Canberra Law Review

The *Canberra Law Review* is a peer-reviewed law journal published each year by the Canberra Law School at the University of Canberra.

It brings together academics, other scholars, legal practitioners, and students within and outside the University. It provides a peer-reviewed open access venue for innovative, cross-disciplinary and creative scholarly articles and commentaries on law and justice.

**Submissions**

The editors of the *Canberra Law Review* seek submissions on aspects of law.

We welcome articles relating to theory and practice, and traditional, innovative and cross-disciplinary approaches to law, justice, policy and society.

**Guidelines**

- 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.
- Submissions should not have been previously published in another journal.

Submissions should be emailed as MS Office .docx or .doc documents to clreditor@canberra.edu.au.

**Peer-Review**

Scholarly articles are blind peer-reviewed by reviewers.

**Open Access**

Consistent with the Canberra Law School’s emphasis on inclusiveness, the Review is open access: an electronic version is available on the University of Canberra website and on the Australasian Legal Information Institute (AustLII) website.

**ISSN**

ISSN 1320-6702 (Print) and ISSN 1839-2660 (Online)
# TABLE OF CONTENTS

The Editors
Introduction to Issue 17(2) iv

**articles**

Bede Harris
The Corporate Opportunity Doctrine and Directors’ Duties – A Critique of the Law in Australia 1

David Mossop
The Associate Judge of the Supreme Court of the Australian Capital Territory 18

Nicholas Felstead
Transactional sex and the peacekeeping economy: Examining The Practical Application Of United Nations Policy On Women In Post-Conflict Societies’ 31

John Boersig and Romola Davenport
Distributing the legal aid dollar – effective, efficient, and quality assured 54

Anthony Gray
The Legality of Denial of Service to Same-Sex Partners and Organisations: Developments in the United Kingdom, United States and Australia 71

Bruce Baer Arnold
Not your standard smoothie: Placentophagy, Influencers and Regulation 89

Dilan Thampapillai
The Australian Government’s Use of Creative Commons Licences: Pushing the Boundaries of Contract? 102

**Student Section**

Huw Warmenhoven
Searching for Self: Realising the Right of Self-Determination for the Palestinian People 116

Vanisha Babani
Does Australia have the Laws it needs in the #MeToo Era? 147

Ryan Waters
Standing Down Athletes Facing Criminal Charges: An Examination of the NRL’s ‘No-Fault Stand Down’ Policy 154

Federica Celli
Deepfakes Are Coming: Does Australia Come Prepared? 192
INTRODUCTION

This, the second issue of Canberra Law Review for 2020, appears during the COVID-19 – a pandemic that as one article notes is not unique and like preceding public health crises provokes thought about rights, responsibilities and regulation. Articles in this issue engage with principles and practice regarding law, spanning from the operation of the Australian Capital Territory court system and best practice for Legal Aid Commissions through to DeepFakes, placentophagy, wedding cakes and professional football.

Bede Harris offers an insightful critique of the Corporate Opportunity Doctrine and Directors’ Duties. His article examines the statutory and common law rules on directors’ duties with specific reference to corporate opportunities. It argues that in interpreting the Corporations Act 2001 (Cth), and in developing the common law, the courts should extend fiduciary duties so as to require a fiduciary to advise a corporation of opportunities falling within the corporation’s area of business, even when the opportunities were discovered in circumstances unconnected with the fiduciary’s role in the corporation. The article also argues that the current ambiguity in the case law over whether a fiduciary who is a shareholder in a corporation may vote his or her shares when seeking permission from shareholders to take a corporate opportunity ought to be resolved in the negative. Finally, although the fiduciary duties extend to employees, the article argues that since not all employees are fiduciaries, the word ‘employee’ both in the Act and under the common law should be given a qualified meaning, and that whether an employee is bound by fiduciary duties should depend on the circumstances of the relationship, and in particular on the scope of authority given to the employee and their level within the corporation.

