided in a timely and comprehensive way; (3) data should be accessible and usable; (4) data should be comparable and interoperable; (5) open data should improve governance and citizen engagement; (6) open data should support inclusive development and innovation: *Open Data Charter Principles* <<https://opendatacharter.net/principles/>>.

While making these commitments to transparency and access to public sector information, governments are increasingly contracting out the provision of research to external entities, including ‘think tanks’, private sector consultants and university-based researchers.⁷ This trend to external procurement is rooted in the ‘New Public Management’ movement, which champions the values of competition and efficiency and aims to reduce the size of government through privatisation and the outsourcing of activities previously seen as the natural domain of government.⁸

The processes by which governments outsource research and advisory services can, in practice, promote secrecy and undermine the goals of transparency and public scrutiny of government actions. A key mechanism of control is the contract that establishes the terms of the relationship between the government purchaser and the external provider of research. Contractually, governments can insist on the rights to control whether, when and how the results of research are publicly disseminated, to claim intellectual property (‘IP’) rights over work produced, and to terminate contractual relationships at will and without cause. Worryingly, these types of contractual clauses — described here as ‘control clauses’ — can limit the degree to which government-purchased research is exposed to external scrutiny and, in turn, diminish the rigour and quality of research.⁹ It can also contribute to duplication of effort and wasteful spending if bureaucrats, unaware of previous contract research that never saw the light of day, go to market again to purchase similar work.¹⁰

This article reports on our investigation into control clauses in health-related research contracts between Commonwealth and New South Wales (‘NSW’) government entities and external providers. We selected health as the focus of this investigation because health expenditure comprises a substantial portion of government spending — over \$180 billion in 2016/17¹¹ — and openness about the

⁷ Ariadne Vromen and Patrick Hurley, ‘Consultants, Think Tanks and Public Policy’ in Brian Head and Kate Crowley (eds) *Policy Analysis in Australia* (Policy Press, 2015) 167. See also Arnošt Veselý, ‘Externalization of Policy Advice: Theory, Methodology and Evidence’ (2013) 32(3) *Policy and Society* 199, 206 <<https://doi.org/10.1016/j.polsoc.2013.07.002>>. Veselý hypothesises three broad reasons for outsourcing: (1) lack of internal capacity; (2) political factors; and (3) the context in which the policy advice is provided.

⁸ Brian Head et al, ‘Are Policy-Makers Interested in Social Research? Exploring the Sources and Uses of Valued Information among Public Servants in Australia’ (2014) 33(2) *Policy and Society* 89. For commentary on the development of the New Public Management movement from the Hawke Government in the mid-1980s, see Judy Johnston, ‘The New Public Management in Australia’ (2000) 22(2) *Administrative Theory and Praxis* 345.

⁹ Schneider, Milat and Moore report the concern that if results will not be published, the ‘quality of evaluations was generally lower due to the absence of expectations of public scrutiny’: Carmen Huckel Schneider, Andrew J Milat and Gabriel Moore, ‘Barriers and Facilitators to Evaluation of Health Policies and Programs: Policymaker and Researcher Perspectives’ (2016) 58 *Evaluation and Program Planning* 208, 211–12.

¹⁰ A 2017 Productivity Commission Report on access to public sector data points out: ‘The lack of public release and data sharing between government entities has contributed to fragmentation and duplication of data collection activities. This ... wastes public and private sector resources’: Productivity Commission (Cth), *Data Availability and Use: Productivity Commission Inquiry* (Report No 82, March 2017) 34, 153 (Finding 3.5) <<http://www.pc.gov.au/inquiries/completed/data-access/report/data-access.pdf>>.

¹¹ Australian Institute of Health and Welfare (Cth), *Health Expenditure Australia 2016–17* (28 September 2018) <<https://www.aihw.gov.au/reports/health-welfare-expenditure/health-expenditure-australia-2016-17/contents/data-visualisation>>.

research informing health policies and programs is vital.¹² Our research contributes an applied, ‘law-in-action’ perspective to transparency discourse.¹³ We adopt a broad conceptualisation of transparency as the availability of information about an entity that allows external parties to monitor its internal activities or performance.¹⁴ Information availability can be achieved through active transparency, which requires governments to proactively release information to the public, or through passive means, such as freedom-of-information (‘FOI’) laws that allow people to request access to government-held records.¹⁵

This article has four main parts. First, we set the context by summarising the origins of the ‘open government’ movement, briefly describing three main government funding sources for health research, and highlighting previous reports of government control over contract research. Second, we present our investigation of Commonwealth and NSW contracts, which reveals that the use of control clauses is routine. Third, we make recommendations to improve government transparency. We advocate for the full disclosure of contracts on public registers and urge governments, in consultation with key stakeholders, to review and update standard contractual terms dealing with publication, IP and termination, to ensure they advance transparency goals. In doing so, the unique role of universities in society must be respected. We also call on governments to publish reports of contract research. Finally, we conclude with an agenda for further research.

II The Context

A *The Open Government Movement*

Australia’s 2016 Open Government Plan has its origins in the Government 2.0 movement instigated nearly a decade ago.¹⁶ In 2009, a taskforce was established to advise the Australian Government on matters that included improving transparency, enhancing the accessibility of government information, and establishing a ‘pro-disclosure culture.’¹⁷ The Taskforce’s central recommendation was that the Australian Government should make a declaration of open government.¹⁸ Further,

¹² In addition, the investigators’ own areas of research expertise are in health-related fields, which strengthened our ability to select and review government contracts.

¹³ Christopher Hood and David Heald (eds), *Transparency: The Key to Better Governance?* (Oxford University Press, 2006).

¹⁴ Stephan Grimmelikhuijsen *Transparency and Trust: An Experimental Study of Online Disclosure and Trust in Government* (PhD thesis, Utrecht University, 2012) 55. See also Stephan G Grimmelikhuijsen and Eric W Welch, ‘Developing and Testing a Theoretical Framework for Computer-Mediated Transparency of Local Governments’ (2012) 72(4) *Public Administration Review* 562.

¹⁵ Vincent Mabillard and Raphael Zumofen, ‘The Complex Relationships between Transparency and Accountability: A Synthesis and Contribution to Existing Frameworks’ (2017) 32(2) *Public Policy and Administration* 110.

¹⁶ Department of Finance (Cth), *Government 2.0* <<https://www.finance.gov.au/archive/policy-guides-procurement/gov20/>>.

¹⁷ Government 2.0 Taskforce, *Engage: Getting on with Government 2.0: Report of the Government 2.0 Taskforce* (December 2009) 88 <<https://www.finance.gov.au/sites/default/files/Government20TaskforceReport.pdf?>> (‘*Government 2.0 Taskforce Report*’).

¹⁸ *Ibid* xvii, 22.

to achieve greater openness, the Government should adopt a default position that public sector information¹⁹ will be freely accessible and should implement a consistent framework to support publication of government information.²⁰ The Government followed through with a Declaration of Open Government in mid-2010 and established the Office of the Australian Information Commissioner.²¹ The Commissioner subsequently promulgated the ‘Principles on Open Public Sector Information’, asserting the primary principle that government-held information should be publicly available unless there is a legal reason for confidentiality: ‘Information held by Australian Government agencies is a valuable national resource. If there is no legal need to protect the information it should be open to public access. Information publication enhances public access.’²²

Pledges to improve government openness coincide with the evidence-based policymaking movement, which is championed within the public sector and by external advisors.²³ In a critical analysis of evidence-based policymaking, Head observed that ‘it is axiomatic that reliable information and expert knowledge are integral to sound processes for formulating and implementing policy’.²⁴ Governments should not only be rigorous in their decision-making, but also be open about the sources and types of evidence used to inform their legislation, policies and practices. Policymaking is not simply a technocratic process of translating evidence into policy. It is, by definition, political and influenced by ideology.²⁵ This fact underscores the need for governments to be transparent about the evidence that has informed policy decisions. As Hawkins and Parkhurst argue, ‘[t]he policies [governments] adopt, the evidence they marshal to support their decisions and the

¹⁹ The Taskforce adopted an Organisation of Economic Co-operation and Development (‘OECD’) definition of public sector information: ‘information, including information products and services, generated, created, collected, processed, preserved, maintained, disseminated, or funded by or for the government or public institutions, taking into account [relevant] legal requirements and restrictions’: *ibid* 4 [1.4]. See also OECD, *OECD Recommendation of the Council for Enhanced Access and More Effective Use of Public Sector Information*, C(2008)36 (17–18 June 2008) 4 n 1 <<http://www.oecd.org/intermet/ieconomy/40826024.pdf>>.

²⁰ *Government 2.0 Taskforce Report*, above n 17, xix, xxi (Recommendations 6, 8).

²¹ Department of Finance (Cth), *Declaration of Open Government* (July 2010) <<https://www.finance.gov.au/blog/2010/07/16/declaration-open-government/>>.

²² Office of the Australian Information Commissioner (Cth), *Principles on Open Public Sector Information*, principle 1 <<https://www.oaic.gov.au/information-policy/information-policy-resources/principles-on-open-public-sector-information>>. Greater openness is also championed at state and territorial levels. For example, the NSW Office of the Premier and Cabinet issued a Memorandum of Open Government in 2012 that expressed its commitment ‘to the open government principles of transparency, participation, collaboration and innovation’ (emphasis in original): Barry O’Farrell (Premier), *M2012-10 Open Government* (22 August 2012) Office of the Premier and Cabinet (NSW) <<http://arp.nsw.gov.au/m2012-10-open-government>>. The Victorian Department of Premier and Cabinet champions these open government principles since they ‘underpin the good government agenda’: Chris Eccles, ‘The “Open Government” Principles of Transparency, Collaboration and Participation Underpin the Good Government Agenda’ (Speech delivered at the ANZSOG Conference, Grand Hyatt, Melbourne, 5 August 2015) <<http://www.vic.gov.au/publicsectorreform/speeches/does-open-government-make-for-good-government.html>>.

²³ See, eg, Productivity Commission (Cth), *Strengthening Evidence-Based Policy in the Australian Federation: Roundtable Proceedings*, vol 1, 9 <<http://www.pc.gov.au/research/supporting/strengthening-evidence>>.

²⁴ Brian W Head, ‘Toward More “Evidence-Informed” Policy Making?’ (2015) 76(3) *Public Administration Review* 472, 472 (citation omitted).

²⁵ *Ibid*.

interpretation of that evidence should be transparent, and thus open to contestation by policy actors and citizens.²⁶ Governments should also be open about the findings of program and policy evaluations so that members of the public can learn whether or not government initiatives have met their stated aims, at what costs, and whether they have had unexpected impacts.

B Government Funding for Health Research

In Australia, government-funded health research can be classified into three types. First, government agencies use internal research conducted by public servants. This capacity has diminished substantially in recent decades and research work is increasingly outsourced.²⁷ Second, governments invest public funds through agencies whose primary purpose is to support research, principally the National Health and Medical Research Council ('NHMRC') and the Australian Research Council ('ARC'). Such research mostly occurs in universities and medical research institutes, to generate new knowledge from basic science, clinical, public health, and health services research. In this category, researchers propose projects that go through competitive peer review processes. Government is at arms-length from the research, typically not seeking to control its conduct or the reporting of findings, and making no claim on the IP generated.²⁸ Moreover, researchers conduct this work within universities that have statutory obligations to undertake research in the public interest, advance knowledge, and promote critical and free inquiry.²⁹

The third category of government-funded health research, and the focus of our study, involves government agencies issuing tenders to purchase research from external providers in order to answer questions relating to their policy and program development, implementation or evaluation. Successful bidders may be universities, medical research institutes and private or quasi-private bodies, including research organisations that are spin-offs from universities and incorporated business entities. The extent of this type of research expenditure is unknown, but likely to be substantial given the large numbers of calls for tenders announced on the Commonwealth AusTender site³⁰ and each of its state counterparts.³¹ In our pilot research, we identified hundreds of projects advertised on these sites with values ranging from tens to hundreds of thousands of dollars per project. The nature of the

²⁶ Benjamin Hawkins and Justin Parkhurst, 'The "Good Governance" of Evidence in Health Policy' (2015) 12(4) *Evidence and Policy* 575, 582 (emphasis altered).

²⁷ Veselý, above n 7; Vromen and Hurley, above n 7.

²⁸ Both ARC and NHMRC have adopted the 'National Principles of Intellectual Property Management for Publicly Funded Research': see NHMRC, *National Principles of Intellectual Property Management for Publicly Funded Research* (7 June 2018) 2(c) <<https://www.nhmrc.gov.au/grants-funding/policy/intellectual-property-management/national-principles-intellectual-property-man>>.

²⁹ See, eg, *University of Sydney Act 1989* (NSW) s 6(2)(b); *University of Melbourne Act 2009* (Vic) s 5(e)(iii); *Australian National University Act 1991* (Cth) s 5(1)(a).

³⁰ Australian Government, *ausTENDER* <<https://www.tenders.gov.au/>>.

³¹ See, eg, NSW Government, *eTendering* <<https://tenders.nsw.gov.au/>>; State Government of Victoria, *Tenders VIC* <<https://www.tenders.vic.gov.au/>>. Australia is not alone in the absence of clear quantification of government spending on externally-purchased research. The 2016 *Sedley Report* noted that '[t]he United Kingdom government spends about £2.5 billion a year on research intended to guide, develop, modify and monitor policy on a wide variety of issues', however '[i]t is difficult to tell how much of this was spent on commissioned research.': *Sedley Report*, above n 2, 1–2.

relationship formed between government and provider is usually different to that in researcher-initiated projects and the mechanisms for promoting research integrity and transparency are far less straightforward. In contract research, the government purchaser may be involved in the framing of research questions, specification of study design, choice of methods, interpretation of results, preparation of reports, and/or the dissemination of findings. The government might require researchers to turn over IP to government and publish results only with its approval, and work may occur under threat that the funder can terminate contracts at will.

C *Concern about Government Control over Externally Commissioned Research*

Political scientists and policy scholars have, for some time, studied who is supplying research and advice to governments and the scope of government control over the internal and external sources of expertise.³² They have developed the concept of a policy advisory system to refer to ‘the interlocking sets of actors and organizations, with a unique configuration in each sector and jurisdiction, that provides recommendations for action to policy-makers’.³³ For example, a policy analyst employed in the public service performs research and provides briefings and advice, but must do so within the boundaries of her or his employment relationship and assigned work duties. Entities established by Acts of Parliament can have statutorily-defined advisory roles and legislative protections can minimise the degree of control exerted by the government. External to government, a range of individuals and organisations can provide input and advice to government, with government exerting no control over some and potentially high levels of control over others. For instance, governments do not control the advice offered by independently funded interest groups that make submissions as part of law reform inquiries. In contrast, consultants and researchers retained by government are controlled by the terms and conditions of their contractual arrangements.

Australian social scientists have made the case for an urgent need to investigate how governments procure and use research to inform policy, enabling a view of ‘the inner workings of the policy “black box”’.³⁴ No published research examines Australian governments’ use of control clauses in research purchased through tenders — a gap addressed by our research. However, a previous survey and a case study reveal evidence of government control over the public dissemination of contract research. In a 2006 survey of approximately 300 public health academics in Australia, Yazahmeidi and Holman found that 21% of the respondents reported having personally experienced a ‘suppression event’ in the preceding 5.5 years. A suppression event is where a government funder had invoked a clause in the contract

³² John Halligan, ‘Policy Advice and the Public Service’ in B Guy Peters and Donald J Savoie (eds), *Governance in a Changing Environment* (McGill-Queen’s University Press, 1995) 138.

³³ Jonathan Craft and Matt Wilder, ‘Catching a Second Wave: Context and Compatibility in Advisory System Dynamics’ (2017) 45(1) *Policy Studies Journal* 215, 215 <<https://doi.org/10.1111/psj.12133>>.

³⁴ Head et al, above n 8, 90.

to ‘sanitize’, ‘delay’ or ‘prohibit’ the publication of findings.³⁵ According to the survey respondents, their work was targeted because it ‘drew attention to failings in health services (48%), the health status of a vulnerable group (26%), or pointed to a harm in the environment (11%)’.³⁶ These findings backed perceptions of a growing tendency among government agencies to control the conduct and reporting of policy-relevant research.³⁷ A case study of an Australian contract negotiation in 2012 raised concerns about control clauses in health research contracts, including provisions that vest IP rights in the Government and allow the Government to limit publication of results and terminate contracts without cause.³⁸

Other sources reveal related problems that undermine the goals of transparency and open government. In Australia, a coalition of major research-intensive universities, the Group of Eight (‘Go8’), was candid in its concerns about research contracts in a 2008 submission to the Review of the National Innovation System:

the standard terms sought by the Commonwealth when entering into research agreements with universities misunderstand the role and nature of universities; are unnecessarily onerous and impractical; often cause delay and uncertainty due to their complexity; and serve to stifle knowledge transfer and innovation by restricting the capacity of universities to disseminate the results of the sponsored research for public benefit.³⁹

Successive Australian National Audit Office (‘ANAO’) reviews find misuses of confidentiality clauses in a range of government contracts notwithstanding a 2001 Senate Order that confidentiality provisions should not restrict public access to contract information unless there is a strong justification for non-disclosure.⁴⁰ A recent audit ‘found that processes to capture information about basic contract details and the reporting of confidentiality provisions were inadequate. Only 19 per cent of contracts sampled were accurately reported in AusTender.’⁴¹

Internationally, a British charity, Sense about Science, is doing groundbreaking work investigating government practices in delaying and withholding commissioned and internal research findings.⁴² The United Kingdom (‘UK’) is ahead of Australia in its open government initiatives — it is already into a

³⁵ Boshra Yazahmeidi and C D’Arcy Holman, ‘A Survey of Suppression of Public Health Information by Australian Governments’ (2007) 31(6) *Australian and New Zealand Journal of Public Health* 551, 552–3 <<https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1753-6405.2007.00142.x>>.

³⁶ *Ibid* 551. See also 553, 555.

³⁷ C D’Arcy J Holman, ‘An End to Suppressing Public Health Information’ (2008) 188(8) *Medical Journal of Australia* 435.

³⁸ Kypros Kypri, ‘Suppression Clauses in University Health Research: Case Study of an Australian Government Contract Negotiation’ (2015) 203(2) *Medical Journal of Australia* 72.

³⁹ Go8, *In the Interests of Innovation: Time for a New Approach to Negotiating Research Agreements between the Commonwealth and Australian Universities: A Supplementary Submission from the Group of Eight to the Review of the National Innovation System* (April 2008) 1 <https://go8.edu.au/sites/default/files/docs/go8_innovation_review_supp_sub_300408.pdf>.

⁴⁰ ANAO, ‘Confidentiality in Government Contracts: Senate Order for Entity Contracts (Calendar Year 2015 Compliance)’ (ANAO Report No 18 of 2016–2017, 27 September 2016) 7 [5] <<https://www.anao.gov.au/work/performance-audit/confidentiality-government-contracts-senate-order-2015>>.

⁴¹ *Ibid* 8 [5].

⁴² See *Sedley Report*, above n 2.

third phase of its National Action Plan on Open Government⁴³ and has been ranked as a global leader in government transparency.⁴⁴ Several high-level protocols from the UK Government Office for Science and the Government Economics and Social Research Team require ‘prompt and complete publication of research conducted or commissioned by’ government departments.⁴⁵ Yet, the *Sedley Report* arising from a 2016 inquiry, sponsored by Sense about Science and led by a former Court of Appeal judge, revealed that governmental bodies routinely conceal externally commissioned research from public view. Suppression is deliberate in some cases where research results are considered politically inconvenient or embarrassing.⁴⁶ In other cases, benign neglect seems to be the problem, where departments lack processes to keep track of research they have commissioned and therefore fail to make it public. The *Sedley Report* endorsed the principle that ‘[p]rompt and full publication of government research is a matter not of contract but of public duty. While research contracts will necessarily vary in their provisions, all contracts should spell out this obligation of principle’,⁴⁷ which would advance government commitments to openness and transparency.

III An Investigation of Commonwealth and NSW Contracts

Our pilot study, undertaken in 2015–16, examined a sample of Commonwealth and NSW contracts.⁴⁸ We sought to identify the presence and content of three types of contractual control clauses; namely, clauses dealing with: (a) contract termination rights; (b) ownership of IP; and (c) control of publication. Through an analysis of draft and executed contracts, we sought to determine whether control clauses are modified or removed in the negotiation process between the government and the successful bidder.

⁴³ Cabinet Office (UK), ‘UK Open Government National Action Plan 2016–18’ (Policy Paper, 12 May 2016) <<https://www.gov.uk/government/publications/uk-open-government-national-action-plan-2016-18/uk-open-government-national-action-plan-2016-18>>.

⁴⁴ World Wide Web Foundation, *WebIndex* <<http://thewebindex.org>>. The Productivity Commission points out that ‘Australia’s provision of open access to public sector data is below comparable countries with similar governance structures, including the United States, the United Kingdom and New Zealand.’: Productivity Commission, above n 10, 33, 76 (Finding 1.1).

⁴⁵ *Sedley Report*, above n 2, 8–9 [2.20]–[2.26]. See also Government Office for Science (UK), ‘Principles of Scientific Advice to Government’ (Guidance Paper, 24 March 2010) <<https://www.gov.uk/government/publications/scientific-advice-to-government-principles/principles-of-scientific-advice-to-government>>; Government Office for Science (UK), ‘The Government Chief Scientific Adviser’s Guidelines on the Use of Scientific and Engineering Advice in Policy Making’ (Guidance Paper, 1 July 2010) <<https://www.gov.uk/government/publications/scientific-and-engineering-advice-guidelines-for-policy-makers>>; Government Economic and Social Research Team, HM Treasury (UK), *Publishing Research and Analysis in Government: GSR Publication Protocol* (May 2015) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/431367/GSR_publication_protocol_2015_FINAL.pdf>.

⁴⁶ *Sedley Report*, above n 2, 16. The Inquiry looked into nine case studies of research reports being withheld: see Sense about Science, *Case Studies* <<https://researchinquiry.org/case-studies/>>.

⁴⁷ *Sedley Report*, above n 2, 34 [4.22].

⁴⁸ The study was approved by the University of Newcastle Human Research Ethics Committee (approval number H-2015-0188).

A *Method*

We accessed the Commonwealth tender website (<https://www.tenders.gov.au>) and the NSW tender website (<https://tenders.nsw.gov.au/>) between March and November 2015. These websites list project descriptions and typically provide a draft, pro forma contract to indicate the expected terms of the relationship between the government and a successful bidder.⁴⁹ We searched for tenders for research and evaluation projects, focused principally on health-related topics. Due to the volume of tenders, we limited the Commonwealth search to tenders issued through the Department of Health. For NSW, we included the Ministries of Health, Justice, Education, Family and Community Services, as well as WorkCover and the Motor Accidents Authority.

A research assistant with an undergraduate law degree produced an initial list of potentially relevant tenders produced using broad search terms of ‘research’ and ‘evaluation’ (‘health’ was added as a search term for the NSW tender website). The lead investigators reviewed the list and selected tenders calling for research to inform proposed government initiatives or to evaluate existing health-related programs. For example, the Commonwealth tenders included a call for an evaluation of a national primary health care strategy, as well as a tender for a research study to investigate how flavourings in tobacco products affect smoking behaviours, both of which we included. We excluded tenders that sought contractors to design research instruments (for example, a survey), carry out health surveillance or monitoring programs, or deliver health programs. On the tender websites we were able to search for awarded contracts to identify the successful bidder. We sought to maximise the heterogeneity in the funding agreements we studied in order to permit a variety of comparisons. Accordingly, we included contracts with different types of research providers, including universities, university-owned research entities, and private sector entities. We avoided selection bias by remaining blind to the content of the draft funding agreement when choosing the cases to study. We hypothesised that university-based researchers might be more likely to negotiate to modify or eliminate contractual clauses that restrict the ability to publish their work. Such control clauses might be of less concern to private sector providers.

We accessed draft contracts that were available on the tender websites and made formal requests to the Australian Government Department of Health and NSW Government entities for executed contracts. These requests were made under the *Freedom of Information Act 1982* (Cth) (‘*FOI Act*’) and the *Government Information (Public Access) Act 2009* (NSW) (‘*GIPA Act*’). In requesting the contracts, we explained we were interested in the specific types of clauses noted above. We made it clear that we were not seeking access to details protected under the *FOI Act* or the *GIPA Act*, including information that could harm the commercial interests of a service provider (such as details of a novel research method) or the privacy of individual researchers.

⁴⁹ A scan of tender websites in other states revealed inconsistent practices. In Western Australia (‘WA’), for example, draft contracts are not available on the WA Tender website: WA Government, *Tenders WA* <www.tenders.wa.gov.au>. In Queensland, draft contracts are not accessible for closed and archived tenders: Queensland Government, *QTenders* <<https://www.hpw.qld.gov.au/qtenders/>>.

We had a modest budget of \$1200 from a University of Newcastle internal grant to cover fees, which allowed us to obtain contract documents for 21 tenders issued by NSW government bodies and six tenders from the Australian Government Department of Health.⁵⁰ One NSW government body disclosed draft contract pro formas to us, which were already publicly available on the tender website, but refused to disclose the final contracts on the grounds that ‘these matters are still ongoing and the funding agreements have not yet been executed or grants have been awarded but the projects are not yet completed’.⁵¹ We were informed that the ‘final executed agreements rarely vary from the standard clauses in the [pro forma contracts]’.⁵² Two NSW tenders resulted in contracts with several different providers. In total, our contract analysis covers 35 projects.

B Results

A major finding of our investigation is that one or more types of control clause are present in all the draft and executed contracts we accessed. This reveals that the contractual relationships between government purchasers and external research providers are weighted in favour of government control and permit conduct that is contrary to transparency commitments. A comprehensive summary of the contract documents we analysed and the sources for all quotations reproduced from contracts is on file with the authors and available on request.

1 *Termination for Convenience*

From a transparency perspective, termination-for-convenience clauses are problematic as they give broad power to the government purchaser to end a contract simply on notice and not for cause. For example, a government agency may want the right to end the contract in case the timing of the planned study becomes politically inconvenient or because embarrassing or unfavourable research results start to emerge. A new government may also choose to terminate contracts awarded by its predecessor.

