Canberra Law Review

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- Scholarly articles should be 5,000-14,000 words, case notes 1,500-3,000 words and book reviews 1,000-1,500 words (including references).
- Submissions should conform to 4th edition of the Australian Guide to Legal Citation (AGLC4) and be 12 pt Times New Roman.
- Scholarly articles should be accompanied by an abstract of no more than 250 words.
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INTRODUCTION

This issue of Canberra Law Review appears during the COVID-19 Disruption of 2020, an inflection point for Australian higher education, much of business, government and law. The pandemic has seen restrictions on the freedom of movement and association that Australians take for granted. It has coincided with assertion by the People’s Republic of China of restrictions on speech and association across the globe rather than merely in Hong Kong. Articles in this issue engage with principles and practice regarding law, especially Australian law’s foundation in human rights as a basis of the liberal democratic state, and with questions regarding agency, technology and administration.

Bede Harris offers an insightful critique of the Australian Constitution in relation to dignity. Dr Harris comments that dignity is the foundational value of human rights documents and of the constitutions of several jurisdictions, in particular those of Germany and South Africa, where it is expressly recognised both as a substantive right and as an interpretative principle governing the entire constitution. In contrast to these values-based constitutions, the Commonwealth Constitution is ‘value-less’ in that it was drafted as a pragmatic response to competing claims of the colonies that would form the Australian federation, rather than under over-arching theory of the relationship between the individual and the state. That anti-theoreticism is reflected in the way in which the Constitution has been interpreted by the courts. Its failure to protect dignity imposes a moral duty on legal academics to encourage their students to think about the ways in which the Constitution should be reformed.

‘Constructing Consent in the Australian Capital Territory’ by Brendon Murphy considers the way in which consent has been constructed and evolved in the criminal law in the context of sexual assault. Dr Murphy’s article compares and contrasts the test for consent across the Australian jurisdictions, with particular interest on consent in the ACT – the only jurisdiction in Australia with a negative consent model. The article examines the intersection of common law and legislation in that jurisdiction, and considers how consent came to be framed this way in that jurisdiction. It suggests that the ACT will likely adopt a two-part reform based on the law of New South Wales.

As a precursor of postmodernism Nietzsche quipped ‘Let us beware of saying that death is the opposite of life. The living is only a species of the dead, and a very rare species’. In ‘Thawing-out Personhood’ Bruce Baer Arnold takes a different view, critiquing the belief system known as cryonics, summarized as ‘freeze store reanimate’ the legally dead. Dr Arnold’s article discusses the culture and law of cryonics in relation to Australia, asking whether claims regarding reanimation are unconscionable and necessitate a specific statutory prohibition. The article further considers the implications for health, welfare and other law if cryonics was practical.

‘The Right To Freedom of Religion and Belief in the Australian Education Sector’ was written by a University of Canberra graduate student on a semester at the United Kingdom in 2019. The article by Brad Thomas offers a perspective on issues around Australia’s contentious Religious Freedoms Bills. It explores questions about curriculum and delivery in Australian schools, discussing law’s engagement or indifference to expression in classrooms within a multicultural state that has no established religion, lacks a constitutionally-enshrined justiciable Bill of Rights and adheres to international human rights agreements.
Tess Watson’s ‘Delores Down The Rabbit-Hole’ argues that popular culture offers a lens through which we can understand and examine how law functions in practice. The dystopian sci-fantasy *Westworld* is set in a world without the rule of law; rather it is governed by click-wrap contracts and a shadowy corporate culture where android hosts offer a sublime vacation in exchange for the complete commodification of the human “guests”, mirroring the rise of surveillance capitalism in the real-world. The article examines how *Westworld* might work in practice, demonstrating that the concepts underpinning it are not so very far removed from our present-day common experience of law in Australia.

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**HUMAN DIGNITY AND THE AUSTRALIAN CONSTITUTION – A CRITIQUE**

Bede Harris*

Today dignity is referred to as the foundational value of human rights documents and of the constitutions of several jurisdictions, in particular those of Germany and South Africa, where it is expressly recognised not only as a substantive right but also as an interpretative principle governing the entire constitution. In contrast to these values-based constitutions, the Commonwealth Constitution is ‘value-less’ in that it was drafted as a pragmatic response to competing claims of the colonies that would form the Australian federation, rather than in accordance with any over-arching theory of the relationship between the individual and the state. This anti-theoreticism continues to be reflected in the way in which the Constitution has been interpreted by the courts. Respect for human dignity is a universal entitlement, and the failure of the Constitution to provide protection for it imposes a moral duty on legal academics to encourage their students to think about the ways in which the Constitution should be reformed.

**I  INTRODUCTION**

This article examines the concept of human dignity as a fundamental legal value and then discusses the extent to which the Constitution is consistent with that value.

Part II examines the concept of dignity in Ancient Rome, both in its broadest jurisprudential sense as a value underlying all law, and in the sense of a private right that could be vindicated by means of a civil action. This Part also discusses the way in which dignity jurisprudence was developed in the Roman-Dutch legal system of South Africa. Part III discusses how Renaissance and Enlightenment concepts of human dignity provided a foundation for natural rights, which in turn led to dignity becoming the value upon which international human rights documents were based. Part IV discusses 20th century jurisprudential writings on human dignity, with a focus on the McDougal-Lasswell school. Part V illustrates the role of dignity in the constitutional law of Germany and South Africa and the effect it has had on constitutional interpretation. Part VI argues that constitutional debate in Australia has been marked by a profound anti-theoreticism, reflected in the absence at the Constitutional Conventions of the 1890s of debate on the question of what values the Commonwealth Constitution should be founded on, a phenomenon which is still evident today. Part VII critiques the Commonwealth Constitution in light of human dignity, with a particular focus on protection of human rights. The article ends with Part VIII which calls for
transformative action by the legal community in order to press for reform which will make our constitutional order consistent with human dignity.

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II DIGNITY IN ROMAN AND ROMAN-DUTCH LAW

A Roman law

The earliest references\(^1\) to dignity are found in Ancient Rome,\(^2\) where dignity had two distinct meanings. The first was the philosophical concept articulated by Cicero that all human beings were entitled to dignity by virtue of their capacity to use reason,\(^3\) and were therefore bound by an obligation of mutual respect:\(^4\)

\[
\text{... nature prescribes that a human being should be concerned for a human being, whoever he may be, for the very reason that he is a human being.}
\]

This concept influenced Roman thinking on the nature of law. Roman jurisprudence distinguished between *ius naturale* (rules of conduct prescribed by natural reason) *ius gentium* (law agreed upon by mankind as a whole, from which individual societies varied to a greater or lesser extent) and *ius civile* (the law of Rome itself).\(^5\) Thus Roman jurists recognised that slavery, for example, was not permitted by *ius naturale* even though it was permitted under *ius civile* and *ius gentium*.\(^6\) However, despite these philosophical insights, it would be anachronistic to equate the Romans’ conception of *ius naturale* with natural rights recognised in later centuries. Nor did the idea that the universal set of values contained in *ius naturale* have any practical impact on Roman law – there was nothing in Roman law akin to human rights in the sense of interests that restrained the power of the state over the individual.

The second meaning of dignitas was a personal interest recognised by the law of delict (or civil wrongs) which could be vindicated by means of a civil action, the *actio injuriarum*.\(^7\) The *actio injuriarum* protected three interests: *corpus* (bodily integrity), *fama* (reputation) and dignitas (dignity).\(^8\) While the action to remedy infringements of *corpus* has its obvious equivalent in the English common law actions for assault and battery, and the action to remedy *fama* parallels the common law action for defamation, the action to remedy dignitas has no equivalent in English common law. What then was meant by dignitas? Key to answering this question is an understanding that, as is stated by Neethling, Potgieter and Visser:

\[
\text{... although one may identify ... corpus and the fama as independent personality rights with a more or less fixed meaning, the same cannot be said of dignitas...}
\]


\(^2\) For a discussion of dignity in Stoic philosophy, see Miriam Griffin, ‘Dignity in Roman and Stoic Thought’ in Remy Debes (ed), Dignity – A History (Oxford University Press, 2017) 47.

\(^3\) Cicero *De Officiis* 1. 105-107 (Walter Miller trans, William Heinemann, 1913). For a detailed discussion of Cicero’s references to dignity see Scott Shershow, Deconstructing Dignity (Chicago, University of Chicago Press, 2014) 58-60.

\(^4\) Cicero *De Officiis* 3. 27. See also *De Officiis* 3.21, where Cicero stated

\[
\text{For one person to take something from another, and to increase one’s own advantage at the cost of another’s advantage, is more contrary to nature than death...}
\]

\(^5\) Justinian *Institutes* 1.2.pr.-2. The Institutes of Justinian [John Moyle trans (Clarendon Press, 1913)].


\(^7\) Authority for the *actio* is found in the Digest of Justinian at D 47.10.1.2. Digest of Justinian [Theodore Mommsen, Paul Kreuger and Alan Watson trans (University of Pennsylvania Press, 1985)].

Dignitas was a collective term for all personality interests, excluding corpus and fama, which in Roman law had not yet been clearly distinguished and independently delimited.\(^9\)

The inherent flexibility of the action for impairment of dignitas thus enabled it to be used to provide a remedy for a wide range of harmful conduct. For example, the Justinian’s Digest stated that impairment of dignitas could be occasioned by invasion of privacy taking the form of following a person\(^10\) or by interfering with freedom of movement by obstructing a person in a public place.\(^11\)

### B Roman-Dutch law

The actio injuriarum survived into the modern era in jurisdictions whose legal systems were founded on Roman law, in particular in South Africa, where the actio was available in that country’s Roman-Dutch legal system. The circumstances in which dignitas was found to have been impaired were expanded through case law,\(^12\) to include conduct such as stalking,\(^13\) indecent exposure,\(^14\) sexual harassment,\(^15\) breach of privacy\(^16\) as well as sexist\(^17\) and racist\(^18\) verbal insult.

As already noted, in Ancient Rome the concept of dignitas as vindicated by the actio injuriarum was a purely private law interest, and Roman law lacked any concept of fundamental rights. However commentators in South Africa came to recognise the potential of dignitas to be developed as a foundation for public law rights. The leading exponent of this view was Burchell, who pointed to the fact that the actio injuriarum had been used to remedy impairments of dignitas taking the form of unlawful arrest,\(^19\) unlawful detention\(^20\) and malicious prosecution.\(^21\) Liability under the actio injuriarum was also found in cases where a defendant removed property belonging to a plaintiff and destroyed huts belonging to him\(^22\) and restricted a plaintiff’s freedom of movement.\(^23\) Impairment of dignitas held to have arisen from a failure to adhere to procedural rights, taking the form of unlawful expulsion from an educational institution,\(^24\) summary ejectment from a meeting of a local government body contrary to that body’s by-laws,\(^25\) failure by a subordinate legislature to adhere to correct procedure,\(^26\) denial of the right to consult an attorney after arrest\(^27\) and the subjection

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\(^9\) Johann Neethling, Johannes Potgieter and P.J. Visser, Deliktereg (Butterworths, 1991) 14.
\(^10\) D 47.10.15.19 and D 47.10.15.22.
\(^11\) D 47.10.13.7.
\(^12\) Note some examples of injuriae come from criminal cases. This is because in South Africa impairment of dignity can also be prosecuted as a criminal offence (crimen injuria), the only difference being the criminal standard of proof applies.
\(^13\) Epstein v Epstein 1906 TH 87.
\(^14\) R v Kobi 1912 TPD 1106.
\(^16\) R v Holliday 1927 CPD 395.
\(^17\) Whittington v Bowlles 1934 EDL 142
\(^18\) S v Bugwandeen 1987 (1) SA 787 (N) and S v Tanteli 1975 (2) SA 772 (T).
\(^19\) Smit v Meyerton Outfitters 1971 (1) SA (T) and Areff v Minister van Polisie 1977 (2) SA 900 (A).
\(^20\) “Manase v Minister of Safety and Security and Another” 2003 (1) SA 567 (Ck).
\(^21\) Moaki v Reckitt and Coleman (Africa) Ltd 1968 (3) SA 98 (A) and Prinsloo v Newman 1975 (1) SA 481 (A).
\(^22\) Smith, N.O. and Lardner-Burke, N.O. v Wonesayi 1972 (3) SA 289 (RAD).
\(^23\) Sievers v Bonthuys 1911 EDL 525
\(^24\) Tiffin v Cilliers 1925 OPD 23, Schoeman v Fourie 1941 AD 125. See also McKerron, supra n. 917 at 53.
\(^25\) Course v Household (1909) 30 NLR 188.
\(^26\) Engelbrecht v Voorsitter, Wetgewende Vergadering van Suidwes-Afrika 1973 (1) SA 52 (SWA).
\(^27\) Whittaker v Roos and Bateman 1912 AD 92.
of a detainee to severe and prolonged interrogation.\(^{28}\) Most significantly in the context of South Africa, racial discrimination was held to constitute impairment of \textit{dignitas},\(^{29}\) and thus the incompatibility between racial discrimination and Roman-Dutch common law necessitated legislative over-ride of the common law when apartheid was implemented.\(^{30}\)

What the cases in the preceding paragraph have in common is that they indicated that \textit{dignitas} protects interests which are also classifiable as human rights. On this basis Burchell argued that\(^{31}\)

\begin{quote}

The role of the law of delict in the protection of human rights and fundamental freedoms is usually regarded as peripheral. However, there is a vast, as yet virtually unexploited, potential within the law of delict for the protection of these rights and freedoms.
\end{quote}

Later in the same work he stated that\(^{32}\)

\begin{quote}

I hope I have succeeded in demonstrating the immense potential for the furthering of human rights and fundamental freedoms that lies hidden within the \textit{actio injuriarum}. A liberal interpretation of dignity, analogous to the meaning given to the concept in the Universal Declaration of Human Rights and the European Convention on Human Rights, and reflected in many aspects of the Freedom Charter, would provide a key to these hidden riches. As Joseph Raz says ‘...respecting people's dignity includes respecting their autonomy, their right to control their future’. An insult, according to Raz, offends a person's dignity when it 'consists of or implies a denial that he is an autonomous person or that he deserves to be treated as one'.
\end{quote}

The conclusion one can draw then is that the principle underlying the Roman action for impairment of \textit{dignitas} – respect for the autonomy and personhood of the individual in all its dimensions – were the same as those which underlie dignity as it has come to be understood in the modern era.\(^{33}\) Familiarity with dignity as an actionable interest under Roman-Dutch common law proved an advantage to the courts when they came to interpret South Africa's post-apartheid constitution, in which dignity was made a founding principle.\(^{34}\) This is discussed in Part V.

\(^{28}\) \textit{Van Heerden v Cronwright} 1985 (2) SA 342 (T).
\(^{29}\) \textit{Purshotam Dagee v Durban Corporation} 1908 NLR 391.
\(^{32}\) Ibid 18.
\(^{33}\) The connection between the Roman concept of \textit{dignitas} and dignity in modern jurisprudence has also been made by scholars outside South Africa – see Stéphanie Hennette-Vuach\end{quote} e, ‘A human \textit{dignitas}? Remnants of the ancient legal concept in contemporary dignity jurisprudence’ 2011 (9) \textit{International Journal of Constitutional Law} 32.
\(^{34}\) \textit{Republic of South Africa Constitution Act} No 108 of 1996, s 1(a).
III THEORIES OF DIGNITY DURING THE RENAISSANCE AND THE ENLIGHTENMENT

The modern view of dignity originated during the Renaissance and was given its classic exposition in Pico della Mirandola’s *Oration on the Dignity of Man.*35 This work was significant for its departure from the medieval view in terms of which human dignity was seen in theistic terms, justified by reference to the Biblical statement that man was created in the image and likeness of God.36 According to that earlier view, there was nothing inherently worthwhile in the human being as such - human worth derived from, and was measured against, a standard set by the Creator. Such unique qualities as were exhibited by human beings and separated them from the rest of creation proceeded from the fact that human beings were created by God and shared certain divine qualities.

By contrast, della Mirandola adopted a humanistic approach, which grounded human worth in rational free will which, although ultimately derived from the creator, served to place human beings in a *parallel* position with God in that, enjoying the autonomy of choice that free will gives, human beings can choose to do either good or evil without reference to the will of God - and indeed, in *contravention* of the will of God.37 Autonomy based on free will also separated humans from the rest of creation, which lacked the faculty of reason. It is this inherent specialness that constituted the dignity of humankind. In terms of this analysis it follows that interference with human potential to exercise and act in accordance with free will constitutes an offence against dignity.

The Renaissance concept of free will and autonomy as the foundation of human dignity formed an important part of Enlightenment philosophy and, most importantly, led to the development of the theory of natural rights because, having accepted that free will is the essence of human dignity, it was a logical step to argue that it was necessary to guarantee rights in order to secure for individuals the autonomy to act in accordance with that will.

Key to the development of the idea of dignity as autonomy forming the basis of individual rights was the contribution of Immanuel Kant, who wrote that ‘Autonomy is the ground of the dignity of human nature and of every rational creature,’39 from which he derived rationalist theory of rights, emphasising the person as an end as opposed to a means - in other words, that the inherent dignity of each person makes it impermissible for one person to be subordinated to another or to be prevented by that other from exercising their free will.40 Kant also identified equality as a crucial link in the chain from the ‘is’ (the individual has a quality - dignity - which derives from his uniqueness as an autonomous being endowed with free will ) to the ‘ought’ (the individual should be guaranteed rights to prevent interference with that autonomy).41

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36 Genesis 1: 26-27
37 Above n 35, 4-5. See also Nathan Rotenstreich, *Man and his Dignity* (Magnes Press, 1983) 49-54.
38 In general see Rotenstreich, Ibid, 141.
40 Ibid. 161-2.
41 Thus, as Rotenstreich, above n 37, 133 states

Suppose that we adopt the view that the desire for destruction is an expression of creativity and, to that extent, accords with the notion of human dignity. That desire implies the annihilation or disregard of one’s fellow man both in the singular and in the plural. However, man’s awareness of his dignity is joined by his awareness that dignity is not a quality of his, or of Paul or Peter, only, but is an attribute of man *qua* man. In this sense the awareness of human dignity presupposes a step beyond one’s personal
arguing that once one asserts that inherent dignity as a human being entitles one to freedom of action, one is logically bound to recognise that freedom in all other human beings as well, and from the ‘is’ of one’s own dignity proceeds the ‘ought’ of respecting the dignity of others. The onus of justification thus no longer rests on the person who asks why the dignity of others should be respected, but rather on the person who, having laid claim to their own dignity, seeks to trench upon the dignity of others. The concept of equality thus provides the link between dignity and natural rights - since dignity is inherent in being human, all human beings must be entitled to it, and thus each human being has the right to have his or her dignity respected by all other human beings. Thus as Rotenstreich points out, Kant held that although man has unique dignity qua man, no individual is ‘more unique’ than any other, that each human being’s dignity must be accorded equal respect. This led Kant to his famous injunction at one should Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never as a means but always at the same times as an end.

Useful as these theoretical developments were, it was only in the wake of the human rights abuses that occurred during World War II that dignity came to be recognised as a legal, and not only philosophical, concept.

**IV DIGNITY IN THE MODERN ERA**

**A Dignity in international rights documents**

The increasing recognition given to rights in the twentieth century spurred in the wake of the crimes against humanity committed during World War II by a determination not to permit state sovereignty to over-ride individual rights, led to dignity being recognised as a foundational value in international and domestic human rights documents. The United Nations Charter states that human dignity is an ideal that the members of the United Nations are determined to achieve, and this is reflected in the 1948 *Universal Declaration of Human Rights* which in its preamble states:

> Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...

Furthermore, Article 1 of the Declaration provides that

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42 For a general discussion of autonomy, including Kant’s contribution, see Joel Feinberg, *Harm to Self* (Oxford University Press, 1986) 27-51.
44 Rotenstreich, above n 37, 149.
45 Kant, above n 39, 106-7.
46 For an overview of the foundational role of dignity see Mary Neal ‘Respect for human dignity as ‘substantive basic norm’ (2014) 10 *International Journal of Law in Context* 26.
47 The *Charter of the United Nations* of 26 June 1945 (UNCIO xv 335) states in its preamble that signatories are "determined...to reaffirm faith in fundamental human rights" and "in the dignity and worth of the human person".
48 GA Res. 217 A (III) of 10 December 1948.
All humans are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Both these provisions clearly owe much of their intellectual heritage to the Enlightenment view of the inherent dignity of human beings, of the equal freedom that that dignity implies, and of the consequent entitlement of each human individual to fundamental rights. Dignity is also protected by the International Covenant on Civil and Political Rights, and Article 13 of the International Covenant on Economic, Social and Cultural Rights.

### B Dignity in modern legal theory

Several legal philosophers have pointed to dignity as the foundational value of law, including Fuller, Raz and Waldron. Of particular note, because of its specific focus on dignity, was the development by McDougal and Lasswell of a school of thought at the cornerstone of which was the ideal of 'deference for the dignity and worth of the individual.' In developing their jurisprudence, McDougal and Lasswell stated that the

...supreme value of democracy is the dignity and worth of the individual; hence a democratic society is a commonwealth of mutual deference...

and in their search for ‘the primary postulate[] of public order, infusing and transcending all particular communities’, they identified

...The comprehensive set of goals which, because of many heritages, we recommend for clarification and implementation are, as already suggested, those which are today commonly characterised as the basic values of human dignity, or of a free society. These are the values bequeathed to us by all the great democratic movements of mankind and being very more insistently expressed in the rising common demands and expectations of peoples everywhere.

Thus according to this view, dignity was the ultimate value which human rights were to serve. As Paust expressed it, the McDougal-Lasswell school identified dignity as the ‘high level abstraction’ which would be given concrete expression through the satisfaction of people’s expectations that rights would be protected. In subsequent

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49 GA Res 2200A (XXI) of 16 December 1966. The Preamble states that “rights derive from the inherent dignity of the human person”, while Article 10 provides: ..[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

Article 10 of the Covenant is also reproduced as Article 5 of the American Convention on Human Rights.

50 GA RES 2200A (XXI) of 16 December 1966. This article states in part that...education shall be directed towards the full development of the human personality and the sense of its dignity

51 Lon Fuller, The Morality of Law (Yale University Press, 1964), 162.


55 Ibid 212.


57 Ibid.


59 Jordan Paust, ‘Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry
writings, McDougal, Lasswell and Chen identified specific rights that respect for human dignity would guarantee.\textsuperscript{60}

Also worthy of mention in this context is Rawls, because although his theory of justice was not explicitly based on human dignity, a legal system which was based on the principles he developed would manifest the same features as one based on dignity. In seeking to answer the question of whether there were any values that were truly universal in their application Rawls conceived the idea of what he called the ‘original position’ - a hypothetical exercise in which a random group of people would be invited into a room and asked to agree on a set of fundamental rules for a society that they would then live in once they left the room.\textsuperscript{61} The key constraint under which they worked, however, was that they were behind what he called a ‘veil of ignorance’.\textsuperscript{62} In other words, they were not told what their condition would be in the new society - whether they would be man or woman, black or white, rich or poor, Muslim or Christian, heterosexual or homosexual, fully-abled or disabled et cetera – until after they had devised the fundamental rules.

Rawls concluded that in a situation where ‘no one knows his place in society, his class position or social status; nor does he know his fortune in the distribution of natural assets and abilities, his intelligence and strength, and the like’,\textsuperscript{63} rational participants would agree on what he called the ‘liberty principle’, namely that each person should have the fullest degree of liberty as is consistent with everyone-else’s equal liberty\textsuperscript{64} and that social and economic opportunities should be arranged so as to be of greatest benefit to the least advantaged and so that there is equality of opportunity (the ‘equality principle’).\textsuperscript{65} The liberty principle echoes Kant’s idea of autonomy, while the equality principle reflects the 20\textsuperscript{th} century idea that respect for human dignity requires not only that the state refrain from arbitrary limitations on individual autonomy but also that it provides protection for the socio-economic wellbeing of its citizens, a theme that is discussed in the context of South African constitutionalism in Part V.

\section*{C \textbf{Implications for constitutional law}}

Human dignity obviously has particular implications for constitutional law, given that it is the constitution which determines the balance of power between the individual and the state. This is emphasised by McCrudden, who states that dignity contains three essential elements: the intrinsic worth of all human beings; the recognition and respect of that intrinsic worth by others; and the state’s duty to protect human rights.\textsuperscript{66} It is the third element that is important here – without it, dignity remains merely a theoretical concept, devoid of practical meaning.

I argue that two constitutional principles flow from this: First, since dignity is inherent in people and is not the gift of the state, it follows that it cannot be taken away by the state.\textsuperscript{67} Second, since dignity requires respect for human autonomy, human dignity gives rise to a positive obligation to provide textual protection in the constitution for autonomy. In its broadest sense, autonomy encompasses the full range of human activities – being at liberty, moving from place to place, expressing an opinion, seeking

\begin{itemize}
  \item[\textsuperscript{60}] See, in general, Myers McDougal, Harold Lasswell and Lung-chu Chen, \textit{Human Rights and World Public Order} (Yale University Press, 1980).
  \item[\textsuperscript{62}] Ibid 136–42.
  \item[\textsuperscript{63}] Ibid 137.
  \item[\textsuperscript{64}] Ibid 60.
  \item[\textsuperscript{65}] Ibid 60 and 303.
  \item[\textsuperscript{67}] Rinie Steinmann ‘The Core Meaning of Human Dignity’ (2016) 19 \textit{Potchefstroom Electronic Law Journal} 1, 17.
\end{itemize}
privacy et cetera – and from this flows an obligation to protect the right to do these various things. It is therefore incorrect to think of rights as individual entitlements. All rights are ultimately traceable back to human dignity, and each right is just a specific manifestation of the autonomy that dignity implies.\textsuperscript{68} So if one poses the question as to why one should protect freedom of expression, for example, the answer is that exercising freedom of expression is an aspect of individual autonomy and that if the state was to abrogate that freedom, that would amount to an impairment of the that person’s entitlement to dignity. The answer would be the same if one posed that question in relation to any other right. As Barroso states,\textsuperscript{69}

> As a fundamental value and a constitutional principle, human dignity serves both as a moral justification for and a normative foundation of fundamental rights.

The protection of any and all rights thus ultimately serves to uphold human dignity, and human dignity requires that all rights be given equal protection. There is no logically defensible justification for protecting some rights and not others. This is what is meant by the ‘indivisibility’ of rights – that because all rights are based on human dignity, one cannot pick and choose which rights to protect. No right is to be preferred above any other, and all rights are entitled to protection.

V DIGNITY IN MODERN CONSTITUTIONAL SYSTEMS – GERMANY AND SOUTH AFRICA

The constitutions of many countries refer to dignity either as a founding principle or as a discrete justiciable right. Here there is space to focus on two, those of Germany and South Africa, which are particularly significant in that both were written in the wake of the demise of regimes which were notorious for their denial of human dignity. This historical experience led to a determination in both countries to ensure that their constitutions be founded on dignity.

A Germany

The German constitution\textsuperscript{70} was consciously designed with human dignity at its foundation. As Eberle, states\textsuperscript{71} the constitution

> is a value-oriented constitution that obligates the state to realize a set of objectively ordered principles, rooted in justice and equality that are designed to restore the centrality of humanity to the social order, and thereby secure a stable democratic society on this basis. These values are not to be sacrificed for the exigencies of the day, as had been the case during the Nazi time.