‘The Associate Judge Of The Supreme Court Of The Australian Capital Territory’ by the Hon David Mossop outlines the history of the position of Master, now referred to as Associate Judge, of the Supreme Court of the Australian Capital Territory. The article demonstrates how the nature of the position has evolved as a result of changes in the Court rules and, only latterly, with legislative intervention. The Associate Judge now performs a role very close to that of a resident judge of the Court. A principled consideration of the structure of the Court may indicate that the maintenance of a separate position, Associate Judge, as distinct from resident judge, is no longer appropriate.

‘Transactional sex and the peacekeeping economy’ by Nicholas Felstead explores the practical application of United Nations policy on women in post-conflict societies. His article argues that the UN zero-tolerance policy response to sexual exploitation and abuse has ostensibly laudable intentions that are not fulfilled in practice. Women in post-conflict societies are rational and autonomous economic actors; the real operation of the policy has a deleterious impact, stripping these women of their economic autonomy. His article reconciles research into transactional sex, peacekeeping economies and the zero-tolerance policy. In doing so it examines the impact of the policy on local women who participate in the market for transactional sex in the peacekeeping economy. Felstead concludes that the UN must consider the lived experience of local women in order to create policy directives that achieve their protective goals.

John Boersig and Romola Davenport offer insights about the ways in which Australian Legal Aid Commissions monitor the quality of legal aid work, and how a national scheme could be remodelled in light of the experiences of other jurisdictions and
emerging evidence as to best practice. Their ‘Distributing the legal aid dollar - effective, efficient, and quality assured?’ argues that peer review is the ‘gold standard’ of quality control. Legal Aid Commissions must evaluate the existing evidence base, implementing a peer review system that operates in parallel to existing performance and financial audits while minimising costs through targeted audits. In this way the Commissions will fulfil not only their statutory obligation to provide efficient and effective legal services, but also their ethical obligation to promote access to justice through delivering high quality legal services to disadvantaged people.

‘The Legality of Denial of Service to Same-Sex Partners and Organisations: Developments in the United Kingdom, United States and Australia’ by Anthony Gray draws on jurisprudence in the United Kingdom and the United States regarding refusals of service (specifically wedding cakes) in the context of same-sex marriage. After outlining existing anti-discrimination and free speech protection in Australia, the article considers how such conflicts would likely be resolved according to Australian law. In so doing, it includes some general reflections on the recent decisions, in the context of larger trends in how the law views sexuality, as well as the relationship between law and religion.

Bruce Baer Arnold’s ‘Not your standard smoothie: Placentophagy, Influencers and Regulation’ considers autonomy, fact-based medicine and regulatory incapacity in discussing challenges posed to health law, consumer law, community education and health practitioner ethics by the consumption of raw or processed human placenta. He suggests that it is a social-media fueled practice in the latest era of ‘fake health news’. Arnold asks whether potential harms are sufficient to justify intervention through regulation by therapeutic goods regulators or consumer protection agencies, for example addressing potentially misleading claims by providers of encapsulated placenta services.

‘The Australian Government’s Use of Creative Commons Licences: Pushing the Boundaries of Contract?’ by Dilan Thampapillai deals with browsewrap contracts, agreements that operate without any explicit act of assent, relying on the notice of terms and the purported acquiescence to those terms. Although browsewrap contracts have been controversial in the United States there is yet to be a case in Australia. However, the Australian Government has emerged as an unlikely actor in the browsewrap contract space through its prolific use of Creative Commons licences. The Australian Government makes content available under CC licences and users knowingly take these materials on that basis. Thampapillai’s article considers whether browsewrap contracts could legitimately arise in this context.