In the contracts we reviewed, clauses that allow the government to terminate a contract without cause or explanation and simply by giving written notice are most common and rarely negotiated out.⁵³ All draft and final Commonwealth contracts contain clauses giving the Government ‘unfettered discretion’ to terminate the contract for convenience, which means that it expressly rejects any requirement to exercise the termination power in good faith.⁵⁴

⁵⁰ Government departments may charge for processing FOI requests; eg, the current NSW fee is \$30 per hour: Department of Justice (NSW) Access to Information <<https://www.justice.nsw.gov.au/contact-us/access-to-information>>.

⁵¹ Notice of Decision Letter from NSW WorkCover to Shelby Houghton, 17 September 2015 (copy on file with authors).

⁵² *Ibid.*

⁵³ Termination for cause was also covered in many contracts, but we do not summarise those provisions here as cause-based termination (eg, due to non-performance of agreed activities) does not compromise government transparency goals.

⁵⁴ The standard Commonwealth contract states that the Government agrees to pay for any services properly rendered up to the termination date and any reasonable and unavoidable costs to the contractor

Of all the contracts we obtained, just three NSW contracts do not have termination-for-convenience clauses and only permit termination for cause.⁵⁵ In two cases, a draft contract gives the Government sole discretion to terminate for convenience, however the final contract gives the providers the same power of termination.⁵⁶ This implies that the providers negotiated the right to end the contract simply by giving a specific period of notice. However, this does nothing to minimise the risk of the purchaser ending the contract at its discretion. The financial benefit gained from the contract means that it would rarely be convenient for the provider to act on a right to end the contract.

2 *Intellectual Property*

Contractual terms governing the ownership and use of IP have transparency implications as they can either restrict or promote the public dissemination of research outcomes. The contracts we analysed typically had clauses dealing with the existing IP that parties bring to the contract (which remains their own) and the new IP created during the course of conducting the research or evaluation study.

All the Commonwealth draft contracts vested IP in the ‘contract materials’ in the Government, which encompasses all materials created for the purposes of the contract, including final reports. By owning the IP, the Government has the right to control the public release of contract deliverables. As a result, the pro formas do not have clauses concerning publication. However, as discussed below, all the final contracts incorporated specific terms on public dissemination through journal articles, conference presentations and other means. In one final contract, the university provider negotiated a licence to use the contract material, however the contractual terms required that draft and final reports be reviewed by the Government, thus providing an opportunity to the purchaser to shape how the findings are presented.

In NSW, a majority of the draft contracts stated that the IP in materials produced from the contract vested in the Government and this ownership is rarely modified in the final contracts. Several draft contracts included a licensing provision that allows the provider to use the IP in the materials for its non-commercial teaching and research purposes; this type of licence is sometimes negotiated into the final contract. For three projects, the providers negotiated specific wording in the IP licencing clause to cover use and adaptation for publications. Of these, one contract allows publications

arising from the termination. There is uncertainty in Australian jurisprudence about implied contractual duties of good faith. The High Court of Australia has not accepted an implied good faith term in termination-for-convenience clauses. However, even if such a requirement were implied, it can be explicitly removed through wording that permits an unfettered right to terminate the contract. For discussion of termination-for-convenience clauses, see Ruth Loveranes, “‘Termination for Convenience’ Clauses” (2012) 14 *University of Notre Dame Australia Law Review* 103.

⁵⁵ These were NSW Department of Health contracts issued in 2013 to a small and a large private consultancy and a medical research institute.

⁵⁶ These were contracts between the NSW Department of Education with a university (2012) and the NSW Department of Family and Community Services with a non-governmental organisation (2014).

only after the completion of the Project and the provision of the final reports, issues papers and other deliverables under this Agreement, and ... only after the Ministry has officially released or published the results of the Project, OR a period of 18 months has elapsed following provision of the final reports, issues papers and other deliverables under this Agreement ...⁵⁷

Three tender contracts from one NSW Ministry provide for IP to be owned jointly between the Government and the service provider.⁵⁸ The tender guidelines from another entity provide that '[a] fair and equitable agreement as to the rights of respective parties to the intellectual property created as a result of the funded project will be negotiated with successful applicants on a case by case basis' and the Government intends that the provider 'will have the full right to publish any results obtained by them' for academic purposes through an appropriate IP licence.⁵⁹

Just one final contract vests IP rights in the university provider with a licence granted to the Government to use and exploit the contract materials for its purposes.⁶⁰

3 *Control of Publication and Dissemination of Results*

Contractual terms governing whether, how and when research results can be disseminated publicly, especially through written publications, have important transparency implications. At one extreme, contracts can allow the government purchaser to exert complete control, for example, by stipulating that research outcomes may only be disseminated following formal processes of government review and approval. At the other extreme, the research provider may have full discretion to disseminate results, including through oral presentations and written publications, without any requirement of prior government review or approval. As a middle ground, the contract may oblige the external researcher to submit a draft report for informal feedback from a government representative, but with no obligation to comply with the government's preferred wording or timing in the dissemination of results. Contracts may specifically require or expect the external provider to produce reports for publication in peer-reviewed journals. This is beneficial in ensuring that purchased research is subject to independent, expert review and makes a contribution beyond government in the advancement and dissemination of new knowledge. This benefit is undermined, however, if governments have the contractual power to direct how the results are expressed.

Compared to the clauses dealing with contract termination and IP, we found the greatest degree of variation between draft and final contracts in their provisions dealing with the publication of results. This indicates that government purchasers and external research providers engage in more negotiation about this aspect of their contractual relationships than concerning contract termination and IP.

⁵⁷ NSW Department of Health contract with a university (2013).

⁵⁸ NSW Department of Family and Community Services (2009; 2012; 2014).

⁵⁹ NSW Workcover (2014).

⁶⁰ NSW Department of Health contract with a university (2015).

As noted above, in the Commonwealth contracts, the ownership of IP permits government control over the publication of outputs. All the final contracts expand on how publication will be handled and require the research provider to submit draft materials for government review. In all but one case, the Government has the right to approve the final version. One contract with a university stated simply that the 'draft report must be presented to the Department for comment prior to the final version being completed'.⁶¹ A contract for a research project involving a literature review stipulates that the research organisation cannot publish the review without the Government's written approval.⁶² Other contracts require the researcher to submit interim and final reports to the Department of Health for review, make revisions as requested, and obtain approval before sharing reports with any other party.⁶³ Another project, a partnership between an Australian Government health commission and a university, requires as a project outcome the publication of results and methodologies in peer-reviewed journals.⁶⁴ Draft publications require the Commission's approval:

Prior to submission of the articles to journals, the Contractor will provide the articles to the Commission for review and approval. In the event of a dispute about a draft journal article, the Advisory Group will be asked to provide a final opinion.⁶⁵

According to the contract, this Advisory Group is a body organised by the Commission.

In NSW, most draft contracts prohibit research providers from publicly releasing results without prior written approval from the Government. A minority of draft clauses provide that this approval will not be unreasonably withheld or that the Government should 'be amenable to negotiation regarding appropriate and acceptable processes and timing for dissemination'.⁶⁶ In some cases, non-disclosure is accomplished by defining as confidential any material created or written for the project and requiring the provider to keep secret any confidential information both during and after the term of the contract.

University-based providers seem more likely to negotiate over restrictions on publication. Some final contracts reveal compromises; for example, instead of requiring formal written approval for any publication or presentation, the provider must instead submit a manuscript or abstract to the government for 'review and comments'.⁶⁷ What happens next varies. The researcher may be contractually bound to modify or delete any information the government 'reasonably believes will harm, prejudice or in any other way injure [its] interests'⁶⁸ or to 'consider but [not be] obliged to follow'⁶⁹ the comments.

⁶¹ Commonwealth contract with a university (2007).

⁶² Commonwealth contract with a small private consultancy (2011).

⁶³ Commonwealth contracts with a university and a small private consultancy (2007).

⁶⁴ Commonwealth contract with a university (2008).

⁶⁵ *Ibid.*

⁶⁶ This provision appeared in draft NSW Department of Health contracts.

⁶⁷ This wording appeared in NSW Department of Health and Department of Education contracts.

⁶⁸ NSW Department of Education contract with a university (2012).

⁶⁹ NSW Department of Attorney General and Justice contract with a university (2013).

Two multi-year and multi-million dollar university research programs funded by the NSW Department of Health require 10–15 peer-reviewed publications of research findings as project deliverables. However, there are differences in the degree of control the government may exert over the public dissemination of findings. One contract requires the university to submit an ‘unabridged version’ of ‘any presentation, abstract, journal article, media material, conference paper or similar ... to the Ministry no less than 30 business days prior to the proposed due date.’⁷⁰ The Ministry then has the option to either approve the material for public release or

on a reasonable basis, reject the Publication in writing, in which case the contractor must omit the content identified ... as unacceptable from the Publication, provided that this rejection may not be exercised by the Ministry after a period of 18 months has elapsed following provision of the final reports, issues papers and other deliverables under this Agreement.⁷¹

The other contract provides that the research team ‘has the right to publish findings of their research’,⁷² but must submit draft publications to the government for review and comment, then ‘incorporate feedback’⁷³ into the final versions. Both contracts include a schedule that details the review process for publications and reports. For articles submitted to scholarly journals, the Ministry must approve any substantial revisions requested during the peer review process. The schedule states that a ‘substantial revision’ includes ‘those that have implications for government policy’.⁷⁴

Two NSW contracts contain an open access clause:

All research papers that have been accepted for publication in peer reviewed journals, and supported in part or in whole with the Funding, must be deposited into an open access institutional repository within a 12 month period from the date of publication.⁷⁵

Such publications must also bear the disclaimer that the views presented are not necessarily those of the Government.

A few contracts, including those with universities, do not have specific provisions on journal publications and state more generally that the research provider must only use contract materials with the government’s written approval. Since a contract is meant to provide evidence of a ‘meeting of the minds’ of the parties to the agreement, it would be better practice to specify the publication terms in the contract. We argue below that such terms should be consistent with the principle of openness and that any restrictions on dissemination should have a strong justification.

⁷⁰ NSW Department of Health contract with a university (2013).

⁷¹ *Ibid.*

⁷² This was a NSW Department of Health contract with a university (2013).

⁷³ *Ibid.*

⁷⁴ NSW Department of Health contracts with universities (2013).

⁷⁵ NSW Department of Health contracts with a university (2011) and a medical research institute (2011).

One NSW Department made contracts with seven different research providers (six were universities) to undertake work on a common project.⁷⁶ Interestingly, the draft contract issued to all bidders required the Government's prior written approval to publish research results, but this clause was absent from all the final agreements, suggesting a common concern among the research providers with limiting government control over dissemination.

C *Implications*

The findings of our contracts analysis have troubling implications. The routine use of control clauses is at odds with government pledges to be more transparent, provide open access to information, and enable the public to be meaningfully engaged in policy debates and decisions. The ideal of evidence-based policymaking is also compromised. As the Productivity Commission Chair has asked: 'Can data and analysis that are not able to be scrutinised by third parties really be called "evidence"?'⁷⁷ The influence of ideology and politics on the production and use of evidence is hidden when governments have the power to control external researchers and the outcomes of their work. Moreover, academic freedom, central to universities' mission to advance and disseminate knowledge informed by free inquiry, is undermined when university-based researchers face restrictions on publication. We turn now to recommendations to improve contracting processes and provisions to ensure that government commitments to transparency are realised in practice.

IV Recommendations to Improve Transparency

In a consultation document for its First Open Government National Action Plan, the Commonwealth claims to have a 'long, proud history' of openness, but acknowledges it 'needs to become even more open, transparent and accountable, and improve public engagement.'⁷⁸ The National Action Plan's commitments include improving 'the discoverability and accessibility of government data and information' and enhancing 'public participation in government decision making'.⁷⁹ Australian states also champion the benefits of openness. According to the NSW Government, '[a] smart government is transparent and accountable, and understands that solutions to policy challenges can come from outside government.'⁸⁰

Despite these public commitments, the starting point for most of the contracts we reviewed is a substantial degree of government control that may only be

⁷⁶ These were NSW Department of Family and Community Service contracts with universities and a non-governmental organisation (2014).

⁷⁷ Productivity Commission (Cth), above n 23 vol 1, 9.

⁷⁸ Department of the Prime Minister and Cabinet (Cth), *Australia's First Open Government National Action Plan 2016–18: Draft for Consultation* (2016) 3 <<https://ogpau.pmc.gov.au/sites/default/files/files/2016/10/Australias-first-Open-Government-National-Action-Plan-Draft-for-consultation-Accessible.pdf>>.

⁷⁹ Department of the Prime Minister and Cabinet (Cth), above n 5, 41, 59.

⁸⁰ NSW Government, *Open Data Policy* (2016) <https://www.digital.nsw.gov.au/sites/default/files/NSW_Government_Open_Data_Policy_2016.pdf>.

diminished through negotiation that depends on the skills and values of the external researchers and their legal representatives (and, of course, on the willingness of the government representative to relinquish control). Our findings underscore the importance of scrutinising government practices and we call on all federal, state and territorial governments to review their procurement practices and pro forma contracts to ensure they advance the principles of openness and transparency.

Transparency in government contracting for research raises several key questions, including:

- (1) To whom are government contracts awarded?
- (2) What are the terms of the contractual relationship between the government purchaser and the external provider of research services? and
- (3) Are the findings of government-purchased research reported publicly?

A To Whom are Government Contracts Awarded?

Reforms have been made to mandate transparency in the awarding of contracts, which is important to root out cronyism and other corrupt practices.⁸¹ The *Commonwealth Procurement Rules* require that Australian Government entities ‘enable appropriate scrutiny of their procurement activity’⁸² and require that tender awards above reporting thresholds be disclosed on the AusTender website.⁸³ In NSW, the *GIPA Act* requires a public register of government contracts over \$150 000⁸⁴ and similar registers exist in other states and territories (with variation in the dollar value of disclosed contracts).⁸⁵ This compulsory disclosure, however, only covers basic details such as the name of the entity awarded the contract, the contract value, and the contract duration.⁸⁶ And, as noted earlier, audits of the AusTender website reveal dismal compliance with reporting requirements.

B What Are the Terms of the Contractual Relationship?

1 Disclosure of Full Contract Details

To achieve an even greater degree of openness, we agree with Transparency International Australia that the ‘[f]ull details of awarded contracts should be

⁸¹ LobbyLens is an online tool that integrates Commonwealth Lobbyists Register Data with contract notices data from AusTender: LobbyLens, *About LobbyLens* <<http://lobbyists.disclosurelo.gs/about.php>>.

⁸² Department of Finance (Cth), *Commonwealth Procurement Rules* (March 2017) 15 [7.1] <<https://www.finance.gov.au/sites/default/files/commonwealth-procurement-rules.pdf>>.

⁸³ Ibid 17 [7.16]–[7.17]. The reporting thresholds are \$10 000 for non-corporate Commonwealth entities and \$400 000 for prescribed corporate Commonwealth entities. A \$7.5 million threshold applies for construction service contracts.

⁸⁴ *GIPA Act* pt 3 div 5 (‘Government contracts with private sector’).

⁸⁵ See, eg, Tenders VIC, *Contracts* <<https://www.tenders.vic.gov.au/tenders/contract/list.do?action=contract-view>>; Department of Corporate and Information Services (NT), *Northern Territory Government — Awarded Government Contracts* (1 August 2018) <https://nt.gov.au/__data/assets/pdf_file/0009/382977/government-awarded-contracts.pdf>.

⁸⁶ *GIPA Act* s 29 lists the details that the contract register must include.

disclosed'.⁸⁷ We argue for proactive transparency, which could easily be accomplished by posting the contract on tender websites, alongside the contract award notice. Members of the public could then see to whom the contract has been awarded, as well as the full terms of the relationship between the government purchaser and the external provider. Importantly, this would enable public scrutiny of control clauses and governments could be held to account for contractual terms that allow them to control the conduct and dissemination of research. Proactive transparency would obviate the need for interested parties — such as the present authors — to make FOI requests for contracts and save government departments the costs of processing these requests.

Our recommendation is not radical since the *Commonwealth Procurement Rules* already express a general presumption that the terms of a contract are not confidential: 'once a contract has been awarded the terms of the contract, including parts of the contract drawn from the supplier's submission, are not confidential'.⁸⁸ An exception applies to details that come within the scope of the government's procurement confidentiality principles, which state that contractual terms may be considered confidential if they deal with 'sensitive security information' or 'the contract is for a consultant to prepare a confidential report which is expected to deal with sensitive public interest issues'.⁸⁹ No further elaboration is provided as to what counts as such sensitive issues, however governments should not apply exceptions to public disclosure in a manner that is inconsistent with principles of openness.⁹⁰ In any case, clauses that set out the terms related to publication, IP and termination do not, in themselves, reveal sensitive information and should not be caught by these exceptions.

2 *The Substantive Content of Contractual Terms*

To advance the goals of transparency, governments should ensure that the contract terms do not exert an unnecessary degree of control over external research providers. Therefore, in addition to advocating for the full disclosure of contracts on public registers, we also recommend that governments, in consultation with stakeholders, review the terms in their standard form contracts and update these pro formas where necessary to advance transparency goals.⁹¹ Representatives of the university sector, including researchers who have experience performing contract research, are key stakeholders. It is imperative that contractual relationships formed between government and university-based researchers do not undermine the public values

⁸⁷ Transparency International Australia, *Transparency in Public Procurement* (Position Paper No 6, (January 2016) 2 <<http://transparency.org.au/tia/wp-content/uploads/2016/10/PP6-Transparency-in-Public-Procurement-Transparency-International-Australia-Jan-2016.pdf>>.

⁸⁸ Department of Finance (Cth), above n 79, 18 [7.21] (subject to some exceptions listed in that paragraph).

⁸⁹ Department of Finance (Cth), *Confidentiality throughout the Procurement Cycle* (10 July 2014) principle 7 <<http://www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/contract-issues/confidentiality-procurement-cycle/principles.html>>.

⁹⁰ Office of the Australian Information Commissioner (Cth), above n 1.

⁹¹ We acknowledge that pro formas need to offer options to take account of interests of the contracting parties that arise in different circumstances.

expressed in the Acts of Parliament that establish Australian universities⁹² and diminish trust in and respect for universities as institutions with a unique and important role in society.⁹³ University-based researchers who believe that contract research compromises their academic freedom may choose to avoid such work. This would be an undesirable outcome as ‘it is clearly not in government’s interest, or in the public interest, if there is a narrowing pool of people who are willing to work on government contracts.’⁹⁴

It is beyond the scope of this article to propose a standard form for contract research, but we synthesise here several core transparency principles and recommendations pertinent to the three types of control clauses we examined in Commonwealth and NSW contracts.

(a) *Termination Clauses*

Termination-for-convenience clauses give government purchasers a broad power to end contracts at their discretion. The Australian Government has recently sought to streamline contracts for under \$200 000 by establishing a core set of contractual terms, including a termination for convenience clause. The Government adopts a rigid stance in warning that these terms ‘**cannot** be changed and are **non-negotiable**’.⁹⁵ The convenience for government must be weighed against the potential downsides for external researchers who face challenges in establishing research teams and managing resources when they lack certainty about the funding commitment.⁹⁶ If government seeks the benefit of termination for convenience, the contract ought to explicitly incorporate a good faith requirement to prevent the unreasonable exercise of this power based on capricious or ulterior motives.⁹⁷ For higher value contracts to fund multi-year research projects, it may be unreasonable to expect external researchers to undertake such work with the risk that the contract may be ended solely at the government’s discretion. Termination-for-cause provisions would meet governments’ interests in ensuring the work progresses in accordance with an agreed plan and schedule.

⁹² See above n 29.

⁹³ This point was emphasised by the Go8, above n 39, 2: ‘Public universities occupy a unique place in society. ... [yet the] important function and role of universities is often not recognised by government[s] ... when they seek to commission research at Australian universities.’

⁹⁴ *Sedley Report*, above n 2, 8 [2.18].

⁹⁵ Department of Finance (Cth) *Commonwealth Contracting Suite (CCS)* (21 August 2018) <<http://www.finance.gov.au/procurement/commonwealth-contracting-suite/>> (emphasis in original).

⁹⁶ The Go8 also noted these problems: above n 39, 10 [6.3]. See also the G08 recommendation at 10 [6.1].

⁹⁷ There is debate in Australian jurisprudence as to the meaning of a good faith provision in termination-for-convenience clauses. It likely implies a duty to act reasonably when invoking the clause (see, eg, *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234) and not to act capriciously based on an ulterior or extraneous motive (see, eg, *Sundararajah v Teachers Federation Health Ltd* [2009] NSWSC 1443 (18 December 2009)).

(b) *Intellectual Property*

Contractual terms governing the handling of IP shape whether and how research findings are publicly disseminated and used. Various recommendations have been put forward for dealing with IP in the context of government-purchased research and public sector information. Internationally, the OECD acknowledges that '[t]here is a wide range of ways to deal with copyrights on public sector information' and encourages 'institutions and government agencies that fund works from outside sources to find ways to make these works widely accessible to the public'.⁹⁸ The 2009 *Government 2.0 Taskforce Report* recommended that '[n]ew contracts or agreements with a third party should endeavour to include a clause clearly stating the Commonwealth's obligation to publish relevant data' using Creative Commons licensing.⁹⁹

In September 2016, the Australian Government released new Intellectual Property Principles for Commonwealth Entities ('IP Principles') and Guidelines on Licensing Public Sector Information for Australian Government Entities.¹⁰⁰ The IP Principles state that, in their approaches to the ownership, management and use of IP, Commonwealth entities should advance the policy objectives that underpin Government 2.0, which includes open access and the flow of information within and beyond government. In regard to public sector information, entities 'should encourage public use and easy access to material' particularly to meet the goals of informing the public on government activities and policies.¹⁰¹ Creative Commons licences are recommended to promote the free and open use of public sector information.

The Guidelines on Licensing mark a policy shift away from the standard practice of the Commonwealth asserting copyright on publications,¹⁰² which was the default we observed in many of the contracts in our study. Instead, the new guidelines advocate open access of public sector information and state that the 'author entity ... is best placed to determine the use that others may make of it'.¹⁰³ From the university perspective, the Go8 has argued that universities should own new IP developed during the course of contract research as they are best positioned to ensure public dissemination.¹⁰⁴

⁹⁸ OECD, above n 19, 6.

⁹⁹ *Government 2.0 Taskforce Report*, above n 17, xix [6.6]. For more information on Creative Commons licensing, see Creative Commons Australia, *About the Licences* <<http://creativecommons.org.au/learn/licences/>>.

¹⁰⁰ Department of Communications and the Arts (Cth), *Australian Government Intellectual Property Rules* (10 July 2018) <<https://www.communications.gov.au/policy/policy-listing/australian-government-intellectual-property-rules>>.

¹⁰¹ Department of Communications and the Arts (Cth), *Intellectual Property Principles for Commonwealth Entities* (10 July 2018) 8 [11(a)] <<https://www.communications.gov.au/policy/policy-listing/australian-government-intellectual-property-rules>>.

¹⁰² Department of Communications and the Arts (Cth), *Guidelines on Licensing Public Sector Information for Australian Government Entities* (10 July 2018) 5 <<https://www.communications.gov.au/policy/policy-listing/australian-government-intellectual-property-rules>>.

¹⁰³ *Ibid.*

¹⁰⁴ Go8, above n 39, 3 (principle 2).

C *Publication of Results*

Contracts should not empower governments to sanitise or suppress the results of externally commissioned research. The publication and dissemination of research findings should be a key goal of contracts between government purchasers of research and the external researchers who provide their expertise. For university-based researchers in particular, the contractual relationship should respect and support the principle that ‘the right to publish the results of all research in a timely manner is a critical tenet of the concept of academic freedom and of the integrity of the research process’.¹⁰⁵ A consultative process of review and feedback between the government purchaser and the researcher may well help improve the accuracy and quality of presentations and publications, but the government should not wield veto power over public dissemination.

The recommendations of the *Sedley Report* in the UK provide an exemplar for Australian governments by urging that research contracts make a clear commitment to the publication of results, recognising that ‘prompt and full publication of government research is the norm’.¹⁰⁶ This is especially important for Australia as a participant in the Open Government Partnership. We elaborate below on a proposal for a public register of contract research reports. This is not a radical suggestion, but rather a logical progression in steps toward enhancing open government that include Australian governments’ current initiatives to provide open access public sector datasets and to publish the results of program evaluations.

1 *The Open Data Movement*

In its current Open Government Action Plan, the Australian Government pledges to increase the availability of public data to support research and data driven decision-making and problem solving.¹⁰⁷ This commitment follows the release of a Public Data Policy Statement in December 2015 in which the Government promises ‘to optimise the use and reuse of public data’ and ‘to release non sensitive data as open by default’.¹⁰⁸ Furthermore, government entities will ‘where possible, ensure non-sensitive publicly funded research data is made open for use and reuse’.¹⁰⁹

These statements are promising, but two important shortcomings are evident. First, the government websites dedicated to publishing datasets currently have meagre content. As of July 2017, 20 healthcare datasets were available on data.gov.au,¹¹⁰ covering disparate topics such as: statistics on health behaviours of

¹⁰⁵ Ibid 5 [1.4]. Schneider, Milat and Moore add that ‘allowing adequate academic freedom and openness to publication can act as facilitators and increase high quality evaluation research’: above n 9, 214.

¹⁰⁶ *Sedley Report*, above n 2, 35 (recommendation III).

¹⁰⁷ Department of the Prime Minister and Cabinet (Cth), above n 5, 25.

¹⁰⁸ Australian Government, *Australian Government Public Data Policy Statement* (7 December 2015) <https://www.pmc.gov.au/sites/default/files/publications/aust_govt_public_data_policy_statement_1.pdf>.

¹⁰⁹ Ibid (emphasis altered).