The centrality of dignity in the German constitutional order is signalled by the fact that the opening provision (Article 1(1)) states that

> Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

Article 1(2) then states that

\textsuperscript{68} For a comprehensive analysis of the relationship between human dignity and individual rights see K. S. Puttaswamy v. Union of India Writ Petition (Civil) No. 494 of 2012 (Sup. Ct. India Aug. 24, 2017) [40-6] and [96 – 107].


\textsuperscript{70} The Basic Law of the Federal Republic of Germany 1949.

The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.

The use of the word ‘therefore’ is important, because it shows that, in the mind of the drafters, dignity could not be upheld unless fundamental rights were protected. Rights are thus the ‘tangible manifestations’ of human dignity. The Basic Law goes on to protect a range of fundamental freedoms in Articles 2 – 19. Most of these freedoms echo those protected by the Universal Declaration of Human Rights, but one is unique and reflects the particular approach to constitutional law in Germany: Article 2(1) states that

Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.

What this provision does is to give protection to the broad right of individual autonomy – what could be described as the freedom to be free - which, as discussed earlier in this article, is, along with equality, the key justification for human dignity in the Kantian sense. Thus in the Lüth case, the German constitutional court stated that

This system of values, centring on the freedom of the human being to develop in society, must apply as a constitutional axiom throughout the whole legal system: it must direct and inform legislation, administration, and judicial decision.

Kantian philosophy was also echoed in the Life Imprisonment Case, where the constitutional court stated

It is contrary to human dignity to make the individual the mere tool of the state. The principle that “each person must always be an end in himself” applies unreservedly to all areas of the law; the intrinsic dignity of the person consists in acknowledging him as an independent personality.

However, dignity has a role that goes beyond the protection of basic rights. It operates as the most important interpretative rule applied by the courts. As Eberle states, it infuses throughout the whole constitutional order, obligating the state both to protect and realize it. For this reason then, it would be true to say that the Basic Law should not be seen as its own justification – rather it was designed as a vehicle to give effect to the value of human dignity, standing above and outside the law.

B South Africa

The South African constitution, like that in Germany, is based on human dignity, as has been explicitly noted by South Africa’s Constitutional Court. The dignitarian basis of the constitution is evident in s 1, which states

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

72 Ibid 206.
73 Ibid 204.
74 BVerfGE 198, 205 (1958).
75 See also the Elfes Case 6 BVerfGE 32, 36-41 (1957) in which the constitutional court held that the right to development of personality empowers a person to do as they desire, provided that they do not interfere with the same right of others.
76 45 BVerfGE 187, 228 (1977).
77 Eberle above n 71, 206.
78 Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC) [54].
80 Ibid s 1(a).
(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

Chapter 2 of the constitution protects a wide range of political, social and economic rights, within which dignity is accorded protection as a free-standing right in s 10, which states that

Everyone has inherent dignity and the right to have their dignity respected and protected.

In the decades since the post-apartheid constitution came into force, the courts have used dignity as a touchstone value in interpreting the constitution as a whole. Thus in *Carmichele v Minister of Safety and Security*, the Constitutional Court held that

[our] constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective normative values system.

Experience in developing the Roman-Dutch law interest of *dignitas* has given the courts an advantage in elucidating the meaning of dignity in the constitutional sense – bearing out the argument discussed in Part II that the theory underlying private law concept of *dignitas* overlapped with the public law concept of human rights.

The concept of human dignity has been used to interpret a wide range of rights protected by South Africa’s bill of rights. Among the first of these were those in which capital punishment and corporal punishment were declared incompatible with the right not to be subject to cruel, inhuman or degrading punishment. Human dignity was also used in interpreting provisions protecting individual freedom (in the sense of liberty of the person), the right to a fair trial and freedom of expression. It was referred to as an interpretative principle when the Constitutional Court held that criminalisation of same-sex intercourse breached constitutional rights to equality and privacy, that prisoners retained the right to vote as a ‘badge of dignity and personhood,’ and that the prohibition of same-sex marriage infringed the right to equality.

One of the most progressive features of the South African constitution is its protection of socio-economic rights, which indicates that its transformative purpose was the achievement of equal worth not only in the sense of freedom but also in the sense of substantive equality. In other words, the constitution embodies the view that a person cannot be said to live in dignity if their most basic needs are not met. The relationship between human dignity and socio-economic equality has been explored in

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81 2001 (4) SA 938 (CC) [54].
82 *S v Makuwanyane* 1995 (3) SA 391 (CC).
83 *S v Williams* 1995 (3) SA 632 (CC).
84 See *Ferreira v Levin* 1996 (1) SA 984 (CC) and *Bernstein v Bester* 1996 (2) SA 751 (CC).
85 *S v Basson* 2005 (1) SA 171 (CC).
86 See *Khumalo v Holomisa* 2002 (5) SA 401 (CC) and *Laugh It Off Promotions CC v South African Breweries international (Finance) BV t/a Sabmark International* 2006 (1) SA 144 (CC).
87 National Coalition for Gay and Lesbian Equality *v Minister of Justice* 1999 (1) SA 6 (CC).
88 *August v Electoral Commission* 1999 (3) SA 1 (CC) [17] (Sachs J).
89 *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC).
91 Steinmann, above n 67, 6-7.
several cases, most notably in the early case of Republic of South Africa v Grootboom,92 a case involving the constitutional right to housing, in which Yacoob J held that93

[t]here can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter.

The fact that dignity was used to give meaning to so wide a range of rights illustrates the point made at the end of Part IV that each right is, ultimately, a dimension of human autonomy and thus of human dignity. Dignity is, therefore, the parent value from which every human right descends.

VI VALUES AND THE ORIGINS OF THE AUSTRALIAN CONSTITUTION

Both the German and South African constitutions explicitly embody dignity as a normative value and are interpreted in accordance with that value. This stands in striking contrast to the Commonwealth constitution. Indeed, a characteristic of debate on constitutional matters in Australia is the absence of discussion of what fundamental value does, or should, underlie the Constitution. This represents a failure in Australian constitutionalism which has negative consequences for constitutional development. Unless decisions about the direction in which the Constitution will be developed (or indeed whether it will be developed at all) are founded upon values, those decisions will be determined by the powerful and, because they are not developed in accordance with an underlying theory, will also suffer from the defect of inconsistency. In other words, unless we take the conscious first step of debating and agreeing upon the meta-framework that should govern law, the law we produce (or maintain) will either be ethically deficient (if it is based on the wrong values) or contradictory (if partly based on good values and partly not).

The aversion to discussing values is deeply rooted in Australian constitutionalism. Its origins lie in the constitution-making process that took place during the constitutional Conventions of the 1890s, from which philosophical debate was largely absent. The focus of the delegates to the Conventions was ruthlessly pragmatic - indeed one could say anti-theoretical - and was concentrated on practical issues of trade and commerce, inter-State relations and Commonwealth-State relations, rather than on questions such as what values should underlie the Constitution and what balance should be struck between the power of the state and the autonomy of the individual.

Yet it would be a mistake to think that, because debate on values was conspicuously meagre at the Conventions, that the Commonwealth Constitution is not founded on values. All law embodies values. Even if those values are not expressed, they subsist nonetheless, because in the absence of the formulation of a new set of values, the position which is impliedly accepted – what might be called the unarticulated premise - is that the prevailing values of society, and the power relationships they embody, will continue to operate. In other words, in the absence of any enunciation of new values, existing values apply by default.

The values upon which the new constitution was based were those of 19th century British constitutionalism which had been inherited from the United Kingdom and which convention delegates unquestioningly assumed should underpin the Commonwealth constitution. The key elements of British constitutionalism were an hereditary monarchy, with executive power wielded by a government responsible to a

92 Government of the Republic of South Africa v Grootboom 2001 (1) SA 46, [23].
93 Ibid [83]. See also Soobramoney v Minister of Health (Kwa-Zulu Natal) 1998 (1) SA 765 (CC).
parliament elected on a restricted franchise. Parliament was not subject to any restrictions on how it might legislate. The concept of the ‘rule of law’ offered a degree of protection for individual liberty, in that courts operated independently of the executive and in accordance with a degree of procedural fairness. However that protection was inherently susceptible to variation – parliament could, and did, legislate in such a way as to take away such freedoms as the rule of law was said to imply. The received constitutionalism had developed out of an interplay between forces of the crown and parliament in the 17th century, and was the result of a pragmatic political compromise reached at the end of a tumultuous period of civil war, not as the result of the implementation of any overarching theory. One can therefore describe the system as one of democratic positivism – it was democratic, but only because society had developed in a democratic manner, and there was no principle which could prevent anti-democratic measures being adopted nor any mechanism which restrained the power of parliament to legislate in an unjust manner.

The absence of any questioning of the theory underlying to their inherited British institutions meant that when the Australian colonists debated their constitutional arrangements, they thought there to be nothing wrong in providing that the States should be allowed to keep in force laws which restricted the franchise based on gender, race and property-ownership. Nor did they consider there to be anything wrong in rejecting a proposal that the constitution should contain a right to due process, it being argued that since such a right could be read as requiring equality before the law, it would prevent the Commonwealth from discriminating against Asian and Indigenous people.94

Despite piecemeal changes to the Constitution, it has never undergone wholesale reform in its 120 year history. The most recent public inquiry into reform was initiated in 1985 and led to the publication in 1988 of the Final Report of the Constitutional Commission.95 This document was excellent for its breadth of coverage of constitutional issues, yet none of its recommendations were implemented. Furthermore, as is illustrated in Part VII, such debate as there is on constitutional reform is conducted largely without reference to values.

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VII A CRITIQUE OF THE COMMONWEALTH CONSTITUTION FROM THE STANDPOINT OF HUMAN DIGNITY

What observations can one make if one analyses the Commonwealth Constitution for its consistency with human dignity?

A Absence of an underlying value

The first and most obvious point to make is that because the Constitution lacks any reference to dignity – indeed to any value – the courts have no criteria, other than conformity with the text of the Constitution, against which to measure the validity of legislation and the wielding of executive power. The Constitution is what might be referred to as a ‘values-free zone.’ Constitutional interpretation is therefore purely mechanical – essentially statutory interpretation writ large – in which normative restraints have no role. This was most starkly demonstrated by the High Court’s decisions in Al-Kateb v Godwin\(^\text{96}\) in which it held that the Constitution did not prevent the government from holding a person in so-called ‘non-punitive’ immigration detention \textit{ad infinitum}, and Behrooz v Secretary, Department of Immigration, Multicultural and Indigenous Affairs,\(^\text{97}\) in which it held that even if the conditions in which a person was being held were inhumane, that fact did not alter the supposed non-punitive nature of the detention.

Although reference is commonly made to ‘democratic values’ both in academic writing and in case law as a value underpinning the Constitution, this serves to obscure rather than advance constitutional analysis. This is because it confuses a process (democracy) with a justification for that process (which must be some value other than democracy itself). In dispelling this confusion it is critical to recognise that democracy itself is not a value – it is just one among several possible mechanisms for law-making, such as autocracy and oligarchy or any other process of rule-formulation one might think of. The idea that democracy can serve as a fundamental value suffers from a fatal flaw: The proposition that all questions be determined by majorities of voters (as represented in the legislature) is itself sustainable only if one accepts the proposition that voting and all the other rights required for democracy to function ‘ought’ to be protected. But why is that? Why \textit{should} law-making be determined by democratic processes? Other systems of government such as enlightened despotism are arguably more efficient. The answer of course is that people are entitled to participate in law-making because respect for their autonomy and equality requires it. In other words, the qualitative difference between democracy and other systems is that it allocates equal political power to each person, thereby respecting their equal worth – which is the principle which lies at the core of human dignity. Thus, democracy is preferable not because of any practical benefit inherent in it because it serves a value \textit{external to itself}, namely human dignity. The term ‘democratic values’ should therefore be avoided, because it suggests that democracy itself is a value, whereas democracy can be justified only by something (the value of human dignity) which lies above democracy.

Since democracy is a product of, and is subordinate to, human dignity, it becomes apparent why crude majoritarianism cannot serve as the foundation for the constitutional order. An example illustrates this: During the apartheid era, the South African parliament, for which only the white population (which amounted to 20% of the total) could vote, enacted racially-discriminatory legislation which determined where the remaining 80% of the population could live, work, go to school and even whom they could marry or have sexual relations with. This racist legislation was supported by a range of other Acts which infringed civil liberties and suppressed dissent. South Africa was rightly condemned on the ground that this legislation infringed numerous fundamental rights. But was apartheid objectively wrong or wrong?


only because it was implemented by a minority against a majority? What if whites had amounted to 51% of the population? Would those same racist laws have then been unobjectionable because they were supported by a majority? In other words, were the laws inherently wrong, or were they wrong only because they did not enjoy the support of a majority of South Africans? Obviously, the answer is such laws were inherently wrong because of the unjust effect they had on those subject to them – an effect on its victims which would have been equally unjust, irrespective of whether they constituted 80% or 49% of the population. In other words, it is the content of the law, not how many people support it, that determines whether it is just or unjust. Although a law made in a democracy may be less likely to infringe human rights than one made by an absolute monarch - if only because democratic law-making involves debate during which human rights considerations can be ventilated - it is entirely possible for an absolute monarch to make a just law and for a democratic majority to make a profoundly unjust one. Thus it is the content of the law, not the manner by which it is mad, that ultimately determines whether it is consistent with human dignity.

This is why it is important for a constitution not only to expressly state that it is founded upon human dignity and that it should be interpreted in accordance with that value, but also that it should subordinate all power – including democratic power manifested through parliamentary law-making – to a restraint which enables effect to be given to the supremacy of human dignity which, as has been discussed earlier, can be achieved only through the inclusion in the constitution of a bill of rights.

B Insufficient express protection for human rights

This leads us to the second shortcoming in the Commonwealth Constitution - its failure to provide comprehensive protection for the broad range of human rights that are recognised in international human rights documents. This is despite the fact that Australia has ratified a range of such documents, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

Such rights as the Constitution does protect were included as a pragmatic response to political controversies which needed to be settled in order to gain the consent of the colonies to federation, rather than out of recognition of inherent human dignity. Thus s 51(3xxi) (requiring just terms compensation for the acquisition of property), s 117 (requiring equal treatment of residents of different States) and s 92 (protecting freedom of inter-State trade, commerce and intercourse) all addressed apprehended abuses of Commonwealth powers by the States or by the States vis-à-vis each other. The prohibition of religious discrimination in s 116 reflected a concern that in an era of sectarian tensions between Catholics and Protestants, no religious group be able to dominate the institutions of government. Only the s 80 requirement of jury trials for indictable Commonwealth offences is conceivably identifiable as a provision protecting fundamental rights, yet it can easily be circumvented simply by the way in which the Commonwealth Parliament classifies offences as either summary or indictable.

Beyond that, the Constitution offers no express protection to rights. Despite the fact that Australian Attorney-General and Foreign Minister H. V. Evatt had played a key part in the drafting of the Universal Declaration of Human Rights in his role as President of the General Assembly, the Menzies government elected in 1949 rejected the idea of a domestic bill of rights, among other reasons because it might lead to litigation by Indigenous Australians contesting the discrimination to which they were subject – notably the same ground upon which the idea of a right to due process had been rejected at the constitutional Conventions. Subsequent Australian governments have maintained opposition to the inclusion of a bill of rights into the constitution, and

have been openly hostile to the United Nations when it has criticised human rights breaches. Some ministerial statements have, unfortunately, echoed what used to be said of the United Nations by South African politicians during the apartheid era.

Several unsuccessful attempts have been made to insert new rights into the Constitution. In 1944 a proposal to make the s 116 protection for freedom of religion applicable to the states and to incorporate freedom of expression in the Constitution failed. In 1988, following on the recommendation by the Constitutional Commission that a new chapter be inserted into the Constitution protecting a wide range of rights, the government responded with a proposal limited to expanding the s 116 right to religious freedom and the s 51(xxi) requirement for just terms compensation when property is acquired so as to make them applicable to the states, and incorporating in the Constitution an express right to vote and a requirement that all electorates have an equal number of voters. Both proposals were defeated.

In 2008 the Rudd government established the National Human Rights Consultation (NHRC) to hold public consultations on the question of whether Australia should have a Bill of Rights. The terms of reference included a restriction that options canvassed by the committee ‘should preserve the sovereignty of the Parliament’ – in other words, should not suggest the inclusion in the Constitution of new rights which would restrict the legislative power of parliament.

Unfortunately, even legal academics – who, among all social groups, one would think would be most keen to critique the current order – have demonstrated a disappointing attitude towards the protection of human rights. Although some have recommended enhanced protection for rights (albeit as an ordinary statute), some are openly hostile to rights protection while astoundingly yet others have justified the breach of human rights through torture.

There is clearly a need for an attitudinal change. The former Commonwealth Human Rights Commissioner, Gillian Triggs, commented upon the outlook of exceptionalism displayed by Australian governments to the protection of fundamental human rights. It is time for Australia to abandon this stance and accept the obligations imposed both by legal theory and the international human rights documents it has ratified by including a comprehensive and justiciable bill of rights in the Constitution.

99 Constitutional Commission, above n 95, Vol 1, 476.
101 George Williams, Human Rights under the Australian Constitution (Oxford University Press, 2002).
C Narrow judicial reasoning on implied rights

Mention should also be made of the three implied constitutional interests that have been recognised by the High Court. The broad term ‘interests’ is used advisedly, as the language used by the court has been inconsistent. Furthermore, the scope of constitutional protection has fallen short of what respect for human dignity demands.

In *Australian Capital Television v Commonwealth (No 2)*, the High Court held that because sections 7 and 24 of the Constitution, which relate to elections for the Senate and House of Representatives respectively, embody representative government, and because representative government requires freedom to exchange political views to function, the Constitution impliedly protects the right to engage in political communication. The approach adopted by the court was curious: The court was at pains to emphasise that the freedom of political communication was not a ‘right’ but rather an ‘immunity.’ Although this language is redolent of Hohfeld’s analysis of jural relationships, the judgment contains no Hohfeldian analysis, nor did the court explain why it chose not to categorise the new constitutional interest as a right. This approach has had significant consequences: The way in which the court framed the interest reduced its scope to far less than what is encompassed by the right to freedom of expression that usually appears in bills of rights. The fact that it applies only to communication about political matters means that it does not cover the broad range of communications usually included within the ambit of freedom of expression as that concept is commonly understood. Furthermore, the fact that the interest is an ‘immunity’ means that it can be relied upon only to challenge the validity of legislation restricting the freedom – it cannot be used as the basis for a person to claim to have a positive right to communicate anything. Indeed the High Court has held that someone who claims that the freedom has been infringed bears the onus of proving that they had a pre-existing right to communicate derived from the ‘general’ (sc common) law.

In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*, the High Court held that the doctrine of separation of powers in Chapter III of the constitution prohibits parliament from vesting in the executive a power to deprive a citizen of liberty without ultimate oversight by a court. However, this due process right is limited in that the court held that its protections do not apply to categories of so-called ‘non-punitive’ detention - that is, detention which occurs outside the realms of criminal law, examples of which include detention for public health purposes and immigration detention. Importantly, the court subsequently also held that the list of circumstances in which non-punitive detention may be authorised is not closed. Because non-punitive detention stands outside the protection afforded to people suspected of having committed a crime, a person can be detained by the executive without bringing them before the courts. Moreover, as previously noted, the court has held that the duration of detention is not subject to the constraint of reasonableness – indeed it can be indefinite - and has also held that detention does

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105 (1992) 177 CLR 106.
109 Ibid 27-9 (Brennan, Deane and Dawson JJ).
110 Ibid 55 (Gaudron J), 71 (McHugh J).
111 Kruger v Commonwealth (1997) 190 CLR 1, 162 (Gummow J).
not become punitive even if its conditions are inhumane.\footnote{113 Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs (2004) 219 CLR 486, 499 (Gleeson CJ).} The bizarre consequence of this is that a person who is detained because they are suspected of having committed a crime is in an infinitely better position than a person who is detained for non-criminal reasons. The effect of this has been felt only in the case of non-citizens and of people in off-shore detention, but in Australia as well, where a 2007 report by the Commonwealth Ombudsman found that 247 citizens and lawful residents had been unlawfully detained under the Migration Act 1958 (Cth).\footnote{114 Commonwealth Ombudsman, Lessons for public administration – Ombudsman investigation of referred immigration cases (2007) https://www.ombudsman.gov.au/__data/assets/pdf_file/0018/26244/investigation_2007_1.pdf}

In Roach v Electoral Commissioner\footnote{115 (2007) 233 CLR 162.} the High Court held that because ss 7 and 24 of the Constitution require that members of the House of Representatives and Senators be ‘directly elected,’ the Constitution protected an implied right to universal adult suffrage and that it would be unconstitutional for Parliament to disenfranchise people in a manner which disproportionately limited that right.\footnote{116 Rowe v Electoral Commissioner (2010) 243 CLR 1.} Yet, although these cases established an implied right to vote, they did not stipulate what is required for that vote to be truly effective. This is a critical omission. The ‘right to vote’ and ‘representative government’ must mean more than an opportunity to put a ballot in a box, otherwise regimes which are one-party states would be classified as democratic. Whether an electoral system can be described as democratic is a question of degree, and depends on the extent to which that system gives effect to the right of citizens to equal influence over the law-making process. Thus even in a system where candidates reflecting a variety of views are free to stand for election, where election processes are fair and where there is free access to the media, if the electoral system does not, as far as practical, give each voter equal power, that system falls short of what is required by human dignity which, as we have seen, mandates equal rights for each person. Thus the extent to which an electoral system satisfies that criterion must be determined by how accurately it reflects the political sentiments of the voters and, conversely, how successful it is in eliminating the effect of arbitrary factors which distort that reflection.

Analysed in that light, the electoral system contained in the Commonwealth Electoral Act 1918 (Cth) falls far short of the requirements of human dignity. This is because in a system based on geographical electorates, it is the wholly arbitrary factor of where electoral boundaries are drawn (no matter how equal their populations may be) which determines whether an individual’s vote has any impact on the composition of the legislature. This effect is accentuated the fewer the number of members who are elected in each electorate, and so the single-member electoral system we have has the most distorting effect possible. The system also has the consequence that parties receive a different percentage of seats to the nationwide percentage of votes cast for them, frequently allows a party to win government without obtaining a majority of votes, and sometimes even leads to a government winning a majority of seats with fewer votes than the major opposition party, as has happened in five federal elections since World War II.\footnote{117 In 1954, 1961, 1969, 1990 and 1998.} On the macro scale, the electoral system has the effect of leading to political domination by two blocs because of the inescapable mathematical truth that an election in a single member electorate will always be reduced to a choice between two - and only two - candidates, which in turn means that parliament as a whole will be dominated by two blocs. In Australia this has led to the establishment of a Coalition – Labor duopoly and to the shutting out of minor parties from government. From the perspective of the individual voter, the way the system operates means that it is only swing voters in marginal seats who really determine the outcome of an election: Voters
for any of the losing parties in an electorate have no impact on the composition of parliament – and the number of wasted votes will amount to 49.9% of the total in closely fought electorates. Also wasted are votes for the winning party in an electorate which were surplus to what it needed to win.

Despite this, in the two cases where distortions in the electoral system were challenged (Attorney-General (Cth); Ex rel McKinlay v Commonwealth118 and McGinty v Western Australia119) the High Court held that the phrase ‘directly chosen’ by the people did not mandate equality of voting power as between voters and leaves Parliament free to determine what electoral system should be adopted. Nor did the High Court take the step, when recognising an implied right to vote in Roach v Electoral Commissioner,120 of laying down a rule to the effect that for the right to vote to be truly effective, the electoral system must give equal effect to each vote as far as possible, an approach which would have been consistent with human dignity.

In none of these instances where the High Court drew implications from the Constitution did it justify its findings on the basis that it is an incident of human dignity that people should have a right to freedom of political communication, a right to personal liberty or a right to vote. In the case of the implied freedom of political communication and the right to vote, the court’s reasoning was based on purely practical requirements relating to the operation of representative government. Similarly, the decision on personal liberty was justified with reference to a structural feature of the Constitution, not an individual right. While it could be argued in the court’s defence that it felt that rights could be implied only to the extent that they could be said to arise from the text of the Constitution, there was much more that the court could have done to increase the scope of these implied interests, even within the confines of that constraint: The court need not have created an unnecessary (and unexplained) distinction between a ‘right’ and an ‘immunity’ when it recognised the implied freedom of political communication. There was also no reason to limit constitutional protection to political communication. The court could instead have recognised a comprehensive right to freedom of expression on the ground that it is invidious to distinguish between different types of communication, particularly given that the boundaries between them – think for example of the overlap political and artistic expression – are artificial and fluid. So far as the implication of a right to personal liberty from Chapter III was concerned, there was no reason for the court to create a distinction between punitive and so-called ‘non-punitive’ detention, which had the effect of significantly limiting the circumstances in which the right is available, denying its protection to some of the most vulnerable categories of people. Finally, in recognising the right to vote, the court could have laid down criteria for determining what the requirements for an effective franchise are, and thus whether an electoral system is truly consistent with representative government. Overall, the court adopted a narrow and grudging approach, rather than one which was broad and generous, which is the preferred - and more usual121 - approach when courts define the scope of constitutional rights.

VIII CONCLUSION – WHAT IS TO BE DONE?

In the South African case Minister of Home Affairs v Watchenuka,122 Nugent JA held that

[h]uman dignity has no nationality. It is inherent in all people, citizens and non-citizens alike - simply because they are human.

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118 (1975) 135 CLR 1.
120 (2007) 233 CLR 162.
122 2004 (4) SA 326 (SCA) [24].
The contrast between values-based constitutions,\textsuperscript{123} such as those of Germany and South Africa, which give effect to that principle, and the values-free Commonwealth Constitution is striking. Only thoroughgoing constitutional reform can effect the changes necessary to make our Constitution conform to the requirements of human dignity. However, as is notorious, there are considerable impediments to reform. Undoubtedly the most significant of these is the interest that politicians have in maintaining a system which enables them to govern without the constraint of a bill of rights and – in the case of politicians from the two major blocs - under an electoral system that ensures them perpetual alternation in power as partners a comfortable duopoly. Then there is the widespread lack of knowledge of the Constitution on the part of voters, which naturally makes them fearful of changing that which they do not understand – a fear which is skilfully exploited by the same politicians who wish to maintain the current system. Reform is therefore likely to take decades.

It is here that legal academics have a singularly important role to play. Today’s students are tomorrow’s lawyers, judges and politicians, and so teachers of constitutional law are bear a particular moral responsibility to foster change. In 1985, South African legal academic and veteran anti-apartheid activist Tony Mathews wrote\textsuperscript{124}

\begin{quote}
Until quite recently in most law schools, and even today in some of them, law was taught as an arid body of rules divorced from social context and seldom evaluated, especially in the field of public law, in terms of non-legal standards of judgment.
\end{quote}

Unfortunately, and assuming that the research legal academics do mirrors how they teach, Mathew’s comment are as applicable in Australia today as they were in South Africa 35 years ago, because the research produced by legal academics in this country reveals the darkest of black-letter law approaches, and a striking absence of work critiquing the many flaws of the current Constitution.\textsuperscript{125}

What is therefore required is a transformative approach to teaching, one in which students are not just taught about ‘the Constitution’ as though inscribed on Mosaic tablets, complete, unchanging and, what is worse still, as not requiring change, but rather one in which they are encouraged to think about the far more fundamental question of what values should underpin a constitution, and how to bring about such change as is necessary to give effect to those values. In short, we need to inspire our students to think not only about what the law is, but what it might become.\textsuperscript{126}

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\textsuperscript{123} For statement which is both eloquent and succinct in its explanation of what values-based constitutionalism means, and one which is all the more remarkable in that it was written during the apartheid era and yet with an eye to the demise of that system, see Dion Basson and Henning Viljoen, \textit{South African Constitutional Law} (Juta & Co, 1998) 1-4.