¹¹⁰ See Australian Government, *About* <<http://data.gov.au/about>>. The site is intended to provide ‘an easy way to find, access and reuse public datasets from Government. The main purpose of the site is to encourage public access to and reuse of public data.’

NSW residents¹¹¹; a database of the location of European wasp nests in the Australian Capital Territory ('ACT'),¹¹² and a list of venues for yoga, pilates and tai chi classes in Victoria.¹¹³

Second, it is important to note that data are distinguished from information: 'data comprises raw, unorganised material', while information is produced from data that has been 'processed and presented in context'.¹¹⁴ Release of datasets is valuable but the Australian Government's Open Government National Action Plan also promises to improve access to information.

If governments release data, then interpretations of data — 'information' — that inform their policy and program development and public spending decisions, ought also to be available. The analyses and interpretations of data should be subject to scrutiny and critique if the conclusions or recommendations made do not follow from the data or if data appear to have been manipulated to reach politically expedient decisions. Further, if governments are committed to public disclosure of research datasets, then externally commissioned researchers will presumably collect data (for example, responses to a survey) on the understanding that the dataset will be made publicly available. Why then should they be expected to work under contractual terms that permit the non-disclosure of research findings (for example, the report that analyses the survey results in the context of a relevant government policy or program)?

Moreover, releasing data while suppressing information can undermine democratic participation and worsen informational inequities:

Without the skills and knowledge to interpret the vast amount of datasets thrown at them, or any context surrounding the data, many citizens will not be able to make sense of these data. They will not benefit from OGD [open government data] and, hence, they will not have full access to the information that can be extracted from these data.

Hence, it will be highly unlikely that the benefits of OGD for transparency, accountability and public participation will actually materialise in this setting. On the contrary, OGD may actually reinforce or enlarge existing inequalities in access to information — the distinction between the information-haves and the information-have-nots ... — and create an elite that can make use of the available datasets and that will hold an important power over other citizens.¹¹⁵

¹¹¹ The Health Behaviours in NSW dataset provides data on the '[p]roportion of NSW population over [the] age of 16 that; smoke, engage in risk drinking, are considered overweight or obese.': Australian Government, *Health Behaviours in NSW* (12 May 2013) <<http://data.gov.au/dataset/health-behaviours-in-nsw>>.

¹¹² Australian Government, *Location of European Wasps Nests (ACT)* (7 March 2015) <<http://data.gov.au/dataset/location-of-european-wasps-nests>>.

¹¹³ Australian Government, *Yoga, Pilates and Tai Chi in Victoria — GFYL* (7 March 2015) <<http://data.gov.au/dataset/yoga-pilates-and-tai-chi-in-victoria-gfyl>>.

¹¹⁴ Department of the Prime Minister and Cabinet (Cth), above n 5, 25 n 2.

¹¹⁵ Katleen Janssen, 'Open Government Data and the Right to Information: Opportunities and Obstacles' (2012) 8(2) *Journal of Community Informatics* <<http://www.ci-journal.net/index.php/ciej/article/view/952/954>> (citations omitted).

2 *Reporting of Program Evaluations*

Some Australian governments are taking steps to adopt transparency in program evaluation by endorsing the publication of program evaluation reports.¹¹⁶ This marks some progress toward a 2009 Productivity Commission recommendation for ‘[a] national repository of evaluation reports ... [to] improve the level of scrutiny and increase the range of evidence available.’¹¹⁷ In 2016, the NSW Government adopted new Program Evaluation Guidelines that set a general rule that agencies must ‘proactively and publicly release the findings of program evaluations.’¹¹⁸ The 2010 ACT Evaluation Policy and Guidelines state that the ‘[c]ommunication of evaluation results helps disseminate key lessons and experience, informs decision making and promotes transparency and accountability’.¹¹⁹ However, the Guidelines imply that communication in many cases will only be internal within government and only the results of ‘significant evaluations [should be] publically [sic] available’.¹²⁰ The Queensland Program Evaluation Guidelines emphasise the importance of ‘clear, transparent reporting’ of key findings, but do not currently require public disclosure of all evaluations.¹²¹ The Guidelines are, however, meant to align with the Government’s overall Performance Management Framework, which asserts that ‘[p]ublishing performance information is essential for accountability, transparency, driving continuous improvement in performance, and influencing trust and confidence in public sector service delivery.’¹²²

We go further and recommend that all externally purchased research, not just evaluation reports, should be made available in a public repository established for this purpose.

¹¹⁶ For links to several government policy statements on program evaluation, see WA Government, *Program Evaluation across Australia* (28 March 2014) <<http://programevaluation.wa.gov.au/About/News/Program-Evaluation-Across-Australia>>.

¹¹⁷ Productivity Commission, above n 23, vol 1, 207.

¹¹⁸ Department of Premier and Cabinet (NSW), *NSW Government Program Evaluation Guidelines* (January 2016) 16 <https://arp.nsw.gov.au/sites/default/files/NSW%20Government%20Program%20Evaluation%20Guideline%20January%202016_1.pdf>. This policy defines program evaluation as a ‘rigorous, systematic and objective process to assess a program’s effectiveness, efficiency, appropriateness and sustainability’: at 5.

¹¹⁹ ACT Government, *Evaluation Policy and Guidelines* (December 2010) 14 <http://www.cmd.act.gov.au/_data/assets/pdf_file/0004/175432/ACT-Evaluation-Policy-Guidelines.pdf>.

¹²⁰ *Ibid* 8. The significance of an evaluation is determined by an ‘assessment of materiality, risk and complexity’.

¹²¹ Queensland Treasury and Trade (Qld), *Program Evaluation Guidelines* (November 2014) 7 <<https://s3.treasury.qld.gov.au/files/qld-government-program-evaluation-guidelines.pdf>>. At page 12, the Guidelines state that ‘reporting requirements will depend on the objectives of the evaluation and the intended audience’.

¹²² Department of the Premier and Cabinet (Qld), *Queensland Government Performance Management Framework: An Overview* (2017) 15 <<https://www.forgov.qld.gov.au/sites/default/files/performance-management-framework.pdf>>.

3 *Public Repository of the Results of Contract Research*

In the UK, the *Sedley Report* recommended ‘[a] standardised central register of all externally commissioned government research.’¹²³ We endorse this approach for Australia since it most strongly advances proactive transparency. As the Australian Information Commissioner has pointed out: ‘Communicating information to the public is a major tool and activity of government. It is how government reports what it is doing ... shares research ... and facilitates public participation in government decision making and priority setting.’¹²⁴

Reports could be identified by the original tender identification number, with links to the materials archived on tender websites, such as the approach to market and contract documents. This reporting would be separate from the publication of scholarly works in peer-reviewed academic journals. In exceptional circumstances, reports may justifiably be withheld from publication on compelling privacy or security grounds, but the existence of the report should be noted in the register along with the basis on which it is being withheld. This is consistent with the Productivity Commission’s recent recommendation that ‘[p]ublicly funded entities, including all Australian Government agencies, should create comprehensive, easy to access registers of data ... that they fund or hold.’¹²⁵

We anticipate several objections to this recommendation, primarily from government officials.¹²⁶ First, governments will fret about ‘how information might be “spun” by the media, their opponents or those with direct commercial interests or an axe to grind.’¹²⁷ These concerns, while genuinely held and understandable, are not legitimate reasons for withholding externally commissioned research results from public view. FOI laws make it clear that the prospect of being embarrassed does not alone justify withholding government-held information from the public.¹²⁸ With effective communication, governments can help the media and public understand research results and explain how ‘negative’ findings are important to evidence-informed policy and program decisions.¹²⁹ Governments that publish

¹²³ *Sedley Report*, above n 2, 34 (recommendation I). The Report goes on further to call for the ‘[r]outine publication of research government has considered in policy formulation with, if appropriate, reasons for rejecting it.’: at 36 (recommendation IV).

¹²⁴ Office of the Australian Information Commissioner (Cth), above n 1, 1. Transparency International Australia also advocates that ‘details of completion of the contract should be published in a timely manner’ and we believe such details include the research findings: above n 84, 2.

¹²⁵ Productivity Commission, above n 10, 243 (Recommendation 6.4). This recommendation continues: ‘Where datasets are held or funded but are not available for access or release, the register should indicate this and the reasons why this is so.’

¹²⁶ European scholars have conducted interviews with public sector officials and data archivists to explore the pros and cons of proactive release of government information: see Anneke Zuiderwijk and Marijn Janssen, ‘Towards Decision Support for Disclosing Data: Closed or Open Data?’ (2015) 20 (2) *Information Polity* 103.

¹²⁷ *Government 2.0 Taskforce Report*, above n 17, 50 [5.6.2].

¹²⁸ For example, the *GIPA Act* s 15(c) states that in determining access requests, ‘[t]he fact that disclosure of information might cause embarrassment to, or a loss of confidence in, the Government is irrelevant and must not be taken into account.’

¹²⁹ On the publication of ‘negative’ results as a component of credible and balanced performance reporting, see Department of the Premier and Cabinet (Qld), *Performance Management Framework — Measuring, Monitoring and Reporting Performance: Reference Guide* (2017) 16 (citation omitted)

program evaluation reports will have experience with this type of communication. We also emphasise that proactive disclosure on a public register would apply only to externally commissioned research. Internal research and policy advice from bureaucrats would not be included, thus freeing them to provide the ‘frank and fearless’ advice that Ministers seek.¹³⁰

Second, the costs and administrative burdens of maintaining another public register may be a concern. However, governments are now well experienced in designing and running other centralised databases, including the AusTender website and data.gov.au, and a similar database should not demand novel information technology expertise and platforms. Improving proactive disclosure could also reduce the costs of processing FOI requests.¹³¹

Third, a requirement to publish the results of externally commissioned research may create an incentive for governments to exert greater control over the design and conduct of the research to produce results that cast them in a flattering light.¹³² However, reports should provide a convincing rationale for the formulation of the research questions, design and methods to counter such manipulation. The knowledge that reports will be open to external scrutiny would also militate against designing studies that are obviously contrived to produce favourable results.

V An Agenda for Further Research

Our investigation of Commonwealth and NSW contracts has started to answer the question of what types of control clauses are present in government contracts and to propose reform options to advance transparency in externally purchased research. One limitation of our documentary analysis of contracts is that it was a pilot study with a small sample of tenders for health-related research and we cannot draw conclusions about the prevalence of control clauses across all types of research contracts. However, control clauses were prevalent in the contracts we accessed and it is reasonable to assume that they exist in other contracts. It would be enlightening to undertake a study of contracts for research in other areas of contemporary policy controversy, such as environmental and climate science issues.

<<https://www.forgov.qld.gov.au/sites/default/files/measuring-monitoring-reporting-performance.pdf>>. The *Government 2.0 Taskforce Report* urged that ‘[o]fficials should be able to express themselves informally, tentatively and candidly but they must also do so in ways that retain people’s confidence that they are acting fairly, professionally and impartially.’: above 17, 20 [3.3]. The *Sedley Report* noted ‘strategies that can help government to commission and publish controversial research without fear of how the public or the media might respond’: above n 2, 31 [4.1].

¹³⁰ Henry Belot, ‘Australia’s Top Public Servants Call for FOI Reform to Hide Advice from Public’, *The Canberra Times* (online) 11 April 2016 <<http://www.canberratimes.com.au/national/public-service/australias-top-public-servants-call-for-foi-reform-to-hide-advice-from-public-20160411-go3gxt.html>>.

¹³¹ Some government departments complain of the cost of managing FOI requests, claiming that many requests are from journalists looking for stories. Proactive disclosure could divert at least some of those requests as journalists could search through the public repository to report on research results. High-quality journalistic reporting can only serve to inform the public of government activities and enhance accountability.

¹³² Schneider, Milat and Moore reported some evidence that this already happens: above n 9, 211.

Further studies are needed to explore: the factors that contribute to the use of such clauses; the experiences of government purchasers and external providers in contract negotiations; the conduct of research that is subject to control clauses; and the broader transparency and accountability implications in this context. Research is needed to investigate the extent to which governments invoke control clauses, especially to suppress the publication of research and to sanitise results and shape the messages that communicate research findings when they are publicised. It would be worthwhile to follow up on Yazahmeidi and Holman's survey of Australian researchers about their experiences of 'suppression events' when doing contract research.¹³³ This survey is now over 10 years old and Australian governments have since made commitments to improve transparency and access to public sector information. Have researchers' experiences of suppression decreased or increased? Do formal transparency requirements, such as obligations to post basic contract information online, lead to greater reliance on clauses within contracts to protect the results from disclosure? The Government 2.0 Report hypothesised that professional advisors to government managers and decision-makers, including legal and communications professionals, are generally risk averse and 'see maximisation of control as a default setting.'¹³⁴ The attitudes and practices of these advisors are important areas for investigation.

Future study should also examine the types of external entities that provide research and advice to governments and identify any differences that arise depending on the provider type, such as university-based researchers, research business spin-offs from universities, or private sector think tanks and consultancies. Such work could investigate how governments construct research briefs and whether they vary for different types of providers. While our analysis focused on contractual control clauses, it is important to note that governments can also exert significant control over research by specifying the design and methods that external providers must use. A recent Australian study interviewed policymakers and researchers involved in evaluations of health programs and policies. The authors learned that '[i]n many cases, evaluations are undertaken specifically to demonstrate positive results and participants reported that briefs for external evaluators were written in a way that implies a certain result is expected.'¹³⁵

As a related question, it is worth exploring how governments view the credibility and legitimacy of different research providers. A recent study by Doberstein observed that '[a]cademics have historically occupied a privileged position of authority and legitimacy in the public domain as it relates to policy research, but some argue that this is changing with the growth of think tanks and

¹³³ Yazahmeidi and Holman, above n 35.

¹³⁴ *Government 2.0 Taskforce Report*, above n 17, 51 [5.6.2.1]:

it is natural for managers seeking to minimise adverse risk to try to control whatever they can. ... [And] specific professions advising management, such as the provision of legal, communications or IT advice and services will typically see maximisation of control as a default setting to minimise adverse risks. ... one cannot be sure that it [information] will not be used or misused in ways that may embarrass an agency. So why release it if one can avoid it?

¹³⁵ Schneider, Milat and Moore, above n 9, 211.

research-based advocacy groups.¹³⁶ Doberstein recommended critical investigation of the ‘competition of ideas and for influence, as the magnitude and sophistication of non-university-derived research and policy advice continues to grow’.¹³⁷ Scholars have observed a trend to an increased politicisation of research and policy advice provided by external think tanks and consultants.¹³⁸ Some research suggests that private sector consultants are ‘often seen as more likely to report positively on policies and programs, in a way that is less of a risk’ for the government purchasing the research.¹³⁹ Further investigation is needed to find out whether private consultants provide skewed results. If universities insist on academic freedom and more transparency in contract research, governments may respond by engaging private consultants who are perceived as more compliant than academics. Competition for funding and pressure to do research that has ‘impact’ on government policies and program may also persuade university-based researchers to accept briefs that are designed to produce results favourable to the government purchaser. Schneider and colleagues have recently commented on these types of political influences in the context of evaluation research:

Political imperatives not only influenced if, when and with what funding a policy or program might be evaluated, but indirectly determined the focus of evaluations. For example, there may be a preference for measuring cost-utility rather than population health outcomes. In some situations, it may be more important to be immediately seen to be ‘doing something’ rather than having an actual effect.¹⁴⁰

In short, the politics and practices of participants and stakeholders in externally purchased research are ripe for legal, ethical and socio-cultural investigation.

VI Conclusion

In 2013, the Office of the Chief Scientist surveyed over 1000 Australians across the country, asking their views on the most pressing issues that science should address. This project culminated in an essay collection, titled *The Curious Country*, featuring expert commentary on those issues.¹⁴¹ The introduction to the volume declared that

it is vital that well-trained minds wield the tools of scientific inquiry. ... the most effective way to enhance Australia’s social, economic, physical and intellectual wellbeing is to sort truth from fantasy, attainable dreams from wild conjecture and apply the findings to evidence-based national, regional and local government policy...¹⁴²

¹³⁶ Carey Doberstein, ‘Whom Do Bureaucrats Believe? A Randomized Controlled Experiment Testing Perceptions of Credibility of Policy Research’ (2017) 45(2) *Policy Studies Journal* 384, 375 <<https://onlinelibrary.wiley.com/doi/pdf/10.1111/psj.12166>> (citations omitted).

¹³⁷ *Ibid* (emphasis altered; citations omitted).

¹³⁸ Vromen and Hurley, above n 7; Jonathan Craft and Michael Howlett, ‘The Dual Dynamics of Policy Advisory Systems: The Impact of Externalization and Politicization on Policy Advice’ (2013) 32(3) *Policy and Society* 187 <<https://doi.org/10.1016/j.polsoc.2013.07.001>>; Veselý, above n 7.

¹³⁹ Schneider, Milat and Moore, above n 9, 211.

¹⁴⁰ *Ibid*.

¹⁴¹ Leigh Dayton (ed), *The Curious Country* (ANU Press, 2013) <<http://press.anu.edu.au/node/159/download>>.

¹⁴² *Ibid* 9.

The Chief Scientist lamented ‘the increasingly limited information available about science and society through mainstream media’ and emphasised the need for transparency and openness in research.¹⁴³

We applaud the Chief Scientist and other government offices for their commitments, at least in principle, to robust scientific inquiry, evidence-informed policymaking, public engagement and transparency. However, as we have argued here, much more effort and cultural changes are needed to see these principles regularly and consistently enacted in practice.

Stating lofty objectives is not sufficient, and organisational cultures and practices must shift to remove attitudinal barriers to transparency. The need for culture change is identified in a recent Productivity Commission Report on access to public datasets:

Despite recent statements in favour of greater openness, many areas of Australia’s public sector continue to exhibit a reluctance to share or release data.

The entrenched culture of risk aversion ... greatly inhibits data discovery, analysis and use.¹⁴⁴

By purchasing external research, governments can deliver to the public the benefit of accessing independent expertise, technical knowledge, innovative methods and ideas, and other resources.¹⁴⁵ Governments could be criticised if they relied solely on internal perspectives in the design and evaluation of their policies and programs. Governments have a corollary obligation to citizens to be open and transparent about the research they purchase and to facilitate the public dissemination of the findings unless there is strong justification for not doing so. Moreover, particularly when making research contracts with universities, governments should not undermine the principal function of universities to engage in the ‘dissemination, advancement, development and application of knowledge informed by free inquiry’.¹⁴⁶

¹⁴³ Ibid. The book offers a brief exposition of the scientific method, then states (at 10): ‘in practice the science process is complex. Experiments must be as free as possible from personal bias or error. Other scientists must be able to replicate the results.’

¹⁴⁴ Productivity Commission, above n 10, 34, 153 (Finding 3.5).

¹⁴⁵ A recent audit of evaluations undertaken internally by government health promotion agencies in Victoria recommended external collaborations with academic partners to strengthen the quality of evaluation projects: Louise J Francis and Ben J Smith, ‘Toward Best Practice in Evaluation: A Study of Australian Health Promotion Agencies’ (2015) 16(5) *Health Promotion Practice* 715, 722.

¹⁴⁶ *University of Sydney Act 1989* (NSW) s 6(2)(b). See also above n 29.

Before the High Court

Abortion Protests and the Limits of Freedom of Political Communication: *Clubb v Edwards*; *Preston v Avery*

Shireen Morris† and Adrienne Stone*

Abstract

Two cases currently before the High Court of Australia — *Clubb v Edwards* and *Preston v Avery* — raise the validity of state laws that seek to prohibit certain communication and protest outside abortion clinics. The laws are justified on the basis that they protect the ‘safety’, ‘dignity’, ‘well-being’ and ‘privacy’ of those seeking abortion services. The cases therefore pose the question of how these values are accommodated within the Australian system of representative and responsible government.

I Introduction

Few aspects of the *Australian Constitution* take the courts as directly to the heart of social and political controversy as the freedom of political communication, said to be ‘implied’ in the *Constitution*. Over the 26 years since it was first recognised,¹ many central features of the doctrine have become clear. Since *Lange v Australian Broadcasting Corporation*,² it has been apparent that the application of the doctrine turns on the answer to two questions: the first is whether a challenged law burdens communication of the relevant kind; and the second is whether the imposed burden is ‘reasonably appropriate and adapted’ to achieving a legitimate end. Since 2015, moreover, a majority of the High Court of Australia has held that the second question can be applied through proportionality analysis.³

However, the current cases show that uncertainties remain. In this comment, we focus on two unsettled questions likely to be central to the decisions in *Clubb v*

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

² (1997) 189 CLR 520, 567–8 (‘*Lange*’).

³ *McCloy v New South Wales* (2015) 257 CLR 178, 193 [2]–[3] (French CJ, Kiefel, Bell and Keane JJ) (‘*McCloy*’); *Brown v Tasmania* (2017) 349 ALR 398, 422 [104] (Kiefel CJ, Bell and Keane JJ), 464–9 [281]–[295] (Nettle J) (‘*Brown*’).

*Edwards*⁴ and *Preston v Avery*⁵: (1) the nature of ‘political communication’; and (2) the role of proportionality analysis in the freedom of political communication, including the significance of ‘discriminatory’ burdens on political communication.

II The Facts and Legislation

A *Clubb v Edwards*

On 4 August 2016, an anti-abortion activist, Ms Clubb, approached a couple at the entrance of the East Melbourne Fertility Control Clinic, to attempt to dissuade them from proceeding with an abortion. Ms Clubb spoke to the couple and tried to give them a pamphlet. In doing so, Ms Clubb breached s 185D of the *Public Health and Wellbeing Act 2008* (Vic) (*Victorian Act*).⁶

Section 185D provides that ‘[a] person must not engage in prohibited behaviour within a safe access zone’. ‘Safe access zone’ is defined in s 185B(1) as ‘an area within a radius of 150 metres from premises at which abortions are provided’. Relevant to this proceeding, the s 185B(1) definition of prohibited behaviour includes in paragraph (b) ‘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’.

Ms Clubb was charged and, in response, argued that s 185D of the *Victorian Act* was invalid for breaching the constitutional freedom of political communication. Her argument was dismissed by the magistrate and she was convicted. Ms Clubb appealed to the Supreme Court of Victoria and the case was subsequently removed to the High Court of Australia.⁷

B *Preston v Avery*

The *Reproductive Health (Access to Terminations) Act 2013* (Tas) (*Tasmanian Act*) also operates by reference to a 150-metre ‘access zone’⁸ around premises at which abortions are provided.⁹ ‘Prohibited behaviour’ is defined to cover ‘a protest in relation to terminations that is able to be seen or heard by a person accessing, or attempting to access, premises at which terminations are provided’.¹⁰ Notably, the term ‘protest’ is not defined¹¹ and, while there is a requirement that such protest be seen or heard by persons accessing the premises, unlike s 185B(1) of the *Victorian*

⁴ *Clubb v Edwards*, High Court of Australia, Case No M46/2018 (*Clubb*).

⁵ *Preston v Avery*, High Court of Australia, Case No H2/2018 (*Preston*).

⁶ Ms Kathleen Clubb, ‘Appellant’s Submissions’, Submission in *Clubb v Edwards*, Case No M46/2018, 8 June 2018, 2–3 [12]–[19] (*Clubb Submissions*).

⁷ *Ibid* 4–5 [23]–[25].

⁸ *Tasmanian Act* s 9(1).

⁹ *Ibid* s 9(2) states: ‘A person must not engage in prohibited behaviour within an access zone.’

¹⁰ *Ibid* s 9(1).

¹¹ The prohibition in the *Victorian Act* does not use the word ‘protest’.

Act, there is no requirement that the behaviour be ‘reasonably likely’ to cause distress or anxiety.

On various occasions in 2014 and 2015, Mr Preston protested against abortions within 150 metres of the Specialist Gynaecology Centre in Hobart and was seen and heard by persons entering the premises. The protest involved signs, leaflets and placards, which included statements like ‘EVERY ONE HAS THE RIGHT TO LIFE, Article 3, Universal Declaration of Human Rights’ and ‘EVERY CHILD HAS THE RIGHT TO LIFE, Article 6, UN Convention on the Rights of the Child’.¹²

Mr Preston was charged with three breaches of the *Tasmanian Act*. In the Magistrates Court, he argued that the *Tasmanian Act* breached the freedom of political communication. The magistrate held that the law burdened political communication, but found that the burden was justifiable and Mr Preston was convicted. Mr Preston sought review in the Supreme Court of Tasmania, then the matter was removed to the High Court of Australia.¹³

III The *Lange* Test

The starting point for the analysis of *Clubb* and *Preston* is the well-established test for the application of the freedom of political communication. Initially stated as a two-stage test in *Lange*,¹⁴ it has been modified in subsequent cases¹⁵ and can now be stated as a three-stage test that poses the following questions:

1. Does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?
2. 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?
3. 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?¹⁶

If the first question is answered ‘yes’ and the second or third ‘no’, the law is invalid.

The application of this test will be informed by the interpretive method *Lange* established. In a passage often understood as a retreat from the High Court’s earlier boldness,¹⁷ a unanimous Court held that

¹² Mr John Graham Preston, ‘Appellant’s Submissions’, Submission in *Preston v Avery*, Case No H2/2018, 6 July 2018, 4 [20] (emphasis in original) (*‘Preston Submissions’*).

¹³ *Ibid* 6–7 [36]–[38].

¹⁴ (1997) 189 CLR 520, 567–8.

¹⁵ *Coleman v Power* (2004) 220 CLR 1, 77–8 [196] (Gummow and Hayne JJ); 50 [92]–[93] (McHugh J); 82 [210]–[213] (Kirby J) (*‘Coleman’*); *McCloy* (2015) 257 CLR 178, 193 [2] (French CJ, Kiefel, Bell and Keane JJ); *Brown* (2017) 349 ALR 398, 422 [104] (Kiefel CJ, Bell and Keane JJ), 464–9 [281]–[295] (Nettle J).

¹⁶ In Part VC below, we discuss how this test is supplemented by a form of ‘proportionality analysis’.

¹⁷ *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104 (*‘Theophanous’*) and *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 are usually considered the high watermark of

the *Constitution* gives effect to the institution of ‘representative government’ only to the extent that the text and structure of the *Constitution* establish it ... Under the *Constitution*, the relevant question is not, ‘What is required by representative and responsible government?’ It is, ‘What do the terms and structure of the *Constitution* prohibit, authorise or require?’¹⁸

This method entails that the freedom of political communication protects only communication necessary to allow citizens to make free and informed choices as voters in federal elections, for the proper functioning of the referendum process, and the proper functioning of responsible government.¹⁹

With these aspects of method in mind, we now turn to consider key unsettled aspects of the *Lange* test (modified as described above) that are likely to be central to the High Court’s decision in *Clubb* and *Preston*.

IV Is There an ‘Effective Burden’ on ‘Political Communication’?

The *Victorian Act* and the *Tasmanian Act* impose prohibitions on communication backed by criminal sanction. There seems little doubt that they impose an ‘effective burden’ on communication. Argument on the first limb of the *Lange* test in *Clubb* and *Preston* is likely to focus on whether the communication at issue is ‘political communication’. We argue that the communication is ‘political’, and the first limb of the *Lange* test is satisfied.²⁰

The emphasis in *Lange* on the text and structure of the *Constitution* seems to favour a narrow definition of ‘political communication’ to include only communication relevant to the functioning of specified institutions of the Federal Government. Consistent with this, the concept of ‘political communication’ was, for a time, defined narrowly.²¹ This approach seems to distinguish the freedom of political communication from a general guarantee of freedom of expression, and may call into doubt the High Court’s earlier position that political communication

the doctrine: George Williams ‘Sounding the Core of Representative Democracy: Implied Freedoms and Electoral Reform’ (1996) 20(3) *Melbourne University Law Review* 848, 848 n 5. However, as Stone has shown, the method adopted in *Lange* in practice places few significant limits on the scope and meaning of the freedom: Adrienne Stone, ‘The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication’ (1999) 23(3) *Melbourne University Law Review* 668; Adrienne Stone, ‘The Limits of Constitutional Text and Structure Revisited’ (2005) 28(3) *University of New South Wales Law Journal* 842.

¹⁸ *Lange* (1997) 189 CLR 520, 566–7.

¹⁹ The sections of the *Constitution* usually cited in support of the freedom are ss 7, 24, 64 and 128. See Stone above n 17, 674; Adrienne Stone and Simon Evans ‘Australia: Freedom of Speech and Insult in the High Court of Australia’ (2006) 4(4) *International Journal of Constitutional Law* 677. See also Dan Meagher, ‘What is “Political Communication”? The Rationale and Scope of the Implied Freedom of Political Communication’ (2004) 28(2) *Melbourne University Law Review* 438, 467.

²⁰ We consider below the submission by the Commonwealth Attorney-General that additional factors should be considered at this stage: see below n 78–9 and accompanying text.

²¹ See the cases discussed in Adrienne Stone, ‘Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication’ (2001) 25(2) *Melbourne University Law Review* 374, 383–4.

should include ‘all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about’.²²

However, developments in the subsequent case law have made it apparent that the concept of ‘political communication’ is rather broad. Early suggestions by some judges that the freedom may not encompass discussion of state political matters²³ have been conclusively set aside.²⁴ It has been accepted that political communication includes expressive conduct,²⁵ speech that causes offence, hatred, disgust or outrage,²⁶ and could also include invective or abuse.²⁷ Moreover, the High Court’s acceptance in *Attorney-General (South Australia) v Adelaide*²⁸ that a city by-law prohibiting ‘preaching’, ‘canvassing’ or ‘haranguing’ without a council permit was a burden on political communication²⁹ indicates that religious speech may also be ‘political communication’ for the purposes of the freedom.³⁰

The trajectory of the case law is not surprising. As argued at length elsewhere, the *Lange* method itself supports a conclusion that ‘political communication’ should be understood to cover a broad category of matters of public interest, extending well beyond communication explicitly about the public conduct of government officials from all branches of government and government policy.³¹

The conduct at issue in *Preston* is clearly ‘political communication’. Mr Preston was holding placards and handing out flyers that opposed abortions in explicitly political terms. Abortion is a live policy and political issue in Tasmania, and given the well-known depth of controversy over the legality of abortion, the controversy over abortion law is likely to continue.³² Therefore, these protest actions are within the core category of explicitly political communication.

²² *Theophanous* (1994) 182 CLR 104, 124 (Mason CJ, Toohey and Gaudron JJ), quoting Eric Barendt, *Freedom of Speech* (Clarendon Press, 1985) 152. This expanded notion was reiterated in *Cunliffe v Commonwealth* (1994) 182 CLR 272, 298–9 (Mason CJ), 336 (Deane J), 379–80 (Toohey J), 387 (Gaudron J) (*‘Cunliffe’*).

²³ *Levy v Victoria* (1997) 189 CLR 579, 595–6 (Brennan J) (*‘Levy’*). See also *Hogan v Hinch* where it was suggested that the freedom only applies to Commonwealth matters: (2011) 243 CLR 506, 543 [48].

²⁴ *Unions NSW v New South Wales* (2013) 252 CLR 530, 549–51 (*‘Unions NSW’*).

²⁵ *Levy* (1997) 189 CLR 579, 595 (Brennan CJ). Justice McHugh noted that non-verbal political communication could include ‘[s]igns, symbols, gestures and images’ (at 622) and Kirby J noted the communicative power of visual gestures and activities like ‘[l]ifting a flag in battle, raising a hand against advancing tanks, wearing symbols of dissent, participating in a silent vigil, public prayer and meditation’ (at 638) as examples of actions that may attract constitutional protection.

²⁶ *Monis v The Queen* (2013) 249 CLR 92, 131 (French CJ), 171–4 (Hayne J) (*‘Monis’*).

²⁷ *Ibid* 136 [85] (Hayne J).

²⁸ (2013) 249 CLR 1 (*‘A-G (SA) v Adelaide’*).

²⁹ *Ibid* 33 [35] (French CJ). While the by-law in question burdened political communication, the High Court found it did not breach the freedom. See also Mitchell Landrigan, ‘Can the Implied Freedom of Political Discourse Apply to Speech By or About Religious Leaders?’ (2014) 34(2) *Adelaide Law Review* 427, 441–2.

³⁰ Nicholas Aroney, ‘The Constitutional (In)Validity of Religious Vilification Laws: Implications for their Interpretation’ (2006) 34(2) *Federal Law Review* 287. See also Landrigan, above n 29.

³¹ Stone, above n 21, 383–4.

³² *Reproductive Health (Access to Terminations) Act 2013* (Tas). For example, in 2018, there is continuing discussion about whether women in Tasmania have access to safe abortions: see Calla Wahlquist, ‘Number of Tasmanians Travelling Interstate for Abortions Rises Fivefold’, *The Guardian* (online), 27 April 2018 <<https://www.theguardian.com/australia-news/2018/apr/27/number-of-tasmanians-travelling-interstate-for-abortions-rises-fivefold>>.

Clubb raises more difficult questions because, though it was accepted that Ms Clubb attempted to dissuade a couple entering the clinic from procuring an abortion, it is not clear exactly what Ms Clubb said. The government submissions argue that not all communication about abortion is ‘political communication’, and that a mere attempt to dissuade persons from procuring an abortion is not relevantly political.

A *Is All Communication about Abortion ‘Political Communication’?*

The Commonwealth and State submissions in *Clubb* contend that, while communication about abortion laws and policies is ‘political communication’, a personal communication or offer of assistance, help and alternatives is not, because ‘[a] communication of that character (concerning an intensely personal issue involving utilisation of a lawful health service) does not concern government or political matters.’³³ Victoria’s submission contends:

not all communication about abortion is political. A medical professional speaking on the topic from a medical perspective at a health conference will not (usually) be engaging in political communication. A woman and her doctor speaking to each other about the procedure are not (usually) engaging in political communication. Something more is required for communication about abortion to be characterised as ‘political’. In the context of anti-abortion protesters outside abortion clinics, while it may be accepted that some individuals might be engaging in political communication, in other cases the aim is to deter women from having an abortion, often through imposing guilt and shame. This latter type of communication is not political communication, although it may represent deeply and sincerely held personal beliefs. It is communication directed at influencing a personal and private medical choice. It is not directed at public debate, nor at ensuring that the people of the Commonwealth can ‘exercise a free and informed choice as electors’.³⁴

Thus, it is argued that there is ‘no evidence that Ms Clubb’s conduct involved *political communication*’.³⁵

There may be strong common-sense appeal to the idea of a category of communication — such as a private medical consultation — that should not be regarded as political communication within the scope of the freedom. However, the proper basis for excluding a medical consultation about abortion is not entirely clear.

³³ Attorney-General (Cth), ‘Submissions of the Attorney-General of the Commonwealth (Intervening)’, Submission in *Clubb v Edwards*, Case No M46/2018, 25 May 2018, 4 [11] (*Attorney-General (Cth) Submissions*). See also Attorney-General (Qld), ‘Submissions for the Attorney-General for the State of Queensland (Intervening)’, Submission in *Clubb v Edwards*, Case No M46/2018, 25 May 2018, 12–14 (*Attorney-General (Qld) Submissions*); Attorney-General (NSW), ‘Annotated Submissions of the Attorney General for New South Wales, Intervening’, Submission in *Clubb v Edwards*, Case No M46/2018, 25 May 2018, 3.

³⁴ Attorney-General (Vic), ‘Submissions of the Attorney-General for the State of Victoria’, Submission in *Clubb v Edwards*, Case No M46/2018, 11 May 2018, 9 [31] (citations omitted) (*Attorney-General (Vic) Submissions*).

³⁵ *Attorney-General (Cth) Submissions*, above n 33, 1 [4] (emphasis in original). The same view is taken in *Attorney-General (Vic) Submissions*, above n 34, 8 [29] and *Attorney-General (Qld) Submissions*, above n 33, 2 [5(c)].

Perhaps it can be excluded on the basis that it has another purpose or dominant characteristic — for example, a therapeutic, rather than political, purpose. But there is scant indication in the case law that either purpose or the idea of a dominant characteristic are relevant to determining whether communication is ‘political’. Alternatively, it might be argued that communications of this kind between a patient and doctor bear such a tangential relationship to the ‘constitutionally prescribed system of representative and responsible government’ that the burden on political communication is negligible. Notably, however, the High Court has, in general, resisted the conclusion that minor burdens on the freedom do not meet the standard of ‘effective burden’ prescribed in the first stage of the *Lange* test³⁶ and so such a conclusion would involve a development of constitutional doctrine.

The logic of the *Lange* method could, in fact, lead to the opposite conclusion. It may well be that communication during a medical consultation is relevant to a citizen’s political views. It is easy to imagine how hearing facts about the abortion procedure might influence a citizen’s views about abortion policy. Indeed, hearing such information in the context of considering or undergoing an abortion may even make the information a more powerful determinant of political views than communication in other contexts.³⁷

B Was Ms Clubb’s Conduct ‘Political Communication’?

Even if it is possible to identify a category of non-political communication about abortion, there is a strong argument that Ms Clubb’s conduct is properly categorised as political. The relevant interaction was not a private medical consultation. Even assuming Ms Clubb merely tried to dissuade the couple from proceeding with an abortion by offering alternatives and support, Ms Clubb’s conduct should be regarded as political protest against abortion laws and hence within the scope of the freedom of political communication.

In support of this conclusion, we draw attention to the High Court’s continued acceptance of protest activity as political communication and acknowledgment that the site of a protest can contribute significantly to the emotional impact of the communication. The significance of site-based protest, first recognised in *Levy v Victoria*,³⁸ was more recently specifically acknowledged in *Brown v Tasmania*.³⁹ Justice Gageler held:

The communicative power of on-site protests, the special case emphasises and common experience confirms, lies in the generation of images capable of attracting the attention of the public and of politicians to the particular area of the environment which is claimed to be threatened and sought to be protected.⁴⁰

³⁶ *Monis* (2013) 249 CLR 92, 130 [64] (French CJ), 144–5 [120]–[121] (Hayne J), 212–13 [343] (Crennan, Kiefel and Bell JJ).

³⁷ We express no opinion as to the nature of the opinion that a patient would be likely to form.

³⁸ (1997) 189 CLR 579, 622–3 (McHugh J), citing *Brown v Louisiana*, 383 US 131 (1966).

³⁹ (2017) 349 ALR 398, 409 [32]–[33], (Kiefel CJ, Bell and Keane JJ).

⁴⁰ *Ibid* 440–41 [191].

Returning to the facts of *Clubb*, the Minister's Second Reading Speech, as well as the Statement of Compatibility required under s 28 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), explained that the *Victorian Act* was a response to a long history of protest outside the East Melbourne abortion clinic.⁴¹ Repeated protests at that site included displaying 'distressing and sometimes graphic' images and props, handing out confronting material and creating 'disturbing theatre' utilising things like a bloody doll in a pram.⁴²

In this context, Ms Clubb's presence as an anti-abortion activist, approaching those entering the facility to try to persuade them not to have an abortion, effectively communicated her opposition regarding abortion as a matter of principle and her support for laws and policies that would restrict abortion. In the context of the history of on-site protest outside abortion clinics, moreover, Ms Clubb's very act of standing near the clinic, and trying to dissuade the couple from having an abortion, was a political act of demonstration that could influence electoral decision-making.

We argue, therefore, that in both cases the communication was political and that the first element of the *Lange* test is satisfied.⁴³

V Do the Laws Impose Justifiable Limitations on Freedom of Political Communication?

Turning to the second limb of the *Lange* test,⁴⁴ the relevant question is whether the burden on the freedom of political communication imposed by the *Tasmanian Act* and the *Victorian Act* can be justified as reasonably appropriate and adapted to a legitimate end.⁴⁵

A A Legitimate End?

The *Lange* test, as now formulated, requires identification of the 'end' to which the law is directed. This determination can prove critical. In *Monis*, the three judges who held the law invalid (French CJ, Hayne and Heydon JJ) did so on the basis that the

⁴¹ In *Attorney-General (Vic) Submissions*, above n 34, 4 [14] (citations omitted), Victoria submits that: In the statement of compatibility for the Bill, the Minister explained that there was a 'long history' of anti-abortion protesters engaging in disruptive activities and worse outside abortion clinics and hospitals that perform abortion. The Minister described women attending clinics (and their support people) being subjected to 'harassing and intimidatory conduct', and staff having experienced 'sustained harassment and verbal abuse over many years'. The most extreme case in Victoria involved the fatal shooting in 2001 of a security guard at the East Melbourne Clinic.

⁴² Victoria, *Parliamentary Debates*, Legislative Assembly, 22 October 2015, 3976 (Jill Hennessy).

⁴³ We consider below the submission by the Commonwealth Attorney-General that additional factors should be considered at this stage: see below nn 78–9 and accompanying text.

⁴⁴ Including the elaborations in: *McCloy* (2015) 257 CLR 178, 194 [2]; *Brown* (2017) 349 ALR 398, 422 [104] (Kiefel CJ, Bell and Keane JJ), 461 [271] (Nettle J).

⁴⁵ *McCloy* (2015) 257 CLR 178, 201 [23] (French CJ, Kiefel, Bell and Keane JJ):

The *Lange* test requires a more structured, and therefore more transparent, approach. In the application of that approach it is necessary to elucidate how it is that the impugned law is reasonably appropriate and adapted, or proportionate, to the advancement of its legitimate purpose.

purpose of the law⁴⁶ was promoting civility in uses of the postal service, which was not a ‘legitimate end’. By contrast, those judges who found the law valid (Crennan, Kiefel and Bell JJ) held its purpose was to prevent offensive intrusions into the private sphere.⁴⁷

The difference between these positions lies in the level of generality at which the notion of statutory purpose is identified. On the former view, exemplified by Hayne J, purpose is construed narrowly, in a manner that is ‘coterminus with the provision’s legal operation’.⁴⁸ The position taken in the joint reasons of Crennan, Kiefel and Bell JJ, by contrast, identifies in broader terms ‘the social objective’⁴⁹ of the challenged law.

In our view, the broader approach to identifying statutory purpose, which is more commonly adopted in freedom of political communication cases,⁵⁰ is better suited to the principled application of the implied freedom. *Lange* requires a consideration of the extent to which the freedom is necessary for the exercise of free voting choices, and how the burdened communication contributes to the operation of constitutional institutions. This determination requires a judgement to be made, often in the face of competing views, about how constitutional institutions should function.⁵¹ Given the value-laden nature of this task, it is, we argue, better performed with a fuller understanding of the object of the challenged law. Only with a full understanding of a law’s purpose can judges truly grapple with the question of whether the law is ‘compatible with the constitutionally prescribed system of representative and responsible government’.⁵²

Of course, there may be some cases where the statutory purpose is difficult to determine. However, with respect to the laws challenged here, there is considerable reason to support the conclusion that the objective of the laws is

⁴⁶ *Criminal Code Act 1995* (Cth) sch (‘*Criminal Code* (Cth)’) s 417.12 prohibited the use of ‘a postal or similar service ... in a way ... that reasonable persons would regard as being in all the circumstances, menacing harassing or offensive’.

⁴⁷ *Monis* (2013) 249 CLR 92, 207 [324]. As Stellios has identified, two approaches are evident in determining the purpose of an impugned provision: James Stellios, *Zines’ The High Court and the Constitution* (Federation Press, 6th ed, 2015) 571, 591.

⁴⁸ Stellios, above n 47, 591. See *Monis* (2013) 249 CLR 92, 161–4 [175]–[184].

⁴⁹ *Monis* (2013) 249 CLR 92, 205 [317]. Their Honours held at 205 [317] that the question of purpose is rarely answered by reference only to the words of the provision, which commonly provide the elements of the offence and no more ... it may be necessary to consider the context of the provision including other provisions in the statute and the historical background to the provision.

⁵⁰ In cases concerning electoral funding, for instance, the High Court has consistently identified the ends pursued by the laws in terms of their public policy goal, which was to address the undue influence of wealthy donors, prevent corruption and the appearance of corruption: see *Australian Capital Television* (1992) 177 CLR 106, 144–5 (Mason J); *McCloy* (2015) 257 CLR 178, 203 [30] (French CJ, Kiefel, Bell, Keane JJ); *Unions NSW* (2013) 252 CLR 530, 546 [9] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), 579 [138] (Keane J).

⁵¹ See Stone above n 17 and for further elaboration of the value judgements required in these cases, see Adrienne Stone, ‘Free Speech Balanced on a Knife’s Edge: *Monis v The Queen*’ on *Opinions on High* (26 April 2013) <<http://blogs.unimelb.edu.au/opinionsonhigh/2013/04/26/stone-monis/>>.

⁵² *Lange* (1997) 189 CLR 520, 567; *McCloy* (2015) 257 CLR 178, 193 [2]; *Brown* (2017) 349 ALR 398, 422 [104] (Kiefel CJ, Bell and Keane JJ).

‘ensuring safety, dignity and privacy in access to abortion services’.⁵³ Once this is established, moreover, a conclusion that such an end is legitimate seems relatively straightforward. The goal of ensuring ‘safety, dignity and privacy’ in accessing a medical service has obvious appeal in a liberal democracy and seems compatible with the constitutional requirements that underpin the freedom of political communication. The purpose seems analogous to that of preventing obstruction in the roads, the ‘safety and convenience of road users’⁵⁴ and protecting the physical safety of protestors.⁵⁵

Before concluding discussion of statutory purpose, we note a complexity that arises in relation to the *Tasmanian Act*. Its operation is limited to ‘protest’ on abortions within a 150-metre ‘access zone’,⁵⁶ raising some question as to whether the purpose of this law is to stop particular kinds of protest and expressions of disapproval in this location. In our view, identifying this kind of purpose does not supplant recognition of the broader policy objective discussed above.⁵⁷ The *Tasmanian Act* is, the respondents submit, directed towards a policy goal that closely resembles the purpose of the *Victorian Act*.⁵⁸ It may also be true that it pursues this objective by targeting protest. This potentially discriminatory operation may be relevant to validity, but the question is dealt with as part of the next stage of the analysis.⁵⁹

B ‘Reasonably Appropriate and Adapted’ and Proportionality

The next step of the *Lange* test is to determine whether the law is ‘reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government’.⁶⁰ Since *McCloy*, it has been clear that this question may involve a form of ‘proportionality analysis’, which requires an assessment of whether the law is:

suitable — as having a rational connection to the purpose of the provision

necessary — in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;

⁵³ Section 185A of the *Victorian Act* states the purpose of the prohibitions is to ‘protect the safety and wellbeing and respect the privacy and dignity’ of patients and employees.

⁵⁴ Accepted as legitimate ends in *A-G (SA) v Adelaide* (2013) 249 CLR 1, 63 [134] (Hayne J); 84 [203] (Crennan and Kiefel JJ).

⁵⁵ Accepted as legitimate in *Levy* (1997) 189 CLR 579, 599 (Brennan CJ); 608 (Dawson J); 614–15 (Toohey and Gummow JJ); 619 (Gaudron J); 620 (McHugh J).

⁵⁶ *Tasmanian Act* s 9(1). Section 9(2) states: ‘A person must not engage in prohibited behaviour within an access zone.’

⁵⁷ We note the rejection of a similar argument in *Brown* (2017) 349 ALR 398, 421 [97]–[100] (Crennan, Kiefel and Bell JJ)

⁵⁸ Namely, enabling ‘persons to access premises where terminations are provided unobstructed, uninjured and un-harried’: Solicitor-General (Tas), ‘Respondents’ Submissions’, Submission in *Preston v Avery*, Case No H2/2018, 3 August 2018, 4 [23] (‘*Solicitor-General (Tas) Submissions*’) citing Tasmania, *Parliamentary Debates*, Legislative Council, 19 November 2013, 50–51 (Ruth Forrest).

⁵⁹ See below nn 83–7 and accompanying text.

⁶⁰ *Lange* (1997) 189 CLR 520, 567.

adequate in its balance — a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.⁶¹

Although a majority of the High Court adopted proportionality analysis in *McCloy* and reaffirmed that position in *Brown*, a majority of the present Court justices have indicated that proportionality need not be used in all cases.⁶² It remains uncertain, therefore, in which circumstances proportionality is to be used. We do not, in this comment, attempt to resolve this uncertainty because, in our view, there is little difference in practice between proportionality and the formulation of the test as it stood before *McCloy*.

In our view, proportionality analysis is best understood as an elaboration upon the position taken by the Court before *McCloy*, rather than a significant revision of it. We argue, first, that this view of proportionality is supported by the case law. The majority of the Court in *McCloy* accepted the plaintiffs' submissions that 'proportionality analysis of some kind is part of the *Lange* test'.⁶³ This position is consistent with the Court's earlier unanimous statement in *Lange* that '[i]n this context, there is little difference between the test of "reasonably appropriate and adapted" and the test of proportionality'.⁶⁴ This view of proportionality is also consistent with an argument made by Stone shortly after *Lange* that the three elements, 'suitability', 'necessity' and 'balancing' are all evident, though not explicitly, in the Court's application of the 'reasonably appropriate and adapted' formulation.⁶⁵ The principal effect of the *McCloy* formulation, therefore, is to state explicitly and separately the 'balancing' part of the analysis, which had previously been only implicit.⁶⁶ The important question, therefore, is not *whether* the Court uses proportionality, but *how* that test is employed. We turn now to that question. Taking the elements of proportionality in turn, we will outline the most relevant features of the argument.

Some clarity can perhaps be found in the application of the first element. Provided that the statutes are interpreted as we suggest, there is a clear argument that the challenged laws are 'suitable' in the sense that they bear a 'rational connection' to the legitimate end to which the laws are directed. In this regard, we note especially the evidence that Victoria and Tasmania put forward as to the negative effects of on-site abortion protests on patients and staff.⁶⁷

The question of 'necessity', however, is a much closer call. To apply this element of the test, the Court will need to consider whether there are 'obvious and compelling alternative, reasonably practicable means of achieving the same

⁶¹ *McCloy* (2015) 257 CLR 178, 195 [2] (emphasis in original).

⁶² *Brown* (2017) 349 ALR 398, 426 [125], 427 [131] (Kiefel CJ, Bell and Keane JJ), 432 [158]–[159] (Gageler J), 463–4 [279]–[280] (Nettle J), 508 [473] (Gordon J).

⁶³ *McCloy* (2015) 257 CLR 178, 212 [66]. See also at 201 [23].

⁶⁴ *Lange* (1997) 189 CLR 520, 567 n 272.

⁶⁵ Stone, above n 17.

⁶⁶ Anne Carter, 'McCloy Symposium: Anne Carter on Proportionality and Its Discontents' on *Opinions on High* (3 December 2015) <<http://blogs.unimelb.edu.au/opinionsonhigh/2015/12/03/carter-mccloy>>.

⁶⁷ See *Attorney-General (Vic) Submissions*, above n 34, 5–9; *Solicitor-General (Tas) Submissions*, above n 58, 6–8 [36]–[39].

purpose'. Ms Clubb and Mr Preston point to a number of alternatives. These include prohibitions (already found in both Acts) that are limited to 'besetting, harassing, intimidating, interfering with, threatening, hindering, obstructing, or impeding',⁶⁸ the inclusion of defences and a 'carve out' applicable to political communication.⁶⁹ Notably, Mr Preston also points out that because the *Tasmanian Act* prohibits protest irrespective of whether that protest is 'reasonably likely' to cause harm, a less restrictive alternative form of the Act would incorporate a requirement for some kind of harm.⁷⁰

In relation to both Acts, what will be required is a comparison of the challenged law against the putative alternatives and a consideration of whether each is 'obvious, compelling' and 'reasonably practicable', a judgement that includes a measure of deference to the legislature.⁷¹ In addition, it will be necessary to consider arguments by Victoria and Tasmania that draw attention to the geographically confined operation of the Acts and to the availability of many alternative means and places in which protestors can express their opinions.⁷²

The last element of the proportionality test, a 'balancing' assessment, required either as an element of determining the availability of alternative means or (under the proportionality formulation) as a separate element,⁷³ is perhaps the most open-ended of all. Balancing, in this context, cannot refer to a precise weighing in an objective sense, since the ends of the law (safety, dignity and privacy) and the constitutional limitation (freedom of political communication) are incommensurable. Moreover, although the determination is underscored by a question of what is compatible with the 'constitutionally prescribed system of representative and responsible government', constitutional text and structure provide little helpful guidance.⁷⁴ What is required, therefore, is a *value judgement* as to the relative importance of the freedom of political communication as measured against the importance of the ends pursued by the challenged laws (namely, the safety, privacy and dignity of those accessing abortion services).⁷⁵

Stated at this level of precision, the complexity of proportionality analysis is fully evident. It requires both a value judgement about how constitutional institutions

⁶⁸ *Victorian Act* s 185B(1); *Tasmanian Act* s 9(1).