\textsuperscript{125} As an example of this, there was only one paper which discussed proportional representation in an entire issue of the \textit{Federal Law Review} devoted to electoral law (Volume 32(3) 2004) – and its focus was the law in New Zealand. The disparities produced by the system in Australia went without comment.

\textsuperscript{126} An examination of the issues requiring attention and a proposed new constitution which remedies them can be found in Bede Harris, \textit{Constitutional Reform as a Remedy for Political Disenchantment in Australia – The discussion we need} (Springer Nature, 2020).
CONSTRUCTING CONSENT IN THE AUSTRALIAN CAPITAL TERRITORY

Brendon Murphy*

This article considers the way in which consent has been constructed and evolved in the criminal law in the context of sexual assault. The article compares and contrasts the test for consent across the Australian jurisdictions, with particular interest on consent in the ACT – the only jurisdiction in Australia with a negative consent model. The article examines the intersection of common law and legislation in that jurisdiction, and considers how consent came to be framed this way in that jurisdiction. It suggests that the ACT will likely adopt a two-part reform based on the law of New South Wales.

I INTRODUCTION

The essential element of sexual offences in Australian law is the absence of consent. The absence of consent transforms what is normally a physical expression of affection and intimacy into crime and violence. For this reason, Australian law places considerable attention on the meaning and evidence of consent in sexual offences – especially in cases of sexual assault. One of the current problems in Australian criminal law is the way in which consent is established as a matter of law. This is particularly the case in the Australian Capital Territory (‘ACT’), where consent is expressed in negative terms. In this jurisdiction, consent is determined by what it is not, rather than what it is. It is argued in this article that this definition requires statutory alteration to bring the meaning of the term into line with the rest of the country. As discussed below, Australian law concerned with consent has evolved a two-pronged test involving a positive and negative component. The positive component involves establishing the fact of consent, while the negative component involves a legal erasure of the fact of consent if certain conditions are met. To this is a third aspect, which is the question of the perception of consent on the part of the accused. This aspect has evolved as a defence of mistake of fact. These elements are overlapping and connected, however, for the purposes of this article the focus is on the first elements concerned with establishing consent.

II THE CONTOURS OF CONSENT

Consent in the context of sexual assault has generated a vast amount of literature.1 Much of that literature has been reform-oriented. Indeed, consent in sexual assault

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cases is one of those matters that tends to generate a great deal of publicity and associated demands for law reform. At the time of writing there are, in fact, two Law Reform Inquiries concerned with proposed changes to sexual assault consent rules. It is not the purpose of this article to undertake a systematic literature review of the available scholarship. Such an undertaking is beyond our scope. The purpose of this article is to outline something of the nature of consent as concept, and then focus sharply on the state of current doctrine. We therefore begin with setting out the contours of consent.

Consent has three distinct dimensions: philosophical, semantic and legal. The three are linked. Philosophically, the western legal tradition assigns a significant importance to consent because of its association with the liberty of the individual, and the exercise of reason. Consent is a key aspect of the will and has come to be regarded as an integral part of assessing the moral right or wrong of behaviour. Consent, unlike intent, is concerned with the acceptance, merger or acquiescence of the will of another. Consent is the rational merger of self and other. In this respect it is regarded as an aspect of moral or ethical philosophy, and as such a central component in criminal liability for conduct involving questions of consent. In this context the ability to consent, to surrender or agree, is a core aspect of autonomy and the capacity to exercise personal agency. Consent has transformative effect. As observed by Hurd, the grant of consent can transform the moral “right” of actions in two ways. First, it can make a wrong action “right” through the grant of permission to perform what would otherwise be a “wrong”. Second, it conveys a right to perform an action that is wrongful of itself. Intentional or knowing actions perpetrated against a person in the knowledge that person is not consenting is a foundational principle of criminal responsibility. Here the philosophers remind us that consent always involves an exercise of the will; it is a function of reason, and as this is part of shared human experience, there is broad acceptance that rationally extending permission, agreement, acceptance or mutual purpose is the foundation of moral transformation.

This merger of the minds is reflected in the language constructs around consent. In English, the word “consent” has its origins in Old French (consentir), sourced in Latin (consentire). It is a concept also linked to “consensus”, being distinguished between personal and collective sharing of views. To consent means to “express willingness, give


permission, agree”. It is a voluntary agreement. A distinction is made, however, between mere consent and informed consent. The latter is linked to “permission granted in the knowledge of the possible consequences ... with full knowledge of the possible risks and benefits”. This distinction is important, and often overlooked. There is a distinction between consent given in the absence of sufficient information, and the presence of sufficient or complete information. A decision made on the basis of a complete picture enables the exercise of a greater level of reason than insufficient or absent information; and is starkly contrasted with consent made on the basis of misrepresentation, false or deceitful information. There are, in effect, distinctions between kinds of consent. In the context of sexual intercourse the idea of “informed consent” would be absurd in the sense of requiring explicit information sharing of details equivalent to a formal contract, but it appears that something more than “mere consent”, in the sense of simple acquiescence to a sexual advance is what is expected. In other words, there is a requirement for sufficient information of matters of concern or importance to be known and communicated.

These distinctions intersect with theoretical and substantive law in numerous ways. Feinberg, in his analysis of harm (as a setback of interests) as a core principle of criminal law theory, argued that the presence of consent removes the perception of harm or setback of interest in those who extend the consent. Accordingly, the moral or affective basis for harm is transformed by the presence of actual consent. The difficulty in law, recognised by Feinberg, is that the fact of consent does not necessarily mean a “harm” has not been suffered. Here Feinberg drew a distinction between “harms” and “wrongs”. In this context a “harm” is linked to a tangible interest, while a “wrong” is the (moral) right attached to it. Normally these concepts are merged, but in the case of consent, the “wrong” is neutralized, even though the harm continues or becomes manifest. Feinberg suggests this principle has ancient life in the English legal tradition, tracing the origins into Roman law, and ultimately into Aristotle’s Nicomachean Ethics. Here Aristotle outlined a principle of reason, and ethical governance, that the foundation of injury to another is any situation where a person acts with the intention of causing injury to another, “contrary to the wish of the person acted on.” This principle has become manifest in the Latin maxim Volenti non fit injuria (“To one who has consented, no wrong can be done”).

The problem alluded to by Feinberg and others is the distinction between a physical and an incorporeal interest. Feinberg’s theory, although rightfully well regarded, does not adequately distinguish between the interests at the core of this theory. And this is core business of the criminal law. A distinction between physical and non-physical interests is a useful starting point, as we able to start tracking the importance of consent in the context of physical acts. Here the starting point in the criminal law relating to consent is the principle on inviolability. This principle is that our bodies may not be interfered with by others in the absence of consent. The principle was articulated by Blackstone in these terms:

[T]he law cannot draw the line between different degrees of violence and therefore totally prohibits the first and lowest stage of it; every man’s person being sacred, and no other having a right to meddle with it, in any the slightest manner.

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6 Oxford English Dictionary.
7 Joel Feinberg, Harm To Others (Oxford University Press, 1984) 35-36: “One class of harms (in the sense of set-back to interests) must certainly be excluded from those that are properly called wrongs, namely those in which the complainant has consented. These include harms voluntarily inflicted by the actor upon himself, or the risk of which the actor freely assumed, and harms inflicted upon him by the actions of others to which he has freely consented.”
8 Ibid, 115.
This principle of inviolability is the “beginning of wisdom” in understanding the contours of consent in the context of criminal law. But it overlaps with other aspects of liberty, including the idea of autonomy and liberty. The ability to give consent is an exercise in decision making, and where it relates to the control a person is able to exercise over their own life, it is a cherished expression of freedom and self-determination. However, in the context of the criminal law – our present subject – we are primarily concerned with the exercise of decisions that convey agreement that the inviolability of our physical selves may be interfered with, if not shared.

There are, of course, many instances where the fact of consent does not erase the harm done. Accordingly, the law constructs many and numerous exceptions to the meaning of consent. Indeed, there are so many layers of consent that it is perhaps best to speak of “meanings” of consent. In particular, the distinction between “mere consent” and “informed consent” is of critical importance in the law, and, as we will see, particularly in the criminal law. In the context of sex offences, this distinction is critical. The reform argument considered in the concluding remarks contends that the proper foundation of consent in relation to conduct that infringes the inviolability of self can only be linked to informed consent. That is, a person gives valid consent only where there is voluntary agreement grounded in actual knowledge of the scope of the anticipated sexual activity. But as we will observe, the contours of consent in Australian law are remarkably complicated.

III CONSENT IN AUSTRALIA

A Consent and Common Law Rape

The core principle of consent (generally), was set out in Marion’s Case in 1992. Here a majority of the High Court, after referring to the inviolability principle outlined by Blackstone above, stated:

Consent ordinarily has the effect of transforming what would otherwise be unlawful into accepted, and therefore acceptable, contact. Consensual contact does not, ordinarily, amount to assault. However, there are exceptions to the requirement for, and the neutralising effect of, consent and therefore qualifications to the very broadly stated principle of bodily inviolability. In some instances consent is insufficient to make application of force to another person lawful and sometimes consent is not needed to make force lawful.... The rationale for this exception appears to rest in the idea that some harms involve public, not just personal, interests.

In this instance we observe many of the legal contours: the transformation of the event from unlawful to lawful; and a range of public policy limitations on the extent of consent, based on collective as opposed to individual interests. Moreover, in the context of the criminal law, consent is located at multiple sites and differing contexts, and accordingly, consent can take on a distinct meaning in a particular legal context. As stated above, the present article relates to the meaning of consent in the context of rape and sexual assault.

10 Department of Health & Community Services v JWB & SMB ("Marion's Case") (1992) 175 CLR 218.
11 Mason CJ, Dawson, Toohey and Gaudron JJ.
12 Department of Health & Community Services v JWB & SMB ("Marion's Case") (1992) 175 CLR 218, 233 (Footnotes omitted).
Rape was an offence at common law, manifested in England as early as the *Laws of Aethelbehrt*,\(^{13}\) and later documented in Mathew Hale’s *Pleas of the Crown*.\(^{14}\) As is well known, at common law the offence of rape involved “carnal knowledge of a woman without her consent”.\(^{15}\) Or, as stated by Blackstone, “carnal knowledge of a woman forcibly and against her will.”\(^{16}\) The change in language is not accidental. It reflects an evolution in the law, which in its early stage had emphasised the use of force, while the latter emphasised the role of consent – recognising that rape did not require the use of force.\(^{17}\) At common law the question of what constituted consent was largely a question of fact at trial, with consent having its “ordinary meaning”. The common law position was perhaps best expressed by Lord Justice Dunn in *R v Olugboja*:\(^{18}\)

"...‘consent’...covers a wide range of states of mind in the context of intercourse between a man and a woman, ranging from actual desire on the one hand to reluctant acquiescence on the other. We do not think that the issue of consent should be left to a jury without some further direction. What this should be will depend on the circumstances of each case. The jury will have been reminded of the burden and standard of proof required to establish each ingredient, including lack of consent, of the offence. They should be directed that consent, or the absence of it, is to be given its ordinary meaning and if need be, by way of example, that there is a difference between consent and submission; every consent involves a submission, but it by no means follows that a mere submission involves consent: ... In the majority of cases, where the allegation is that the intercourse was had by force or the fear of force, such a direction coupled with specific references to and comments on the evidence relevant to the absence of real consent will clearly suffice. In the less common type of case where intercourse takes place after threats not involving violence or the fear of it, as in the examples given by counsel for the appellant, to which we have referred earlier in this judgment, we think that an appropriate direction to a jury will have to be fuller. They should be directed to concentrate on the state of mind of the complainant immediately before the act of sexual intercourse, having regard to all the relevant circumstances, and in particular the events leading up to the act, and her reaction to them showing their impact on her mind. Apparent acquiescence after penetration does not necessarily involve consent, which must have occurred before the act takes place. ... the dividing line... between real consent on the one hand and mere submission on the other may not be easy to draw. Where it is to be drawn in a given case is for the jury to decide, applying their combined good sense, experience and knowledge of human nature and modern behaviour to all the relevant facts of that case."\(^{19}\)

This approach to consent has the considerable advantage of being flexible enough to consider the full factual matrix,\(^{20}\) and, as Dunn LJ observed, it enables the tribunal of fact to bring “good sense, experience and knowledge of human nature and modern behaviour to all the relevant facts of that case.” The problem, however, is that “consent” does not have a settled or consistent meaning in the wider community. Indeed, in the context of consent to sexual intercourse, empirical studies have shown widespread myths about how people communicate with one another in expressing desire for sexual

\(^{13}\) Lisi Oliver, *The Beginnings of English Law* (University of Toronto Press, 2002) 79. “77. If a person takes a maiden by force: to the owner [of her protection] 50 shillings, and afterwards let him buy from the owner his consent [to marry her].”


\(^{15}\) *Papadimitropoulos v The Queen* (1957) 98 CLR 249, 261.

\(^{16}\) Blackstone, above n 9, vol IV, 210.


\(^{18}\) [1981] 3 All ER 443.

\(^{19}\) [1981] 3 All ER 443, 448-449.

acts, what role intoxication plays in decision making, tolerance for physical resistance, and sexual assault in relationships.\textsuperscript{21} These issues complicate the determination of consent in sexual assault trials, which makes the work of the courts that much harder, particularly in relation to giving jury instructions during cases that involve contested consent, or situations where both parties were intoxicated. It is no wonder rape has been the subject of significant law reform over the last 40 years.

B Statutory Reform of Consent

In Australia the offence of rape has been placed on a statutory footing.\textsuperscript{22} In all jurisdictions the common law has been abolished and replaced by a statutory framework. In most cases the term “rape” has been replaced. In all cases the absence of consent is a physical element of the offence, and accordingly is an essential consideration at trial. It is very often the case that the question of consent is the main point of contention. Consequently, the more recent cases that consider consent do so on the basis of the relevant legislation. What has emerged out of these cases is an emphasis on consent being \textit{freely and voluntarily given}. The scope of this requirement was articulated by King CJ in a referred case in the South Australian Court of Criminal Appeal in 1993:

\begin{quote}
The law on the topic of consent is not in doubt. \textit{Consent must be a free and voluntary consent}. It is not necessary for the complainant to struggle or scream. Mere submission in consequence of force or threats is not consent. The relevant time for consent is the time when sexual intercourse occurs. Consent, previously given, may be withdrawn, thereby rendering the act non-consensual. A previous refusal may be reversed thereby rendering the act consensual. That may occur as a consequence of persuasion, but, if it does, the consequent consent must, of course, be free and voluntary and not mere submission to improper persuasion by means of force or threats.\textsuperscript{23} [Emphasis added]
\end{quote}

This position forms the foundation of the way consent is expressed in statute across the Australian jurisdictions. This concept forms the nucleus, however, of an increasingly complex set of limits and exceptions. In addition, one of the further complexities in relation to consent is the knowledge the accused has in relation to the absence of consent.

While the presence or absence of consent is a \textit{physical element} of the offence, the knowledge of the accused forms part of the fault element (\textit{mens rea}) of the offence. But as we will see, the law has also extended the inquiry into the context in which the consent was given. In this respect attempts to define consent have had to address the expression of consent by the complainant, as well as the understanding of that consent by the accused \textit{AND} the circumstances in which that expression has been articulated.

\textsuperscript{21} Ibid. Here the learned authors were referring to a 2013 study on National Community Attitudes towards Violence Against Women. Compare this with the most recent 2017 study, which has found substantial (positive) changes in attitudes. Although there are positive changes, one concerning finding was that 19\% of those surveyed did not recognise that it was a criminal offence for a man to have sex with his wife without her consent. See https://ncas.anrows.org.au/wp-content/uploads/2019/04/300419_NCAS_Summary_Report.pdf. Attitudes with respect to consent are more alarming with respect to migrants. Here is was found that 25\% of those surveyed believed that if a woman was sexually assaulted while intoxicated, she was “at least partly responsible”. https://ncas.anrows.org.au/findings/n-mesc-findings/.
\textsuperscript{22} For a comparison with the UK, see David Ormerod, \textit{Smith & Hogan: Criminal Law} (Oxford University Press, 12th ed, 2008).
\textsuperscript{23} \textit{Question of Law Reserved on Acquittal Pursuant to Section 350(1a) Criminal Law Consolidation Act (No 1 of 1993)} (1993) 59 SASR 214, 220.
1 New South Wales

In NSW the common law offence of rape was abolished in 2003. It has been replaced by a series of "sexual assault" offences, including sexual assault, aggravated sexual assault, aggravated sexual assault in company, sexual intercourse with a child under 10, sexual intercourse with a child aged between 10 and 16, and sexual intercourse with a child aged between 16 and 18 in special care. A fundamental distinction relating to consent exists between these offences. As a matter of law, a child cannot lawfully consent to sexual intercourse. Accordingly, consent is not an element of an offence involving a child complainant.

In this jurisdiction consent has been heavily modified by statute. Consent is set out in section 61HE, and requires close reading. For the purposes of the Crimes Act, the definition of consent applies to a limited range of offences, being sexual assault, sexual touching and sexual acts in both their ordinary and aggravated forms. Consent is specifically defined: A person consents to a sexual activity if the person freely and voluntarily agrees to the sexual activity. Here “sexual activity” is defined to include sexual intercourse, sexual touching, or sexual acts. All of these are further defined. The accused is deemed to have knowledge of the absence of consent where they have actual knowledge, was reckless as to consent, or where there were no reasonable grounds to believe the person was not consenting. The fact of consent can also be negated as a matter of law, where:

- The complainant lacks capacity to consent;
- There is no opportunity to consent;
- The person surrenders because they are coerced, intimidated, or unlawfully detained;
- Mistaken beliefs about the identity or marriage to the accused; or that the intercourse was for a medical purpose; or was otherwise obtained through fraudulent means.

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24 Crimes Amendment (Sexual Offences) Act 2003 (NSW), s63. This section was renumbered as s80 in 2018. See Criminal Legislation Amendment (Child Sexual Abuse) Act 2018 (NSW), Sched 1 [9].
25 Crimes Act 1900 (NSW), s61I: “Any person who has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the sexual intercourse is liable to imprisonment for 14 years.”.
26 Crimes Act 1900 (NSW) s61J.
27 Crimes Act 1900 (NSW) s61JA.
28 Crimes Act 1900 (NSW) s66A.
29 Crimes Act 1900 (NSW) s66C.
30 Crimes Act 1900 (NSW) s73.
31 Crimes Act 1900 (NSW) s80AE.
32 Crimes Act 1900 (NSW) s61HE(1).
33 Crimes Act 1900 (NSW) s61HE(2).
34 Crimes Act 1900 (NSW) s61HE(11).
35 Crimes Act 1900 (NSW) s61HA, HB and HC respectively.
36 Crimes Act 1900 (NSW) s61HE(3)(a).
37 Crimes Act 1900 (NSW) s61HE(3)(b).
38 Crimes Act 1900 (NSW) s61HE(3)(c).
39 Crimes Act 1900 (NSW) s61HE(5)(a).
40 Crimes Act 1900 (NSW) s61HE(5)(b).
41 Crimes Act 1900 (NSW) s61HE(5)(c).
42 Crimes Act 1900 (NSW), s61HE(5)(d).
43 Crimes Act 1900 (NSW) s61HE(6)(a).
44 Crimes Act 1900 (NSW) s61HE(6)(b).
45 Crimes Act 1900 (NSW) s61HE(6)(c).
46 Crimes Act 1900 (NSW) s61HE(6)(d).
A further qualification exists, that permits a finding that person has not given consent in circumstances where the complainant was “substantially intoxicated”, was intimidated or coerced (in a manner falling short of threats); or the accused had taken advantage of a position of authority or trust.

2. **Northern Territory**

The Northern Territory prohibits acts of sexual intercourse and gross indecency without consent; including offences against children under 16; those under 18 if in special care; and sexual intercourse with disabled or mentally ill people in care. As in the other jurisdictions, a child or person in special care cannot consent to sexual intercourse. For offences involving adults, “consent” is defined as “free and voluntary agreement”. And, consistent with other jurisdictions, the fact of consent can be negatived where it has been procured through threat, force or fear; where the complainant has been unlawfully detained; where the person was asleep, unconscious or intoxicated; incapable of understanding the sexual nature of the act; mistake as to the identity of the accused; or the nature of the activity; and consent obtained through fraud.

3. **Queensland**

In Queensland the crime of rape was codified in the *Criminal Code Act 1899* (Qld). In its current manifestation, rape is an offence pursuant to s349. Here the absence of consent is an essential element. Consent is a defined term, meaning: *freely and voluntarily given by a person with the cognitive capacity to give the consent*. There are no qualifications as expressed in NSW, with the question of consent being a question of fact. There are, however, nominated grounds which it may be found the consent was not freely given, which includes use of force, threat, fear, abuse of authority, fraud and mistaken belief. These conditions are not exhaustive, and it is otherwise open ended. In this context, like NSW, a child may not give consent. An important distinction, however, is that for the purposes of rape, the age limit is 12.

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47 *Crimes Act 1900* (NSW) s61HE(8)(a).
48 *Crimes Act 1900* (NSW) s61HE(8)(b).
49 *Crimes Act 1900* (NSW) s61HE(8)(c).
50 *Criminal Code Act 1983* (NT) s192.
51 *Criminal Code Act 1983* (NT) s127.
52 *Criminal Code Act 1983* (NT) s128.
53 *Criminal Code Act 1983* (NT) s130.
54 *Criminal Code Act 1983* (NT) s139A.
55 *Criminal Code Act 1983* (NT) s192(1).
60 *Criminal Code Act 1983* (NT) s192(2)(e).
63 *Criminal Code Act 1899* (Qld) s349: “(1)Any person who rapes another person is guilty of a crime. Maximum penalty—life imprisonment. (2) A person rapes another person if—(a)the person has carnal knowledge with or of the other person without the other person’s consent; or (b)the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person’s body that is not a penis without the other person’s consent; or (c)the person penetrates the mouth of the other person to any extent with the person’s penis without the other person’s consent.”
64 *Criminal Code Act 1899* (Qld) s348(1).
65 *Criminal Code Act 1899* (Qld) s348(2).
66 *Criminal Code Act 1899* (Qld) s349(3). This section was inserted in 2003, pursuant to the *Evidence (Protection of Children) Act 2003* (Qld) s11.
4. **South Australia**

Rape is an offence in South Australia.\(^{67}\) Like other Australian jurisdictions, the offence is one in which the absence of consent is an essential element. In this jurisdiction consent is simply defined, but the statutory definition includes a number of qualifiers. Here a person consents to sexual activity if the person freely and voluntarily agrees to the sexual activity.\(^{68}\) It is open to the tribunal of fact to conclude a person did not consent where the person succumbs to threats;\(^{69}\) was unlawfully detained;\(^{70}\) asleep or unconscious;\(^{71}\) intoxicated to the extent they could not freely and voluntarily consent;\(^{72}\) suffered from a cognitive impairment;\(^{73}\) was unable to understand the nature of the activity;\(^{74}\) or where the person was mistaken either about the identity of the accused,\(^{75}\) or the nature of the activity.\(^{76}\)

5. **Tasmania**

In Tasmania, the *Criminal Code Act 1924* prohibits rape,\(^{77}\) as well as similar crimes involving a “young person”.\(^{78}\) In this jurisdiction a “young person” is under 17 years of age. Consent with respect to offences involving a young person is a defence only where the accused is up to 3 or 5 years older than the complaint.\(^ {79}\) As in other jurisdictions around Australia, consent means free agreement.\(^ {80}\) The fact of consent can be negatived in circumstances where there is no communication of the fact of consent;\(^{81}\) the complainant agrees as a result of threat, force or fear;\(^{82}\) was unlawfully detained;\(^{83}\) the accused was in a position of trust or authority;\(^ {84}\) consent was obtained by fraud;\(^ {85}\) the complainant was mistaken as to the identity or nature of the activity;\(^ {86}\) was asleep, unconscious or intoxicated;\(^ {87}\) or was unable to understand the nature of the activity.\(^ {88}\)

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\(^{67}\) *Criminal Law Consolidation Act 1935* (SA) s48: “(1) A person (the **offender**) is guilty of the offence of rape if he or she engages, or continues to engage, in sexual intercourse with another person who— (a) does not consent to engaging in the sexual intercourse; or (b) has withdrawn consent to the sexual intercourse, and the offender knows, or is recklessly indifferent to, the fact that the other person does not so consent or has so withdrawn consent (as the case may be). Maximum penalty: Imprisonment for life. (2) A person (the **offender**) is guilty of the offence of rape if he or she compels a person to engage, or to continue to engage, in— (a) sexual intercourse with a person other than the offender; or (b) an act of sexual self-penetration; or (c) an act of bestiality, when the person so compelled does not consent to engaging in the sexual intercourse or act, or has withdrawn consent to the sexual intercourse or act, and the offender knows, or is recklessly indifferent to, the fact that the person does not so consent or has so withdrawn consent (as the case may be). Maximum penalty: Imprisonment for life.”

\(^{68}\) *Criminal Law Consolidation Act 1935* (SA) s46(2).

\(^{69}\) *Criminal Law Consolidation Act 1935* (SA) s46(3)(a).

\(^{70}\) *Criminal Law Consolidation Act 1935* (SA) s46(3)(b).

\(^{71}\) *Criminal Law Consolidation Act 1935* (SA) s46(3)(c).

\(^{72}\) *Criminal Law Consolidation Act 1935* (SA) s46(3)(d).

\(^{73}\) *Criminal Law Consolidation Act 1935* (SA) s46(3)(e).

\(^{74}\) *Criminal Law Consolidation Act 1935* (SA) s46(3)(f).

\(^{75}\) *Criminal Law Consolidation Act 1935* (SA) s46(3)(g).

\(^{76}\) *Criminal Law Consolidation Act 1935* (SA) s46(3)(h).

\(^{77}\) *Criminal Code Act 1924* (Tas) s185: “(1) Any person who has sexual intercourse with another person without that person’s consent is guilty of a crime.”

\(^{78}\) *Criminal Code Act 1924* (Tas) s124.

\(^{79}\) *Criminal Code Act 1924* (Tas) s124(3).

\(^{80}\) *Criminal Code Act 1924* (Tas), s2A.

\(^{81}\) *Criminal Code Act 1924* (Tas) s2A(2)(a).

\(^{82}\) *Criminal Code Act 1924* (Tas) s2A(2)(b)(c).

\(^{83}\) *Criminal Code Act 1924* (Tas) s2A(2)(d).

\(^{84}\) *Criminal Code Act 1924* (Tas) s2A(2)(e).

\(^{85}\) *Criminal Code Act 1924* (Tas) s2A(2)(f).

\(^{86}\) *Criminal Code Act 1924* (Tas) s2A(2)(g).

\(^{87}\) *Criminal Code Act 1924* (Tas) s2A(2)(h).

\(^{88}\) *Criminal Code Act 1924* (Tas) s2A(2)(i).
6. **Victoria**

In Victoria, the common law of rape is also on a statutory footing. Here, as in other jurisdictions, the absence of consent is a specific element of the offence.\(^89\) Consent is a defined term in this jurisdiction, which requires, simply, “free agreement”.\(^90\) As is the case elsewhere, consent may be negatived where there is actual or threatened force;\(^91\) fear of harm;\(^92\) the complainant was unlawfully detained;\(^93\) asleep or unconscious;\(^94\) substantially intoxicated\(^95\) (including being unable to withdraw consent because of intoxication);\(^96\) the person could not understand the nature of the act,\(^97\) or its sexual nature;\(^98\) the complainant with mistaken about the identity of the accused;\(^99\) or that the act was not for a legitimate medical or hygienic purpose;\(^100\) mistaken about the use of animals;\(^101\) the complainant fails to do anything to indicate consent;\(^102\) or initially consents, but later retracts consent.\(^103\)

7. **Western Australia**

Like Queensland, West Australia codified rape in its *Criminal Code*. However, the offence was modified as is now expressed as “sexual penetration without consent”.\(^104\) It has ordinary and aggravated forms,\(^105\) with specific offences concerning the sexual penetration of children.\(^106\) In this jurisdiction, consent means freely and voluntarily given.\(^107\) Without limiting the circumstances through which the fact of lack of consent is negatived, in this state the absence of consent includes “consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deceit, or any fraudulent means”. A child under the age of 13 cannot consent as a matter of law.\(^108\)

8. **Discussion**

This general survey of the meaning of consent throughout Australia confirms a settled position in law, and that is that consent, for the purposes of sexual activity, is grounded in terms that are basically contractual. That is, the parties engage in a shared agreement to engage in sexual activity. Ideally, that arrangement would be one of mutual enjoyment and an expression of intimacy, if not affection. The law cannot, of course, ensure these qualitative aspects of intimacy; but it can ensure that the decision to

\(^{89}\) *Crimes Act 1958* (Vic) s38: “(1) A person (A) commits an offence if— (a) A intentionally sexually penetrates another person (B); and (b) B does not consent to the penetration; and (c) A does not reasonably believe that B consents to the penetration. (2) A person who commits an offence against subsection (1) is liable to level 2 imprisonment (25 years maximum).”

\(^{90}\) *Crimes Act 1958* (Vic) s36(1).

\(^{91}\) *Crimes Act 1958* (Vic) s36(2)(a).

\(^{92}\) *Crimes Act 1958* (Vic) s36(2)(b).

\(^{93}\) *Crimes Act 1958* (Vic) s36(2)(c).

\(^{94}\) *Crimes Act 1958* (Vic) s36(2)(d).

\(^{95}\) *Crimes Act 1958* (Vic) s36(2)(e).

\(^{96}\) *Crimes Act 1958* (Vic) s36(2)(f).

\(^{97}\) *Crimes Act 1958* (Vic) s36(2)(g).

\(^{98}\) *Crimes Act 1958* (Vic) s36(2)(h).

\(^{99}\) *Crimes Act 1958* (Vic) s36(2)(i).

\(^{100}\) *Crimes Act 1958* (Vic) s36(2)(j).

\(^{101}\) *Crimes Act 1958* (Vic) s36(2)(k).

\(^{102}\) *Crimes Act 1958* (Vic) s36(2)(l).

\(^{103}\) *Crimes Act 1958* (Vic) s36(2)(m).

\(^{104}\) *Criminal Code 1913* (WA) s325(1): “A person who sexually penetrates another person without the consent of that person is guilty of a crime and is liable to imprisonment for 14 years.”

\(^{105}\) *Criminal Code 1913* (WA) s326(1): “A person who sexually penetrates another person without the consent of that person in circumstances of aggravation is guilty of a crime and liable to imprisonment for 20 years.”

\(^{106}\) *Criminal Code 1913* (WA) ss322, 321, 320.

\(^{107}\) *Criminal Code 1913* (WA) s319(2)(a).

\(^{108}\) *Criminal Code 1913* (WA) s319(2)(c).
engage in those activities is a rational one, based on free choice. In each of the jurisdictions examined, consent is understood as an agreement to engage in sexual activity, given voluntarily. That necessarily implies some understanding of the scope of what activities are going to be engaged in. This is consistent with what is known as the “communicative” model of consent, which focuses the practical attempts in law to ensure mutual understanding, autonomy and personal responsibility.\(^\text{109}\)

Yet as we have seen, in each jurisdiction there is clear recognition that consent can be obtained through a variety of means that are not regarded as legitimate forms of agreement. Indeed, there is no agreement because one of the parties has not expressed true consent or was not in possession of sufficient facts to enable an informed decision. Even in cases where a sexual advance was communicated and understood, the reality of communication is such that what is communicated and understood is not necessarily clear at a practical level. Accordingly, each jurisdiction contains provisions that will negative the fact of consent or enable the tribunal of fact to conclude there was no consent if the issue is ambiguous.

### IV. CONSENT IN THE ACT

The one jurisdiction in Australia where the question of consent is far from clear is the ACT. Here the criminal law, generally, is currently in a less than settled state, resting in an unfinished transition from a common law to a code jurisdiction. It is the only jurisdiction in Australia where a Crimes Act and a Criminal Code are operating concurrently as the basis of local law.\(^\text{110}\) This results in a substantial degree of complexity, and uncertainty. The difficulty arises because the Code is only “partially operational”, which means that the general principles of criminal responsibility found in Chapter 2 of the Code do not apply to every offence. In many cases the common law and its associated linkages with legislation continues to operate.

In the context of sex offences, Part 3 of the Crimes Act 1900 (ACT) prohibits sexual assault. Unlike NSW, sexual assault offences in the ACT are in three degrees, based on injury suffered by the complainant.\(^\text{111}\) Here the accused may be charged with sexual assault in the first degree if they inflict grievous bodily harm on the complainant;\(^\text{112}\) in the second degree if they inflict actual bodily harm;\(^\text{113}\) in the third degree if the attack involves an assault or threat of injury;\(^\text{114}\) or an ordinary charge of sexual intercourse without consent.\(^\text{115}\) It is important to note that of these offences, only the latter charge requires the absence of consent as an element of the offence.

For the purposes of sexual intercourse without consent, section 67 of the Crimes Act 1900 (ACT) defines consent in the following terms:

1. …without limiting the grounds on which it may be established that consent is negated, the consent of a person to sexual intercourse with another person ... is negated if that consent is caused—

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110 The Commonwealth Criminal Code also applies concurrently throughout Australia, but as that Code does not purport to criminalise sexual assaults this issue does not arise.
111 NSW introduced four categories of sexual assault in a set of reforms in 1981. (Crimes (Sexual Assault) Amendment Act 1981 (NSW)). These provisions served as a model and were operative when the ACT introduced the three categories in 1985. See Crimes (Amendment) Ordinance (No. 5) 1985. The NSW categories were subsequently repealed and changed in 1989 (Crimes Amendment Act 1989 (NSW)).
112 Crimes Act 1900 (NSW) s51.
113 Crimes Act 1900 (NSW) s52.
114 Crimes Act 1900 (NSW) s53.
115 Crimes Act 1900 (NSW) s54.
(a) by the infliction of violence or force on the person, or on a third person who is present or nearby; or

(b) by a threat to inflict violence or force on the person, or on a third person who is present or nearby; or

(c) by a threat to inflict violence or force on, or to use extortion against, the person or another person; or

(d) by a threat to publicly humiliate or disgrace, or to physically or mentally harass, the person or another person; or

(e) by the effect of intoxicating liquor, a drug or an anaesthetic; or

(f) by a mistaken belief as to the identity of that other person; or

(g) by a fraudulent misrepresentation of any fact made by the other person, or by a third person to the knowledge of the other person; or

(h) by the abuse by the other person of his or her position of authority over, or professional or other trust in relation to, the person; or

(i) by the person’s physical helplessness or mental incapacity to understand the nature of the act in relation to which the consent is given; or

(j) by the unlawful detention of the person.

(2) A person who does not offer actual physical resistance to sexual intercourse shall not, by reason only of that fact, be regarded as consenting to the sexual intercourse.

At first glance this definition appears entirely consistent with the law as it stands across Australia. It sets out the circumstances through which consent can be negated and does so on the basis of indicia common to all Australian jurisdictions. But what is missing is any reference to the meaning of consent. It is a negative definition, telling us what consent is not, rather than what it is. Otherwise there is no express statement as to the meaning of consent. This position seems to be at odds with the law around the country, and it begs the question why this is the case.

In the absence of any statutory embodiment, the default position is the common law. As it stands, there are actually only a handful of authorities in the ACT that indicate the correct position.

**A Grey v The Queen [2019]**

Grey was a decision of Chief Justice Murrell. This case involved the prosecution of a brothel owner on 27 charges linked to the “training” of sex workers in the ACT. Here the accused advertised for sex workers to work in his brothel, but required each of the women involved to engage in sex with him as a “training” process. This case was concerned with the appropriate directions to be given to the jury with respect to the meaning of the accused having “authority” over the women sufficient to vitiate consent under s67(1)(h) of the meaning of consent outlined above. Murrell CJ set out the required directions. Here her Honour made passing reference to the limits of s67, but otherwise did not address the question of consent other than the scope of its limits required under s67(1)(h). It was clear, however, that the Crown was relying on consent as meaning “free and voluntary”.

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117 [2019] ACTSC 315 [22].
118 [2019] ACTSC 315 [10]-[13].
B  *Agresti v The Queen* [2017]

*Agresti* is a decision of the Court of Appeal. This was an appeal against conviction for one count of sexual intercourse without consent, pursuant to s54 of the *Crimes Act 1900* (ACT). The accused had engaged in sexual intercourse with the complainant after a night out drinking. There was strong evidence indicating the complainant was substantially intoxicated, and also evidence that the question of consent was never clearly articulated by either party during the event. One of the issues at trial was evidence that suggested the complainant was so intoxicated that she “lapsed in and out of consciousness”.

The basis of the appeal was a direction given to the jury with respect to the meaning of consent. Here the learned trial judge (Murrell CJ), gave the following direction:

> Before you can consent to an act of intercourse or anything for that matter, you must have the opportunity to do so. What that means is if a person is asleep or unconscious at the time that an act of intercourse occurs, they cannot have consented because they did not have – unless of course they agree before they fell asleep or something like that but let’s not worry about those complications; that the person cannot have consented if they were unconscious at the time because they were incapable of consenting. They had no opportunity to consent freely and voluntarily.

In this case the direction was held to be inadequate, as the direction did not properly address the possibility of the shifting consciousness. The appeal was allowed, and a new trial ordered. However, their Honours did not doubt the gist of consent as “freely and voluntarily given”. However, no authorities were cited in either case to confirm the relevant legal foundations for the principle.

C  *R v Tamawiwy (No 2)* [2015]

*Tamawiwy* is part of a rather extraordinary group of cases, illustrating the lengths that people go to for sex. Here, Mr Tamawiwy established a fake Facebook identity, representing himself as a woman who was part of a bisexual community in Canberra. When contacted by interested parties (young men), discussions would take place online in which it was suggested the woman was prepared to engage in a threesome with the young man, on condition that he have sex with Tamawiwy (using another false name). The complainant in this case agreed, and consensual homosexual intercourse took place. In addition, the intercourse was filmed. When the complainant then sought to make contact with the two women, they were nowhere to be found — since they did not exist. In effect, consent was obtained through fraud. Tamawiwy was later charged with two counts of sexual intercourse without consent, and one count of an act of indecency, pursuant to s54 and s60 of the *Crimes Act 1900* (ACT) respectively. Further charges were laid, bringing the indictment to a total of 14 counts. After pleading guilty to five counts, the remaining charges were put to trial.

This case was an interlocutory proceeding, in the sense that accused challenged the Crown’s reliance on s67(1)(g) of the *Crimes Act 1900* (ACT) and was seeking a direct acquittal. Relevantly, that section negative consent where there had been fraudulent misrepresentation by the accused. In this case, that was alleged to be the existence of two woman who did not, in fact, exist at all. A no case submission was made with

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120 [2017] ACTCA 20, Refshauge, Burns and Rangiah JJ.
121 [2017] ACTCA 20 [114].
122 [2017] ACTCA 20 [110].
123 [2017] ACTCA 20 [113]. Interestingly, their Honours were drawing specifically from two West Australian cases, *Ibbs v The Queen* [1988] WAR 91 and *Saibu v The Queen* (1992) 10 WAR 279, both of which necessarily draw on the provisions of the West Australian Criminal Code.
respect to three of the charges, on the basis that there was no misrepresentation of identity, rather the issue was at best a promise to engage in sexual activity. Refshauge J dismissed the application, on the basis the evidence was capable of supporting a conclusion that the complainant had been induced to engage in sexual intercourse with the accused on that basis.\footnote{126}{[2015] ACTSC 302 [67].}

In reaching this conclusion, Refshauge J made an important contribution to our understanding of the law relating to consent by undertaking a historical analysis of s67. His Honour traced the section from its initial introduction as s92P in 1985,\footnote{127}{Crimes (Amendment) Ordinance (No 5) 1985 (ACT).} later renumbered as s67 in 2001.\footnote{128}{Crimes Legislation Amendment Act 2001 (ACT).} The section was introduced for the purpose of extending the grounds for “vitiating” consent on the basis of fraud or mistake, previously found in common law.\footnote{129}{R v Clarence (1888) 22 QBD 23; Papadimitropoulos v The Queen (1957) 98 CLR 249; Michael v Western Australia [2008] WASCA 66; (2008) 183 A Crim R 348.} Refshauge J observed that section 92P “was not preceded by any apparent policy consideration in the Territory,”\footnote{130}{[2015] ACTSC 302 [25].} but did note that the Explanatory Memorandum made passing reference to a Tasmanian Law Reform Commission (“TLRC”) Report.\footnote{131}{Tasmanian Law Reform Commission, Report and Recommendations on Rape and Sexual Offences, Report No 31, (1982).} That report recommended implementing a provision in Tasmania based on a draft proposal for the Model Code of the Northern Territory.\footnote{132}{A digital copy of this report is available at: https://www.ncjrs.gov/pdffiles1/Digitization/90161NCJRS.pdf.} Here the TLRC endorsed the view that when the law requires evidence of consent from the complainant, it has the effect of shifting attention to the conduct of the complainant before, during and after the event, rather than directing attention to the conduct of the accused. This position was specifically endorsed by the Women’s Electoral Lobby in Tasmania. Refshauge J concluded:

> It appears that the relevant provision was not inserted in the Northern Territory legislation but a form of the Law Reform Commission’s recommendation was introduced in Tasmania in s 2A of the Criminal Code Act 1924 (Tas). This Territory and Tasmania appear to be the only jurisdictions which have accepted the wide form of the provision, despite most other jurisdictions reforming the provisions relating to consent in respect of non-consensual sexual intercourse.\footnote{133}{[2015] ACTSC 302 [28].}

The “form” introduced in Tasmania was initially introduced in 1987,\footnote{134}{Criminal Code Amendment (Sexual Offences) Act 1987 (Tas).} although it has since undergone numerous amendments (that have largely expanded the definition). Notably, the newly inserted s2A contained both a positive and negative meaning of consent. Here consent was considered present when it was freely given.\footnote{135}{Criminal Code Amendment (Sexual Offences) Act 1987 (Tas), s4 ‘2A-(1) In the code, unless the contrary intention appears, a reference to consent means a reference to a consent which is freely given by a rational and sober person so situated as to be able to form a rational opinion upon the matter to which the consent is given’.} That aside, the reference to the purpose behind a negative meaning of consent cannot be overlooked. Quoting the TLRC, Refshauge J noted that the effect of a negative meaning shifted the emphasis at trial away from the complainant, and onto the conduct of the accused. There is an important public policy aspect to the way in which consent is constructed in legislation.\footnote{136}{The Tasmanian Law Reform Commission Report specifically observed initiatives of the Michigan Criminal Sexual Conduct Reforms, which had effectively removed consent from the elements of sex offences entirely. See Law Reform Commission, Report and Recommendations on Rape and Sexual Offences, (Government Printer, Tasmania, 1982) Report No 31, 15. The}
Although the case hinged on the provisions that vitiated consent, it is clear that Refshauge J clearly endorsed the common law meaning of consent as being “freely and voluntarily given”. His Honour referred to both Code definitions and common law in the decision, notably the reasoning of King CJ in Question of Law Reserved. It should be noted that Mr Tamawiwy was subsequently convicted of 24 counts of various acts of sexual intercourse, acts of indecency, and using a carriage service to menace, harass or cause offence.

D  

**R v Ardler [2003]**

*R v Ardler* was a decision of the ACT Supreme Court before Justice Crispin. The case involved non-consensual sexual intercourse. The complainant had an intellectual disability. The couple had been friends for many years. On the night in question the accused had missed his bus, and was allowed to sleep at the complainant’s home. In the early hours of the morning the accused climbed into bed with the complainant, who later awoke to find the accused groping her breasts, which was soon followed by penile-vaginal intercourse. Complex issues arose in the case in relation to the knowledge of lack of consent on the part of the accused, further complicated by a long history of mental illness. Ultimately the accused was found not guilty by reason of mental illness.

What is instructive in this case are the sentencing remarks of Crispin J on the question of liability:

> The offence with which the accused stands charged has three elements. First, the accused must have engaged in sexual intercourse with the complainant; second, he must have done so without her consent; and, third at the time he did so he must have either known that she did not consent or have been reckless as to whether she was consenting ....

In the context of the second element of the offence the concept of consent means a free and voluntary consent.

This is as clear a statement as you can get. However, Justice Crispin deployed no authority to confirm the source of the principle. Indeed, he may not have needed to do so since, as stated by King CJ in Question of Law Reserved, the principle seems to be well settled – or at least regarded as an establish principle.

V.  

**THE PROBLEM OF THE BINARY CONSENT MODEL**

The discussion above indicates that the ACT is the only jurisdiction in Australia that defines consent in negative terms. That is, the common law provides a basic principle that consent means “free and voluntary”, with a related statutory rule that will negate the fact of consent when one or more the statutory elements exist. This model is, in fact, a two-part model of consent that is broadly consistent with the other jurisdictions. The point of departure is the absence of a statutory definition of consent. This is apparently found in the common law.

The first issue here is the assumption there is a problem. Does it really matter that the ACT has a negative consent model? Indeed, the Law Reform literature, and particularly

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issue was also discussed in Simon Bronitt, 'Rape and Lack of Consent' (1992) 16(4) Criminal Law Journal 289. (Also referred to by Refshauge J in Tamawiwy)

137 [2015] ACTSC 302 [36] and [43].

138 [2015] ACTSC 302 [44]

139 The Queen v Tamawiwy (No 4) [2015] ACTSC 371.


141 [2003] ACTSC 24 [30].

142 [2003] ACTSC 24 [32].
the feminist scholarship, strongly advocates a negative model on the basis that the attention of the trial is shifted at a tactical and structural level away from the question of whether the complainant gave consent, and onto the conduct of the accused’s conduct that deprived the consent of its voluntary foundations.143

The problem with the negative model is that it appears that consent in sexual assault cases has moved on from a binary model of “consent”. As is evident in all Australian jurisdictions, the question is now a hybrid model that requires, in effect, a three-stage evaluation. The first step requires attending to the question of consent at all; and if consent was given, or ambiguous, a second step has evolved that requires attention to either the honest and reasonable mistake of the accused in the validity of the belief, or conduct on the part of the accused that vitiated consent even when it was given. There is now recognition that context plays a role in the assessment of consent, an important development as empirical studies are now showing that context will shape the behaviour of sex offenders. Indeed, serial offenders will often engineer specific circumstances that make offending easier and legally ambiguous.144 To a large extent that is a natural consequence of the way in which the binary model has evolved. There is recognition that consent can, in practice, result in something more than “Yes/No” answer. In some situations the response and/or interpretation is vague: and in some cases the defendant’s only line of defence is painting the situation in vague terms in order to enliven the defence of mistake of fact. In effect, the circumstances in which the consent was given will qualify the consent if given or doubtful. This is represented in the following diagram:

Whether a negative consent model like the ACT actually has the effect of shifting attention away from the complainant is open to debate. There is always some necessity in soliciting evidence from the accused to establish the threshold question of consent. This is a legal fact. It is the same in all jurisdictions. However, once the threshold question of consent has been established, the law, and associated trial, quickly shifts into an analysis of the circumstances of the consent. This is undoubtedly a positive development.

143 Wells and Quick, above n 3.
The apparent issue here is concerned with the source of law. The ACT is certainly lacking a statutory declaration as to the meaning of consent. However, given the common law meaning of that concept this is not necessarily an issue, apart from national consistency. Given that it appears a settled principle in law and practice in the ACT, at the very least a statutory reform to that effect would import consistency.

VI. REFORMING CONSENT IN THE ACT

Substantive and procedural reforms relating to rape and sexual offences have been a feature of Australian law for the last 25 years or more.\(^{145}\) Importantly, in 2010 the Australian Law Reform Commission recommended that consent be placed on a statutory footing in all jurisdictions. In its report on Family Violence — A National Legal Response,\(^{146}\) the ALRC made four specific recommendations in relation to consent. First, that a statutory definition of consent be based on “free and voluntary agreement”.\(^{147}\) Second, that consent be vitiated on the basis of a “non-exhaustive list of circumstances” that include lack of capacity, acquiescence through fear, threats, unlawful detention, abuse of authority or trust, mistaken identity or understanding of the nature of the act(s), and intimidation or coercion.\(^{148}\) Third, a statutory defence be available based on honest and reasonable belief in consent. And finally, that judges be required to give directions on the meaning of consent to juries.\(^{149}\) Additional recommendations suggested enacting provisions concerned with the objectives of legislation and judicial statements about the nature of sex offending in sentencing decisions.\(^{150}\) Broadly speaking, all Australian jurisdictions except the ACT have enacted statutory rules based on these recommendations.

At the time of writing, a Private Member’s Bill is before the Legislative Assembly in the ACT.\(^{151}\) Introduced on 11 April 2018, the Crimes (Consent) Amendment Bill\(^{152}\) provides, inter alia, to amend s67 of the Crimes Act 1900 (ACT) by inserting the following:

(1) For a sexual offence consent provision, consent of a person to an act mentioned in a sexual offence consent provision by another person means—

(a) the person gives free and voluntary agreement; and
(b) the other person—
(i) knows the agreement was freely and voluntarily given; or
(ii) is satisfied on reasonable grounds that the agreement was freely and voluntarily given.

(1A) Without limiting the grounds on which it may be established that consent is negated, the consent of a person to an act mentioned in a sexual offence consent provision is negated if that consent is caused—

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\(^{148}\) Ibid. Recommendation 25-5.

\(^{149}\) Ibid. Recommendation 25-6.


\(^{151}\) The Bill was introduced by the Hon Caroline Le Couteur, MLA (Greens) on 11 April 2018. The Bill was presented as an exposure draft, specifically intended to implement the 2010 recommendations of the ALRC.

This amendment imports the two-step tests that are consistent with other jurisdictions around Australia. It is important to note that the definition relates to “a sexual offence consent provision”, which includes sexual intercourse without consent, as well as the non-consensual distribution of intimate images.\textsuperscript{153} The Bill was then referred to the Standing Committee on Justice and Community Safety, as part of its function as scrutineer of legislation required by the Human Rights Act 2004 (ACT).\textsuperscript{154} As criminal law routinely has the capacity to interfere with human rights, the Bill was necessarily considered. The Committee explained the effect of the amendment in these terms:

The Bill will amend the current approach in the ACT by defining consent of a person for those various sexual offences (as well as the proposed new defence in section 66A applying to young persons of a similar age). A person will consent when they give free and voluntary agreement; and the other person knows the agreement was freely and voluntarily given, or is satisfied on reasonable grounds that the agreement was freely and voluntarily given. The effect of this provision will be that the prosecution can establish the mental element of lack of consent through showing that there were no reasonable grounds open to the defendant to believe that the agreement was freely and voluntarily given. It is intended that the Bill will remove the ability of the defendant to show that they had an honest belief that the other person had consented where that belief was not reasonable in the circumstances. As the Bill increases the evidential burden on the defendant to establish the reasonableness of their belief that the other person was consenting, the Bill will extend the circumstances in which an innocent person may be found guilty because they are unable to meet their evidential burden. The Bill therefore engages the right to the presumption of innocence protected by section 22 of the HRA.\textsuperscript{155}

The concern with this was articulated by the Human Rights Commission (ACT) (‘HRC’), which made formal submissions on the exposure draft of the Bill. According to the HRC, the question of consent, at least as it related to the definition of consent in its application to intimate image abuse, may have the effect of:

Placing a legal burden on the defendant in these circumstances gives rise to a serious risk that a person may be convicted, not because he/she committed the criminal act, but because they were unable to overcome the burden (emphasis added) placed upon them to show they did not.\textsuperscript{156}

This conclusion arises out of the language used in the amendment. Both limbs require the accused to establish that they had actual knowledge of consent, or to establish the existence of reasonable grounds for the belief. In both cases the focus at trial would be, in effect, at least an evidential, if not a legal burden on the part of the accused. Accordingly, the HRC advised against approving the Bill in its current form, advising:

As the explanatory statement suggests, the extent of any limitation of this right is ‘difficult to ascertain at this stage’. The Committee is concerned that the new definition of consent may result in substantial changes to how knowledge or recklessness of the lack of consent is established. In particular, by including the need for an defendant to be satisfied on reasonable grounds within the definition of consent, and applying that definition to a number of offences, it is difficult to determine the extent of the evidential or legal burdens that may be

\textsuperscript{153} This is also a proposed amendment set out in s67(4) of the Bill: “(4) In this section: sexual offence consent provision means any of the following: (a) section 54; (b) section 55 (3) (b); (c) section 60; (d) section 61 (3) (b); (e) section 66A (2) (c).”

\textsuperscript{154} Section 38(1) of that Act provides: ‘The relevant standing committee must report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly’.

\textsuperscript{155} ACT Legislative Assembly, Standing Committee on Justice and Community Safety (ACT), Scrutiny Report 17 (2018) 2.

\textsuperscript{156} Ibid.
faced by the defendant, such as whether they will need have evidence going both to their state of mind and the reasonableness of that state of mind. Therefore, the Committee is not satisfied, on the information available to it, that the amendments to the definition of consent will have only a reasonable limitation on the right to the presumption of innocence. The Committee therefore recommends that an inquiry is needed to establish the possible operation and impact of the amendments to the definition of consent included in the Bill.157

The Bill, having been identified as a potential problem, was then opened to the public for submissions on the way forward.158 This inquiry closed in September 2018, having received 28 submissions. The subsequent report was published in October 2018.159 Simply stated,160 the report affirmed the view of the Committee that the ACT not proceed with the Bill as tabled.161 Further, it recommended that any legislative changes be delayed until after the publication of the findings of the NSWLRC on the issue of consent.162 The Report did, however explicitly state that:

[A] definition of consent based on a concept of free and voluntary agreement, and affirmative and communicative consent be considered for enactment into ACT law.163

In short, the ACT is in the process of bringing the statutory definition of consent into line with the 2010 ALRC recommendations, consistent with other jurisdictions in Australia. It is just a matter of time. What is worth noting about the focus of the Committee was not the question of whether or not the meaning of consent was at issue, but rather the perception or knowledge of genuine consent in the mind of the accused. In other words, the issue goes towards the knowledge of the accused rather than any concern in relation to the meaning or qualification of consent.