⁶⁹ See *Clubb Submissions*, above n 6, 15–16 [83]–[88]; *Preston Submissions*, above n 12, 13–14 [62]–[70].

⁷⁰ We note that Mr Preston raises this matter as going to suitability, submitting that the failure to include a harm requirement indicates that the *Tasmanian Act* is not properly directed to the prevention of harm: *Preston Submissions* above n 12 12 [58].

⁷¹ *Brown* (2017) 349 ALR 398, 428 [139] (Crennan, Kiefel and Bell JJ), 464 [282] (Nettle J). While 'necessity' is not applied this way in all constitutional systems, the stricter form of necessity is attributable to constitutional features not shared by the *Australian Constitution*. On the 'strict' interpretation of necessity and its relationship to specifically German conceptions of rights, see David Bilchitz, 'Necessity and Proportionality: Towards a Balanced Approach?' in Liora Lazarus et al, *Reasoning Rights* (Hart Publishing, 2014). Compare the more deferential approach taken by the Supreme Court of Canada in *Irwin Toy v Quebec (Attorney General)* [1989] 1 SCR 927, 994 (Canada).

⁷² *Attorney-General (Vic) Submissions*, above n 34, 18 [59]–[61]. Also adopted by *Solicitor-General (Tas) Submissions*, above n 58, 19 [96].

⁷³ See above n 66.

⁷⁴ On the difficulties inherent in this question, see Stone, above n 17.

⁷⁵ In our view, like the 'necessity' element, it should be accompanied by some deference to parliaments, especially given the qualification (unique to the Australian context) that a challenged law be 'adequate in its balance': *McCloy* (2015) 257 CLR 178, 195 [2].

of representative and responsible government should operate *and* consideration of possible alternative laws and their relative effectiveness. This combination of a value judgement unconstrained by constitutional text and structure, and the detailed context-specific and fact-specific questions⁷⁶ about the operation of the challenged laws and possible alternatives, renders the results of this form of analysis particularly hard to predict.

C Further Development of Proportionality Analysis

Given the difficulties inherent in predicting the outcome of proportionality analysis, we do not make a firm view of the correct result. We offer instead a consideration of how proportionality analysis could be developed to address these difficulties.

One approach is for the High Court to develop specific and determinate tests of narrower application that could be used instead of (or as a supplement to) the test stated in *Lange*. Indeed, this approach is not wholly foreign to this area of law. The test developed in *Lange*, which applies specifically to defamation actions, is one such narrower, and at least somewhat more determinate, test.⁷⁷ Moreover, the Commonwealth Attorney-General's submissions in *Clubb* and *Preston* identify one way that this kind of development could occur. The Commonwealth submits that answering the first limb of the *Lange* test — whether the law constitutes a burden on political communication — requires more than just a 'yes' or 'no' answer. Rather, the Court should identify 'the nature and extent of the burden with precision', so as to give direction to inquiries into the justification for the burden.⁷⁸

Another way this general strategy could be pursued is by identifying particular circumstances or places in which free political communication is to be especially highly valued. The many statements in *Brown* and *Levy* that point to the importance of site-based protest could be understood as developing just such a doctrinal category.⁷⁹ These cases provide an excellent opportunity for the significance of site-based protest to be further clarified. As noted above, these Acts both burden site-based protest, making the relevance of this criterion especially significant in this case.⁸⁰

Another possibility is that particular kinds of laws might merit higher level scrutiny. It has long been suggested, for instance, that laws that target the content of speech, its information or ideas, need a 'compelling justification' and must be weighed against what is 'reasonably necessary to achieve the protection of the

⁷⁶ On factual judgements required by proportionality, see Anne Carter, 'Constitutional Convergence? Some Lessons from Proportionality' in Mark Elliott, Jason NE Varuhas and Shona Wilson Stark (eds), *The Unity of Public Law?: Doctrinal, Theoretical and Comparative Perspectives* (Hart Publishing, 2018) 373, 380–82.

⁷⁷ These matters are more fully explained in Stone, above n 17, 705–7.

⁷⁸ *Attorney-General (Cth) Submissions*, above n 33, 8 [24]. See also *Attorney-General (Qld) Submissions*, above n 33, 3 [7].

⁷⁹ See above nn 38–40 and accompanying text.

⁸⁰ Amelia Simpson, 'Brown v Tasmania: High Court Delivers a Win for Protesters' (2018) 41 *Law Society Journal* 90, 90.

competing public interest’,⁸¹ whereas other laws are presumed to be valid unless the burden is ‘disproportionate to the attainment of the competing public interest’.⁸²

More recently, a distinction has been drawn between a law that is *aimed at* political communication or at political communication of certain kinds.⁸³ Justice Gageler held in *Brown*⁸⁴ that such discriminatory laws warrant closer scrutiny because of the risk ‘political communications unhelpful or inconvenient or uninteresting to a current majority might be unduly impeded’.⁸⁵

Once again, a rule articulated along these lines could be especially helpful in this case. Both the challenged laws could be characterised as having a discriminatory operation in the sense that they target certain kinds of political communication. The *Victorian Act* applies only to communications ‘about abortion’, and not to other communications (even if distressing) within a safe access zones, whereas the *Tasmanian Act* applies specifically to ‘protest’ within such zones.

One matter that such a rule might address is the distinction between discrimination against political communication in general and discrimination against particular viewpoints. We would argue that the discrimination in the *Victorian Act* against communication ‘in relation to abortion’ is more easily justified in terms of the objective of the Act, which is to ensure safe and dignified access to abortion services.⁸⁶ However, the discrimination effected by the *Tasmanian Act* is more troubling. By prohibiting ‘protest’, the *Tasmanian Act* appears to come dangerously close to implementing a form of viewpoint discrimination.⁸⁷ That is, a restriction applying only to those who oppose abortion and not those who might support the provision of abortion services. Viewpoint discrimination is widely regarded as the most problematic form of a content-based law, because it raises the greatest risk that some ideas are preferred over others.

As Gageler J explained, developing the analysis in this way allows for a more precise identification of the nature of the justification for the challenged law and the cost that the law imposes on political communication. His Honour stated:

Of course, the measure is not scientific. It can itself be nothing more than a heuristic tool. *But it is a tool custom-made to place the question of the justification for the particular burden which the law imposes on political*

⁸¹ *Australian Capital Television* (1992) 177 CLR 106, 143 (Mason CJ).

⁸² *Ibid* 143 (Mason CJ). See also *ibid* 234–5 (McHugh J); *Cunliffe* (1994) 182 CLR 272, 299–300 (Mason CJ). In the context of proportionality analysis, it might be that such laws require more by way of justification at the balancing stage: see *Brown* (2017) 349 ALR 398, 420 [94]–[95], 425 [120]–[121] (Crennan, Kiefel and Bell JJ).

⁸³ For comparative analogies, consider the United States and Canada. Under the First Amendment of the *United States Constitution*, ‘content-based’ laws are ‘presumptively invalid’: *R.A.V v St Paul, Minnesota*, 505 US 377, 382 (1992). In Canadian constitutional law, if a law is content-based then the need for a factual inquiry into the effect of the law on freedom of expression is circumvented and the Court automatically proceeds to apply s 1 of the *Canada Act 1982 (UK)* c 11, sch B pt I (*‘Canadian Charter of Rights and Freedoms’*): *Irwin Toy* [1989] 1 SCR 927, 972–5.

⁸⁴ *Brown* (2017) 349 ALR 398, 446 [220], [223].

⁸⁵ *Ibid* 443 [202].

⁸⁶ A similar argument was accepted by the joint reasons in *Brown*: *ibid* 421 [101].

⁸⁷ See Leslie Kendrick ‘Content Discrimination Revisited’ (2012) 98(2) *Virginia Law Review* 231, 242; Adrienne Stone, ‘Viewpoint Discrimination, Hate Speech Laws, and the Double-Sided Nature of Freedom of Speech’ (2017) 32(3) *Constitutional Commentary* 687.

*communication on a scale which reflects the reason why the question is asked.*⁸⁸

In our opinion, the apparent viewpoint discrimination effected by the *Tasmanian Act* renders it vulnerable to invalidation (though we do not think this conclusion is certain). But just as important for our argument is the question of method. The close tailoring of analysis to the circumstances of the particular case and the generation of a more precisely defined rule (that could serve as an alternative or as a supplement to a ‘one-size-fits-all’ form of proportionality) will lend decision-making in these cases a greater measure of clarity and predictability.⁸⁹

VI Conclusion

Clubb and *Preston* concern a matter of high public controversy: the longstanding moral and political dispute about abortion. In constitutional terms, they represent an opportunity to resolve some doctrinal uncertainties.

In the preceding section we noted two factors — the effect on site-based protest and the discriminatory operation of the laws — that may require comparatively greater justifications for the Acts. It may well be that in their strong submissions on the effect of abortion protest, Victoria and Tasmania discharge this requirement. However these cases are decided, decisions in future cases on the freedom of political communication would be assisted if the High Court could clarify the relevance of these kinds of factors as a general matter, as well as their significance in these particular cases. That kind of doctrinal development would be a step towards greater predictability in freedom of political communication cases.

⁸⁸ *Brown* (2017) 349 ALR 398, 443[202] (emphasis added).

⁸⁹ For further analysis, see Stone, above n 17, 705–7.

Case Note

“All Necessary Measures” to Avoid Fragmentation: Reflections on the UK Supreme Court’s 2017 *Al-Waheed* Decision

Alyssa Glass*

Abstract

This case note argues that the decision of the United Kingdom Supreme Court in *Al-Waheed v Ministry of Defence* [2017] AC 821 (*‘Al-Waheed’*) underscores the uncertainty that plagues the interaction between United Nations (‘UN’) Security Council resolutions (‘SCRs’) and international human rights law. It is argued that the *Al-Waheed* majority’s interpretation of the relevant SCRs with respect to Iraq and Afghanistan is correct, but would have benefited from more integration of fundamental principles of human rights law and a clearer interpretative framework. Similarly, while the majority took a pragmatic approach in adapting art 5 of the *European Convention on Human Rights* (‘ECHR’) to the circumstances of armed conflict, they avoided the pivotal significance of *UN Charter* art 103 and thereby missed an opportunity to strengthen the Court’s analysis of the interaction between the SCRs and the *ECHR*. The decision in *Al-Waheed* prompts consideration of new possibilities for coherent, practical interpretations of international legal instruments: interpretations of SCRs that take account of fundamental, universal principles of human rights law; and interpretations of human rights treaties which recognise the primacy afforded to the Security Council in maintaining international peace and security.

I Introduction

The United Kingdom (‘UK’) Supreme Court commenced 2017 by delivering a trio of judgments in a set of appeals arising from actions brought by several hundred claimants, who alleged that they were wrongfully detained or mistreated by British forces during military operations in Iraq and Afghanistan.¹ This case note is concerned with the second of the three judgments, *Al-Waheed*, and argues that the decision in *Al-Waheed* underscores the uncertainty that plagues the interaction between United Nations (‘UN’) Security Council resolutions (‘SCRs’) and international human rights law. The Court’s reasoning with respect to this interaction in *Al-Waheed* has critical implications for any State deploying troops to the armed

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¹ *Mohammed (Serdar) v Ministry of Defence* [2017] AC 649; *Al-Waheed v Ministry of Defence* [2017] AC 821 (*‘Al-Waheed’*); *Belhaj v Straw* [2017] AC 964.

conflicts in Iraq and Afghanistan, and indeed to other theatres of operation, under Security Council mandates.²

After discussing the background to *Al-Waheed* in Part II, this case note examines the Court's reasoning with respect to the crucial questions that arose for determination, as follows:

- (i) whether UK forces had legal power to detain the claimants pursuant to the relevant SCRs with respect to Iraq and Afghanistan; and
- (ii) if so, whether art 5 of the *European Convention on Human Rights* ('ECHR')³ should be read so as to accommodate, as permissible grounds, detention pursuant to such a power.⁴

The first question turns on the interpretation of the relevant SCRs. Part III of this case note argues that the approach of the European Court of Human Rights ('ECtHR') to interpreting SCRs, exemplified by that Court's 2011 decision in *Al-Jedda v United Kingdom*⁵ and applied by the minority in *Al-Waheed*, is unsound and lacks a basis in general international law. The majority in *Al-Waheed* were correct to depart implicitly from that approach, although they should have done so expressly. However, the majority missed an important opportunity to clarify the role of international human rights law in the interpretation of SCRs. They took an ad hoc, confused approach to interpreting the operative resolutions, whereas a clearer, more principled approach would have provided a more persuasive route to the same conclusion.

In addressing the second question, the majority in *Al-Waheed* pushed the boundaries of systemic integration to their outer limit. They held that the ECtHR's reasoning in its 2014 decision in *Hassan v United Kingdom*⁶ should be extended to non-international armed conflicts where SCRs, rather than international humanitarian law, conferred powers of detention. This is a logical extension of *Hassan*, and is preferable to the minority's more restrictive reading of that decision. It represents a practical outcome that pursues integration, rather than fragmentation, of international law and permits human rights protections to continue in armed conflict. However, the modified interpretation of ECHR art 5 endorsed in both *Hassan* and *Al-Waheed* comes close to rewriting, rather than interpreting, that article. Part IV of this case note argues that the *Al-Waheed* majority could have relied on art 103 of the *Charter of the United Nations* ('UN Charter') to strengthen their analysis, either to justify their interpretation of ECHR art 5 more persuasively or to displace that article to the extent of its inconsistency with the SCRs.

² See *Al-Waheed* [2017] AC 821, 842–3 [4] (Lord Sumption).

³ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, ETS No 5 (entered into force 3 September 1953), as amended by *Protocols Nos 11 and 14*.

⁴ *Al-Waheed* [2017] AC 821, 843 [5] (Lord Sumption).

⁵ [2011] IV Eur Court HR 305 ('*Al-Jedda*').

⁶ [2014] VI Eur Court HR 1 ('*Hassan*').

II The Background to *Al-Waheed*

The appeals in *Al-Waheed* arose out of actions for damages brought against the UK Government by two detainees, Mr Abd Ali Hameed Ali Al-Waheed ('AW') and Mr Serdar Mohammed ('SM'). Both claimants alleged that they were unlawfully detained and mistreated by UK forces, relying on *ECHR* art 5.

A *AW's Case*

British forces captured AW in Basrah, Iraq on 11 February 2007, during a search at his wife's home.⁷ The UK Ministry of Defence alleged that components for improvised explosive devices ('IEDs'), explosive charges, and other weaponry were found on the premises.⁸ AW was held at a British military detention centre for six-and-a-half weeks, but was released after an internal review concluded that successful prosecution was unlikely.⁹

The case came before Leggatt J for pre-trial review,¹⁰ where it was clear that insofar as the claim was based on *ECHR* art 5, both the primary judge and the Court of Appeal would be bound by the 2007 House of Lords decision in *R (Al-Jedda) v Secretary of State for Defence*¹¹ to dismiss it.¹² Justice Leggatt dismissed the *ECHR* art 5 claim by consent and granted a certificate for appeal direct to the Supreme Court.¹³

In AW's case, a majority of the Supreme Court held that UK forces had legal power to detain AW pursuant to *SCR 1546 (2004)*¹⁴ where necessary for imperative reasons of security and that *ECHR* art 5.1 should be read so as to permit detention pursuant to that power.¹⁵

Following the Supreme Court decision in *Al-Waheed*, AW's case was remitted for trial on the questions of whether AW's detention was justified by imperative reasons of security and whether the treatment of AW violated *ECHR* standards. In judgment delivered on 14 December 2017, Leggatt J applied the Supreme Court's conclusions as to *SCR 1546 (2004)*, but found that AW was detained without any legal basis for a period of 33 days, in violation of *ECHR* art 5.¹⁶

⁷ *Al-Waheed* [2017] AC 821, 842 [3] (Lord Sumption).

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Al-Waheed v Ministry of Defence* [2014] EWHC 2714 (QB) (31 July 2014).

¹¹ [2008] AC 332 ('*Al-Jedda (HL)*').

¹² *Al-Waheed* [2017] AC 821, 842 [3] (Lord Sumption).

¹³ *Ibid.*

¹⁴ SC Res 1546, UN SCOR, 4987th mtg, UN Doc S/RES/1546 (8 June 2004) ('*SCR 1546 (2004)*').

¹⁵ *Al-Waheed* [2017] AC 821, 887 [112] (Lord Sumption), 896 [140] (Lord Wilson), 923 [222] (Lord Mance), 923 [224] (Lord Hughes), 924–5 [231] (Lord Toulson).

¹⁶ *Alseran v Ministry of Defence* [2017] EWHC 3289 (QB) (14 December 2017), [17](iii).

B *SM's Case*

According to the UK Ministry of Defence, SM was captured on 7 April 2010 in the course of a ten-hour firefight in Afghanistan, during which he was seen to flee, discarding a rocket-propelled grenade launcher and ammunition.¹⁷ After he was taken to the base in Helmand province, military intelligence identified SM as a senior Taliban commander who had been involved in large-scale production of IEDs and had commanded a Taliban training camp.¹⁸ SM was detained for three-and-a-half months in a British military facility, before being transferred to the Afghan authorities.¹⁹

In SM's case, Leggatt J ordered the determination of three preliminary issues, on the assumption that the Ministry's account of SM's capture and detention was true.²⁰ One of those issues concerned the relationship between *ECHR* art 5 and the international law governing detention in the course of armed conflict.²¹ Ultimately, both Leggatt J and then the Court of Appeal²² concluded that British forces in Afghanistan had no power to detain SM for any longer than was required to transfer him to Afghan authorities and, in any event, for no longer than 96 hours (as prescribed in the detention policy of the International Security Assistance Force ('ISAF')), and that the UK had therefore breached *ECHR* arts 5.1 and 5.4.²³ The Ministry of Defence appealed to the Supreme Court.

A majority of the Court allowed the Ministry's appeal in certain respects, holding that UK forces had legal power to detain SM in excess of 96 hours pursuant to *SCR 1386 (2001)*,²⁴ *SCR 1510 (2003)*²⁵ and *SCR 1890 (2009)*²⁶ where necessary for imperative reasons of security.²⁷ As in AW's case, the majority held that *ECHR* art 5.1 should be read so as to permit detention pursuant to that power.²⁸

¹⁷ Ibid 842 [4] (Lord Sumption).

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ *Mohammed (Serdar) v Ministry of Defence* [2014] EWHC 1369 (QB) (2 May 2014).

²¹ *Al-Waheed* [2017] AC 821, 842 [4] (Lord Sumption).

²² *Mohammed (Serdar) v Ministry of Defence* [2017] AC 649, 659–773.

²³ *Al-Waheed* [2017] AC 821, 842 [4] (Lord Sumption).

²⁴ SC Res 1386, UN SCOR, 4443rd mtg, UN Doc S/RES/1386 (20 December 2001) ('*SCR 1386 (2001)*').

²⁵ SC Res 1510, UN SCOR, 4840th mtg, UN Doc S/RES/1510 (13 October 2003) ('*SCR 1510 (2003)*').

²⁶ SC Res 1890, UN SCOR, 6198th mtg, UN Doc S/RES/1890 (8 October 2009) ('*SCR 1890 (2009)*').

²⁷ *Al-Waheed* [2017] AC 821, 886–7 [111] (Lord Sumption), 896 [140] (Lord Wilson), 916 [200] (Lord Mance), 923 [224] (Lord Hughes), 924–5 [231] (Lord Toulson).

²⁸ Ibid 886–7 [111] (Lord Sumption), 896 [140] (Lord Wilson), 916–17 [201]–[202] (Lord Mance), 923 [224] (Lord Hughes), 924–5 [231] (Lord Toulson).

C *Relevant Law*

1 *UN Security Council Resolutions with respect to Iraq*

The operative resolution at the time of AW's detention was *SCR 1723 (2006)*.²⁹ In that Resolution, the Security Council 'reaffirms the authorization for the multinational force as set forth in resolution 1546 (2004)' and extends the mandate of the force to the end of 2007.³⁰ This directs attention to the authorisation in *SCR 1546 (2004)*,³¹ where the Security Council:

9. ... reaffirms the authorization for the multinational force under unified command established under resolution 1511 (2003), having regard to the letters annexed to this resolution;

10. Decides that the multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution expressing, inter alia, the Iraqi request for the continued presence of the multinational force and setting out its tasks, including by preventing and deterring terrorism ...

The letters annexed to *SCR 1546 (2004)* include a letter dated 5 June 2004 from the United States Secretary of State, which gives as an example of the force's tasks, 'internment where this is necessary for imperative reasons of security'.³² The preamble to *SCR 1723 (2006)* expressly recognises the tasks set out in those annexed letters.³³

In both resolutions, the Security Council states that it is acting under ch VII of the *UN Charter*.³⁴

2 *UN Security Council Resolutions with respect to Afghanistan*

The operative resolution in Afghanistan at the time of SM's detention was *SCR 1890 (2009)*.³⁵ At [1]–[2], the Security Council '[d]ecides to extend the authorization of the International Security Assistance Force, as defined in resolution 1386 (2001) and 1510 (2003)' and '[a]uthorizes the Member States participating in ISAF to take all necessary measures to fulfil its mandate'.³⁶

SCR 1386 (2001) defined ISAF's mandate, being 'to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas, so that the Afghan Interim Authority as well as the personnel of the United Nations

²⁹ SC Res 1723, UN SCOR, 5574th mtg, UN Doc S/RES/1723 (28 November 2006) ('*SCR 1723 (2006)*').

³⁰ Ibid [1].

³¹ *SCR 1546 (2004)*, UN Doc S/RES/1546, [9]–[10].

³² Ibid annex, 11.

³³ *SCR 1723 (2006)*, UN Doc S/RES/1723, Preamble [15].

³⁴ Ibid Preamble [23]; *SCR 1546 (2004)*, UN Doc S/RES/1546, Preamble [21].

³⁵ *SCR 1890 (2009)*, UN Doc S/RES/1890.

³⁶ Ibid [1]–[2].

can operate in a secure environment'.³⁷ *SCR 1510 (2003)* authorised expansion of that mandate to 'maintenance of security in areas of Afghanistan outside of Kabul'.³⁸

The preamble to *SCR 1890 (2009)* expresses 'strong concern about the security situation in Afghanistan' and notes increased violent and terrorist activities by the Taliban, Al-Qaida, and other extremist groups, resulting in 'threats to the local population, including children, national security forces and international military and civilian personnel'.³⁹ The Security Council condemns 'in the strongest terms all attacks', including IED attacks, suicide attacks and abductions, and the use of civilians as human shields.⁴⁰ The preamble reiterates support for the endeavours of ISAF 'to improve the security situation and to continue to address the threat posed by the Taliban, Al-Qaida and other extremist groups'.⁴¹

None of the Resolutions with respect to Afghanistan refer, in their text or annexes, to detention.

As with the SCRs relating to Iraq, the Security Council indicates in all of these resolutions that it is acting under ch VII of the *UN Charter*.⁴²

3 Article 5 of the European Convention on Human Rights

Article 5.1 of the *ECHR* provides:

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law ...

The article then specifies, in sub-paragraphs (a)–(f), six situations in which deprivation of liberty is permitted. In *Al-Waheed*, it was assumed that AW's detention did not fall within any of these sub-paragraphs and, after some consideration of sub-paragraphs (c) and (f), the Court reached the same conclusion with respect to SM's detention.⁴³

Article 5.4 provides further procedural safeguards that apply where a person is deprived of their liberty by arrest or detention. This provision was only relevant in SM's case, where the Court unanimously held that the UK had breached art 5.4 (although disagreeing on the extent of that breach).⁴⁴ The issues relating to art 5.1(c) and (f) and art 5.4 are not addressed in this case note.

³⁷ *SCR 1386 (2001)*, UN Doc S/RES/1386, [1].

³⁸ *SCR 1510 (2003)*, UN Doc S/RES/1510, [1].

³⁹ *SCR 1890 (2009)*, UN Doc S/RES/1890, Preamble [9].

⁴⁰ *Ibid* Preamble [13].

⁴¹ *Ibid* Preamble [12].

⁴² *Ibid* Preamble [26]; *SCR 1510 (2003)*, UN Doc S/RES/1510, Preamble [12]; *SCR 1386 (2001)*, UN Doc S/RES/1386, Preamble [13].

⁴³ *Al-Waheed* [2017] AC 821, 875–7 [77]–[83] (Lord Sumption), 887 [113] (Lord Wilson), 924–5 [231] (Lord Toulson), 925 [233], 960–1 [351] (Lord Reed).

⁴⁴ *Ibid* 882–6 [99]–[109] (Lord Sumption), 897–8 [144] (Lord Wilson), 918–23 [205]–[219] (Lord Mance), 924 [227] (Lord Hughes), 925 [232] (Lord Hodge), 925 [233], 962–3 [359] (Lord Reed).

III Interpreting UN Security Council Resolutions: What Role for Human Rights?

The first crucial question for the Court's determination in *Al-Waheed* was whether UK forces could legally detain the claimants in circumstances beyond those specified in *ECHR* art 5.1(a)–(f), pursuant to the operative SCRs in Iraq and Afghanistan. As this was a question of interpretation, the Court's reasons can only be understood against the background of the approach to interpreting SCRs adopted by the ECtHR in a 'clear and constant'⁴⁵ body of jurisprudence including, in particular, the ECtHR's 2011 *Al-Jedda* decision.⁴⁶ This Part first outlines that approach, which the minority in *Al-Waheed* applied. Second, this Part addresses the *Al-Waheed* majority's unacknowledged departure from *Al-Jedda*, which permitted their conclusion that the operative SCRs authorised the UK to detain individuals where necessary for imperative reasons of security, in circumstances outside the six cases in *ECHR* art 5.1. It is argued that the majority were correct to depart from the *Al-Jedda* approach, however they should have more strongly anchored their interpretation of the SCRs to international law, particularly the principle of systemic integration and the established rules of treaty interpretation.⁴⁷ That approach would have provided a more persuasive pathway to the same outcome, while facilitating a clearer conception of the role of international human rights law in interpreting SCRs.

A *The Minority's Approach: The Al-Jedda Presumptions*

In the minority in *Al-Waheed*, Lord Reed (with whom Lord Kerr agreed) held that any authority to detain pursuant to the SCRs was limited to the circumstances exhaustively listed in *ECHR* art 5.1(a)–(f).⁴⁸ Lord Reed expressly relied on the ECtHR's *Al-Jedda* decision and applied the interpretative presumptions therein articulated.

In *Al-Jedda*, the ECtHR had to determine whether the UK had violated *ECHR* art 5 by detaining Mr Al-Jedda for over three years in Iraq.⁴⁹ The same SCRs (*SCR 1546 (2004)* and *SCR 1723 (2006)*) were under consideration as in *Al-Waheed*, at least with respect to Iraq.

The Court noted that in interpreting *SCR 1546 (2004)*, it must have regard to the purposes and principles of the UN, including promoting respect for human rights.⁵⁰ Against that background, the Court held:

[I]n interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on member States to breach fundamental principles of human rights. In the event of any ambiguity in the

⁴⁵ Ibid 945 [296] (Lord Reed).

⁴⁶ [2011] IV Eur Court HR 305.

⁴⁷ See *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) arts 31–2 ('VCLT').

⁴⁸ *Al-Waheed* [2017] AC 821, 925–7 [234]–[235], 939–43 [277]–[289], 950 [316], 955–6 [332]–[334] (Lord Reed).

⁴⁹ *Al-Jedda* [2011] IV Eur Court HR 305, 315 [9]–[10].

⁵⁰ Ibid 373–4 [102], citing *UN Charter* arts 1.3, 24.2.

terms of a United Nations Security Council resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the [European] Convention and which avoids any conflict of obligations. In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law.⁵¹

Applying that presumption, the Court noted that internment was not expressly referred to in *SCR 1546 (2004)*, and that the Resolution's preamble recorded the commitment of all forces to act in accordance with international law.⁵² The Court concluded that, absent any clear provision in the Resolution authorising detention outside the circumstances exhaustively prescribed by *ECHR* art 5, Mr Al-Jedda's detention violated that article.⁵³

In *Al-Waheed*, Lord Reed applied the interpretative principles articulated in *Al-Jedda* and adopted the ECtHR's conclusion that *SCR 1546 (2004)* did not clearly authorise detention in circumstances falling outside *ECHR* art 5.1(a)–(f).⁵⁴ Lord Reed reached the same conclusion with respect to the SCRs operative in Afghanistan.⁵⁵

B The Al-Waheed Majority's Departure from Al-Jedda

The majority in *Al-Waheed* departed from the ECtHR's approach without expressly acknowledging that they were doing so, distinguishing *Al-Jedda* on narrow grounds while omitting to address the ECtHR's substantive reasoning.

Lord Sumption (with whom Baroness Hale agreed) and Lord Mance distinguished *Al-Jedda* as solely decided on the 'relatively narrow'⁵⁶ question of whether *SCR 1546 (2004)* imposed an obligation to detain, as distinct from an authorisation, for the purposes of *UN Charter* art 103.⁵⁷ Lord Wilson did expressly note the *Al-Jedda* principles, but rather than critiquing them in order to justify departing therefrom, his Lordship merely distinguished *Al-Jedda* on the same basis as Lords Sumption and Mance.⁵⁸ That narrow point of distinction, however, does not adequately explain why the interpretive principles in *Al-Jedda*, which were broadly applicable, were glossed over by the majority.

Similarly, the majority did not grapple with the fact that in both *Nada v Switzerland*⁵⁹ and *Al-Dulimi v Switzerland*⁶⁰ the ECtHR had strongly reiterated the

⁵¹ *Al-Jedda* [2011] IV Eur Court HR 305, 374 [102].

⁵² *Ibid* 374–5 [104]–[105].

⁵³ *Ibid*.

⁵⁴ *Al-Waheed* [2017] AC 821, 941–2 [284]–[285], 945 [296], 948 [306], 950 [314] (Lord Reed).

⁵⁵ *Ibid* 955–6 [332]–[334] (Lord Reed).

⁵⁶ *Ibid* 863 [50] (Lord Sumption).

⁵⁷ *Ibid* 848–9 [20], 861–3 [47]–[50] (Lord Sumption), 900–1 [153]–[154] (Lord Mance).

⁵⁸ *Ibid* 887–8 [114]–[117] (Lord Wilson).

⁵⁹ [2012] V Eur Court HR 213, 272–3 [171]–[172].

⁶⁰ (European Court of Human Rights, Grand Chamber, Application No 5809/08, 21 June 2016) [139]–[140] ('*Al-Dulimi*').

Al-Jedda presumptions. Lord Sumption stated only that in both of those decisions, the ECtHR had held *UN Charter* art 103 to be inapplicable.⁶¹ Lord Mance distinguished *Al-Dulimi* as concerned with general international human rights law,⁶² despite the fact that in *Al-Dulimi*, the ECtHR expressly confirmed that SCRs should be read so as to ensure compatibility with the *ECHR*.⁶³

The majority's reluctance to depart expressly from the ECtHR's reasoning in *Al-Jedda* is not explicable by any superiority of the latter in terms of precedent — the UK Supreme Court is not bound by ECtHR decisions. In this author's view, it would have been far more conducive to principled decision-making and to the development of international law in both courts had the majority directly questioned the flawed reasoning in *Al-Jedda*.⁶⁴ Although a more open interrogation of the *Al-Jedda* approach would have been preferable, nonetheless it is clear that in substance the *Al-Waheed* majority did depart from *Al-Jedda*, and they were undoubtedly correct to do so. The *Al-Jedda* approach to interpreting SCRs comprises two core components:

- (i) a presumption that the Security Council does not intend to impose any obligation on States to breach fundamental principles of human rights; and
- (ii) a requirement that, in the event of any ambiguity in the terms of a resolution, the Court must choose the interpretation most in harmony with the *ECHR*, thereby avoiding any conflict of obligations.⁶⁵

While the first component has a convincing basis in general international law, explored in Part IIIC below, the same cannot be said for the second component. Assuming, for present purposes, that the presumption in (i) can be supported, the *Al-Waheed* majority were nevertheless correct not to apply the requirement articulated in (ii).

In the ECtHR's reasoning, (ii) is presented as a necessary corollary of (i). That reasoning is logically flawed. It operates on the false assumption that the *ECHR*, a regional human rights treaty, can be entirely equated to fundamental principles of human rights as expressed in general, universally applicable, international law. SCRs are addressed to all the world, and are universally binding.⁶⁶

⁶¹ *Al-Waheed* [2017] AC 821, 861 [47] (Lord Sumption).

⁶² *Ibid* 902–3 [159]–[160] (Lord Mance).

⁶³ *Al-Dulimi* (European Court of Human Rights, Grand Chamber, Application No 5809/08, 21 June 2016) [140].

⁶⁴ For a recent consideration of the relationship between the ECtHR and the UK Supreme Court (taking into account the dynamics surrounding the June 2016 'Brexit' vote in favour of the United Kingdom withdrawal from the European Union), see, eg, Merris Amos, 'The Value of the European Court of Human Rights to the United Kingdom' (2017) 28(3) *European Journal of International Law* 763. See also, Roger Masterman, 'Supreme, Submissive or Symbiotic? The United Kingdom Courts and the European Court of Human Rights' (The Constitution Unit, School of Public Policy, University College of London, October 2015).

⁶⁵ *Al-Jedda* [2011] IV Eur Court HR 305, 373–4 [102].

⁶⁶ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16, 54 [116] ('*Namibia Opinion*').

They should not be construed by reference to particular regional codes of human rights protection. Article 31.3(c) of the *Vienna Convention on the Law of Treaties* ('*VCLT*') offers a useful analogy here: it requires treaties to be interpreted by reference to 'relevant rules of international law applicable in the relations between the parties'. Of course, there are no 'parties' to SCRs. But, just as it would make no sense to construe a large multilateral treaty by reference to a rule of international law operative between only two parties, it is illogical to construe a universally applicable resolution by reference to a regional treaty of limited application.

Upon consideration of the specific provision at issue in *Al-Jedda* and *Al-Waheed*, the problems with the ECtHR's approach become more apparent. Article 5.1 of the *ECHR* differs from general international law. It is unique in, apparently exhaustively, prescribing six circumstances in which detention is permissible.⁶⁷ The paradigm prohibition of arbitrary deprivation of liberty, art 9.1 of the *International Covenant on Civil and Political Rights* ('*ICCPR*'),⁶⁸ contains no such qualification. It provides:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.⁶⁹

The ECtHR emphasised in *Al-Jedda* that *ECHR* art 5.1 'enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty'.⁷⁰ However, in limiting deprivation of liberty to the six cases in sub-paragraphs (a)–(f), art 5.1 goes beyond the core, fundamental right, which is freedom from arbitrary deprivation of liberty. This illustrates that not every part of every *ECHR* article protects a fundamental principle of universal human rights law. That is a further reason why the requirement to choose the interpretation most in harmony with the *ECHR* does not follow from the presumption that the Security Council does not intend to impose any obligations to breach fundamental principles of human rights. Lords Sumption and Mance in *Al-Waheed* touched on arguments to this effect,⁷¹ although without acknowledging that such arguments contradict the reasoning in *Al-Jedda*. Lord Reed, in the minority, expressly noted the force of such an argument and, in response, merely reiterated reliance on the authority of the ECtHR.⁷²

Therefore, the *Al-Waheed* majority were correct to depart from *Al-Jedda*, although they should have done so expressly rather than distinguishing the decision by adopting an overly narrow interpretation of its import.

⁶⁷ *Al-Waheed* [2017] AC 821, 858 [42] (Lord Sumption), 896–7 [142] (Lord Wilson), 902–3 [160] (Lord Mance).

⁶⁸ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

⁶⁹ *Ibid* art 9.1.

⁷⁰ *Al-Jedda* [2011] IV Eur Court HR 305, 372–3 [99].

⁷¹ *Al-Waheed* [2017] AC 821, 857–8 [41]–[42] (Lord Sumption), 902–3 [159]–[161] (Lord Mance).

⁷² *Ibid* 946 [300] (Lord Reed).

C *Pursuing Systemic Integration: A Principled Framework for the Interpretation of UN Security Council Resolutions*

Having thus, at least implicitly, departed from the *Al-Jedda* approach, the majority in *Al-Waheed* did not expressly articulate a principled replacement for it. The majority judgments lack a clear analysis of the role of international human rights law in interpreting SCRs and adopt an ad hoc medley of interpretive principles. This Part argues that existing international law, particularly the principle of systemic integration, supports an approach to the interpretation of SCRs which takes account of fundamental, universal principles of human rights law. Further, it is argued that the *VCILT* rules would have provided a more coherent framework for the majority's interpretation of the relevant SCRs.

1 *Avoiding Fragmentation: Interpreting UN Security Council Resolutions by Reference to Fundamental Human Rights*

The majority judgments leave unresolved the role of general international human rights law when interpreting SCRs. Lords Sumption and Wilson did not discuss the question. Lord Mance stated that it is 'tenable' to treat a resolution as intended to comply with general principles of international law, absent clear and specific language to the contrary,⁷³ but did not state a view as to whether this approach is preferable, nor explain the basis for any such presumption. This omission is a consequence of the majority's failure to address the reasoning in *Al-Jedda* squarely, and also flows from the absence in the majority judgments of a principled framework for interpreting SCRs.

As adverted to above, the *Al-Jedda* approach to interpreting SCRs has two components, and, in my view, the second component is unsound. However, the broader first component entails a presumption that the Security Council does not intend to impose any obligations on States to breach fundamental principles of human rights. Three related considerations, all linked to the principle of systemic integration, support the adoption of that presumption.

First, in its 2006 report on the fragmentation of international law, the International Law Commission concluded that international law includes a strong presumption against normative conflict, often referred to as the norm of systemic integration.⁷⁴ That principle is not limited to treaty interpretation,⁷⁵ but is widely accepted as a general interpretive rule to the effect that 'when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations'.⁷⁶ The basis for this presumption is essentially

⁷³ Ibid 903 [161] (Lord Mance).

⁷⁴ Report of the Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 58th sess, UN Doc A/CN.4/L.682 (13 April 2006) 25 [37] ('*ILC Fragmentation Report*').

⁷⁵ Ibid 26 [38].

⁷⁶ International Law Commission, *Report of the International Law Commission: Fifty-eighth session: (1 May-9 June and 3 July-11 August 2006)*, UN GAOR 61st sess, UN Doc A/61/10 (2006) 408 [251] ((4) 'The principle of harmonization') ('*ILC Fragmentation Conclusions*'). See also, Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law* (Longman, 9th ed, 1992) vol 1, 1275; Johann Ruben Leiã and Andreas Paulus, 'Ch. XVI Miscellaneous Provisions, Article 103' in

normative: it reflects a generally shared systemic objective of pursuing ‘some coherent and meaningful whole’⁷⁷ in international law.⁷⁸ That concern must be understood against the background of the horizontality of the international legal system, its lack of a developed hierarchy, and the consequent risk of fragmentation as norms proliferate.⁷⁹ A further justification for the presumption flows from good faith and the principle of *pacta sunt servanda*: pursuing interpretations that avoid normative conflict ensures that the effectiveness of existing treaties or customs is maximised, rather than undermined.⁸⁰

This strong presumption against normative conflict supports interpreting SCRs within the context of general international law, including international human rights law. In its *Kosovo Opinion*, the International Court of Justice (‘ICJ’) held that the SCR there under consideration must be understood and applied against the background of general international law.⁸¹ That statement accords with a consistent approach to systemic integration in ICJ jurisprudence, reflected for example in the early *Right of Passage over Indian Territory* decision where the Court articulated the principle that a text ‘must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law’.⁸² The first component of the *Al-Jedda* approach may therefore be seen as a specific manifestation of a well-established broader presumption against normative conflict.

Second, situating SCRs within the *UN Charter* framework provides further support for the first component of *Al-Jedda*. This is one means of pursuing systemic integration. Article 24 of the *UN Charter* provides that in discharging its ‘primary responsibility for the maintenance of international peace and security’, the Security Council must act in accordance with the purposes and principles of the UN. This logically supports interpreting SCRs by reference to the purposes set out in *UN Charter* art 1, including, in art 1.3, ‘promoting and encouraging respect for human rights and for fundamental freedoms’.⁸³ Admittedly, there are different views on the implications of *UN Charter* art 24 for interpreting SCRs.⁸⁴ As discussed above, contrary to the ECtHR’s reasoning in *Al-Jedda*, arts 1.3 and 24.2 of the *UN Charter*

Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary, Volume II* (Oxford University Press, 3rd ed, 2012) 2118 [17].

⁷⁷ *ILC Fragmentation Report*, UN Doc A/CN.4/L.682, 208 [414].

⁷⁸ *Ibid* 207 [412], 208 [414], 209 [416], 211 [419]; Dame Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, 2nd ed, 2000) 1, 8.

⁷⁹ Campbell McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the *Vienna Convention*’ (2005) 54(2) *International and Comparative Law Quarterly* 279, 282, 285, 287; Dinah Shelton, ‘International Law and “Relative Normativity”’ in Malcolm Evans (ed), *International Law* (Oxford University Press, 4th ed, 2014) 137–8; Leiaë and Paulus, above n 76, 2118 [17].

⁸⁰ See *ILC Fragmentation Report*, UN Doc A/CN.4/L.682, 207 [411]; Leiaë and Paulus, above n 76, 2118 [17].

⁸¹ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* [2010] ICJ Rep 403, 436 [78] (‘*Kosovo Opinion*’).

⁸² (*Portugal v India*) (*Preliminary Objections*) [1957] ICJ Rep 125, 142.

⁸³ See, eg, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Further Requests for the Indication of Provisional Measures)* [1993] ICJ Rep 325, 440–1 [100]–[102] (Judge Lauterpacht) ‘*Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*’; Leiaë and Paulus, above n 76, 2120 [24].

⁸⁴ Compare *Al-Jedda* [2011] IV Eur Court HR 305, 373–4 [102]; *Nada v Switzerland* [2012] V Eur Court HR 213, 272–3 [171]–[172]; Dame Rosalyn Higgins et al (eds), *Oppenheim’s International Law: United Nations* (Oxford University Press, 2017) 421–2 [12.18]–[12.20], 423 [12.22].

do not provide convincing support for imposing a presumption that SCRs will conform to regional human rights treaties. It is, however, relatively well-established that the Security Council may not violate *jus cogens* norms.⁸⁵ In my view, the human rights principles to be taken into account should be fundamental and universal principles of human rights, proclaimed in instruments adopted within the UN.⁸⁶

Third, the *VCLT* rules on treaty interpretation support the adoption of this presumption. Article 31.3(c) of the *VCLT* directs attention to '[a]ny relevant rules of international law applicable in the relations between the parties'. Evidently, a SCR is not a treaty, and there are important differences between SCRs and treaties, particularly as regards the processes for drafting, voting upon, and adopting SCRs. However, SCRs are adopted within the framework of a treaty, the *UN Charter*, and through its provisions, they may impose obligations under international law. The ICJ has interpreted and applied SCRs on multiple occasions, and has held that the *VCLT* rules may provide guidance.⁸⁷ Articles 31 and 32 of the *VCLT* cannot simply be applied wholesale to SCRs, however as the most authoritative international rules of interpretation, they are an obvious starting-point. In addition to the ICJ, many other international courts and tribunals have interpreted SCRs in accordance with or analogously to the *VCLT* interpretation rules.⁸⁸ It is therefore appropriate to apply *VCLT* art 31.3(c) to SCRs, modified as necessary to reflect the absence of parties to a resolution. As resolutions are addressed to all the world, the principle of systemic integration in art 31.3(c) should only apply to those rules which are themselves universal.

As to where this leaves the *Al-Waheed* majority's conclusion that the operative SCRs authorised detention where necessary for imperative reasons of security, the majority were correct to avoid circumscribing the SCRs by reference to subparagraphs (a)–(f) of *ECHR* art 5.1. However, insofar as *ECHR* art 5.1 reflects general international law, articulated in this area by *ICCPR* art 9, that should have been expressly taken into account. Had the majority done so, the same conclusion would still follow. This is because it is possible to interpret the relevant SCRs consistently with fundamental, universal human rights principles, as authorising detention where necessary for imperative reasons of security, provided that detention is non-arbitrary and conforms to basic procedural safeguards. This is implicit in some parts of the

⁸⁵ Higgins et al, above n 84, 421–2 [12.19]; *Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [1993] ICJ Rep 325, 440–1 [100]–[102] (Judge Lauterpacht); *Kadi v Council of the European Union* (T-315/01) [2005] ECR II-3649 II-3725 [230].

⁸⁶ Higgins et al, above n 84, 421–2 [12.19]. See also, Human Rights Committee, *Views: Communication No 1472/2006 (Sayadi v Belgium)*, UN Doc CCPR/C/94/D/1472/2006 (29 December 2008), Concurring Opinion Sir Nigel Rodley.

⁸⁷ *Kosovo Opinion* [2010] ICJ Rep 403, 442 [94]. See also *Namibia Opinion* [1971] ICJ Rep 16, 53 [114].

⁸⁸ See, eg, *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* (Special Tribunal for Lebanon, Appeals Chamber, STL-11-01/1, 16 February 2011) [26]; *Prosecutor v Al Bashir (Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court)* (International Criminal Court, Pre-Trial Chamber II, ICC-02/05-01/09-195, 9 April 2014) [29]; *Prosecutor v Milošević (Decision on Preliminary Motions)* (International Tribunal for Yugoslavia, Trial Chamber, IT-02-54, 8 November 2001) [47]. See also, UN Office of Legal Affairs [2003] *UN Juridical Yearbook* 539, cited in Higgins et al (eds), above n 84, [26.87] n 289; Sir Michael Wood, 'The Interpretation of Security Council Resolutions, Revisited' (2017) 20(1) *Max Planck Yearbook of United Nations Law* 3; *ILC Fragmentation Conclusions*, UN Doc A/61/10, 409 [251] (3) 'The *VCLT*'.

majority's reasoning, but the finding that the SCRs authorised detention could have explicitly included an interpretation of the authorisations as subject to the fundamental right to freedom from arbitrary, unlawful deprivation of liberty.

2 *A Useful Analogy: Applying Principles of Treaty Interpretation to Security Council Resolutions*

Turning to the more general question of the majority's interpretive approach to the SCRs, none of the majority judgments referred to the *VCLT* rules at all when interpreting the relevant resolutions. However, this part argues that all of the interpretive factors which the majority in fact considered can be justified by reference to *VCLT* arts 31–2. While the majority's interpretation of the SCRs yielded a practical and sensible result, applying an interpretation framework built upon the *VCLT* rules would have structured the inquiry and firmly anchored the approach to international law, thereby enabling the majority to articulate a more persuasive counterpoint to the minority's approach.

Article 31.1 of the *VCLT* requires a treaty to be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.

First, this provision clearly encompasses the aspects of the majority's approach that centred on the SCRs' terms. Lord Wilson prioritised the ordinary meaning of the words 'all necessary measures', explaining that there is no doubt that the phrase conferred powers of detention, because 'all' measures were included if 'necessary'.⁸⁹ Likewise, Lord Mance found *SCR 1546 (2004)* clear 'on its face' in authorising detention, because the annexed letters expressly referred to internment where 'necessary for imperative reasons of security'.⁹⁰ By analogy to *VCLT* art 31.2, the text of a resolution may be considered to include its annexes.

Second, in accordance with *VCLT* art 31.1, the majority pursued good faith interpretation and had regard to the Resolutions' objects and purposes. For example, Lord Wilson stated that '[a]n authority to assist in the maintenance of security which did not include a power to intern would not have been a worthwhile authority at all.'⁹¹ Lords Sumption and Mance adopted similar reasoning.⁹² Throughout their reasons, the majority displayed awareness of the need to adopt interpretations that would facilitate the effective fulfilment of the aims of maintaining peace and security in Iraq and Afghanistan.

Moreover, while the definition of 'context' in *VCLT* art 31.2 is somewhat restrictive, art 32 permits reference to the 'preparatory work of the treaty and the circumstances of its conclusion ... to confirm the meaning resulting from the application of article 31'. Lord Sumption referred to discussions preceding the SCRs, the *UN Charter* provisions invoked, and 'in general, all circumstances that might assist

⁸⁹ *Al-Waheed* [2017] AC 821, 889 [119] (Lord Wilson).

⁹⁰ *Ibid* 900 [153] (Lord Mance).

⁹¹ *Ibid* 889 [119] (Lord Wilson).

⁹² *Ibid* 856 [38] (Lord Sumption), 904 [164] (Lord Mance).

in determining the legal consequences of the resolution',⁹³ all of which can be understood within this framework. All of the majority judgments took into account 'the context of the extreme circumstances of violence'⁹⁴ in Iraq and Afghanistan, recounted in the SCRs' preambles, and the need to interpret the SCRs 'in the light of the realities of forming a multinational force and deploying it in a situation of armed conflict'.⁹⁵ This pragmatic regard for the circumstances that formed the background to the SCRs could have been situated within *VCLT* arts 31–2.

Further, *VCLT* arts 31.3(b) and 32 permit consideration of subsequent practice in the application of a treaty.⁹⁶ Lord Sumption stated that the expression 'all necessary measures' in the SCRs has 'acquired a meaning sanctioned by established practice' as authorising 'the full range of measures open to the [UN] itself for the purpose of maintaining or restoring international peace and security under Chapter VII of the Charter', which will normally involve the use of force subject only to the requirement of necessity.⁹⁷ His Lordship referred to surveys of past Security Council practice,⁹⁸ an approach that is consistent with the ICJ's approach to interpreting SCRs by reference to contemporaneous Security Council practice.⁹⁹

Therefore, the majority's general approach to interpreting the SCRs fits within the *VCLT* rules, and they could have built a coherent interpretive framework upon those rules, in order to justify their methods of interpretation more thoroughly.

Overall, it could be said that on the first crucial question in *Al-Waheed*, the minority's approach had the advantage of clarity. Lord Reed comprehensively outlined the *Al-Jedda* approach, and applied it to conclude that the SCRs only authorised detention falling within the six sub-paragraphs of *ECHR* art 5.1. The majority, on the other hand, did not squarely address *Al-Jedda* and missed the opportunity to articulate a principled replacement for it. Nonetheless, the majority's conclusion that the operative SCRs authorised detention where necessary for imperative reasons of security should be preferred. The *Al-Jedda* presumption that SCRs will conform to the *ECHR*, regardless of discrepancies between this regional human rights treaty and general international human rights law, lacks a convincing foundation. Situating the majority's interpretive approach within the principled framework offered by systemic integration and the *VCLT* rules supports the conclusion that the SCRs considered in *Al-Waheed* authorised detention where necessary for imperative reasons of security, provided that detention is non-arbitrary and complies with basic procedural safeguards. Part IV of this case note considers the implications of that interpretation of the SCRs for the UK's obligations under *ECHR* art 5.

⁹³ Ibid 851–2 [25] (Lord Sumption), quoting *Namibia Opinion* [1971] ICJ Rep 16, 53 [114]. See also ibid 904 [164] (Lord Mance).

⁹⁴ *Al-Waheed* [2017] AC 821, 851–2 [25], 905 [168] (Lord Mance).