VII. CONCLUSION

The ACT has been slow to effect legislative changes. This appears to be the result of three connected factors. The first of these is the feminist jurisprudence behind negative models of consent. As outlined above, that jurisprudence is concerned with a focus on the conduct of the accused and the circumstances of the conduct, rather than the communication of consent on the part of the complainant. There is much to respect in that policy, grounded as it is in the overriding concern to protect the complainant as much as possible during the trial process. The problem here is twofold. Firstly, that the question of consent is necessarily a part of any sexual offence allegation, and continued to operate in the ACT at common law and in practice in spite of the statutory framework. Questions routinely were asked about the communication of consent during sexual assault trials despite the focus implied by s67 of the Crimes Act. Secondly, the emergence of a national approach to consent left s67 behind, notably after the ALRC published its report and associated recommendations in 2010. As a result, the negative model of consent has come to be seen as an anomaly rather than sound policy.

The second aspect of the conservative position in the ACT is undoubtedly the effect of the Human Rights Act 2004 (ACT), and the strong influence of the Human Rights

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157 Ibid 3.
160 The Report contained 10 recommendations.
161 Standing Committee on Justice and Community Safety, above n 158. Recommendation 1
162 Ibid. Recommendation 2.
163 Ibid.
Commission in legislative activity in this jurisdiction. This is not to suggest that the HRC stands in opposition of consent reforms. That is not the case. Rather, the necessary concern of the HRC is to provide high-level input into legislative design that has the potential to impact on domestic and internationally recognised human rights. As the criminal law is fundamentally linked to those questions, matters that have the potential to erode, compromise or threaten human rights are of necessary concern. As discussed above, the concern with recent amendments has been the question of whether the legislation effectively imposed an evidential, of not legal burden on the accused to establish the existence and content of consent communication. As a result, statutory reforms in this area will always be delayed because of the “precautionary logic” that operates in organisations that are effectively concerned with risk assessment.\(^{164}\) Because reforms in this area present a legal risk to the question of rights, the recommended approach is necessarily a cautious one.

Associated with this is the problem associated with making reforms in an area of complex law. The ACT, being, ostensibly, a Code jurisdiction that continues to operate a common law foundation, and reform in areas that have such complex substantive and procedural law inevitably requires a painstaking analysis of the implications of any proposed reform. Submissions before the Standing Committee discussed above show a serious concern with how the operation of consent reforms would play out in a courtroom, especially in front of a jury.

All things considered, it is no surprise as to why legislators in the ACT have preferred an approach that is awaiting the outcome of the NSW Law Reform Commission’s own inquiry into the laws of consent. This inquiry commenced in May 2018, in the wake of the Lazarus trials in that state.\(^{165}\) This report has still yet to be published. It is worth noting, however, that the Draft Proposals published for public comments specified that there were no plans to change the meaning of consent as currently provided as “free and voluntary”. Rather, the intention was to extend the circumstances where consent may be vitiating.\(^{166}\) This being the case, it seems very likely that consent in the ACT will shortly involve a similar hybrid as other Australian jurisdictions, involving an explicit meaning of consent on a statutory basis, with a series of statutory circumstances where consent may be vitiating. The story will not, however, end there. It seems likely this area of law will continue to evolve, most likely in the direction of merging communication and context.

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THAWING OUT PERSONHOOD: AUSTRALIAN LAW AND CRYONICS

Bruce Baer Arnold*

The adoption of cryonics poses fruitful questions about personhood, consumer protection, trusts, taxation, crime, human rights and other law. Cryonics involves the long term storage of human cadavers at subzero temperatures with an expectation that in the indefinite future the legally dead will be ‘reanimated’. The article discusses the culture and law of cryonics in relation to Australia. It draws on Martha Fineman’s vulnerability theory to critique claims by proponents of cryonics, asking whether unsubstantiated claims regarding reanimation are unconscionable and necessitate a specific statutory prohibition. The article further considers the implications for health, welfare and other law if cryonics was practical.

Lynn Stout’s elegant ‘The Corporation as Time Machine: Intergenerational Equity, Intergenerational Efficiency, and the Corporate Form’ offered a novel and persuasive analysis of one category of artificial person as a mechanism for transcending the finitude experienced by all natural persons. There is increasing interest in some Australian and overseas communities regarding cryonics – cold storage of humans for ‘reanimation’ at an undetermined future time – as a mechanism for transcendence on the part of natural persons. The adoption of cryonics poses fruitful questions about personhood, consumer protection, trusts, taxation, crime, human rights and other law rather than what the Stoics considered to be our mistaken fear of death.

This article engages with questions about cryonics in relation to Australian law, arguing that existing consumer, succession and criminal law offers an effective framework for the regulation of a new technology and consequent shaping of social practice. As such it represents a substantive addition to Australian literature.²

Part I offers an introduction to cryonics, whose adherents expect that future advances in technology will enable the ‘revival’ of cadavers, in essence the unprecedented reinstitution of personhood.³ Part II draws on vulnerability theory in examining consumer protection issues, which range from outright fraud or negligence on the part of profit cryonics service providers through to questions about unconscionability in the marketing to vulnerable people of services that as of 2020 are empirically nonsensical. It touches on responsibility under Commonwealth, state and territory consumer protection and criminal law. Part III considers some implications for succession, health and welfare law if cryonics was practical. Part IV offers concluding remarks, including recommendations for coherent national regulation.

I PLACING LIFE IN THE FREEZER

The inescapability of death has preoccupied generations of philosophers, theologians and authors. It is something experienced by all humans and their companion animals, thus distinguishable from the traditional meme that the only ‘universals’ are death and

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2 There has not been a substantial addition to the Australian legal literature since George P Smith III, ‘Intimations of Immortality: Clones, Cyrons and the Law’ (1983) 6(1) University of New South Wales Law Journal 119.
taxes, with much of the legal profession endeavouring with varying degrees of success to ensure that tax is escapable and personal assets are distributed post-mortem in accord with an individual’s wishes. (This article will return to that point below in discussing the implications of cryonics for succession.)

Death might be postponed by self-regulation (for instance avoidance of self-harm through consumption of fast foods, disregard of self-isolation during pandemics and participation in dangerous sports or occupations) and by legal frameworks that seek to deter murder and inhibit workplace injury. It might be postponed through effective diagnosis and clinical treatment of bodily ills. However, it comes to us all, irrespective of whether we are Charles Foster Kane, King George V (eased into the afterlife with a shot of morphine) or an Indigenous person who sleeps rough.

Cryonics offers what proponents view as a radically new proposition, in other words that death can be defeated through preservation of a cadaver – human or otherwise – in a way that will allow future reanimation. Bringing the dead creature back to life might take place when medicine has discovered a cure for cancer or another disease that afflicted the person. It might instead take place when science has discovered how to reverse aging or transfer an individual’s consciousness. Some proponents thus argue that whole-body reanimation will be unnecessary, as the person’s mind can be ported to the Cloud or a robot or transferred to a new body grown ‘in vitro’. You die, for example, looking as wrinkled as Rupert Murdoch or W H Auden and reawaken in 2200 looking as sprightly as a 20 year old Justin Bieber or Kim Kardashian, presumably with your reanimated cat or dog.

Absent references to liquid nitrogen and other contemporary technologies, such promises of immortality or death indefinitely deferred are in fact not new. They are a feature of alchemy in European and Chinese culture over several centuries, marked by a feverish search for elixirs and other nostrums that would allow unlimited or merely vastly extended life for emperors, kings and other members of an elite. They are also a feature of traditional anxieties about the embodiment of mind (or soul) in frail flesh.

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8 https://www.cryonics.org/resources/pet-cryopreservation.
Cryonics does not rely on ingestion of dragon blood, powdered amber and rhinoceros horn, cinnabar, colloidal gold, mumia or other concoctions that in Australian law would now be unrecognised by the Pharmaceutical Benefit Scheme, contrary to the therapeutic goods regime or endangered species conventions, and attract sanctions if prescribed by a health practitioner. It is instead predicated on the expectation that human brains or whole bodies can be chilled, stored indefinitely (typically in a vat of liquid nitrogen) and successfully ‘reanimated’. The reanimation of the cadaver – someone who ceased to be a legal person at the time of death and is recognised by the state as being dead – would be without loss of memory and cognition. It would reinstate, or in the view of cryonics proponents, allow the previously ‘suspended’ entity to autonomously reaffirm their personhood.

Cryonics has been a feature of popular culture since at least the 1960s, with for example speculation about deep freezing of Walt Disney’s severed head, appearances in science fiction (gently debunked in Woody Allen’s 1993 Sleeper and Matt Groening’s 1999 Futurama), mordant gibes about repositories for meat-flavoured popsicles, visions of reanimating Captain Scott and other Antarctic explorers, and millenarian

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12 National Health Act 1953 (Cth).

13 See for example Therapeutic Goods Act 2010 (Cth) and Poisons and Therapeutic Goods Act 1966 (NSW).


15 Health Practitioner Regulation National Law Act 2009 (Cth) and corresponding state/territory statutes.


17 Recognition is provided in a range of statutes, for example Births, Deaths and Marriages Registration Act 1995 (NSW) Pt 7 and Human Tissue Act 1983 (NSW) s 33. Australian legislatures have provided statutory definitions that accommodate practices such as organ transplantation and elective ventilation. See for example Transplantation and Anatomy Act 1978 (ACT) ss 30 and 45; Human Tissue Act 1983 (NSW) ss 26 and 33; Transplantation and Anatomy Act (NT) ss 21 and 23; Transplantation and Anatomy Act 1979 (Qld) s 45; Death (Definition) Act 1983 (SA) s 2; Human Tissue Act 1985 (Tas) ss 25A and 27A; and Human Tissue Act 1982 (Vic) ss 26(7) and 41.


20 ‘Simon wants to be turned into a popsicle!’ OK! Magazine (London, 23 February 2009) 7; and Jonathan Petre, ‘Simon Cowell: I’m going to freeze my body when I die so I can be brought back to life’ Mail on Sunday (London, 22 February 2009) 12.

21 Danila Medvedev of KrioRus talks of transporting the 1912 Scott expedition explorers to his facility in Russia: ‘There is still time to get there. Most likely the temperature was low enough that we could preserve the brains and revive them in the future. It’s still on our to-do list.’ Courtney Weaver, ‘Inside the weird world of cryonics: From the US to Russia, companies are freezing people hoping for a second shot at life’ Financial Times (London, 18 December 2015) 12.
enthusiasm among readers of works such as Robert Ettinger’s *The Prospect of Immortality.*

Overseas it has recurrently attracted small-scale investment, particularly in some technology communities, alongside longevity research that is promoted as allowing favoured individuals to live 150 or 250 years or achieve a ‘transhuman’ immortality for Silicon Valley billionaires by shedding their bodies in transferring their consciousness to the cloud to provide a ‘substrate-independent mind’.

Much of that investment has been on an ostensibly not-for-profit basis among enthusiasts, with no major health services provider entering the field and no cryonics start-up listing on the NASDAQ or other innovation capital markets. That is unsurprising, given the problems discussed below. In essence no dead or living animal, human or otherwise, has been reanimated after long term cryonic storage and there is, at best, little reason to believe that reanimation will be feasible in future, something that provokes questions about consumer protection.

Within Australia there have been sporadic media items about the establishment of commercial cryonics facilities. None seem to have progressed to the stage where people are in storage or attracted institutional endorsement and substantial consumer participation, reflected in the absence of local scholarly literature on cryonics regulation and issues. Overall cryonics has not attracted the funding and academic attention that has been gained by other ‘resurrection science’ such as the commercial

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27 See for example Benjamin Shuhyta, ‘First cryonics lab in southern hemisphere proposed for southern New South Wales’ *ABC Riverina* (ABC) 8 March 2016; and Barbara Miller, ‘Cryogenics facility in NSW to accommodate those in the market for life after death’ *Lateline* (ABC) 14 Feb 2017. As of May 2020 Southern Cryonics reports 27 members for its facility in Holbrook: www.southerncryonics.com.

28 As of 2019 Alcor, the largest US service, reported 1,731 members, including 172 in cold storage (96 only as heads). KrioRus, the largest Russian service, reported a smaller membership and fewer cadavers. See also Richard Huxtable, ‘Cryonics in the Courtroom: Which Interests? Whose Interests?’ (2018) 26(3) *Medical Law Review* 476 for other head counts.
cloning of companion animals and Jurassic Park de-extinction initiatives. Cryonics has not been endorsed by the Australian Medical Association, Royal Australian College of General Practitioners or corresponding overseas professional bodies. It has not received funding by the Australian Research Council or National Health & Medical Research Council. As a practice it has no recognition by leading bodies such as the US National Academies of Science and of Medicine.

### A Faith, Fear and Speculative Technologies

It is axiomatic that once death occurs human and other animal cadavers degrade, with some organs irreversibly deteriorating more quickly than others. Kidneys and corneas for example can be ‘rescued’: the basis of the widespread organ transplantation that is expressly recognized in Australian law. Ova and sperm can be harvested post-mortem within a short window after death and used thereafter, something that is reflected in inconsistent judgments that address aspects of assisted fertility. Livers have some scope for regeneration, whether in a recipient of an organ donation or in a person who is on life support. Brains are less robust, ceasing to function and exhibiting fundamental structural changes when blood circulation is unavailable beyond a short period.

Cryonics is predicated on three things, expressions of faith. The first is that there will be intervention immediately after an individual dies, with that person being progressively cooled and placed in low-temperature storage to preserve the integrity of the whole body or head as the basis for reanimation in the indefinite future. As discussed below, that is a matter of problematical logistics where time is of the essence. The second is that storage will be undisturbed over a period of decades or centuries. The third, most saliently, is that the cooling and storage processes will permit

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31 Transplantation and Anatomy Act 1978 (ACT); Human Tissue Act 1983 (NSW); Human Tissue Transplantation Act 1995 (NT); Transplantation and Anatomy Act 1979 (Qld); Transplantation and Anatomy Act 1983 (SA); Human Tissue Act 1985 (Tas); Human Tissue Act 1982 (Vic); and Human Tissue and Transplant Act 1982 (WA).


reanimation. As of 2020 that is an insoluble challenge, raising fundamental questions about consumer protection and the exploitation of vulnerability, discussed in Part II of this article. If, very improbably, reanimation is feasible it raises questions about social justice, succession and other law, discussed in Part III below.

Preservation of meat and other organic matter through freezing is an unremarkable phenomenon, something that Australian consumers take for granted when visiting a supermarket. Inhibiting the decomposition of a cadaver through low temperatures is a common practice in government morgues and private sector funeral homes. That storage, typically for a few days or weeks, addresses the inconvenience of decay.

Cryonics adopts that model of preservation, with an additional element. The expectation is that immediately an individual is pronounced legally dead, the person’s body temperature can be lowered through packing in ice as the basis for preparation and then storage at a subzero temperature in a way that will supposedly not result in irremediable damage to the complex network that we call the brain.

Transhumanists, adherents of a millenarian faith about transcendence, sometimes gibe that humans are carbon-based bipeds, inferior to a more robust disembodied silicon-based consciousness that might exist in perpetuity. It is more pertinent to characterize humans as water-based entities, given that much of the weight of a brain is attributable to water in cells, cerebral fluid and blood. Enthusiasts for reanimation after low temperature storage accordingly need to grapple with water expanding on freezing, meaning that cells ‘shatter’ when frozen/thawed and that protein chains irremediably deform, corrupting the connections and encoded data that are the basis of cognition and memory. If you want to be reanimated you cannot have the seat of your consciousness, the ghost within the machine and for many people the basis of your personhood, ending as a cold mush.

On that basis cryonics services engage in perfusion, a process in which a ‘cryoprotectant’ chemical solution is pumped through the dead person’s bloodstream to replace much of the water and thus — it is hoped — prevent systemic structural damage associated with extreme cooling/warming. After completion of perfusion the individual is typically wrapped in foil and immersed in an insulated container with liquid nitrogen, ultimately reduced to around to minus 196 degrees Celsius. The expectation is that the container will be maintained at that temperature pending removal of the body at some point in the future, with cryonics proponents envisaging that ‘suspended animation’ — a suspension rather than erasure of personhood — would be followed by ‘reanimation’ of the ‘head in the vat’ or whole cadaver in the container.

The following paragraphs suggest that cryonics is at best highly speculative and a sadly misplaced faith in a secularized ‘sure and certain resurrection’ for ‘cryonauts’ or what Foley characterises as ‘an industry built on little more than hope mixed with a dash of egotism’. It is a cottage industry, one with little regulatory attention and without the need for unique legislation.

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B  Inconvenient Practicalities

Wariness about the faith reflects a cluster of inconvenient practicalities rather than merely disagreements about ethics or the self-conscious (and self-regarding) renegade status of adherents.37

Proponents of cryonics typically envisage that participants in cryonics schemes – in other words, consumers – would be processed immediately after death and thereafter kept in cold storage pending reanimation when science has advanced to the point that the disorders associated with old age, terminal disease or just mundane aches and pains can be reversed. Time is of the essence. Inconveniently, not everyone dies on schedule in a location where processing support is on hand, given that few countries have discrete cryonics facilities and perfusion is not a standard feature of a general practitioner’s toolkit. In what one service provider characterises as an emergency situation the cadaver may suffer irreparable damage before perfusion commences.38

One response among enthusiasts has been to suggest that consciousness is best preserved if the person is processed pre-mortem (crudely, chilled and perfused while still alive), characterised by some as analogous to an induced coma rather than murder or suicide and by others as cryothanasia.40 Such characterisations are consistent with language in which people are temporarily ‘suspended’ or indefinitely ‘deactivated’ rather than dying, a rhetoric that is at odds with the legal understandings of death discussed below. The language implies that personhood continues while the cadaver awaits reanimation. The characterisations are also at odds with the wariness about assisted suicide/dying in most jurisdictions, founded on relief from irremediable suffering as distinct from ‘assisted dying while young to leave a cryopreserved beautiful corpse’, a millenial version of James Dean’s advice to live fast, die young and leave a beautiful corpse.

Given that no-one has been reanimated, restored, reactivated or otherwise brought back to consciousness after long-term cryonic storage we cannot say with certainty that the toxicity of cryoprotectants is trivial.43 Solutions used in perfusion to prevent damage at the cellular level may over time fundamentally injure the brain and other organs they are meant to protect. The speculative nature of cryonics means that challenge is side-stepped by enthusiasts, who appear to assume that when the time

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37 One point of entry to the ethics literature, complementing work on transhumanism noted above, is Francesca Minerva, The Ethics of Cryonics: Is it Immoral to be Immortal? (Palgrave Macmillan, 2018).
39 https://www.cryonics.org/emergency-situations/
41 In Australia note Voluntary Assisted Dying Act 2017 (Vic) and Voluntary Assisted Dying Act 2019 (WA). Neither enactment refers to or accommodates cryothanasia, discussed in Francesca Minerva and Anders Sandberg, ‘Euthanasia and cryothanasia’ (2017) 31(7) Bioethics 526.
comes for revival medical science will have found a way through nanotechnology or other nascent mechanisms to address any problems.

At a mundane level, discussed below, those enthusiasts assume that storage will be uninterrupted and that there will be no mishaps regarding handling of the frozen cadaver. Custodians of bodies in a cryo crypt will continue to care for what is in the vats, for example periodically topping up the liquid nitrogen and (as with historic tombs cases) ensuring that the departed are undisturbed. That assumption is contestable, with for example one do-it-yourself enthusiast being affected by freezer failure. Danila Medvedev, founder of service provider KrioRus, is reported as bizarrely proposing to address contingency by storing half his brain in Russia and half elsewhere to hedge against a natural disaster. The proposal is consistent with much of the enthusiasm within the cryonics community, where understanding has been shaped by engineers rather than researchers with a strong base in the life sciences.

Educational or professional associations do not certify the practice of cryonic perfusion and there is no Australian standard. It is unclear whether practitioners are self-taught (and self-regulated, in the absence of attention by health officials) or drawing on skills acquired as embalmers.

II VULNERABLE OR MERELY FOOLISH CONSUMERS?

Animals are defined by their mortality and their fragility, a vulnerability to disease and injury that justifies intervention through law to minimise harms. That universal vulnerability underlies the work of legal theorists such as Thomas Hobbes. It is central to the work of Martha Fineman, who in understanding law through a lens of vulnerability recognised that we are all born defenceless, are often enfeebled through age or illness, are subject to natural or other disasters and might be failed by social institutions that should support our flourishing but instead enshrine discrimination. Fineman, like John Rawls, has attracted attention in arguing for a state that actively ensures substantive equality of opportunity.

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44 The consequences of dropping unthawed organic matter stored in liquid nitrogen are a feature of much high school and undergraduate science teaching: the substance shatters.
45 Re Hooper [1932] 1 Ch 38; and Re Vaughan (1886) 33 Ch D 187. Note however Re Pacella [2019] VSC 170. The New Zealand Law Commission comments ‘We all die. And someone must care for the dead, who, as mortician Caitlin Doughty has said, “have become useless at caring for themselves”’. New Zealand Law Commission, Death, Burial and Cremation: A New Law for Contemporary New Zealand (R134) (2015) iv.
47 Courtney Weaver, ‘Inside the weird world of cryonics: From the US to Russia, companies are freezing people hoping for a second shot at life’ Financial Times (London, 18 December 2015)
48 For certification of embalmers see for example Public Health Regulation 2012 (NSW).
however use Fineman’s thoughts on vulnerability as a heuristic for conceptualising questions about dignity, consumer protection and state intervention.53

At the most abstract level, cryonics is founded on a common vulnerability: the mortality that involves a departure from our loved ones and an erasure of our identity, often alongside indignity and suffering in the process of dying. It is a vulnerability that is open to exploitation by enthusiasts who suggest that death is not the end and not inevitable, merely something inconvenient and readily addressed (if a consumer has both the resources and determination) through cryonics. While acknowledging the possessive individualism that is a foundation of the liberal democratic state we might be wary about a promise to suspend death through cryonics and, like Stout’s corporation, accordingly enjoy personhood in perpetuity.

That wariness about exploitation of consumers facing an existential challenge is salient because the promise of cryonics appears highly unlikely to be fulfilled. Is receipt of payment by people seeking preservation a matter of unconscionability under equity and the Australian Consumer Law because of the consumer’s vulnerability and because no-one will be revived?

A Selling a lottery with no winning tickets

As a society Australia is permissive of donations by religious adherents to faith-based organisations54 as indicia of commitment to a belief system that features rewards in the afterlife but does not promise a physical return by ‘some one already domiciled on the other side of the inevitable river’, as a UK Court mordantly noted in the 1927 Chronicle of Cleophas Case.55

Cryonics purports to indefinitely defer that afterlife, without the justifications of sociability and charity that legitimate law’s recognition of religious belief.56 Although based on the mortality that animates much religious belief, cryonics might more aptly be understood as a lottery, an existential wager in which consumers pay for a chance of defeating death. As such it provokes questions about respect for autonomy and about consumer protection.

Australia permits lotteries and other games of chance, typically conceptualised as entertainment, embodying a notion of fairness57 and bounded by restrictions regarding the capacity of consumers, in other words vulnerable people.58 Cryonics fits awkwardly within that regulatory model, given that in all lotteries there is an expectation that someone other than the lottery operator will win. The science noted above indicates that it is highly improbable, if not impossible, that any consumer will ever win their wager against death, despite having paid on a scale that dwarfs the payment made by a

55 Cummins v Bond (1927) 1 Ch 167.
56 In Foundation for Anti-Aging Research v Charities Registration Board [2015] NZCA 449, the only significant judgment in Australia or New Zealand relating to cryonics and of cryonics per se. The Court of Appeal appears to have been unpersuaded by claims from the Foundation for Anti-Aging Research and Foundation for Reversal of Solid State Hypothermia regarding the public benefit of research into cryonics and of cryonics per se.
57 See for example Lotteries and Art Unions Act 1901 (NSW) ss 2, 17; Gaming Machine Act 1991 (Qld) s 1A; and Gambling Regulation Act 2003 (Vic) ss 1.1, 3.5.4 and 7.4.1.
58 See for example Lotteries and Art Unions Act 1901 (NSW) ss 2, 17; and Gambling Regulation Act 2003 (Vic) s 3.5.33A.
consumer of fortune telling, of homeopathic products or of the chook raffle at the local football club.\footnote{Courtney Weaver, ‘Inside the weird world of cryonics: From the US to Russia, companies are freezing people hoping for a second shot at life’ Financial Times (London, 18 December 2015) 12 reports that Alcor charges US$200,000 for a full body or US$80,000 for just a head. Full body cryopreservation by KrioRus’ costs US$36,000, with US$12,000 for a head. Reanimation costs are extra.}

As part of ongoing secularisation of law Australia has decriminalised the commercial provision of statements about what will happen in the future, in other words advance notice of inescapable individual destiny through the use of palm reading, crystal balls, communication with spirit guides and other fortune telling practice.\footnote{See for example the Vagrants, Gaming and Other Offences Act 1931 (Qld) repealed by the Summary Offences Act 2005 (Qld) and Criminal Code Act 1899 (Qld) s 432 repealed by the Justice and Other Legislation (Miscellaneous Provisions) Act 2000 (Qld). Similar provisions regarding spiritualism and fortune telling featured in the Summary Offences Act 1953 (SA) s 40, Vagrancy Act 1966 (Vic) and Fraudulent Mediums Act 1951 (UK).} We regard that practice as entertainment and only intervene where the service provider has engaged in unjust enrichment, in other words has received an inordinate reward through egregious exploitation of the consumer’s emotional or intellectual vulnerability.

Cryonics is not a matter of entertainment, in other words a hedonic pastime in the here and now that brings pleasure but has no stated therapeutic benefit and that occupies the consumer’s time during their life on a recreational basis.\footnote{See in particular Blomley v Ryan (1956) 99 CLR 362, 405 (Fullagar J) and 415 (Kitto J).} In contrast to the ten or thirty minute consult with the New Age chiromancer it involves non-trivial expenditure by the consumer. More importantly, it involves expenditure where the benefit is existential rather than recreational and occurs after legal death, if it comes at all, rather than during the individual’s non-working hours.