⁹⁵ Ibid 851–2 [25], 856 [38] (Lord Sumption).

⁹⁶ As to *VCLT* art 32, see International Law Commission, *Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties*, 68th sess, UN Doc A/CN.4/L.874 (6 June 2016) Draft conclusion 2 [4].

⁹⁷ *Al-Waheed* [2017] AC 821, 852 [26] (Lord Sumption).

⁹⁸ Ibid 852 [27] (Lord Sumption).

⁹⁹ *Kosovo Opinion* [2010] ICJ Rep 403, 442 [94], 449 [114].

IV Interpreting *ECHR* Article 5: The Limits of Systemic Integration

As noted above, *ECHR* art 5 is ostensibly exhaustive in prescribing six circumstances in which detention is permitted. On the view of the majority in *Al-Waheed*, the SCRs authorised what art 5 purportedly prohibited. The majority's conclusion that the SCRs authorised detention where necessary for imperative reasons of security therefore raised the question of how best to reconcile two conflicting instruments.

The majority held that *ECHR* art 5 should be read so as to accommodate, as permissible grounds, detention pursuant to the power to detain conferred by the SCRs. They relied on the ECtHR's 2014 decision in *Hassan*,¹⁰⁰ in which the Court held that art 5 should be read non-exhaustively, to allow for detention pursuant to powers available under international humanitarian law. While the majority found that the reasoning in *Hassan* could be extended to detention pursuant to SCRs, the minority took a much more restrictive view of the scope of *Hassan*.

This Part of the case note argues first that the majority's application of *Hassan* was a logical extension of the ECtHR's reasoning. By extending *Hassan*, the majority treated the conflict between the SCRs and *ECHR* as merely an ostensible conflict, which could be resolved by recourse to treaty interpretation, in particular relying on the principle of systemic integration embodied in *VCLT* art 31.3(c). Although this is a pragmatic outcome, both *Hassan* and *Al-Waheed* push systemic integration to its outer limit and arguably go too far — rewriting, rather than interpreting, *ECHR* art 5. This Part therefore goes on to consider the possibility of strengthening the majority's analysis by reference to *UN Charter* art 103. On a narrow interpretation of art 103, given that the SCRs only entail authorisations to detain, rather than mandatory obligations to do so, there is no conflict of obligations in the strict sense and art 103 has no application. That view should not be preferred. A broader interpretation of the scope of art 103 supports its engagement in the circumstances at issue in *Al-Waheed*, either to bolster the majority's expansive reading of *ECHR* art 5 or to displace *ECHR* art 5 to the extent of its inconsistency with the SCRs. The latter approach avoids an interpretation that, in effect, disregards the plain words of *ECHR* art 5, but essentially yields the same pragmatic result. That result permits effective fulfilment of Security Council mandates while enabling human rights protections to continue in armed conflict.

A *A Logical Extension of Hassan*

Hassan concerned the arrest and detention of the applicant's brother, Tarek Hassan, by British forces in Iraq in April 2003 (at a time when the armed conflict was international in character).¹⁰¹ Following his release from detention, Tarek Hassan was found dead in unexplained circumstances.¹⁰² His brother brought proceedings

¹⁰⁰ [2014] VI Eur Court HR 1.

¹⁰¹ *Ibid* 9–10 [3], 12 [12].

¹⁰² *Ibid* 9–10 [3].

in the ECtHR with respect to Tarek's arrest, detention, and death. Relevantly, one of the applicant's claims was that Tarek's arrest and detention were arbitrary, unlawful, and lacking in procedural safeguards, in violation of *ECHR* art 5.¹⁰³ In response, the UK argued that the Court should interpret the obligations under *ECHR* art 5 in light of the powers of detention available under international humanitarian law.¹⁰⁴ The ECtHR accepted that argument, holding that

the grounds of permitted deprivation of liberty set out in sub-paragraphs (a) to (f) of [art 5] ... should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions.¹⁰⁵

In *Al-Waheed*, the majority applied the reasoning in *Hassan* to detention pursuant to powers conferred by SCRs. The minority, by contrast, held that *Hassan* was confined to powers of detention in international armed conflict, conferred by international humanitarian law, and could not be extended to the non-international armed conflicts in Iraq and Afghanistan which were under consideration in *Al-Waheed*. The better view is that *Hassan* can be extended to the circumstances in *Al-Waheed*, because both limbs of the ECtHR's reasoning in *Hassan* are equally applicable to non-international armed conflicts where powers of detention are conferred by SCRs.

First, the ECtHR in *Hassan* relied on *VCLT* art 31.3(b), noting that consistent subsequent state practice could be taken as establishing agreement not only as regards interpretation, but even to modify the text of the *ECHR*.¹⁰⁶ In the minority in *Al-Waheed*, Lord Reed interpreted that analysis as limited to international armed conflict, and stated that the Court in *Hassan* 'expressly contrasted' the absence of derogations from *ECHR* art 5 in relation to detention during international armed conflicts with the practice of derogating from art 5 in relation to non-international armed conflicts.¹⁰⁷ However, the ECtHR's reasons in this respect are more ambiguous than Lord Reed suggested. While the Court did refer to the absence of derogations in relation to detention 'on the basis of the Third and Fourth Geneva Conventions during international armed conflicts', the express contrast drawn was between 'extraterritorial' and 'internal' conflicts, rather than between international and non-international armed conflicts.¹⁰⁸

Lord Reed placed considerable reliance on the ECtHR's statement in *Hassan* that it 'can only be in cases of international armed conflict ...'.¹⁰⁹ However, that statement must be read in the context of the sentence that precedes it, as a contrast to 'internment in peacetime'.¹¹⁰ While the Court referred to international armed conflict in *Hassan*, because that was the specific issue raised before it, that does not mean that its reasoning depended on the international character of the armed conflict

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid* 53–5 [87]–[89], 59–60 [99].

¹⁰⁵ *Ibid* 62 [104].

¹⁰⁶ *Ibid* 60–1 [101], citing *Soering v United Kingdom* (1989) 161 Eur Court HR (ser A), [102]–[103]; *Al-Saadoon v United Kingdom* [2010] II Eur Court HR 61, 125–6 [120].

¹⁰⁷ *Al-Waheed* [2017] AC 821, 948 [308] (Lord Reed).

¹⁰⁸ *Hassan* [2014] VI Eur Court HR 1, 60–1 [101].

¹⁰⁹ *Ibid* 62 [104].

¹¹⁰ *Ibid.*

in question. In the majority in *Al-Waheed*, Lord Wilson correctly pointed out that the ‘essential distinction’ that the Court drew in *Hassan*¹¹¹ was between detention during international armed conflicts, on the one hand, and detention during peacetime (not non-international armed conflicts) on the other.¹¹² Similarly, Lord Sumption noted that the Court in *Hassan* cited both the ICJ judgment in *Armed Activities on the Territory of the Congo*¹¹³ and the ICJ opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*¹¹⁴ and then drew ‘the same distinction as the [ICJ] had made between peacetime norms ... and detention in the course of an armed conflict’.¹¹⁵ In *Al-Waheed*, Lords Sumption and Mance both emphasised that the subsequent state practice as regards derogations from *ECHR* art 5 is the same in international and non-international armed conflict, in that no European State ‘has ever derogated from the European Convention with respect to military action of whatever kind taken abroad’.¹¹⁶ On that basis, the ECtHR’s reasoning with respect to subsequent state practice is equally applicable to the non-international armed conflicts at issue in *Al-Waheed*.

Second, the ECtHR’s reasoning in *Hassan* also relied on the application of *VCLT* art 31.3(c) to take into account rules of international humanitarian law in the interpretation of *ECHR* art 5.1.¹¹⁷ Resolutions adopted by the Security Council form part of the framework of international obligations, as the ICJ held in its *Kosovo Opinion*.¹¹⁸ The SCRs at issue in *Al-Waheed* derive their force from the *UN Charter* (particularly ch VII) and are thereby binding on all of the parties to the *ECHR*. Therefore, just like the rules of international humanitarian law considered in *Hassan*, the SCRs constitute ‘relevant rules of international law’¹¹⁹ to be taken into account in interpreting *ECHR* art 5.1. Lord Sumption articulated these arguments:

[R]esolutions under Chapter VII are a cornerstone of the international legal order. Their status as a source of international law powers of coercion is as significant as the Geneva Conventions, and is just as relevant where the [*ECHR*] falls to be interpreted in the light of the rules of international law.¹²⁰

There is no reason in principle not to apply systemic integration to SCRs. The ICJ acknowledged the pivotal significance of *VCLT* art 31.3(c) in its *Oil Platforms* decision, using it to import an extensive body of general international law, including

¹¹¹ [2014] VI Eur Court HR 1, 58–9 [97], 62 [104].

¹¹² *Al-Waheed* [2017] AC 821, 893 [130] (Lord Wilson).

¹¹³ (*Democratic Republic of the Congo v Uganda*) (*Judgment*) [2005] ICJ Rep 168, 242–3 [215]–[216].

¹¹⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (*Advisory Opinion*) [2004] ICJ Rep 136, 178 [106]. See also, *Legality of the Threat or Use of Nuclear Weapons* (*Advisory Opinion*) [1996] ICJ Rep 226, 240 [25].

¹¹⁵ *Al-Waheed* [2017] AC 821, 868 [61] (Lord Sumption), citing *Hassan* [2014] VI Eur Court HR 1, 61–2 [102]–[104]. See also *Hassan* [2014] VI Eur Court HR 1, 26–8 [35]–[37].

¹¹⁶ *Al-Waheed* [2017] AC 821, 868 [61] (Lord Sumption). See also at 903–4 [163] (Lord Mance).

¹¹⁷ *Hassan* [2014] VI Eur Court HR 1, 61 [102].

¹¹⁸ *Kosovo Opinion* [2010] ICJ Rep 403, 439 [85], citing *Namibia Opinion* [1971] ICJ Rep 16; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (*Libyan Arab Jamahiriya v United Kingdom*) (*Provisional Measures*) [1992] ICJ Rep 3, 15 [39]–[40] (*‘Lockerbie’*).

¹¹⁹ *VCLT* art 31.3(c).

¹²⁰ *Al-Waheed* [2017] AC 821, 868 [60] (Lord Sumption). See also at 893 [132] (Lord Wilson), 902 [158] (Lord Mance).

the *UN Charter*, into its analysis of a bilateral treaty.¹²¹ Similarly, in *Loizidou v Turkey*, the ECtHR used art 31.3(c) to justify reference to SCRs when interpreting the *ECHR*.¹²² That was consistent with the ECtHR's repeated statements that the *ECHR* 'cannot be interpreted in a vacuum' and must 'so far as possible be interpreted in harmony with other rules of international law of which it forms a part'.¹²³ This second limb of the reasoning in *Hassan* is therefore also equally applicable to powers of detention conferred by SCRs.

Therefore, the majority's approach in *Al-Waheed* was a logical extension of the reasoning in *Hassan*, and is preferable to the minority's restrictive reading of the decision. However, neither the majority nor minority doubted the correctness of *Hassan*: the difference of opinion lay in the preferable construction of the ECtHR's reasons. The fact that *Hassan* and, consequently, *Al-Waheed*, went so far beyond the ordinary meaning of *ECHR* art 5 leaves the decisions open to the criticism of rewriting, rather than interpreting, the provision. Part IVB of this case note argues that the majority in *Al-Waheed* could have relied on *UN Charter* art 103 in two alternative ways to bolster its reasoning.

B An Alternative Route: Article 103 of the UN Charter

Article 103 of the *UN Charter* provides:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

The Court in *Al-Waheed* did not rely on art 103 and simply argued by analogy from *Hassan*. Perhaps this was a cautious route, given the ECtHR's tendency to take an excessively narrow view of the article's scope.¹²⁴ However, by sidestepping the relevance of art 103, the Court in *Al-Waheed* avoided the heart of the issue. *Al-Waheed* raised the difficult question of how to navigate the interface between SCRs and human rights instruments, a topic of sharp disagreement between the courts of the UK and Strasbourg, and the UK Supreme Court missed the opportunity to fully address that controversy.

The scope of art 103 remains unclear and is subject to heated debates.¹²⁵ The facts of *Al-Waheed* engage one aspect of those debates, namely, whether the article's scope is limited to contradictory 'obligations' strictly so called, or extends to incompatibilities between obligations and permissions.¹²⁶ This Part first explains why the latter view should be preferred. If that broader view had been applied in

¹²¹ (*Islamic Republic of Iran v United States of America*) (*Judgment*) [2003] ICJ Rep 161, 182 [41].

¹²² *Loizidou v Turkey* (European Court of Human Rights, Grand Chamber, Application No 15318/89, 18 December 1996) [43]–[44].

¹²³ See, eg, *McElhinney v Ireland* (European Court of Human Rights, Grand Chamber, Application No 31253/96, 21 November 2001) [36]; *Al-Adsani v United Kingdom* [2001] XI Eur Court HR 79, 100 [55]; *Banković v Belgium* (European Court of Human Rights, Grand Chamber, Application No 52207/99, 12 December 2011) [57].

¹²⁴ See *Al-Jedda* [2011] IV Eur Court HR 305, 373 [101].

¹²⁵ See Higgins et al, above n 84, 427 [12.31].

¹²⁶ This question is noted, but not resolved, in Higgins et al, above n 84, 427 [12.31]. One comprehensive recent consideration appears in: Leiã and Paulus, above n 76, 2122–6.

Al-Waheed, the potential engagement of art 103 would have been clear. Having established that art 103 was potentially at play, the Court in *Al-Waheed* could have relied on the article to strengthen its analysis in two possible ways: either to provide a more persuasive justification for its expansive interpretation of *ECHR* art 5, or to enable the authorisations in the SCRs to prevail over *ECHR* art 5. The second section of this Part addresses those alternatives.

1 *The Scope of Article 103*

It is beyond question that the reference in art 103 to obligations ‘under the present Charter’ extends to obligations that result from a binding Security Council decision.¹²⁷ Strictly speaking, this extension occurs by means of *UN Charter* art 25, which enforces the obligations under SCRs and is in turn enforced by art 103.¹²⁸

However, it is far less clear whether the ‘conflict between obligations’ to which art 103 refers is confined to a strict contradiction between mandatory obligations that leave no room for discretion (such as may be imposed in a sanctions resolution). When *Al-Jedda* came before the ECtHR, this narrow view carried the day. The alternative, broader view is that art 103 can also apply to incompatibilities between obligations and Security Council authorisations, such as those typically granted when the Security Council acts under ch VII (and, in particular, under art 42). While the narrow view has some support, the authors of Simma’s commentary to the *UN Charter* conclude that the broad view represents the currently prevailing opinion.¹²⁹

A purposive interpretation of art 103 supports the broad view. Article 103 is intended to protect the efficacy of the *UN Charter* system and remove obstacles in other treaties for the implementation of obligations under that system.¹³⁰ The *UN Charter* system affords primacy to the Security Council in maintaining international peace and security, and empowers it to authorise forcible measures. If art 103 only applied to obligations, many ch VII resolutions would not be covered, leaving States at risk of violating other treaty obligations while complying with their obligation under *UN Charter* art 25 to carry out Security Council decisions, and discouraging enforcement of SCRs.¹³¹ Moreover, this view reflects the practice of the UN and its

¹²⁷ Higgins et al, above n 84, 427 [12.31]; Leïæ and Paulus, above n 76, 2116 [10], 2124 [38]. This view is expressly supported by the *travaux*, the ICJ, the ILC, and the Security Council, see: United Nations Conference on International Organization (‘UNCIO’) *Documents: Vol XIII* (1945) 686 (‘*UNCIO XIII*’); *Lockerbie* [1992] ICJ Rep 3, 15 [39]–[40]; *Namibia Opinion* [1971] ICJ Rep 16, 99 [18] (Vice-President Ammoun); *Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [1993] ICJ Rep 325, 439–40 [99]–[100] (Judge Lauterpacht); *ILC Fragmentation Conclusions*, UN Doc A/61/10, 420 [251] ((35) ‘The scope of Article 103 of the Charter’); *ILC Fragmentation Report*, UN Doc A/CN.4/L.682, 168–9 [331]; SC Res 670, UN SCOR, 2943rd mtg, UN Doc S/RES/670 (25 September 1990) Preamble [12].

¹²⁸ Leïæ and Paulus, above n 76, 2124 [38].

¹²⁹ *Ibid* 2122–6.

¹³⁰ *Ibid* 2123 [35]. See also the *travaux* to the *UN Charter*, especially *UNCIO XIII*, 602, 686.

¹³¹ See *Al-Jedda (HL)* [2008] AC 332, 351–5 [31]–[39] (Lord Bingham).

Member States, as is indicated in the surveys of practice by Lord Bingham in the House of Lords' *Al-Jedda* decision and by Simma et al.¹³²

2 Two Possible Applications of Article 103 in *Al-Waheed*

Applying the prevailing, broader view of art 103, there is an apparent 'conflict' between the authorisations in the relevant SCRs to detain where necessary for imperative reasons of security and the ordinary meaning of *ECHR* art 5.1. That gives rise to two options, either of which would have yielded effectively the same result in *Al-Waheed* by a more persuasive route.

First, having acknowledged that art 103 might be engaged, the Court in *Al-Waheed* could have interpreted *ECHR* art 5 in light of that possibility. That is, the majority could have strengthened their existing interpretation of *ECHR* art 5, which relied solely on extending *Hassan*, by reference to the stronger interpretive imperative that operates once art 103 has the potential to apply. That imperative is simply a specific manifestation of the principle of systemic integration: where there is potential conflict between a 'hierarchically superior norm' and another norm of international law, all efforts must be made to interpret the *latter* in accordance with the former, to preserve the latter's effectiveness if at all possible.¹³³ Article 103, as a provision of last resort, thus only applies if no interpretation of the latter, which would harmonise it with the former, is possible.¹³⁴ Here, the superior norms are the Security Council authorisations, pursuant to *UN Charter* arts 25 and 103, and the 'latter' norm is *ECHR* art 5.

Second, and in the alternative, the Court in *Al-Waheed* could simply have accepted that there was a genuine conflict, which could not be resolved by interpretation and harmonisation, and applied art 103.¹³⁵ Applying art 103 would only displace or suspend *ECHR* art 5.1 to the extent of the inconsistency:¹³⁶ that is, the requirements that the detention be lawful, non-arbitrary, and conform to procedural safeguards could all still apply, with the only displacement being the restriction of permissible detention to one of the six circumstances in sub-paragraphs (a)–(f). Essentially, that is the same result as the majority in *Al-Waheed* reached by applying *Hassan*. However, the outcome has a much stronger justification because it does not rely on an interpretation of *ECHR* art 5 that arguably pushes the boundaries of systemic integration beyond their limit.

¹³² *Ibid*; Leïa and Paulus, above n 76, 2125–6. See also the discussion of the first instance *Al-Jedda* judgment (*R (Al-Jedda) v Secretary of State for Defence* [2005] EWHC 1809 (Admin) (12 August 2005)) in *ILC Fragmentation Report*, UN Doc A/CN.4/L.682, 171–2 [336]–[338].

¹³³ *ILC Fragmentation Conclusions*, UN Doc A/61/10, 423 [251] ((41) 'The operation and effect of jus cogens norms and Article 103 of the Charter').

¹³⁴ Leïa and Paulus, above n 76, 2114 [3], 2120 [21].

¹³⁵ See Christopher J Borgen, 'Resolving Treaty Conflicts' (2005) 37(3) *George Washington International Law Review* 573, 640. See also *ILC Fragmentation Report*, UN Doc A/CN.4/L.682, 27 [42].

¹³⁶ Higgins et al, above n 84, 427–8 [12.32], citing the *travaux* to the *UN Charter* (*UNCIO XIII*, 602, 685); *ILC Fragmentation Conclusions*, UN Doc A/61/10, 423 [251] ((41) 'The operation and effect of jus cogens norms and Article 103 of the Charter'); *ILC Fragmentation Report*, UN Doc A/CN.4/L.682, 170 [333].

Therefore, by squarely addressing the eminent relevance of *UN Charter* art 103 in *Al-Waheed*, the Court could either have used the threat of the article to strengthen an otherwise relatively implausible interpretation of *ECHR* art 5, or could have displaced *ECHR* art 5 to the extent of its inconsistency with the operative SCRs. Irrespective of which of those paths the Court took, it would have thereby reaffirmed the unity and coherence of the *UN Charter* system of international law, clarified the uncertain scope of art 103, and more fully justified the outcome of the case.

V Conclusion

The UK Supreme Court's decision in *Al-Waheed* underlines the uncertainty surrounding the interaction between SCRs and international human rights law. Located at the interface between potentially conflicting international instruments, the decision compels consideration of how best to resolve interpretive conflicts in an increasingly fragmented 'system' of international law.

This case note has argued that the *Al-Waheed* majority's interpretation of the SCRs with respect to Iraq and Afghanistan is correct, but would have benefited from more integration of fundamental principles of human rights law and a clearer interpretive framework. Similarly, while the majority pragmatically adapted *ECHR* art 5 to the circumstances of armed conflict, they cautiously avoided the pivotal significance of *UN Charter* art 103. The majority thereby missed the opportunity to reassert the preferable, broad view of art 103 and strengthen their analysis of the interaction between the SCRs and *ECHR*.

The two crucial questions for the Court in *Al-Waheed* both turned ultimately on the power of, and limits to, the principle of systemic integration. The potential applications of systemic integration in relation to SCRs are rarely considered. More frequently, SCRs are seen as giving rise to relationships of conflict, rather than of interpretation. The decision in *Al-Waheed* suggests new possibilities for coherent, practical interpretations of international legal instruments: interpretations of SCRs that take account of fundamental, universal principles of human rights law; and interpretations of human rights treaties that recognise the primacy afforded to the Security Council in maintaining international peace and security.

Review Essay

The Future of Private Property

The Inner Level: How More Equal Societies Reduce Stress, Restore Sanity and Improve Everyone's Well-being

by Richard Wilkinson and Kate Pickett (2018)

Allen Lane, 352 pp, ISBN 9780525561224

Property and Human Flourishing by Gregory S Alexander (2018) Oxford University Press, 400 pp,

ISBN 9780190860745

Radical Markets: Uprooting Capitalism and Democracy for a Just Society by Eric A Posner and E Glen Weyl (2018)

Princeton University Press, 368 pp, ISBN 9780691177502

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Abstract

Using the theory of inequality developed by Wilkinson and Pickett in *The Inner Level: How More Equal Societies Reduce Stress, Restore Sanity and Improve Everyone's Well-being*, this review essay canvasses two recent normative contributions that claim a way forward for the concept and law of private property: Alexander's defence of private property as fostering human flourishing through the living of a good life, as advanced in *Property and Human Flourishing*, and Posner and Weyl's radical liberal overhaul of the very content of property found in *Radical Markets: Uprooting Capitalism and Democracy for a Just Society*. The essay assesses Alexander's focus on the role of obligation as a component of private property necessary to fostering the living of a good life, and Posner and Weyl's proposal that private property be replaced with a new ideal-typic form of property known as 'partial common ownership'. It concludes with a reflection on the ubiquity of inequality in any proposal one might adopt for either the overhaul or the replacement of private property.

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Society is impossible without inequality.¹

I Equality is Good for You

In their recent book, as the title suggests, Richard Wilkinson and Kate Pickett argue that more equal societies reduce stress, restore sanity and improve everyone's well-being.² Recounting how 'the world has changed [since 2008], rocked by economic crisis, political polarization and populism, ideological conflicts, and the mass movement of refugees and economic migrants worldwide', Wilkinson and Pickett conclude that '[i]nequality has made no small contribution to all of these'.³ More worryingly,

[t]here will always be people who, while claiming to deplore class and status divisions, nevertheless imagine that large income differences do not matter. ... [and] many continue to dismiss the popular demand to reduce income differences as just 'the politics of envy'.⁴

Why does inequality matter? Because it causes significant harm: worsened social gradients, decreased social mixing and cohesion, increased anxieties about status, and heightened consumerism and conspicuous consumption.⁵ For Wilkinson and Pickett, policies aimed at reducing or eliminating these harms can 'improv[e] the quality of life and well-being of the vast majority of the population'.⁶ They envisage four key improvements that will follow the implementation of policies aimed at reducing inequality: (i) 'a world where status matters less, where the awkward divisions of class begin to heal, where social anxieties are less inhibiting of social interaction and people are less plagued by issues of confidence, self-doubt and low self-esteem';⁷ (ii) 'a society that uses each increase in productivity to gain more leisure and reduce the demands of work';⁸ (iii) 'improvement in the quality of working life resulting from the extension of democracy into employment';⁹ and (iv) corresponding 'health and social benefits'.¹⁰

Yet, private property, one of the foundational building blocks of modern neoliberal society, remains inherently unequal. Both as a concept and as a means of allocating resources, private property presupposes inequality; it does not end, but *begins* with inequality. This has been known for quite a long time; Rousseau wrote that inequality 'derives its force and its growth from the development of our faculties and the progress of the human mind, and finally becomes fixed and legitimate

¹ Napoleon Bonaparte, Emperor of the French, cited in George Rudé, *Revolutionary Europe: 1783–1815* (Harper & Row, 1st ed, 1964) 237 citing Maurice Vitrac (ed), *Autour de Bonaparte: Journal du Comte P-L Roederer, Ministre et Conseiller d'État: Notes Intimes et Politiques d'un Familier des Tuileries* (H Daragon, 1909) 18.

² Richard Wilkinson and Kate Pickett, *The Inner Level: How More Equal Societies Reduce Stress, Restore Sanity and Improve Everyone's Well-being* (Allen Lane, 2018).

³ *Ibid* xxii.

⁴ *Ibid* 231.

⁵ *Ibid* 231–5.

⁶ *Ibid* 235.

⁷ *Ibid* 262–3.

⁸ *Ibid* 263.

⁹ *Ibid*.

¹⁰ *Ibid* 264.

through the institution of property and laws'.¹¹ Flannery and Marcus summarise Rousseau's insight this way:

[A]ll the unpleasant characteristics of the human condition derived ... from society itself as it developed. Self-respect, vital for self-preservation, was the rule at first. Unfortunately, as society grew, this attitude gave way to self-love, the desire to be superior to others and admired by them. Love of property replaced generosity. Eventually, a growing body of wealthy families imposed a social contract on the poor, a contract that institutionalized inequality by providing it with moral justification.¹²

Rousseau lacked evidence to support the conclusions about equality¹³ — the social sciences would not even come into existence until the work of Auguste Comte and Émile Durkheim in the mid- to late-19th century. And it would be another century again before Flannery and Marcus would fill this evidentiary vacuum with meticulous and detailed empirical research drawing upon archaeological and anthropological information.¹⁴

Put simply, property assumes scarcity of everything and, therefore, the necessity to allocate resources in such a way that some will win and some will lose. Inevitably, then, some end up with more of whatever the resource happens to be, and some with less. Both historical fact¹⁵ and contemporary reality,¹⁶ these assumptions led one prominent property theorist to conclude that '[p]roperty is [j]ust, to a [d]egree, [s]ometimes'.¹⁷ And given that it rests on private property as its principal means of resource allocation, it should come as no surprise that inequality in the contemporary neoliberal world is increasing. This is part of a historical trend — the only aberration in which followed, for a brief time, the end of the Second World War.¹⁸ This historical trend, too, was known long ago: Marx was the first to identify the truth that the inequality that follows from a capitalist world order predicated upon alienated labour produces unjust outcomes.¹⁹ Recently, no less a periodical than *The Economist* pronounced Marx's analysis, if not his solution, correct.²⁰

The question, then, is not whether inequality exists — it clearly does — but how to reconcile the need for greater economic equality with the inherent inequality in the way in which we allocate things. This review essay canvasses two recent normative contributions that claim a way forward for the concept and law of private

¹¹ Jean-Jacques Rousseau, *A Discourse on Inequality* (Maurice Cranston (trans), Penguin, 1984) 137 [trans of (first published 1755)].

¹² Kent Flannery and Joyce Marcus, *The Creation of Inequality: How Our Prehistoric Ancestors Set the Stage for Monarchy, Slavery, and Empire* (Harvard University Press, 2012) ix–x.

¹³ Ibid x.

¹⁴ Flannery and Marcus, above n 12.

¹⁵ Walter Scheidel, *The Great Leveler: Violence and the History of Inequality from the Stone Age to the Twenty-First Century* (Princeton University Press, 2017).

¹⁶ Danny Dorling, *Inequality and the 1%* (Verso, 2015).

¹⁷ J W Harris, *Property and Justice* (Oxford University Press, 2002) ch 18.

¹⁸ Thomas Piketty, *Capital in the Twenty-First Century* (Arthur Goldhammer trans, Belknap Press, 2014) [trans of: *Le Capital au XXI^e Siècle* (first published 2013)].

¹⁹ Karl Marx, *Capital (Vol 1: A Critique of Political Economy)* (Ben Fowkes trans, Penguin, 1992 [trans of: *Das Kapital. Erster Band. Buch I: Der Produktionsprozess des Kapitals*, 1867]).

²⁰ 'Rulers of the World: Read Karl Marx!', *The Economist* (online), 3 May 2018 <<https://www.economist.com/books-and-arts/2018/05/03/rulers-of-the-world-read-karl-marx>>.

property. Part II considers Gregory S Alexander's defence of private property as fostering human flourishing, the living of a good life, the key to which lies in the inherent obligation of private property.²¹ Part III assesses Eric A Posner and E Glen Weyl's radical liberal²² overhaul of the very content of property, which argues for a new ideal-typic form known as 'partial common ownership'.²³ Part IV offers some brief concluding reflections.

II Human Flourishing

Alexander defends the liberal institution of property on the grounds that it promotes human flourishing.²⁴ Joining a venerable intellectual tradition — Hegel connected private property and personality,²⁵ a foundation built upon by Radin,²⁶ Harris,²⁷ and Munzer,²⁸ among others,²⁹ Alexander makes contributions both conceptually — providing a means of unpacking the meaning of ownership — and normatively — developing a moral justification for property.³⁰ While not entirely rejecting them, Alexander differentiates the human flourishing theory from the 'utilitarian/information cost' and the 'Kantian rights' theories that dominate Anglo-American property theory, finding both 'radically incomplete'.³¹ Instead, Alexander incorporates parts of both theories to render a 'much richer and morally satisfying approach to explaining what private ownership means and what its limits are'.³² Thus, while accepting the importance of both information efficiency and personal autonomy and self-governance, Alexander rejects the suggestion that information alone should or does decide cases, and that individual autonomy alone is the value foundation of property. Rather, human flourishing is pluralistic, with information and autonomy merely two values among many constitutive components.³³

Alexander limits the scope of the human flourishing theory. While normative, the theory is one of private law. Thus, while applicable to a number of specific examples — public access to private beaches,³⁴ trespass and excludability,³⁵ the twin

²¹ Gregory S Alexander, *Property and Human Flourishing* (Oxford University Press, 2018).

²² 'Don't Shrink the Role of Markets — Expand It', *The Economist* (online), 10 May 2018 <<https://www.economist.com/books-and-arts/2018/05/10/dont-shrink-the-role-of-markets-expand-it>>.

²³ Eric A Posner and E Glen Weyl, *Radical Markets: Uprooting Capitalism and Democracy for a Just Society* (Princeton University Press, 2018) 20–5.

²⁴ Alexander, above n 21.

²⁵ G W F Hegel, *Outlines of the Philosophy of Right* (T M Knox trans, Oxford University Press, 2008) 57–83 (First Part: Abstract Right: (I) Property) [trans of: *Grundlinien der Philosophie des Rechts* (first published 1820)].

²⁶ Margaret Jane Radin, 'Property and Personhood' (1982) 34(5) *Stanford Law Review* 957.

²⁷ Harris, above n 17, 231–43.

²⁸ Stephen R Munzer, 'Ellickson on "Chronic Misconduct" in Urban Spaces: Of Panhandlers, Bench Squatters, and Day Laborers' (1997) 32(1) *Harvard Civil Rights-Civil Liberties Law Review* 1.

²⁹ Dudley Knowles, 'Hegel on Property and Personality' (1983) 33(130) *The Philosophical Quarterly* 45; Justin Hughes, 'The Philosophy of Intellectual Property' (1988) 77(2) *Georgetown Law Journal* 287.

³⁰ Alexander, above n 21, xvi.

³¹ *Ibid* xi.

³² *Ibid*.

³³ *Ibid* xi–xii.

³⁴ *Ibid* 169–207.

³⁵ *Ibid* 103–68.

ubiquitous concerns in American constitutional jurisprudence of takings and segregation,³⁶ and the right to destroy³⁷ — Alexander is clear that it cannot, for instance, provide solutions to systemic and structural problems like homelessness.³⁸ Moreover, it is not a theory of resource redistribution; rather, Alexander seeks only to reveal duties already owed by owners as part of developing human capabilities.³⁹

Having set the boundaries of the theory, Alexander defines what is meant by ‘human flourishing’:⁴⁰ broadly Aristotelian, the theory insists ‘on the inherently social character of humans and the implications that each person’s dependence on other human beings have for the substantive content of ownership’.⁴¹ It follows that ‘private ownership is justified insofar as it facilitates the opportunity of individuals to live well-lived lives’.⁴² The theory, containing three components, explains how property facilitates human flourishing.⁴³ First, the core claim — which is plural and objective — is that property enables individuals to live a flourishing life, with ‘the well-lived life ... measured by a person’s capabilities rather than ... possession[s] or by the satisfaction of his subjective preferences’.⁴⁴

Second, to go well, a life requires certain essential capabilities — health, security, autonomy, and sociability — that exist only within communities, including the State, which act as ‘the mediating vehicles through which we come to acquire the resources we need to flourish and to become fully socialized into the exercise of our capabilities’.⁴⁵ This means that we owe obligations to others, not because of reciprocity or some notion of contract, but on the basis of ‘the obligation each of us owes to ourselves to live well’.⁴⁶

Finally, the obligation to support the communities of which one is a part means that one

owe[s] certain duties, some of which are negative, others affirmative, to members of [one’s] communities to facilitate development of their necessary capabilities. These duties [are] not imposed externally by the state. Rather, they are inherent in what it means to own property ...⁴⁷

Duties are limited through ‘the same demands generated by the capabilities that facilitate human flourishing — health, personal security, sociability, and so forth’.⁴⁸

Yet, obligation implies the very inequality it seeks to redress. That is the true inherent quality of private property. Why the need for obligation if not to redress inequality? If true equality was achieved in the allocation of goods, there would be

³⁶ Ibid 209–29, 267–94.

³⁷ Ibid 231–66.

³⁸ Ibid xvii. See also 295–320.

³⁹ Ibid xix–xx.

⁴⁰ Ibid 3–35.

⁴¹ Ibid xii–xiii.

⁴² Ibid.

⁴³ Ibid 39–100.

⁴⁴ Ibid xiv.

⁴⁵ Ibid xv.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid xvi.

no need for obligation because equal access to a good or resource would obviate it. Even if Alexander's theory promotes human flourishing, then, does the good life lived by an individual who fulfils every obligation imposed by social context outweigh the loss of equality suffered by those protected by such obligation? In *Radical Markets: Uprooting Capitalism and Democracy for a Just Society*, Posner and Weyl suggest not. Rather, they argue, more than inequality, private property creates monopoly. Let's consider their proposed solution.

III Partial Common Ownership

For Posner and Weyl, the mere existence of choice and markets fails to provide the best outcomes, either for market actors exercising that choice, or for others affected by the resulting consequences. While they claim that free, competitive, and open markets remain the best way to organise a society,⁴⁹ Posner and Weyl argue that the problem is that 'most important markets are monopolized or entirely missing'.⁵⁰ More than inequality, then, they argue that the real problem with private property involves the 'monopoly problem', which pertains when

private ownership [of any asset] ... hamper[s] allocative [and investment] efficiency. ... Because of the ubiquity of private property in our economy, empirical research suggests that the misallocation of resources due to monopoly and related problems ... may be reducing output by 25% or more annually...⁵¹

This misallocation due to monopoly can occur in at least four ways: (i) 'signaling' or 'adverse selection': essentially, tales told about an asset by a seller that inflate the price paid by a buyer;⁵² (ii) the 'endowment effect': the difference between what one is willing to pay for something as opposed to what one might accept to part with it;⁵³ (iii) barriers to borrowing;⁵⁴ and, (iv) simple laziness, incompetence, and malice: '[p]rivate property allows lazy or misanthropic owners to hoard assets and to do so not for gain, but out of sloth.'⁵⁵ Whatever form it takes, though, the monopoly problem allows private property holders to stand in the way of economically valuable projects.⁵⁶

Like Alexander, Posner and Weyl propose a normative theory to redress the monopoly problem. Using the concept of the auction, they claim that their theory *would* result in resource redistribution and that it *might just* have the answer to systemic problems like homelessness. The answer is a 'Radical Market', a form of 'auction [that] require[s] people to bid against each other, [where] the object on the block winds up in the hands of the person who wants it most — with the caveat that

⁴⁹ Posner and Weyl, above n 23, 20–5.

⁵⁰ *Ibid* xvi.

⁵¹ *Ibid* 38. See also 34–5.

⁵² *Ibid* 66–7, citing George A Akerlof, 'The Market for "Lemons": Quality, Uncertainty and the Market Mechanism' (1970) 84(3) *Quarterly Journal of Economics* 488.

⁵³ Posner and Weyl, above n 23, 67, citing Richard Thaler, 'Toward a Positive Theory of Consumer Choice' (1980) 1(1) *Journal of Economic Behavior and Organization* 39.

⁵⁴ Posner and Weyl, above n 23, 67–8.

⁵⁵ *Ibid* 68.

⁵⁶ *Ibid* 39.

differences in bids may represent differences in wealth as well as desire'.⁵⁷ In their proposal, Posner and Weyl attempt to combat failure of the assumption of perfect competition in markets — in most cases, one deals with 'highly idiosyncratic, one-of-a-kind assets'.⁵⁸ This Radical Market solution can be applied to private property,⁵⁹ democracy,⁶⁰ labour,⁶¹ corporations,⁶² and data.⁶³ I focus here only on the Radical Market solution as it applies to the concept and law of liberal private property.

Applied to private property, the Radical Market solution involves two components. On the one hand, to address allocative monopoly, the 'Vickery Commons' — so-called in honour of Nobel Laureate William S Vickery — involves using

an auction where all property — every factory, house, and car — is held in common and the right to rent and use it is constantly auctioned. The citizen who offers the highest bid (in the form of a rental payment) possesses the object until outbid by another citizen. Each factory, house, or car would have a standing highest bid placed on it, representing the rent that the current possessor agreed to pay to the government for using the asset. Anyone could beat this bid and claim the object. The money collected from rents is used to finance public goods ... and fund a social dividend.⁶⁴

And, on the other hand, to optimise both allocation and investment, 'partial common ownership' — an ideal-typic form of property somewhere between commons and private property — implements common ownership to 'deter monopoly power while private ownership [encourages] investment'.⁶⁵

Partial common ownership operates on the basis of 'liturgy', a concept known to the ancient Greeks, whereby the thousand wealthiest citizens funded public operations of the State through a process of exchange. Thus, a person could be challenged and would either have to assume the liturgical responsibility for the State or exchange all possessions with the challenger. This required self-assessment and honesty — one who claimed to be poor to avoid the liturgical burden could end up losing everything if challenged by someone poorer. It also incorporated the 'require[ment] to declare the value of [one's] possessions for the purpose of a transaction or public project...[thus] stand[ing] ready to "prove" that the declared value is correct'.⁶⁶ In addition to liturgy, then, partial common ownership also operates as a form of tax, making it 'costly to declare a high valuation and thus deter the purchase of assets. ... [and] penalizes any attempt to exercise monopoly power over an asset. The higher the price the possessor demands, the more tax she must pay.'⁶⁷

⁵⁷ Ibid xvii.

⁵⁸ Ibid 26.

⁵⁹ Ibid 30–79.

⁶⁰ Ibid 80–126.

⁶¹ Ibid 127–67.

⁶² Ibid 168–204.

⁶³ Ibid 205–49.

⁶⁴ Ibid 49.

⁶⁵ Ibid 52.

⁶⁶ Ibid 55.

⁶⁷ Ibid 57, citing Maurice Allais, *L'impôt sur le Capital et la Réforme Monétaire* (Hermann, 1988).

Partial common ownership, as conditioned by liturgy and tax, thus achieves efficiency of both allocation and investment. In the case of someone who holds an asset that they wish to retain, so long as they set their valuation or reserve price at the rate exactly equal to the tax rate, full allocative efficiency is achieved: only those buyers willing to pay more than the reserve price will in fact end up taking the asset, meaning that ‘every asset passes to the hands of the person best able to use it and invest in it’.⁶⁸ The optimal position in relation to any asset is a very small tax, which will ensure that allocative efficiency is achieved without distorting investment.⁶⁹

Partial common ownership, then, uses tax as a means of modifying traditional private property: ‘The two most important “sticks” in the bundle of rights that compose private property are the “right to use” and the “right to exclude.” With a [tax], both rights are partly transferred from the possessor to the public at large.’⁷⁰ In the case of the right to use, a fraction of it ‘is revealed and transferred to the public through the tax; the higher the tax, the greater the fraction of use value transferred.’⁷¹ The right to exclude is considered to be of far greater significance — what happens here is radical:

the “owner” does not enjoy this right to exclude vis-à-vis anyone who offers to buy at the self-assessed price. In fact, any member of the public may exclude the current owner in exchange for this price. The lower the price, therefore, the greater is the extent to which the exclusion right is held by the public at large rather than the “owner.” The price falls as the tax rises, so raising the COST also gradually shifts the exclusion right to the public at large, any member of whom can pay a price to claim the property.⁷²

So,

[w]e can conceptualize [partial common ownership] as sharing ownership between society and the possessor. Possessors become lessees from society. Their lease terminates when a higher-value user appears, whereupon the lease is automatically transferred to that user.⁷³

This, in turn, would ‘encourage attachment to communities and civic engagement, which have sometimes been damaged by capitalism’.⁷⁴ Where property as social relations theorists emphasise the role of the police power of the State through regulation as the means of fostering social relationships,⁷⁵ Posner and Weyl see partial common ownership, liberalism itself, as fulfilling this role.

Rather than rejecting the concept of property, Posner and Weyl radically redeploy two ideal-typic forms — common and private — in a novel hybrid partial common — to deal with problems presented by the neoliberal economic order. In doing so, they reconceive the nature of the rights to use and to exclude, two of the

⁶⁸ Posner and Weyl, above n 23, 58.

⁶⁹ Ibid 61.

⁷⁰ Ibid 61, citing Thomas W Merrill, ‘Property and the Right to Exclude’ (1998) 77(4) *Nebraska Law Review* 730.

⁷¹ Posner and Weyl, above n 23, 61.

⁷² Ibid 62.

⁷³ Ibid.

⁷⁴ Ibid 78.

⁷⁵ See, eg, Joseph William Singer, *Entitlement: The Paradoxes of Property* (Yale University Press, 2000).

eleven standard incidents of ownership first identified by Honoré⁷⁶ and later narrowed by Radin to the ‘liberal triad’ of use, exclusivity, and alienability.⁷⁷ This is clearly a novel contribution to contemporary property theory scholarship. Still, merely to reconceptualise the liberal triad is not to change the nature of property itself. By retaining use and exclusivity, they retain the underlying reality of property: inequality. And no matter how radical, it is difficult to conceive of a world in which we could entirely do away with some form of allocating scarce resources among people. Whatever we might come up with, we still face the issue of inequality — some will win and some lose in the allocation effected by that system. In fact, whatever we can imagine tends to look a lot like property as we already know it; and that means facing the truth of inequality. And therein lies the difficulty.

IV The Last Word

The problem, as much as Posner and Weyl try to tell us their solution can overcome it, *is* inequality. The very need for a system of allocation is due to the scarcity of whatever it is one is trying to allocate. If there were no scarcity, there would be no need to allocate. Whatever system one uses to do that exists because of scarcity. And using any such allocative mechanism we can imagine — as Posner and Weyl do — involves, by its very nature and therefore of necessity, inequality. Similarly, however it may allow us to live a good life, to flourish, as Alexander suggests, private property is, in itself, inherently unequal. The truth is that few who write about property, and certainly not Alexander or Posner and Weyl, denies that property is inequality. Indeed, that is the very problem the authors reviewed here set out to redress.

The problem — both with Alexander’s suggestion that the obligation to others and to the community is already there, we just need to see it, and Posner and Weyl’s partial common ownership — is that both urge a change in the social imaginary of private property. Taylor defines a ‘social imaginary’ as

the ways in which [people] imagine their social existence, how they fit together with others, how things go on between them and their fellows, the expectations which are normally met, and the deeper normative notions and images which underlie these expectations.⁷⁸

He explicitly uses ‘social imaginary’ as a contrast to ‘social theory’. The latter, as its very name suggests, focuses on theory, and not on the way that ordinary people ‘imagine’ their social surroundings in images, stories, legends, and so on.⁷⁹ Moreover, theory is the province of a small minority elite, rather than large groups of people — perhaps the whole of society. When applied to law, an ‘idea’, for Taylor, means the legal forms, accepted norms and so forth that help make sense of

⁷⁶ A M Honoré, ‘Ownership’ in A G Guest (ed), *Oxford Essays in Jurisprudence* (Oxford University Press, 1961) 107.

⁷⁷ Margaret Jane Radin, *Reinterpreting Property* (University of Chicago Press, 1993) 121.

⁷⁸ Charles Taylor, *A Secular Age* (Belknap Press, 2007) 171.

⁷⁹ *Ibid* 171–2.

collective life — in short, it means the way the broader society, rather than elites, see law.⁸⁰

But it is far from easy to change the social imaginary through elite theory. Theory, by its very normativity, is malleable and easily changed. The social imaginary is not so easily changed. Taylor identifies a very few epochal moments in human history where such shifts have occurred — the most notable being ‘the great founding revolutions of our contemporary world, the American and the French’.⁸¹ And, in the case of the French Revolution, the inability to translate the idealisation of theory into a stable and agreed upon set of practices led to conflict that lasted for over a century. Still, Taylor argues that:

in both these great events, there was some awareness of the historical primacy of theory, which is central to the modern idea of a ‘revolution’, whereby we set out to remake our political life according to agreed principles.⁸²

And the lesson of these two epochal moments is that a shift in social imaginary occurs where:

people take up, improvise, or are inducted into new practices. These are made sense of by the new outlook, the one first articulated in [a] theory; this outlook is the context that gives sense to the practices. And hence the new understanding comes to be accessible to the participants in a way it wasn’t before. It begins to define the contours of their world, and can eventually come to count as the taken-for-granted shape of things, too obvious to mention.⁸³

Private property as it exists now is part of the social imaginary. If the American and French Revolutions are the only two moments in the last three centuries of theory driving change in the social imaginary, then the likelihood that Alexander or Posner and Weyl might foretell change in the social imaginary of private property is vanishingly slim. Human flourishing and partial common ownership are elite theory. A real change requires that the social imaginary of private property become partial common ownership.

True enough, Posner and Weyl argue that we are subject to forced sales in many cases already without even realising it: mortgage foreclosures and sales; repossession for failure to pay a car loan; eviction for failure to pay rent under a lease of premises; self-assessment to determine how much our house or contents are worth in purchasing insurance in case they are lost; and the sharing economy.⁸⁴ Still, that is a long way from the sort of shift that Posner and Weyl propose, even if we accept that what they propose is already happening. Would people be any more inclined to accept it in every aspect of resource allocation? Notwithstanding the allocative and investment efficiency gains to the market, is the potential loss of an asset to an individual something that people are likely to countenance?

Among the many examples that could be chosen to demonstrate the problem, consider gentrification in the United States (‘US’). The popular perception of this

⁸⁰ Ibid 171–6.

⁸¹ Ibid 175.

⁸² Ibid.

⁸³ Ibid 175–6.

⁸⁴ Posner and Weyl, above n 23, 70.

process goes along these lines: ‘hordes of well-to-do whites are descending upon poor, minority neighbourhoods that were made to ensure decades of discrimination. ... these people snuff out local culture. As rents rise, lifelong residents are evicted and forced to leave.’⁸⁵ But might this be a myth? The available data might appear to suggest that what is really happening in gentrification is that

[l]ongtime residents reap the rewards of reduced crime and better amenities. Those lucky enough to own their homes come out richer. [Rather than a] lack of investment in historically non-white neighbourhoods, white flight from city centres and economic segregation[,] gentrification straightforwardly reverses each of those regrettable trends.⁸⁶

Seen in this way, gentrification might endorse, rather than challenge, the traditional social imaginary of private property; moreover, the potential for profit seems to provide little incentive to change. The traditional social imaginary of private property remains very strong; perhaps prohibitively so. People want to retain the property rights that they think secure to them the greatest benefit; the complex logic behind Posner and Weyl’s proposal means that it is unlikely to catalyse a shift in the social imaginary of private property, even if people could understand the benefits of that shift.

Still, it *might* be possible. Berger recounts the experience in the US State of Oregon where, between 2004 and 2007, Oregonians approved ballot Measure 37, which required ‘compensations for losses caused by most regulatory restrictions imposed after the acquisition of property’.⁸⁷ Measure 37 resulted in a drastic change in owners’ attitudes toward private property. During the time that it lasted, Oregonians seemed to understand, in some way, that regulation is in fact an important component of private property and that government and community are central to its existence.⁸⁸ Still, this demonstrates that while changing the social imaginary of private property may be possible, that change is likely to be incremental. And Wilkinson and Pickett write that:

[c]hange on the scale needed ... can only be achieved if large numbers of people commit themselves to achieving it. Sometime after the late 1970s, it seems, progressive politics either lost its conviction that a better form of society was possible or lost the ability to convince people that politics was the route to achieving it. The result was the almost uncontested rise of neoliberalism. Now, facing the evidence of global warming and calamitous climate change, the world is in need of a radical alternative, a clear vision of a future society which is not only environmentally sustainable, but in which the real quality of life is better for the vast majority. Only then will people commit themselves to the long task of bringing that society into being.⁸⁹

Even if Alexander’s assessment may hold some promise as a means of educating the general populace, that may result in little progress on the scale

⁸⁵ ‘In Praise of Gentrification’, *The Economist* (online), 23 June 2018 <<https://www.economist.com/united-states/2018/06/23/in-praise-of-gentrification>>.

⁸⁶ *Ibid.*

⁸⁷ Bethany R Berger, ‘What Owners Want and Governments Do: Evidence from the Oregon Experiment’ (2009) 78(3) *Fordham Law Review* 1281, 1283.

⁸⁸ *Ibid.* 1281–2, 1286–1303.

⁸⁹ Wilkinson and Pickett, above n 2, 265.

Wilkinson and Pickett suggest is necessary. To say nothing of the reforms advocated by Posner and Weyl, which, while ‘they may help jolt liberals out of their hand-wringing, and shape a new line of market-oriented thinking’, ‘are so radical that they are unlikely ever to be adopted.’⁹⁰ To put it simply, most ‘may view [Posner and Weyl] in the way radicals are often perceived: as somewhat eccentric’.⁹¹ Not a promising foundation on which to build the sort of epochal change witnessed in the American and French Revolutions, the scale of which Wilkinson and Pickett suggest is necessary to deal with the modern problem of inequality.

The truth is, as Rousseau wrote over 200 years ago, property and law fix and legitimate inequality.⁹² In our modern neoliberal world, the possibility that people would trade inequality away for something far more ephemeral (human flourishing) or egalitarian (partial common ownership) seems, therefore, remote at best. Sadly, as much as we might desire it, and as good as equality might be for us, Napoleon’s words may still be true: ‘society is impossible without inequality’.⁹³

⁹⁰ ‘Don’t Shrink the Role of Markets’, above n 22.

⁹¹ *Ibid.*

⁹² Rousseau, above n 11, 137.

⁹³ Bonaparte, above n 1, 18.