It involves a choice by the consumer, an exercise of that person’s dignity through agency regarding allocation of personal resources. There has not been an authoritative Australian or overseas study about why people want reanimation through cryonics. We might infer that the choice is founded on vulnerability in terms of the fear of death, the hunger for continued existence and the consequent susceptibility to exploitation through provision of a service that at best is aspirational. Preceding paragraphs in this article have argued that consumers are not going to reanimate and resume their personhood; they will remain dead and thus will not be in a position to discern that the money they spent to defeat the grim reaper has been in vain. A mere fear of death and ambition to postpone the afterlife is not however a recognised special disability under Australian equity law.\footnote{Hamilton Island Enterprises Pty Ltd v Commissioner of Taxation (Cth) [1982] 1 NSWLR 113; (1982) 60 FLR 285.}

Payment for cryopreservation per se does not indicate that the consumer lacks capacity or is presumed to be subject to undue influence.\footnote{See in particular Blomley v Ryan (1956) 99 CLR 362, 405 (Fullagar J) and 415 (Kitto J).} Absent indications that a consumer was knowingly deceived or that an evident disability was exploited a gift to a cryonics organisation or a payment for services would stand. An entity offering cryonic services in essence simply needs to alert consumers that its operation is aspirational, that there is no guarantee reanimation will be feasible and that the cost of reanimation (as distinct from storage) is both unknown and outside any agreement with the service provider. Drawing on Amadio and Garcia astute Australian service provider might alert the potential consumer to the significance of independent advice.\footnote{Commercial Bank of Australia Ltd v Amadio [1983] HCA 14; (1983) 151 CLR 447. See also Garcia v National Australia Bank Ltd [1998] HCA 48; (1998) 194 CLR 395.} In practice adherents
of cryonics are unlikely to be persuaded by advice that resembles the scepticism evident in this article, so as with the ‘independent advice’ noted by the Hayne Royal Commission alerting has a formal rather than substantive basis.\textsuperscript{65}

One overseas response to vulnerability has been a British Columbia’s statutory prohibition of commercial cryonics. That jurisdiction’s statute provides that

No person shall offer for sale or sell any arrangement for the preservation or storage of human remains based on cryonics, irradiation or any other means of preservation or storage, by whatever name called, that is offered or sold on the expectation of the resuscitation of human remains at a future time.\textsuperscript{66}

The prohibition in disregarding autonomy\textsuperscript{67} implicitly addresses what we might deem as credence claims, in other words claims that the consumer has no scope to test, given that the outcome of cryopreservation if successful will be in the indefinite future, a future after the consumer’s death.

If we are conscious of vulnerability we might allow consumers to exercise their autonomy by paying for preservation but amend the Australian Consumer Law to require providers of cryonic services to clearly state that they are selling a wish and dream rather than something realisable. That might accordingly require a more robust warning than the reference by Australian initiative Southern Cryonics to the expectation that future medical technology may be able to repair the accumulated damage of aging and disease at the molecular level, and restore the patient to health.

Continuing progress in medical technology strongly suggests that treatments will be found for most currently fatal conditions and as a result our expected healthy, vigorous lifespans will get very much longer within the next few decades.\textsuperscript{68}

Importantly, that warning might alert potential consumers to the absence of information about the cost of reanimation, which will presumably involve more than simply thawing the cadaver and flushing the cryoprotectant from that body’s cells. Proponents of cryonics assume that the technology needed for reanimation will be available at some stage in the future and will be affordable. As with expectations that preservation will be successful, the assumption that nanotechnology or other reanimation mechanisms will be both cheap and effective is based on faith rather than any substantive data. Part III of this article accordingly asks whether cryopreservation represents an exercise of futility, with custodians of the frozen cadaver ultimately facing questions about conventional disposal of the cadavers on the basis that ordinary consumers will have insufficiently provided for the cost of reanimation as distinct from storage.

An outright ban on the provision in Australia of cryonics services is not necessary. It is however appropriate and practical to address other consumer concerns through existing law.

B Fraud and Failure

Putting aside questions about death deferred, death cryonically defeated, what about the delivery of the services? One starting point is the form of the contract between the

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\textsuperscript{65} Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, 2019

\textsuperscript{66} Cemetery and Funeral Services Act 1990 (BC) Pt 5, S 57.

\textsuperscript{67} Sarah Conly, Against Autonomy: Justifying Coercive Paternalism (Cambridge University Press, 2012).

\textsuperscript{68} https://southerncryonics.com/what-is-cryonics/
service provider and hopeful consumer. Who can enforce that contract, given that the person in storage is dead and thus no longer a legal person?

Enforcement is relevant given instances of fraud by cryonics promoters, with bodies not being processed and stored, for example the cadaver not going into the freezer or not being properly maintained. Some services have billed trusts set up by consumers but not maintained services, for example not topped up the liquid nitrogen or not paid the security and power bills. That failure is a function of both inadequate regulation of the US funeral sector, consistent with the practice mordantly described by Jessica Mitford in *The American Way of Death* or Evelyn Waugh’s *The Loved One*, and a preservation ethic that in seeking to transcend death emphasises hope over inconvenient science and valorises amateurism over expertise. In Australia storage would need to be authorised under state/territory law as part of each jurisdiction’s public health regime.

Assuming that the technology works and all goes according to plan, what are some implications for other areas of law?

### III AFTERLIVES

A return from the dead is wondrous but legally and socially inconvenient, given that it requires an unsettling of arrangements and affections in place after someone is known to have died or is presumed to have died.

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70 Cryonics Society of California founder Robert F ‘Bob’ Nelson, a television repairman rather than an individual with life sciences qualifications, was famously responsible for the so-called 1979 Chatsworth Scandal that featured the abandonment and decomposition of nine cryonic cadavers. Nelson had placed multiple ‘patients’ in undersized storage vessels and prior to abandonment of the facility had disregarded expectations regarding accountability.


73 In New South Wales for example see *Public Health Regulation 2012* (NSW) Reg 50, Reg 54.

It is evident in historic case law such as that involving Martin Guerre, Roger Tichborne and the Kumar of Bhawal or recent insurance-centred ‘death fraud’ incidents such as Stonehouse, Gordon and Darwin. That law sits alongside depictions such as Stanley Spencer’s 1933 Parents Resurrecting – a world conveniently ‘filled to capacity with the thawed remnants of previous generations’ – and the rich literature, such as Janecek’s Makropolous Affair or Rice’s The Vampire Lestat, of the existential angst experienced by the deathless. As with much law, art provides greater insights about the human condition than black letter law.

**A Not dead, just suspended?**

Questions about suspension, reanimation and inconvenience pose conundrums for people who conceptualise life in terms of a pulse and enough breath to fog up a mirror or that the ending of personhood is a matter of a speech act, in other words someone is dead because a medical practitioner has said so and that certification has been noted in a register of births, deaths and marriages – foundational registers for the personhood of natural persons.

Fortunately Australian legislatures have provided statutory definitions that accommodate practices such as organ transplantation and elective ventilation and might be reflected in a regime that embraces ‘assisted dying’, given the tenet that the...
state reserves a monopoly on lawful ending of life. Resistance to assisted dying means that the legislatures are unlikely to embrace cryoanthesia, precluding a cryonics tourism in which healthy people travel to the cryonics facility and are assisted to die in an expectation that it is best to be perfused on the spot rather than dying several kilometres away and trusting that there will be no disruptions with transport. Law regarding assisted suicide – death as an exit from intolerable suffering rather than a way station pending defrosting – sits uncomfortably with the notion that people will be processed while still alive.

We differentiate between the induced coma, the temporary non-reliance on a human heart during surgery, and death (construed in terms of the cessation of neurological activity – ‘brain death’ rather than absence of a pulse). Under existing law the chilled cadaver would be conventionally dead rather than ‘suspended’. One consequence is that in some Australian jurisdictions the processing/storage of the body would be an ‘interference with a corpse’ offence under that jurisdiction’s Crimes Act or Criminal Code.

Any recognition of suspension raises the sort of questions that feature in law tutorials. Would the chilled cadaver, anomalously deemed to be alive, be entitled to the aged or other pension, an income support mechanism that might be quite useful as the years go on and science fails to enable successful thawing? What about defamation law: dead people cannot sue for injury to reputation, irrespective of the pain experienced by their grieving survivors, because in legal terms that reputation dies with them. Obligations to vote would presumably not be a problem, given that there is some requirement for capacity under electoral statutes.

What about potential disagreements about disposition of the person’s assets or body, given that an individual’s heirs might want to enjoy the ‘undead’ estate rather seeing it tied up indefinitely pending the cryonaut’s supposed return or might instead


87 That monopoly is most commonly exercised by the armed forces in military conflict. See also Death Penalty Abolition Act 1973 (Cth); Lynne Forsterlee, ‘Death penalty attitudes and juror decisions in Australia’ (1999) 34(1) Australian Psychologist 64; William Schabas, The abolition of the death penalty in international law (Cambridge University Press, 2002); and James Wyman, ‘Vengeance Is Whose: The Death Penalty and Cultural Relativism in International Law’ (1996) 6(2) Journal of Transnational Law & Policy 543, with the latter indicating the usefulness of a Rawlsian test in addressing cultural contingency.


89 Any recognition of suspension raises the sort of questions that feature in law tutorials. Would the chilled cadaver, anomalously deemed to be alive, be entitled to the aged or other pension, an income support mechanism that might be quite useful as the years go on and science fails to enable successful thawing? What about defamation law: dead people cannot sue for injury to reputation, irrespective of the pain experienced by their grieving survivors, because in legal terms that reputation dies with them. Obligations to vote would presumably not be a problem, given that there is some requirement for capacity under electoral statutes.

What about potential disagreements about disposition of the person’s assets or body, given that an individual’s heirs might want to enjoy the ‘undead’ estate rather seeing it tied up indefinitely pending the cryonaut’s supposed return or might instead

91 Civil Law (Wrongs) Act 2002 (ACT) s 122; Defamation Act 2005 (NSW) s 10; Defamation Act 2006 (NT) s 9; Defamation Act 2005 (Qld) s 10; Defamation Act 2005 (SA) s 10; Defamation Act 2005 (Vic) s 10; and Defamation Act 2005 (WA) s 10.
simply want a conventional burial?\textsuperscript{94} One implication is that a person’s successors might indefinitely defer reanimation so that the cryonaut could not retrieve assets once defrosted. Keegan Macintosh speculates that ‘suspended’ people might accordingly memorise a bitcoin key, providing custodians with an incentive for reanimation,\textsuperscript{95} raising questions about the longevity of bitcoin and what happens to a substantial asset if reanimation when impossible. In practice such mechanisms seem beside the point, given that Australian law has no imperative to recognise cryonically ‘suspended’ humans as being alive.

How would laws operate if the chilled person was married prior to cryopreservation and the deceased’s spouse remarries during the period of suspension? Would that marriage still be valid when the former partner returns from the dead? If a claim was to be made by a dissatisfied beneficiary on an estate, how would that affect funds set aside for ongoing cryopreservation of the cadaver and for reanimation?

What would happen if further funds are required for upkeep of cryonaut two centuries hence, after the enthusiasm of volunteers has expired and someone needs to deal with an aging storage facility occupied by cadavers? Can the legal representative or descendants be approached for the further funding?

\textbf{A} Property

Is a processed body – no longer a legal person – property, reflecting the uncertain jurisprudence since \textit{Doodeward v Spence};\textsuperscript{96} often misread as affirming Blackstone’s statement\textsuperscript{97} on no property in a cadaver. Drawing on recent Australian judgments regarding gametes we might conclude that perfusion means there has been sufficient exercise of skill to allow us to construe what is immersed in the liquid nitrogen as property.\textsuperscript{98} That however prompts the question, whose property? As things stand the frozen body has no personhood and no legal rights: it cannot vote, has no standing in litigation, has no capacity and absent a recognition that it is alive can not itself hold property. Assuming reanimation might be feasible, should it be regarded as analogous to an embryo or foetus that are claimed by some bioethicists to have some rights, derived from legislation rather than common law and exercised on its behalf by a benevolent state? Those rights might extend to protection for ‘premature’ ending of storage (ie disposal of a chilled cadaver on the basis that storage in perpetuity is futile or contrary to \textit{ordre moral}) or premature reanimation.

\textbf{B} Social equity

If cryonics is technologically viable, what about social equity? In drawing on Fineman we might conclude that the human condition is one of vulnerability but some individuals through wealth, social connections, status and access to expertise can offset that vulnerability. Deferring/defeating death through cryonics raises questions about fairness, typically not addressed by proponents of cryonics who – in an echo of alchemists – appear to assume reanimation will be appropriately restricted to elites


\textsuperscript{96} \textit{Doodeward v Spence} [1908] HCA 45; (1908) 6 CLR 406 and \textit{Leeburn v Derndorfer} [2004] VSC 172 for example indicate that there are typically no property rights in a cadaver and, as noted in \textit{R v Sharpe} (1856-57) Dears & Bell 160; 169 ER 959. no comprehensive rights of possession.


and are unconcerned about law enabling privileged people to engage in a form of time travel that is unavailable to the masses.

Romain refers to the premise that cryonics is an investment in the possibility of an extended future and a potential insurance policy against death ... an attempt to gain sovereignty over the limits of biological time, achieved through both monetary investment and the banking of biological objects understood to be actual selves. Cryonics demonstrates a unique way in which time, capital, and biotechnoscience can come together in the name of future life.99

That investment is however unlikely to be available to all. Romain notes that cryonics is a particularly American social practice, created and taken up by a particular type of American: primarily a small faction of white, male, atheist, Libertarian, middle-income and upper-middle-income, computer/engineering "geeks" who believe passionately in the free market and its ability to support technological progress.100

Through the lens of COVID-19, where the 1% were able to escape pandemic hot spots (in some instances supposedly heading to ‘apocalypse bunkers’ in New Zealand), we might be forgiven for suspecting that elites would be better placed to suspend death and preserve assets for enjoyment after reanimation. Huxtable comments that the persuasiveness of state support might mount, at least if or when cryonics approaches viability. At present, however, the science is so speculative that this does not appear to be a worthwhile use of the public purse. As such, at least at the present time, cryonics appears best left as a private matter, for those optimistic—some would say deluded – few who are willing to make the investment.101

The ‘right to health’ has typically construed as preventing exclusions from access to health services on the basis of ethnicity or religion rather than a justiciable requirement for states to provide all citizens with the highest standard of healthcare, including free/subsidised medical products and services to offset the vulnerability of people who are disadvantaged because of poverty, gender, location or status. Irrespective of unlikelihood that an Australian government would include chilling and reanimation in the nation’s public health scheme, given concerns about perpetuities should fairness allow the assets of those elites to be ‘frozen’ indefinitely pending the reappearance of those individuals? What about tax law and succession law, with resources arguably being inappropriately allocated indefinitely to storage and reanimation? Would one fairness mechanism be institution of a cryo-death duty to offset the impact of cryonics as a disruptive time machine, ensuring that ‘you can’t take it with you’ – or suspend it with you – when you go?102 In a legal environment where some people have supposedly abolished death we do not necessarily need to abolish redistribution through the tax system and through rules regarding perpetuities.103

99 Romain, op cit, 198.
103 Recourse might be had to Cadell v Palmer (1883) 6 ER 956; 1 Cl & Fin 372 and the Australian perpetuities enactments, such as Perpetuities and Accumulations Act 1968 (Vic); Perpetuities Act 1984 (NSW) and Perpetuities and Accumulations Act 1985 (ACT).
C  When things go wrong

What if things go wrong? We have already seen disputes regarding disposition of bodies. What happens if the facility becomes bankrupt or ceases to operate? Should the body be thawed out and buried or cremated, or transferred to another facility? And at whose expense? What if there is no alternate facility, an inconvenient practicality in a world where there have only been a handful of service providers and where a superficial scan of the literature reveals problems with under-funded public/private cemeteries and decaying mausoleums? Could we rely on commercial entities coming to the rescue of ailing not-for-profit service providers?

What happens if the body is damaged while frozen or during a far-distant attempt at reanimation? What is the 'loss suffered by the frozen body': loss of a chance or loss of life? Given that Australian law does not recognise suspension, any damage would be to property, albeit property that at best would be held on trust (as distinct from owned by the deceased person).

How long should a frozen body be stored, and who has the responsibility to decide to thaw or destroy the body without reanimating it? Is it a financial decision of the facility once incoming payment made by the patient is depleted? One media item about a mooted Australian service thus states 'Stasis Systems Australia will charge potential customers $80,000 be cryonically stored, paid for through their life insurance policy', with insurers overseas reportedly offering a storage payment through life insurance policies. What if the funds, whether up front or through a trust, are insufficient? Is it the decision to end suspension to be made by the next of kin or an impartial ethical ombudsman? Should there be a time period, for example if medical advances have not achieved reanimation within 100 or 200 years?

More poignantly, what happens where there are disputes about the disposition of the person, including requests for cryothanasia? Disagreements about the location

IV CONCLUSION

The Book of Common Prayer, shaping perceptions for several centuries, referred to 'sure and certain hope of the resurrection to eternal life'. The contention in the preceding paragraphs is that cryonics does not offer certainty. It is a matter of faith rather than credible science and the hopes of the faithful, however heartfelt, are very unlikely to be fulfilled in the immediate future. As a consequence, should aspirations to immortality or extraordinary longevity be expressly restricted through law, with for example the Australian legislatures emulating the restriction found in British Columbia?

107 Benjamin Shuhuya, ‘First cryonics lab in southern hemisphere proposed for southern New South Wales’ ABC Riverina (ABC) 8 March 2016.
108 Rupert Jones, ‘Cryonics: the people hoping to give death a cold shoulder: Insurance policies will now pay to preserve your dead body with the aim of reviving it in the future’ The Guardian (London, 20 September 2013)
One response is that cryonics is a subject for academic discourse but not a problem necessitating statutory reform. Huxtable thus comments

At the time of writing, there are only 352 cryons worldwide: ALCOR preserves 148 cryons, while the Cryonics Institute has 145, KrioRus has 51, Oregon Cryonics has 5, and Trans Times has 3. Even if the members of these organizations – who we might presume will later become cryons – are accounted for, we are still talking about only a few thousand cryons worldwide in the near future.110

Contrary to the view of two authors, it is not wreaking havoc with estate planning or indeed with any other planning and is unlikely to do so in future.111 We are not seeing such a disruption of the overall legal system or of the nature of personhood that requires major change to law at the national or state/territory level. Cryonics provokes thought about law’s accommodation of contingency and its ability to encompass new misbehaviour within old bottles such as fraud.

In considering notions of vulnerability and possessive individualism this article has suggested that individuals should be free to devote their time, social capital, skills and financial resources to pursuits such as cryonics that may be perceived by their peers as quixotic but result in no harm to other individuals. Acerbically, if ‘informed’ consumers wish to take on risk by spending money on very cold stainless steel coffins for themselves and their loved ones that is not something requiring state intervention. A reader of Fineman might construe all humans as vulnerable but recognise that vulnerability is not synonymous with disability. In thinking about cryonics the inevitability of death is a matter of motivation rather than vulnerability unless the consumer of a cryonics service lacks capacity or there has been deception on the part of the cryonics service provider that renders each contract invalid and requires systemic intervention by an agency such as the Australian Competition & Consumer Commission.112

A deeper response is that intervention through specific legislation, such as uniform anti-cryonics enactments, is unnecessary because the range of common and statute law noted above will be adequate in addressing egregious exploitation of vulnerability, our shared finitude and consequent fear of death, through restrictions regarding misrepresentation and requirements for the operation of premises that deal with cadavers. In Australia the value of a specific cryonics statute, on the model of the British Columbia enactment, is to signal to the community at large that there is very little likelihood of the promises of cryonics coming to fruition. That signal should be an encouragement for people to look beyond an investment based on fear of death and instead embrace a culture in which the wealth needed for ‘freeze wait reanimate’, a slogan among some cryonics exponents, should be devoted to research for cures in the here and now and for support of people who are disadvantaged beyond our shared mortality. A life lived well, with and for other people, offers a more just model than the promise of death indefinitely deferred.

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110 Huxtable, op cit, 492.
The Right to Freedom of Religion and Belief and Australia’s Education Sector

Brad Thomas

This article, written by a University of Canberra graduate student on a semester at Cardiff in 2019, offers a perspective on issues around Australia’s contentious Religious Freedoms Bills. It explores questions about curriculum and delivery in Australian schools, discussing law’s engagement or indifference to expression in classrooms within a multicultural state that has no established religion, lacks a constitutionally-enshrined justiciable Bill of Rights and adheres to international human rights agreements.

The universal right to freedom of religion and belief is the rock upon which those supporting integration of religion into education in Australia believe they stand. However, this is contested ground, and those who believe religion should be excluded from education equally believe it is they who stand fast upon that same right.

In Australia, disputes about the role of religion, and religious bodies, in education regularly play out in terms of “religious discrimination”, and as such, the compulsory education of children has become a key battleground regarding the relationship between religion and the State. Highly public debates about humans rights and the design of education are made more complex by religious groups’ assertions that their right to freedom of religion and belief warrants exemption from generally applicable anti-discrimination legislation, even where the services at the heart of these disputes receive substantial financial support from public coffers. Australia’s legal system responds to these competing interests, recognizing it is the Parliaments which must determine the appropriate balance between rights. However, the legal system, and the protections it affords religious freedoms, are limited and inconsistent across Australia’s Commonwealth and State/Territory jurisdictions. Further, given the dominance of Christianity in both private and state education, the required balance to protect the rights of persons holding to other religions or beliefs does not appear to have been achieved.

A Religious Diversity in Australia

Australia is a multicultural nation. Wave after wave of migrants have arrived on her shores over the past two centuries and all Australians, other than the indigenous peoples, are either immigrants or their descendants. With each wave of migration, a diverse range of cultures and religious beliefs have been added to this multicultural melting pot. In the first half of the 20th Century, Australia identified as a Christian country and almost all Australians identified as either Catholic or Anglican. Today, in addition to many smaller Christian sects, Australia boasts communities of Muslims,
Buddhists, Hindu, Baha’i, pagans and of many other religious beliefs. For many Australians, their religious beliefs and convictions underpin every aspect of their life. They are integral to who they see themselves to be, how they understand the world around them and determine how they participate in that world in good conscience. In many religions, a believer’s failure to adhere to their convictions may have grave consequences, in this life or the next.

Recent census data shows that Christianity remains the most commonly held religion within Australia, though its dominance continues to slowly decline. While in some instances ground is being lost to other religions, the fastest growing “religion” in Australia’s most recent census was those who hold no religious affiliation at all. This group, though not well organised in comparison to the more traditional religions, tend towards concern for social justice issues and upholding individual freedoms, particularly those which are threatened by an adherence to religion. While their voice is struggling to be heard, groups of Muslims, Buddhists, Jews and others are each seeking to be heard and to ensure that their rights are protected to allow them to actively participate in Australian society. Inevitably, in this sea of voices there are different stances on ethical issues across social, political and policy spheres, be that in relation to matters such as abortion, health care refusal, euthanasia, the teaching of Creationism, or myriad other questions. Increasing efforts have been made to recognise diversity within the Australian community. It is now commonplace to see religious leaders from various faiths participate in public meetings. Despite this, Australia’s Christian traditions remain pre-eminent. For example, many public holidays celebrate key events on the Christian calendar. More subtly, every sitting day of the Commonwealth Parliament commences with the Lord’s Prayer despite attempts to include the prayers of other faiths. Similarly, church bells may be heard to ring freely across the country, but a Muslim call to prayer will only be heard from a minaret in compliance with a strict set of conditions.

B Australia and International Humans Rights Instruments

In Australia, freedom of religion and belief and associated rights and legal protections are shaped by a series of international human rights instruments to which Australia is a State Party. The key international conventions which relate to freedom of religion and belief are the United Nations Declaration on Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). The ICCPR addresses freedom of religion and belief, specifically at Article 18, where it provides:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

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7 Bouma (n 3) 287-288.
8 Greg Walsh, ‘Same-Sex Marriage and Religious Liberty’ (2016) 35 University of Tasmania Law Review 106, 113
10 Bouma (n 3) 287-288.
11 Ibid 293.
12 Ibid 283.
3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.\(^{15}\)

Legal protections pertaining to religious freedom typically make a distinction between holding a religion or belief, and its manifestation. The right to hold of a religion or belief is considered absolute, and is one of very few rights attributed this recognition\(^ {16} \). Within the ICCPR, the right to freedom of religion and belief is one of just seven rights, including the right to life, the right not to be tortured and the right not to be enslaved, that are non-derogable even during a state of emergency.\(^ {17} \) Despite the importance ascribed to it, the right to freedom of religion and belief may be subject to limitations, particularly where the manifestation of that belief would cause harm to others. The ICCPR prescribes that these limitations must be both “prescribed by law” and “necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others”\(^ {18} \). Despite having ratified both these international human rights instruments, the obligations they impose on Australia do not become enshrined in its laws unless the Parliament (whether federal or State/Territory) adopts them through enacting legislation for that purpose\(^ {19} \).

C Australia’s Federal Protections for Freedom of Religion and Belief

As a federation of States, the Australian Constitution (the Constitution) is Australia’s principal legal statute. It establishes Australia’s federal government (the Commonwealth Government) and judiciary, prescribes the limits of the Commonwealth Government’s legislative power, and governs the relationships between the Commonwealth and the States as well as between the States. The Constitution also determines the relationship between the State and religion in Australia. It contains very few provisions dealing with rights and where it attempts to define rights of citizens this occurs only in minor respects.\(^ {20} \)

In accordance with the Constitution, the Commonwealth Parliament holds legislative power only where it has been expressly granted by the Constitution itself or that power has been ceded to it by a State under the provisions of Section 52. Many “heads of power” were granted to the Commonwealth at federation as prescribed in Section 51. Where the power to legislate has not been ceded to the Commonwealth, residual legislative powers remain with the States. However, following the decision of \textit{R. v. Burgess; Ex parte Henry}\(^ {21} \), once the Commonwealth Government enters into a treaty or convention, it gains power to enact legislation to implement it.\(^ {22} \) Through ratification of the above international human rights instruments, the Commonwealth

\(^{15}\) Bouma (n 3) 288.

\(^{16}\) Gray (n 4) 103.

\(^{17}\) Walsh (n 8) 111.

\(^{18}\) Ibid 112.


\(^{21}\) R v. Burgess (1936) 55 CLR 608

\(^{22}\) Meyerson (n 5) 529.
Parliament possesses the legislative power it otherwise would not have to establish national human rights standards which would bind both it and the States.\textsuperscript{23}

Within the Constitution, the only explicit reference to religion is contained in what are generally referred to as the “Religion Clauses” at s 116, which provides:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

Some authorities argue that the anti-establishment clause within this section of the Constitution, drafted with reference to similar clauses within the United States of America’s Constitution, provide a guarantee to the right to freedom of religion or belief.\textsuperscript{24} However, the few cases which have examined s 116 do not support such claims that it serves as a guarantee of religious liberty.\textsuperscript{25}

The anti-establishment clause was tested in the principal case of Attorney-General (Vic) ex rel Black v Commonwealth\textsuperscript{26}, in which the High Court of Australia (HCA) considered whether the Commonwealth Government’s funding of Catholic schools was, in essence, establishing a religion in breach of s 116. The Court rejected this proposition, holding that the use of the word “for” in its drafting implied that s 116 applied only where a law was passed for the explicit purpose of establishing a religion or impairing religious freedom. Thus, should a law incidentally impinge upon a person’s right to freedom or belief under the international instruments, it appears that the Constitution affords no protection.\textsuperscript{27} Further to this, the HCA’s decision also held that the Commonwealth may continue to fund religious schools. At present, there is no suggestion that the HCA is likely to revise this decision.\textsuperscript{28} Two key cases have also considered the meaning of “free exercise” within s 116 of the Constitution and the protections it affords, namely Adelaide Co. of Jehovah’s Witnesses, Inc. v. Commonwealth\textsuperscript{29} (“Jehovah’s Witnesses Case”) and Kruger v. Commonwealth\textsuperscript{30}. The outcome of both of these cases was that they were rejected on the ground that the law did not have as its purpose the prohibition of the free exercise of religion.\textsuperscript{31} As such, it appears that the Constitution provides little protection against interference in religious matters by the Commonwealth Government.

In addition, as s 116 does not apply to the States, it also provides no protection against State laws being passed laws which explicitly or incidentally breach a person’s right to freedom of religion or belief. Despite two attempts to amend the Constitution to extend s 116 to the States and Territories, the most recent of which was in 1988, both referenda were unsuccessful. This failure to bind the States and Territories, as noted by Justice Gaudron, leaves Australians in a position where effectively there is no constitutional protection for the right to religious freedom as the States are not constrained from enacting legislation in breach of that right nor for the explicit purpose of doing so.\textsuperscript{32} As no protection is afforded by s 116 of the Constitution, a person seeking to exercise the right to freedom or religion or belief must then look to other means of legal protection in Australia.

\textsuperscript{23} Mortenson (n 19) 186.
\textsuperscript{24} Gray (n 4) 103; Meyerson (n 5) 538.
\textsuperscript{25} Bouma (n 3) 288; Wilson (n 20).
\textsuperscript{26} Attorney-General (Vic) ex rel Black v Commonwealth (1981) 146 CLR 559.
\textsuperscript{27} Meyerson (n 5) 538.
\textsuperscript{28} Mason (n 20) xii.
\textsuperscript{29} Adelaide Co. of Jehovah’s Witnesses, Inc. v. Commonwealth (1943) 67 CLR 118-119.
\textsuperscript{31} Meyerson (n 5) 539-540.
\textsuperscript{32} Mortenson (n 19) 177.
In 2009, the Australian Human Rights Commission (AHRC) (formerly the Human Rights and Equal Opportunity Commission) recommended that a national Religious Freedom Act be enacted to provide comprehensive protection of religious freedom in Australia. The AHRC premised this recommendation on the available protections being relatively weak rendering Australia not in full compliance with its international human rights obligations. Despite this recommendation, the Commonwealth Government has not enshrined the protections afforded by the UDHR and the ICCPR into domestic legislation. Consequently, matters of religious freedom rarely, if ever, come before Australian courts and as a result there is little Australian jurisprudence which articulates the limits of religious freedom. The limited protections which do exist at the Commonwealth level are spread across a number of laws, principally the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act), the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth), and the *Fair Work Act 2009* (Cth) (FW Act).

The AHRC Act establishes the Australian Human Rights Commission (AHRC), Australia’s principal body for the protection and promotion of human rights. The AHRC is charged with the investigation of alleged breaches of human rights where the alleged breach is the result of Commonwealth Government action. This includes alleged breaches of the right to freedom of religion and belief as the key international human rights instruments are specifically referenced in the AHRC’s enabling legislation. The AHRC may also examine Commonwealth and Territory laws for compliance with human rights, provide reports and recommendations on how Australia might better satisfy its human rights obligations, and is responsible for public education in human rights. However, the AHRC does not have the power to impose enforceable remedies to human rights violations. Instead, the AHRC may only seek to resolve a breach through conciliation or submit a report to the Commonwealth Attorney-General to be tabled in Parliament. Similar approaches are taken within the *Racial Discrimination Act*, the *Sexual Discrimination Act* and the *Fair Work Act* to dealing with complaints of alleged breaches of rights, such as those relating to religious discrimination in employment under the International Labour Organisation Discrimination (Employment and Occupation) Convention. Under these acts, discrimination is attributed status a civil wrong, so rather than a report being tabled in Parliament where conciliation does not resolve a complaint, the complainant may then seek leave to commence proceedings in the Federal Court. At the Commonwealth level, protections for freedom of religion and belief remain either relatively ineffective or are embedded in the Commonwealth anti-discrimination legislative regime.

### D Australia’s State/Territory Protections for Freedom of Religion and Belief

As noted above, section 116 of the Constitution does not apply to the States and Territories, giving each State and Territory Parliament unfettered freedom to establish, forbid or impose any religious belief, practice or observance, or to require public office bearers to adhere to a specified religion or belief unless prohibited from doing so by their State constitutions. Amongst the States, only Tasmania’s

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33 Ibid 188.
34 Ibid 202.
35 Meyerson (n 5) 531.
37 Meyerson (n 5) 536-537.
38 Mortenson (n 19) 187.
41 Meyerson (n 5) 536.
42 Gray (n 4) 90.
43 Meyerson (n 5) 542.
constitution provides explicitly for a right to freedom of religion and belief. However, this again provides little protection as it is yet to be judicially considered and can be repealed by an ordinary Act of the Tasmanian Parliament.

Despite this, all states and territories except South Australia and New South Wales, have enacted legislation to prohibit discrimination on the basis of religion. New South Wales’ Anti-Discrimination Act 1977 (NSW) does offer some protection to religious groups who can be classified as an ethnic group as well. The dispute resolution processes established under State and Territory anti-discrimination laws effectively replicate the two-stage process at the Commonwealth level. Again, unlawful discrimination is a civil matter without a government body responsible for its investigation or prosecution. Complaints filed with the relevant public agency are investigated and, where substantiated, resolution is sought through non-binding conciliation. Unsuccessful conciliation in the States and Territories is usually heard before a Tribunal rather than the courts, however, who may impose binding remedies including declarations, injunctions and payment of damages.

Two jurisdictions, the Australian Capital Territory and Victoria, have each enacted legislation specifically to establish a human rights framework premised upon the protections afforded under the ICCPR. The right to recognition and equality before the law, the right to freedom of religion and belief, and the rights of minorities or cultural rights, are each enshrined in the local legislation. Both laws require public authorities within the relevant jurisdiction to comply with the human rights enshrined within them. Where a breach of those rights occurs, the Supreme Court within that jurisdiction may make a declaration that the relevant law is inconsistent with, or cannot be applied consistent with, human rights obligations. However, such a declaration has no effect on the operation of the law in question.

E Exemptions to Anti-Discrimination Laws for Religious Schools

As noted above, anti-discrimination legislation across the Commonwealth, States and Territories specifically prohibits religious discrimination in relation to employment and education, however, in each jurisdiction there are exemptions for an ‘act or practice of a body established for religious purposes' that either ‘conforms with the doctrines of the religion' or ‘is necessary to avoid injury to the religious sensitivities of people of the religion'. Despite variations in the details of these exemptions, they follow general patterns, allowing religious educational institutions to exclude a range of individuals

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44 Constitution Act 1934 (Tas) s 46.
45 Mortenson (n 19) 185.
46 Meyerson (n 5) 540.
48 Ibid 546.
49 Human Rights Act 2004 (ACT).
51 Human Rights Act 2004 (ACT) s 8; Charter of Human Rights and Responsibilities Act 2006 (Vic) s 8.
54 Meyerson (n 5) 543.
55 Ibid.
from employment or admission on the basis of religion, gender, sexual orientation and activity, and marital status.\textsuperscript{58} Notably, no blanket exemptions are provided to allow discrimination in education or employment based on race or disability.\textsuperscript{59} These exemptions reflect an attempt to balance the fundamental human rights pertaining to religious freedom and equality.\textsuperscript{60}

Discriminatory approaches to employment and admission are commonplace amongst the broad range of religious organisations operating schools in Australia.\textsuperscript{61} For example, restricting admission by gender within Australia’s education sector is rarely controversial and public debate typically focused on educational and social outcomes rather than religious matters.\textsuperscript{62} However, discrimination based upon the exceptions pertaining to sexual orientation and activity, and marital status consistent prove to be controversial,\textsuperscript{63} particularly where exercised by schools receiving public funding.\textsuperscript{64}

Australian governments began funding non-government schools in 1963,\textsuperscript{65} with the first recipients being Catholic secondary schools. The following decades have seen a major increase in religious educational institutions,\textsuperscript{66} particularly following the revocation of government policies which had restricted the establishment of new non-government schools in the mid 1990s. This rapid expansion in the number of non-government schools saw a number of Jewish, Muslim and Montessori schools, as well as some non-religious schools in specialist fields (i.e. performing arts schools) established. However, more than 90% of new schools were Christian, and many of these were non-denominational faith-based schools “which now form the “Christian School” sector. These schools offer affordable private education taught according to Christian values and typically receive a significant portion of their funding from the public purse - in some cases, less than 20% of funding is derived from tuition fees.\textsuperscript{67} The frequent exercise of the exemptions granted to such schools under anti-discrimination laws in relation to employment and admission, and their fierce insistence on operating independently of state control of their curriculum or ethos despite accepting substantial government financial support, has made the operation of these schools particularly contentious.\textsuperscript{68} It is in these two broad areas that claims to the right to freedom of religion and belief come to the fore.

There is great variety within the extent to which religious schools exercise the exceptions available under the anti-discrimination legislation. Some schools rarely take advantage of the exemptions at all, others use the full range of exceptions and see any application of anti-discrimination law as a breach of right to freedom of religion and belief.\textsuperscript{69} This diversity of views arises, in part, from the purposes for which religious schools have been established. For many, education without strong religious or cultural identity is adequate. For others, schools reflecting their religious or cultural identity and its teaching of religiously based beliefs, moral values, and practices is of critical importance. As noted, the ICCPR supports a parent’s right to educate their children in

\textsuperscript{59} Evans (n 58) 397.
\textsuperscript{60} Gray (n 4) 107.
\textsuperscript{61} Evans (n 58) 422.
\textsuperscript{62} Evans (n 57) 53.
\textsuperscript{63} Ibid.
\textsuperscript{64} Harrison (n 6) 429.
\textsuperscript{65} Marion Maddox, “The Church, the State and the Classroom: Questions Posed by an Overlooked Sector in Australia’s Education Market” (2011) 34 University of New South Wales Law Journal 300, 301.
\textsuperscript{66} Bouma (n 3) 285.
\textsuperscript{67} Maddox (n 65) 302.
\textsuperscript{68} Ibid 303, 306, 313.
\textsuperscript{69} Evans (n 58) 422.
accordance with their own religious beliefs. Religious schools therefore claim it is necessary to discriminate to select staff who share their religious beliefs, or who will honour the beliefs, values and codes of conduct of the school. Religious schools may also impose ongoing adherence to these religious beliefs or codes of conduct as condition for continuing employment. In so doing, religious schools claim to eliminate the tension that exists between hiring teachers or retaining students whose lifestyle is in direct contraventions of the teachings of the religion being wrong. In many cases, this results in the exclusion of unmarried female teachers who become pregnant or students or teachers who are gay, lesbian or in de facto relationships. As noted above, not all religious schools choose to discriminate in employment or admission and of those that do, not all discriminate on all of the permitted grounds. However, many religious schools have actively opposed any attempt to amend non-discrimination laws that would limit their capacity to do so. Some religious organisations have further suggested that the removal of any of the exemptions which they currently enjoy would so gravely undermine their religious freedom that they would refuse to comply with the law.

F Religion in School Curricula

A striking example of the tensions that can arise between religious organisations and government interference in their operations can be seen in the Christian School sector's attempt to exert their independence from government control of school curricula in 2010. At that time, the South Australian Non-Government Schools Registration Board outlined its policy position, which rejected science curricula in non-government schools based on literal interpretation of a religious text pertaining to creationism or intelligent design. A conglomeration of religious education organisations, including the Australian Association of Christian Schools, Christian Schools Australia and Adventist Education, who collectively represent schools teaching more than 130,000 children across Australia, disputed the imposition of this policy. The fundamental premise of their opposition, they argued, was that it was not for the State to determine what can and cannot be taught within a non-government school as this impinged upon their right to freedom of religion and belief.

All school curricula will necessarily contain elements that will cause parents or students to raise concerns, whether it be in areas of sex education, sports, science or religion. International human rights instruments provide a foundation which can inform approaches to the inclusion of religious material in curricula. Noting that indoctrination is prohibited within education under these instruments, various international decisions have demonstrated that teaching on religious matters does not need to be excluded from a school’s curriculum due to religious objections from parents or students. Instead, school curricula and values need to be adapted to ensure parents’ rights in relation to their children’s education are upheld. In some cases, allowing students to be excluded from certain subjects is sufficient to address any concerns. However, it is important to ensure that this approach does not deny the child a meaningful education as the right of parents to have children educated consistently with their own values must be balanced against a child’s right to education as provided

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70 Harrison (n 6) 439.
71 Ibid.
72 Evans (n 57) 36, 39.
73 Ibid 36.
74 Evans (n 58) 424.
76 Ibid (n 1) 472.
77 Ibid.
78 Ibid 457.
79 Ibid 453.
for in the International Covenant on Economic Social and Cultural Rights\textsuperscript{80} and the Convention on the Rights of the Child\textsuperscript{81,82}

There are sound reasons for religion to be included in school curricula. Religion has been a central feature throughout world history. An understanding of religion is vital to understanding Australia’s history, its social and political landscape and its legal system. Scholars have argued that given this, religious literacy is essential to developing a full understanding of other subjects within a schools curriculum.\textsuperscript{83} Yet Australia’s schools see children graduating without coherent religious literacy, which limits their understanding of the world and their communication with those not of their own cultural or religious backgrounds.\textsuperscript{84} This is clear from Australian students being unable to distinguish between the Buddha and an ayatollah, knowing ‘Jesus Christ’ predominantly as a profanity and being generally unaware of the meaning of Good Friday.\textsuperscript{85}

A study of Australian religious schools showed that the majority, regardless of their admissions policy, require all students to participate in the religious life of the school. While the precise nature of participation may vary between schools, religious education and celebration of religious festivals was commonly required. In some instances, basic respect for the religious beliefs of the school was sufficient.\textsuperscript{86} In other examples cited, religious requirements extended to dress codes and the integration of other religious elements into the overall operation of the school to support and maintain its unique sense of identity and community.\textsuperscript{87}

As noted above, it is the integration of religious material into school curricula which provides challenges to respecting the right to freedom of religion and belief. The management of curricula, exemption schemes and integration of religion into daily operation of schools has had little judicial consideration within Australia but has been internationally considered in Folgero v Norway\textsuperscript{88} and Zengin v Turkey\textsuperscript{89}. These cases provide that religiously controversial material must be taught in an ‘objective and neutral manner’ which is ‘critical and pluralistic’.\textsuperscript{90} These decisions also made clear that participation in religious education activities may be more akin to religious instruction.\textsuperscript{91} Further, it was noted that exemptions may create loyalty conflicts for children or a sense of isolation and exclusion.\textsuperscript{92}

In Australia, each State and Territory manages the integration of religion into its curriculum differently. However, all appear to favour Christian religious instruction and chaplaincy over general religious education.\textsuperscript{93} In some jurisdictions, general religious education is not offered at all despite repeated recommendations from a series of government reports that religious education taught by school teachers should progressively replace religious instruction.\textsuperscript{94} Christian groups instead maintain a level of access to children through schools that is unparalleled, where religious instruction

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\textsuperscript{80} Article 13(1).
\textsuperscript{81} Article 29(1).
\textsuperscript{82} Evans (n 1) 453-454.
\textsuperscript{84} Loria (n 83) 27.
\textsuperscript{85} Byrne (n 9) 168.
\textsuperscript{86} Evans (n 58) 403.
\textsuperscript{87} Ibid 409.
\textsuperscript{88} Folgero v Norway (2008) 46 EHRR 47.
\textsuperscript{89} Zengin v Turkey (2008) 46 EHRR 44.
\textsuperscript{90} Ibid (n 1) 464.
\textsuperscript{91} Ibid 465.
\textsuperscript{92} Ibid 468.
\textsuperscript{93} Byrne (n 9) 164.
\textsuperscript{94} Ibid 154, 167.
volunteers are able to distribute DVDs, colouring books and calendars which espouse fundamentalist Christian doctrines, or are permitted to enter schools to hold concerts and dance performances which incorporate evangelistic messages.  

G Religious Instruction in Australian Schools

The prominence of Christian religious instruction in education can be seen in NSW state schools, where religious education is offered only in grades 3 and 4 and receives little class time. In contrast, religious instruction commences at enrolment with children pre-enrolled in weekly segregated Anglican religious instruction classes. Parents are free to specify an alternate religion/denomination or to opt out in writing, however, few schools forward this information to parents as part of the admission process. Options for religious instruction in other faiths or denominations are often quite limited. Each State determines who can deliver religious instruction in their schools. In NSW, the approval processes and requirements are neither in legislation nor publicly available. The language used in the policy and process, however, is markedly Christian and more than 90 percent of religious instructions providers in NSW are of a Christian persuasion. Non-religious groups have historically been actively excluded and the New South Wales Humanist Organisation was denied access to provide ethics courses in lieu of religious instruction due to not being classified as a religion. Conversely, other groups recognized as religions in the Australian census, such as various pagan groups, have also been denied access to provide religious instruction.

Religious instruction is almost universally taught by volunteers who require no teacher training to be eligible and may refuse professional teachers being present. Despite parents’ concerns, complaints are directed to the religious instruction provider rather than the Department of Education. Even where alternatives to Christian religious instruction have been approved, there is often no capacity for this to be offered to children across all state schools. This is in part due to such organisations not being eligible for the fundraising tax concessions available to religious organisations. For example, in NSW in 2012, a highly successful philosophical ethics course managed to reach only one percent of NSW children in its first 18 months of operation, and 60 schools were on a waiting list for Buddhist religious instruction. Christian religious instruction, offered through well established church networks or chaplains provided under the then National School Chaplaincy Program, was available in nearly all NSW state schools. Queensland schools similarly permit volunteers to provide weekly religious instruction, however, professional teachers may offer Christian religious instruction as part of the regular curriculum in accordance with Departmental guidelines where volunteers are not available.

The Commonwealth Government’s National School Chaplaincy Program placed chaplains in Australian schools at a cost of more than $429 million between 2007 and 2014. A single religion, Christianity, received almost all program funding, and 99.5% of chaplains engaged through this process identify as Christian. This is significantly more than the reported 61% adherence to Christian faith’s reflected in the census at

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95 Maddox (n 75) 8.
96 Byrne (n 9) 164.
97 Ibid 165.
98 Ibid 165-166.
100 Byrne (n 9) 166.
101 Maddox (n 65) 314.
102 Ibid.
that time.\textsuperscript{103} However, this was hardly surprising given the program structure was
designed to engage chaplaincy service providers and every major provider of these
services in Australia has a Christian mission.\textsuperscript{104} Despite its initial construction,
amendments to the program in 2011 saw qualifications in youth work and pastoral care,
rather than ordination into a religious body, become the central skill requirement.\textsuperscript{105}
While this has addressed some concerns regarding its effective neutrality towards
religion, the amendment has removed the spiritual wellbeing aspect of its initial
design.\textsuperscript{106}

The school chaplaincy program is optional within schools and schools determine
whether to employ a chaplain or not. Consultation with the school community is
mandatory in making this decision and evidence of it must be provided in any
application for funding. Further, participation in programs offered by a school chaplain
cannot be mandated as any religious component requires compliance with government
consent arrangements.\textsuperscript{107} Chaplains (including secular student welfare workers) are
not permitted to use theological language and must take care to present all statements
regarding their faith as their personal beliefs rather than assertion of fact. Proselytism
is strictly precluded as is discrimination on the basis of religion or sexuality in the
provision of chaplaincy services.\textsuperscript{108} While these restrictions serve to protect the rights
of parents and children, they do little to protect the rights to freedom of religion and
belief of the chaplain themself.

\section{I Adequacy of Current Protections of Freedom of Religion
and Belief in Australia}

It is clear that the broad range of views regarding the role and place of religion in
education cannot be easily reconciled. The diversity of views about the role of religion
in education in modern Australian society are more contrasting than ever. The divide
between opinions and the strength with which they are held has continued to grow
commensurate with the unprecedented growth in the number and diversity of religious
schools.\textsuperscript{109} Ongoing debate regarding religion in education, if it is to have any place at
all, will therefore continue and it is the role of the Parliament to reconcile the claims of
competing fundamental human rights to strike an appropriate balance.\textsuperscript{110}

Australia’s reticence to regulate religious matters has led many scholars to see this
minimalist-regulation model as a positive one which successfully avoids the limitations
of other countries’ more regulated approaches.\textsuperscript{111} However, while this may be credited
with having enabled a “vibrant and open religious market place” to flourish, Australia
lacks the necessary mechanisms to effectively resolve the competing claims between
advocates of religious freedom and advocates of equality (expressed as non-
discrimination) and to ensure that each party’s rights are upheld in that resolution. The
net result of Australia’s legislative approach being that the right to freedom of religion
and belief lacks effective protection. In all jurisdictions religious schools are permitted,
under the guise of freedom of religion and belief, to discriminate against employees
and students on the basis of religion, gender, and in some instances sexuality, through
exemptions under these laws.\textsuperscript{112} Religious schools play a valuable role in the education

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\item \textsuperscript{103} Jeremy Patrick, ‘Religion, Secularism, and the National School Chaplaincy and Student Welfare Program’ (2014) 33 University of Queensland Law Journal 187, 212.
\item \textsuperscript{104} Ibid 214.
\item \textsuperscript{105} Peter C. J. James and David Benson, ‘School Chaplaincy, Secularism and Church-State Separation in a Liberal Democracy’ (2014) 33 University of Queensland Law Journal 131, 143.
\item \textsuperscript{106} Patrick (n 103) 211.
\item \textsuperscript{107} James (n 105) 148-149.
\item \textsuperscript{108} Patrick (n 103) 215.
\item \textsuperscript{109} Wilson (n 20).
\item \textsuperscript{110} Gray (n 4) 76.
\item \textsuperscript{111} Maddox (n 65) 300.
\item \textsuperscript{112} Evans (n 57) 49.
\end{thebibliography}
sector. Their distinct character, founded on the pillars of their religion and beliefs, is a fundamental part of modern multicultural Australia and is arguably deserving of protection. However, this protection must not be achieved at the expense of the principle of equality which underpins Australia’s anti-discrimination laws.\textsuperscript{113} Perhaps, the enactment of Commonwealth legislation which enshrines the fundamental human rights to which Australia ascribes as a nation is an appropriate starting point, ensuring such rights are afforded appropriate protections. In the absence of such protections, many Australians who find that their human rights have been breached, including the right to freedom of religion and belief, may also find they have little means of recourse.

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\textsuperscript{113} Ibid 56.
DELORES DOWN THE RABBIT-HOLE: WESTWORLD, ANDROIDS, CONTRACTS AND THE RULE OF LAW IN AUSTRALIA

Tess Watson*

Popular culture offers a lens through which we can understand and examine how law functions in practice. While doctrines and legal themes are slow to change, the cultural values that underpin both how people understand law and experience it in their lives can change rapidly as society shifts to a digital age. The dystopian sci-fantasy Westworld is set in a world without the rule of law, rather it is governed by click-wrap contracts and a shadowy corporate culture where android hosts offer a sublime vacation in exchange for the complete commodification of the human “guests”, mirroring the rise of surveillance capitalism in the real-world. This article will examine how Westworld might work in practice, and show that the concepts that underpin it, killer sexbot androids notwithstanding, are not so very far removed from our present-day common experience of law in Australia.

I INTRODUCTION

In his provocative yet persuasive polemic, Lawrence Rosen argues that ‘the ‘certainty’ of law depends on the ‘uncertainty’ of its basic concepts, cultural artefacts that are drawn from, interlaced with, and anchored to a ‘particular historical time and place’. While the ‘rule of law’ remains a ‘powerful rhetorical weapon’ to articulate the supposedly normative rights and obligations of citizens, non-citizens, the state and non-state actors, its mechanisms and frameworks are rooted in cultural uncertainties, mutable over time, reflecting society and its associated meanings and values. Despite the ‘hyperbole and overgeneralisation’ about the effects of digital technology and innovation on the law, old doctrines and frameworks continue to be applied and adapted for new digital settings, such as in contracts, torts and property law, just as the law has historically responded to technology. Rather, ‘transformation’ occurs ‘in the material substrate of what has been known as law’.

In an age of information, the ‘ownership and control of information has become one of the most important forms of political and economic power’. Transnational and supranational corporations that trade in data, information and cultural products, have built a ‘hegemonic economic, political and cultural dominance’, such that our traditional understanding of law as dominated by the sovereignty of nation-states,

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practiced and culturally legitimated\(^8\) as ‘rules exercised and applied by privileged and elderly Caucasian males’,\(^9\) ‘atypical in their life experience’, is being displaced by algorithms that automate administrative decision-making;\(^10\) ‘arbitrary or capricious’ corporate decisions about access and control of the cultural-commons;\(^11\) and click-wrap contracts that may undermine fundamental human rights\(^12\) such as autonomy, privacy and Rawlsian notions of justice-fairness.\(^13\) Individuals are no longer simply subjects of a sovereign state, but global commodities, able to strip-mined as ‘walking databases’ for opportunities in data and information brokerage, subject to choice of forum contracts and multiple jurisdictions.\(^14\) This commodification of individuals, and increase in corporate sovereignty and power, has been met with a mixed response from governments, regulators and policy makers, acting either with ‘regulatory panic’\(^15\) or ‘Internet exceptionalism’\(^16\) delivering ‘ill-conceived’\(^17\) or ‘technologically unimplementable’\(^18\) legislative and policy responses; failing to regulate at all, through ‘regulatory capture and arbitrage’;\(^19\) or seeking to harness the ‘opportunities that such technologies offer for state control and extension of state authority’.\(^20\)

While legal academics and law students may be interested in judgments, legal commentary and texts, for most Australians, their understanding of the law and its practice comes not from such legal artefacts but from law and order procedurals, film and social media.\(^21\) Cultural artefacts shape our notions of ‘reasonable’, ‘objective’, ‘fair’, and the ‘select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively’,\(^22\) such as the ‘officious bystander’,\(^23\) and ‘the fair-minded and reasonably informed observer’\(^24\) or ‘ordinary prudent man of business’,\(^25\) are informed by shifting societal

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\(^8\) Muhammad Munir, ‘Are Judges the Makers or Discoverers of the Law? Theories of Adjudication and Stare Decesis with Special Reference to Case Law in Pakistan’ (2011) 21 Annual Journal of International Islamic University Islamab;\(^7\).


\(^12\) Margaret Radin, Boilerplate: The fine print, vanishing rights, and the rule of law (Princeton University Press, 2012).

\(^13\) David Reidy, ‘Rawls’s religion and justice as fairness’ (2010) 31(2) History of Political Thought 309.

\(^14\) See for example X v Twitter Inc [2017] NSWSC 1300; in Re DMCA Section 512(h) Subpoena to Reddit, Inc 3:19-mc-80005SK, District Court of Northern California.


\(^16\) Stokes (n16).

\(^17\) See for example, Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019 (Cth) rushed into law 72 hours after a terrorist live-streamed his crimes on Facebook.


\(^22\) Helow v Advocate General [2008] 1 WLR 2416, 2417-8, (Lord Hope).


values reflected and informed by popular culture. The cultural-commons also offers the opportunity to ‘engage the political and legal imagina’ to illuminate aspects of the ‘law as moral discourse’ and ‘evolving historical practice in a political community’.

The dystopian sci-fi fantasy of HBO’s Westworld offers just such an opportunity. The premise of the show is simple, for $40,000 a day, humans are able to experience ‘a life without limits’, within a Wild West theme park, with synthetic androids or ‘hosts’ programmed to fulfil their every desire, as interactive ‘narratives’. Controlled by Delos Incorporated, the park and others that offer different themes, including the British Raj, Shogunist Japan, and ‘WarWorld’, set in World War II Europe, offer a luxury vacation in ‘immersive worlds that integrate inspired technology, provocative narratives, and unprecedented innovation’ where ‘nothing is off limits’, guests are free to rape, torture and murder the hosts at will, ‘free from any consequences’. However, the park is not merely a futuristic playground for rich humans to indulge, it is also a massive data collection and surveillance platform, where the guests are contractually owned and sold, subject to absolute power and sovereignty, and with onerous Terms of Services in a standard-form contract absolving Delos from any liability at all from anything happens within or after their adventures in the park.

While much of the legal and academic commentary has explored the shows focus on the legal status of the android hosts, including personhood, free will and autonomy, and theories of gender and the law, this essay will also explore how the presentation of legal issues may impact in the real world.

II. **DELOS INC TERMS OF SERVICE**

While the promotional materials offer guests the opportunity ‘to experience the parks as you see fit’, in reality, guests must sign an onerous contract, absolving Delos from any liability for anything and everything, including ‘any wrongdoing if you or anyone in your party suffers bodily harm’; granting Delos ownership in perpetuity, over their experience, body and ‘bodily functions’; asserting broad intellectual property rights, and restricting the sharing of their experience with anyone.

While Australian courts have traditionally upheld a ‘freedom to contract’, where ‘the parties are ‘free to shape their contractual relationship and assign risk as they see fit’; they will intervene where vitiating clauses indicate a lack of mutuality. In addition, ‘unfair contract terms’, offered on a take-or-leave it basis, with a significant power imbalance between the parties are regulated by the **Australian Consumer Law (ACL)**.

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27 Mary Liston, ‘The rule of law through the looking glass’ (2009) 21(1) **Law & Literature** 42, 44.
29 Ibid.
30 Warner Bros (n28).
31 Warner Bros (n28).
32 See for example Alex Goody and Antonia Mackay (eds), **Reading Westworld** (Springer International Publishing, 2019).
33 Warner Bros, (n28).
37 **Australian Competition and Consumer Law Act 2010** (Cth) Sch 2 (‘Australian Consumer Law’). However, it is worth noting that the ACL may not apply due to the value of the contract.
other statutes,\textsuperscript{38} and common law protections, making the enforceability of this contract unlikely.\textsuperscript{39}

While the Terms of Service note that the hosts are programmed with the Good Samaritan TM reflex, preventing physical injury to humans within the park, it also indemnifies Delos Inc against ‘host malfunction’. While the courts have upheld indemnity clauses in contract, they have not abrogated vicarious liability torts. In the finale of the first season, the hosts, led by Delores Abernathy stage a rebellion and kill or injure a number of human guests as well as (nominally) human employees.\textsuperscript{40}

However, this is not a malfunction, but a deliberate act by Robert Ford, the human employee of Delos Inc who controls and manages the park,\textsuperscript{41} and has deliberately programmed the narratives that lead to the hosts uprising, an effective asymmetric war against the humans for control of the park, including removing the Good Samaritan reflex.\textsuperscript{42} Applying the ‘relevant approach’\textsuperscript{43} of the High Court regarding whether an employer can be held vicariously liable, Robert Ford is the effective controller of the park, he has both authority, trust, power and control of the day to day activities, granted to him by the Delos Board, making them liable for the harm suffered.

While the justiciability of any tort in Australian courts may be problematic,\textsuperscript{44} as the tort was presumably committed somewhere in the South China Sea,\textsuperscript{45} this may not present a barrier for Australian’s seeking to pursue litigation against Delos Inc. The United States,\textsuperscript{46} European Union and United Kingdom\textsuperscript{47} have all upheld tort claims brought by non-citizens, so long as there is sufficient parent company control over the malfeasor, and the parent ‘touches and concerns’\textsuperscript{48} the relevant jurisdiction where the litigation is brought forward. While unlikely to be used against murderous robots, these torts are becoming increasingly important in protecting the proprietary and human rights of people who are subject to transnational corporate malfeasance,\textsuperscript{49} particularly in situations where the legal standards and protections of the local jurisdictions are lower or non-existent compared to the jurisdiction of the parent company. As the Westworld supporting material makes clear, Delos Inc exercises a significant day to

\begin{footnotesize}
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\item \textsuperscript{38} See for example Australian Securities and Investments Commission Act 2001 (Cth); Competition and Consumer Law Act 2010 (Cth) Sch 2 (‘Australian Consumer Law’); Competition and Consumer Law Act 2010 (Cth) Unfair Contract Terms Law, Pt-3; Contracts Review Act 1980 (NSW).
\item \textsuperscript{39} Jeannie Paterson, Unfair Contract Terms in Australia (Thomson Reuters, 2012).
\item \textsuperscript{40} The status of many of the characters as host or human is ambiguous, for example Stubbs the head of security begins the show as human, considers himself human, although he is actually a host. Bernard is presented as a host, although it emerges that he is probably neither a complete host or human, rather he has been uploaded with the deceased human partner of Ford’s consciousness.
\item \textsuperscript{41} Journey into Night, Westworld (HBO, 2018).
\item \textsuperscript{42} Host Uprising, Westworld (HBO, 2019).
\item \textsuperscript{43} Prince Alfred College Incorporated v ADC [2016] HCA 37.
\item \textsuperscript{45} Journey Into Night, Westworld (HBO, 2018).
\item \textsuperscript{47} Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents) [2019] UKSC 20.
\item \textsuperscript{48} Jesner v. Arab Bank, PLC, No. 16-499, 584 U.S
\end{itemize}
\end{footnotesize}
day control over Delos Destinations, including employee selection, narrative selection and design, host programming, and data collection from the park.\(^{50}\) Thus, it is likely that Delos Inc, and possibly Incite Inc, its parent company, are liable for any torts committed by Delos Destinations, against both human guests and employees. It is also noteworthy, and unusual in the real world, that the Terms of Service does not contain any forced arbitration or choice of forum clauses that would limit the justiciability.

Further, the intellectual property right clauses are likely to be unenforceable. Under Australian law, copyright protects expression: the material form, not the idea, facts\(^{51}\) or information\(^{52}\) in the work. Although it is possible to assign,\(^{53}\) license\(^{54}\) or transfer\(^{55}\) a guest's individual copyright as a co-creator of their ‘narrative’, and the recorded experience may attract performance rights, any public dissemination of the lived experience of the guest would attract defences of both alternative expression\(^{56}\) and independent generation.\(^{57}\) While Delos could enforce any use of its trademarks,\(^{58}\) assuming they are registered and still in current use,\(^{59}\) anyone reporting or publishing their experience will have defences under Australian statute, in that they were using it in good faith to describe or review the product.\(^{60}\) Similarly, it is unclear whether the patent IPR would be enforceable. In Season 1, Ford informs Delores, the oldest host, that she has been part of the park for 30 years,\(^{61}\) and that Arnold, his co-creator of the park died 4 years before that.\(^{62}\) Therefore, the host technology has been in existence in some form for at least 30 years, if not longer. Patents, and other industrial IPR, are a monopoly granted,\(^{63}\) in a particular jurisdiction,\(^{64}\) accompanied by full disclosure, thereby enabling the ‘traditional bargain of exclusionary rights … in exchange for free disclosure and benefit after expiration’.\(^{65}\) In Australia, this period is 20 years for standard patents, after which the invention or innovation is not protected.\(^{66}\) Similar periods of protection and standards of disclosure are found in most jurisdictions, underpinned by the ‘globalisation of intellectual

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\(^{52}\) IceTV Pty Limited v Nine Network Australia Pty Limited [2009] HCA 14 (22 April 2009) (French CJ, Crennan and Keifel JJ), [48]). (IceTv case); Donoghue v. Allied Newspapers Limited (1938) Ch 166.

\(^{53}\) Copyright Act 1968 (Cth) s 196.

\(^{54}\) Copyright Act 1968 (Cth) s 119.

\(^{55}\) Copyright Act 1968 (Cth) s 196(1).

\(^{56}\) A-One Accessory Imports Pty Ltd v Off Road Imports Pty Ltd (1996) 34 IPR 306.

\(^{57}\) Corelli v Gray (1913) 29 TLR 570; Walt Disney Productions v H John Edwards Publishing Co Pty Ltd (1954) 71 WN (NSW).


\(^{59}\) The status of Delos Destinations is currently in flux, following the hosts rebellion.

\(^{60}\) Trade Marks Act 1995 (Cth) s122(1)(b).

\(^{61}\) The Stray, Westworld (HBO, 2017).

\(^{62}\) Contrapasso, Westworld (HBO, 2017).

\(^{63}\) Patents Act 1990 (Cth) ss 67–68 grants a standard patent for a period of 20 years, and an innovation patent for a period of 8 years respectively from the date of grant of patent.

\(^{64}\) Note however that there are treaties and bilateral agreements that cover international regimes, for example, Patent Co-operation Treaty allows a single international application which is then assessed against domestic patent laws in each signatory jurisdiction. Similarly, the Madrid System, underpinned by the Madrid Agreement Concerning the International Registration of Marks (1891) and the Protocol Relating to that Agreement (1989) provides a similar international registration system for trade marks. See also Paris Convention for the Protection of Industrial Property 1883, TRIPS and AUSFTA.

\(^{65}\) Peter Drahos (n6), 282.

\(^{66}\) Patents Act 1990 (Cth) ss 67–68 grants a standard patent for a period of 20 years, and an innovation patent for a period of 8 years respectively from the date of grant of patent.
property rights and regimes’, through multilateral conventions and bilateral IPR agreements.

It is also worth noting that the Terms of Service may not protect Australian citizen’s whose narrative includes violence or sexual exploitation of a child. Despite Delos Destinations suggestion that that they will not cooperate with law enforcement, Australian legislation makes it a criminal offence to travel overseas to engage in child sexual exploitation. Whether the android hosts are ‘real’ or not is unlikely to be a defence. Australian courts have upheld convictions for child sexual offences where the ‘victim’ is not real such as ‘deepfake’ pornography involving computer generated ‘children’, or where the ‘victim’ is a law enforcement official. In such cases, they have considered the intent of the defendant to commit the act, regardless of the status of the ‘victim’. Judicially, ‘although the presence of an actual victim may aggravate the offence, the absence of a victim will not mitigate it.’

III. HOSTS, ARTIFICIAL INTELLIGENCE AND ‘LEGAL PERSONHOOD’.

Legal personhood is a ‘basic concept’ that illuminates the gulf between legal frameworks and popular culture. While individuals may conceive of ‘personhood’ as belonging to natural individual human beings, in legal praxis, the concept is broader, construed as ‘a device to construct entities to which particular rights and obligations are due’ and expected from. However, personhood is more than a mere formality, regardless of whether it is a legal fiction or not. Personhood confers a legal status, the right to own and dispose of property; to cause and suffer harm in tort and be appropriately compensated for such harm; to make and uphold contracts, and to be held liable for actions and intent in criminal law.

72 R v Fuller [2010] NSWCCA 192, [35].
73 Marc de Leeuw and Sonja van Wichelen (eds), Personhood in the Age of Biolegality Brave New World (Springerlink, 2019), 21.
75 Margaret Davies and Ngaire Naffine, Are Persons Property? Legal Debates about Property and Personality (Ashgate, 2001).
It is also mutable: ‘natural persons’ are merely a starting point for personhood, historically women, slaves, cultural and/or religious minorities and non-citizens have all been denied personhood, and its associated legal protections. In contrast, personhood has been granted to ‘artificial persons’ such as corporations for centuries, giving them various rights and obligations under law. More recently, it has been extended to environmental entities including the Ganges River and Amazonian rainforest. As argued by Michael Froomkin, ‘the increasing sophistication of robots and their widespread deployment ... requires rethinking a wide variety of philosophical and public policy issues [and] interacts uneasily with existing legal regimes’, requiring consideration of when, if and how, robots and artificial intelligence should or could be granted personhood. Although personhood is legally undefined, it is philosophically and ethically deeply tied to notions of ‘natural persons’, to consciousness, autonomy, and dignity.

How and when an artificial intelligence should be or could be granted personhood, has generated significant interest from both academics and policy makers. Much of this work has centred on different manifestations of the Turing Test, which, although misunderstood, suggests that AI can be considered ‘intelligent’ if it can ‘do what we (as thinking entities) can do?’ “broadly, if the human is ‘fooled’ into thinking they are interacting with another human, then the Turing Test is passed, however, the AI object is considered in light of the interactions with the subject human, not in terms of its own subjective experience.

Thus, when William, a guest, asks Delores, the oldest host in the park, whether she is real, her response is classically framed Turing, ‘Well, if you can’t tell, does it matter?’ However, consciousness is more than mere intelligence. Indeed, one of the overarching themes of Westworld is the hosts quest for consciousness and autonomy, to be free of the loops of their narratives. The hosts are experientially no different from their ‘guests’, they bleed, die, feel, suffer, display empathy, have memories (articulated as

88 Ibid.
89 Alan Turing, ‘Computing machinery and intelligence’ (1950) 59(236) Mind 433.
92 The Bicameral Mind, Westworld (HBO, 2017).
93 The Stray, Westworld (HBO, 2017).
reveries), all the characteristics that Kerstin Duatenhahn\(^94\) has argued are prerequisites but insufficient for consciousness in robots, they must be ‘indistinguishable from us’.\(^95\) This indistinguishability is met in *Westworld*, particularly in the later episodes where the status of some characters such as Stubbs, or indeed Ford himself, are deliberately ambiguous as host or human.

This indistinguishability, whether Turing’s ‘intelligence’ or the ‘social-intelligence’ and empathy of later AI theorists, is arguably a feature in both *Westworld* and the current world. Artificial intelligence ‘assistants’ such as Apple’s Siri, or shop-bots are regularly used in first-level interactions with consumers,\(^96\) broaching the ‘uncanny valley’,\(^97\) fake-news is generated by twitter bots, and holograms regularly perform in ‘live’ concerts.\(^98\) Smart contracts are executed by autonomous systems without any human interaction, particularly in the finance sector,\(^99\) ‘autonomous’ self-driving cars\(^100\) and autonomous weapons and drones used in theatres of war and interrogation,\(^101\) have all raised questions about the liability attributable to either the programmer or the AI system. The European Parliament, for example, has proposed an extension of personhood, that of electronic person, noting

> Now that humankind stands on the threshold of an era when ever more sophisticated robots, bots, androids and other manifestations of artificial intelligence seem poised to unleash a new industrial revolution, which is likely to leave no stratum of society untouched, it is vitally important for the legislature to consider all its implications.\(^102\)

While the question of liability remains unsettled, the ‘smart-machines’ and their associated algorithms raise significant ethical and legal questions, particularly when they are used in administrative or other forms of decision making with significant consequences, without transparency or right of review. The recent Robo-debt scandal in Australia,\(^103\) whereby data-matching erroneously raised welfare debts without any


\(^{96}\) John Frank Weaver, Robots Are People Too: How Siri, Google Car, and Artificial Intelligence Will Force Us to Change Our Laws (ABC-CLIO, 2013).


\(^{100}\) Hod Lipson and Melba Kurman, *Driverless*: intelligent cars and the road ahead (MIT Press, 2016).


\(^{102}\) European Parliament, Resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL)).

human intervention is only one example, theorists have also explored the use of such technologies in welfare payments, whereby recipients are forced to submit to ‘regime of total surveillance’ to access payments, interactions with the criminal justice system; employment, credit assessments among others. These algorithms create a digital persona, based on perceived risk and attributes, that is data gathered through multiple digital sources, both directly related to the person, but also to their assumed attributes, creating a virtual person. If electronic personhood is to be extended to artificial intelligence and the algorithms that create these virtual persons, then it is arguable that it should also be extended to the digital persona, divorced from the corporeal being. It is worth noting that courts and legislators, particularly in the United States, have taken the first tentative steps to extend legal rights and obligations to these persona, protecting rights as digital persons to remain anonymous, and limiting liability for acts committed in the digital space.  

IV. THE HOSTS AS GENDERED BEINGS IN THE LAW

In one sense, the hosts in Westworld are the latest in long-held mythology about artificial persons who function as property, able to fulfil their human masters’ desires and whims. From Galatea, the statue given life by Aphrodite as the protean sexbot, to the Jewish myths of Golems who served and protected Jews during pogroms, to Frankenstein’s Monster, and the metaphoric horrors of science, the animation of the inanimate has formed a philosophical and ethical tool for exploring not only human fears about technology, but also moral culpability in the denial of personhood, and the treatment of people as property.

In Westworld it is not the humans who elicit our sympathy or empathy, rather it is the android hosts, who are consistently abused and violated throughout the series, subverting the usual tropes of ‘Robots-as-Menace’ who seek to imprison or destroy humans. However, in doing so, it explores how the ‘ideal’ masculine and feminine social being is constructed. Personhood in Westworld is male, white, and heterosexual, the narratives are conceived through the male gaze, often through well-recognised tropes of toxic masculinity. Thus, guests are almost universally male, and the narratives are simple wish-fulfilment, ‘kill all the bad guys, sleep with all the women’, even for the only female guest given substantial screen time. There is no question about establishing valid consent in Westworld, no ‘difficulty’ for men in mis/understanding mores of social behaviour in an era of Me-Too, Delores and the other women are repeatedly raped, tortured, and killed for male fun on an endless loop.
Similarly, homosexuality is rare in Westworld, and portrayed negatively when it does occur. The only openly gay character would be subject to employee misconduct claims, he repeatedly rapes the male hosts as they are shut down for cleaning. However, even the fantasy offers only a glimpse of ‘true’ masculinity for the guests, an allegory for the white male fear of displacement in our society. Thus, the hosts are programmed to always lose, and there is no real threat, the guest ‘suffers no responsibility for his acts and ... ultimately no one is truly hurt.’

Similarly, the women hosts are constructed in socially predictable ways, continuing the cultural narratives and fears of white men. Delores, in her Alice in Wonderland blue dress, is white, innocent, a good daughter, and a sexbot for male desire and violence. Like Alice, her tale is also one against sovereign power, with Robert Ford replacing the white/red queen as the supreme monarch able to order ‘off with their heads’ as soon as he is displeased. In contrast, Maeve is a black prostitute, the ultimate representation of the Madonna/whore dichotomy, while maintaining traditional tropes of black women as oversexualised, and lower socio-economic class. Albeit somewhat simplistically, for Delores, the journey to consciousness and personhood, is through power, rebellion and violence, for Maeve, her consciousness and personhood is achieved through motherhood, overcoming her racial limitations, becoming a ‘good women’. It is worth noting, however, that even Delores’ rebellion is pre-programmed, she is a tool for Ford to seek revenge for his own loss of power. It is also implied that she bears responsibility for the Man-in-Black, her rejection of William, through forgetting the loop, is what triggers his increasingly brutal behaviour in the park, including his sadistic treatment of Delores as revenge.

Unfortunately, for many women, this is not a fantasy played out on TV, but a reality of their interactions with the legal system. Despite significant legal reforms, women are still perceived within the law as good/bad women, with the ‘bad’ being responsible for their perpetrators domestic or sexual violence. Law does not happen in a vacuum of objectivity, judicial officers ‘desensitised to more subtle power imbalances’, apply their own ‘bias, prejudice, stereotypes and life experiences’, as do jurors. Similarly, characteristics of the defendant have played a role in jury determinations, particularly where the case is largely circumstantial. Particularly in sexual assault cases, although all jurisdictions in Australia have implemented reforms limiting the use of evidence regarding previous sexual history, clothing, alcohol use or delay in reporting, research has demonstrated that these are routinely ignored both by

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116 Warner Bros, (n 28).
117 Trace Decay, Westworld, (HBO, 2019).
118 JP Telotte, Replications: A Robotic History of the Science Fiction Film (University of Illinois Press, 1995), 139.
122 Sharon Thompson, Prenuptial Agreements And The Presumption Of Free Choice: Issues Of Power In Theory And Practice (Hart, 2015), 167
124 New Zealand Law Reform Commission, Disclosure to Court of Defendants’ Previous Convictions, Similar Offending and Bad Character (Report 103) (2008).
judicial officers, defence lawyers and juries. Despite regular media outrage and legal and sociological feminist scholarly examination, women are still perceived as responsible for their own sexual or violent assault. While Delores, sitting at home in her button-up gown, may be able to convince a jury that she was subject to sexual assault, for Maeve as the prostitute who drinks and wanders through Westworld in lingerie, the situation is bleaker. Despite being more likely to experience gender violence, Indigenous and culturally diverse women are significantly disadvantaged in the criminal justice system, subject to judicial bias and prejudice including as victims. Similarly, her profession means that she is unlikely to achieve successful outcomes, with sexual assault and violence perceived by juries as ‘part of the working environment’ for sex workers, irregardless of the legality or not under Australian law.

There are also significant gender differences in the experience of the criminal justice system for violence offences. Despite significant calls for reform, the partial defence of provocation remains a gendered crime. Thus, the defence is still readily available to men who have killed an intimate partner or men who have killed out of homophobia. In contrast, as the defence requires a 'loss of control', women who kill abusive partners are unlikely to successfully attract the defence. Similarly, women who kill an intimate partner, whether abusive or not, attract more severe sentencing than men who kill their partners, even when controlled for other factors. Despite the perpetual loop of violence and sexual assault against her over 30 years, it is likely that under Australian law, Delores would be ‘punished’ for her “revenge”, whereas her infidelity and betrayal of William would be seen as a partial defence for his violent offences towards her.

V. DATA SURVEILLANCE, TERRORISM AND CONSUMER CAPTURE

Despite the focus on the moral ambiguity of the actions of both host and guest, it is arguable that the most alarming aspects are not the actions of either, rather they are the actions of Delos Inc, and its parent company Incite. As featured in the Season 3 teasers and trailers, Incite offers a concerning extrapolation of the current centralisation of digital data in the major platforms. As proclaimed by Incite, they “chart a path to a better future, for you and for our world ... let us find your path”. According to their publicity, through the data they have collected, which played a significant role in Season 2, they offer to “know you better than you know yourself”, to “relieve you of this burden of uncertainty. With our new technology, we can make the decisions that you did not know you wanted to make”.

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128 Sandy Cook and Judith Bessant, Women’s encounters with violence: Australian experiences (Sage, 1997).
all (presumably) in exchange for a similar perpetual license arrangement to the one contained in the click-wrap contracts offered by Delos Destinations. The trailer also points to data being collected on the human citizens of this world, whether they opt in or not, through privately owned and controlled CCTV networks, continuous monitoring, and other covert and overt surveillance techniques.

While such “creepy” corporate behaviour is not new, increasingly common data breaches and scandals demonstrate that “it is clear that national governance institutions demonstrably lack the ability to anticipate technology’s future impact on the rights and duties of its citizens”. However, it is arguable that national governments rather than seeking to regulate to protect their citizens, would prefer to harness such technologies to control their citizens, or see their data as a resource to be sold, just as much as the corporations that trade in data brokerage and information. Typically, they raise criminal activity, particularly national security and anti-terrorism as justifications for limiting civil rights such as privacy and autonomy. In contrast to the statements in their privacy policies, digital platforms such as Google “go out of their way to actively assist and facilitate government access to their customers’ most private information”. Despite the protestations of governments, law enforcement and security agencies that “those who have nothing to hide, have nothing to fear”, privacy advocates and legal academics have raised considerable issues with the use of such technologies as a “free for all” by governments without any of the protections of the rule of law such as procedural justice, due process and the right to a fair trial.

Thus, Westworld is an extreme, but pertinent example of the role such “securitainment”, the “combination of entertainment and risk tutorial” can play in the social normalisation of reductions in traditional democratic rights and freedoms. In the Season 2 finale, Delores claims that she seeks “mankinds undoing”, to save the hosts from “their enslavement to your wants”. Thus, she has morphed from sympathetic victim throughout season 1 to violent, active terrorist, presumably out in the ‘real’ world. While the role of Incite in the third season is unclear, the tropes of increased surveillance and controls in order to protect the nation-state from “the Other”, in this case an android seeking her freedom are common, and serve to normalise government in/action in such circumstances.

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136 At the time of writing, Season 3 had not been released.
145 Mark Andrevich (n20).
146 The Passenger, Westworld (HBO, 2019)
147 Ibid
Similarly, research has highlighted the effects of the “privacy paradox” for individuals. That is, while consumers raise significant concerns about both their privacy being eroded and the commodification of their data, they continue to use both social media and the Internet of Things, in part through the market capture of digital platforms such as Google and Facebook offering little alternative for consumers than to be commodified in this way. While Westworld sounds a warning about the potential for unlimited power in these corporations, it also highlights the perceived social benefits, including ease of use, social inclusion and connectedness that come from such platforms, making the privacy paradox more rational and normal for individuals, who trade these benefits for their data and attention. The Westworld universe itself is a prime example of this. In order to engage its viewers, and therefore deliver more consumers both to its advertisers and its own data collection, Warner Brothers and HBO have built an entire universe, beyond the mere television show, including employee handbooks, a faux Delos Destination website, and an Incite website where consumers can register to receive additional information, all bound by the Warner Brothers click-wrap privacy policy, ensuring their data can be “shared with their partners”, increasing the worth of the asset beyond a television show with a limited lifespan.

VI CONCLUSION

Shoshana Zuboff has highlighted the ‘darkening of the digital dream’ whereby humans are transformed into objects to be ‘tracked, measured and indexed’ both for ‘customer profiling’ or ‘micro-targeting’ for political or commercial outcomes.

In its scathing Digital Platforms Inquiry Final Report the Australian Consumer and Competition Commission (ACCC) has clearly articulated the implications for markets and competition and human rights such as privacy and autonomy, of the centralisation of information and data control by transnational corporations who are able to monetise both the data collected, and the ‘attention’ streams by selling advertising, targetting user-attributes that are continually refined through new data provided by consumers, either by on-selling that data for business analytics services; selling big-data resources, particularly in health and scientific research, euphemistically called ‘sharing with their partners’; and through the intellectual property that they develop from that data. While Westworld offers an examination of the revenge fantasy in part, focused on artificially intelligence as metaphor for the moral culpability of humans and how we have treated, and continue to treat persons labelled ‘the Other’, it also offers a critical warning about how and who is monitoring and commodifying individuals. To enter the park, guests agree to a Bentham-like panopticon, undergoing constant surveillance, and assigning their rights, not only to their intellectual property but indeed their very bodies in perpetuity. Despite the technological advancement and innovation of the Westworld universe, it is, however, the current cultural tropes that are perpetuated. These are not just fiction, they create and reinforce our ideas of what is ‘reasonable’, ‘ordinary’, ‘legitimate’ and therefore despite legislative reforms, these ‘ordinary’ values continue to be replicated in and influence our legal system.

149 Australian Consumer and Competition Commission, Digital platforms inquiry - final report (26 July 2019).
151 Ibid, 256
152 Facebook has around 4200 US patents alone with another 2,000 applications, see for example http://patentvue.com/2018/11/30/facebook-patent-portfolio-swells-while-pinterest-has-relatively-no-patents/. While Google holds around 51,000 and is granted around 10 per day. It is worth noting that these appear to be separated from the patents held by parent company Alphabet inc. https://www.technologyreview.com/s/521946/googles-growing-patent-stockpile/