*Canberra Law Review* also includes work by current students and recent graduates, typically a version of their LLB dissertations. This issue of the *Review* features the following articles

Huw Warmenhoven’s ‘Searching for Self: Realising the Right of Self-Determination for the Palestinian People’ explores the principle and right of self-determination, applies the international law concerning self-determination to the Palestinian context and identifies key limitations of scope, status and subject. Occupation of Palestinian territory by Israel raises the issue of whether the status of an occupying power can move from lawful to unlawful as a result of actions contrary to international law. The article discusses the applicability of international legal enforcement mechanisms available to the Palestinian people, including UN Resolution 377 (Uniting for Peace) and its potential application in the contemporary Palestinian context through the realisation of the latent potential of the General Assembly to maintain peace and security where the Security Council has failed to execute its responsibilities.
Vanisha Babani’s ‘Does Australia Have The Laws It Needs In The #MeToo Era?’ considers the adequacy of Australian laws for tackling complaints of sexual assault and harassment in relation to defamation. It discusses the positive and negative effects of #MeToo in Australia, arguing that although the *Sex Discrimination Act* (Cth) is able to deal with sexual harassment complaints and compensate victims, it does not encourage change in the behaviour of perpetrators. Babani argues that the current legal framework is insufficient for adequate justice, particularly in relation to Australia’s defamation regime. This has resulted to victims being cautious about sharing their stories on digital platforms. In order to provide victims with the justice they deserve, further changes to defamation law and a uniform approach is needed.

‘Standing Down Athletes Facing Criminal Charges’ by Ryan Waters considers the introduction of a policy to the NRL in 2019 that made it mandatory for players charged with certain criminal offences to be stood down from their sport. The article compares this policy with principles found in general employment law, examining why athletes may be subject to higher behavioural standards. It examines in detail the test case for this policy heard in 2019, looking at the impacts of that judgment, and how the motivations for the policy were justified in court. The article compares the approach adopted by the NRL to other sports, domestically and internationally, looking at the issue of the off-field conduct of athletes. It concludes with recommendations for sporting organisations seeking to write similar policies, and how these can be constructed to best balance a range of competing interests.

Federica Celli’s ‘Deepfakes Are Coming: Does Australia Come Prepared?’ considers the phenomenon of ‘deepfakes’, a computer-aided appropriation of persona. The article suggests that the dangers to democracy as well as to individuals’ reputation are significant. It discusses the adequacy of Australian laws, analysing the technology behind deepfakes and their misuse. It then offers a comparative analysis of European personality rights, the US right of publicity, and the US Deep Fakes Accountability Act before evaluating Australian tort, consumer and intellectual property law. It concludes that Europe’s personality rights model provides an effective and desirable legal response to deepfaking.

***
The Corporate Opportunity Doctrine and Directors’ Duties – A Critique of the Law in Australia
Bede Harris*

The law in Australia on the circumstances in which a fiduciary will be held to have breached their duties by taking a corporate business opportunity does not strike an adequate balance between the interests of corporations and of fiduciaries. This article examines the statutory and common law rules on directors’ duties with specific reference to corporate opportunities. It argues that in interpreting the Corporations Act 2001 (Cth), and in developing the common law, the courts should extend fiduciary duties so as to require a fiduciary to advise a corporation of opportunities falling within the corporation’s area of business, even when the opportunities were discovered in circumstances unconnected with the fiduciary’s role in the corporation. The article also argues that the current ambiguity in the case law over whether a fiduciary who is a shareholder in a corporation may vote his or her shares when seeking permission from shareholders to take a corporate opportunity ought to be resolved in the negative. Finally, although the fiduciary duties extend to employees, the article argues that since not all employees are fiduciaries, the word ‘employee’ both in the Act and under the common law should be given a qualified meaning, and that whether an employee is bound by fiduciary duties should depend on the circumstances of the relationship, and in particular on the scope of authority given to the employee and their level within the corporation.

I Introduction

This article argues that the law in Australia relating to the circumstances in which a person who stands in a fiduciary relationship with a corporation may take a corporate opportunity is in need of reform. This reform could be achieved through judicial interpretation of the statutory duties contained in the Corporations Act 2001 (Cth) and the common law duties that carry on in existence in parallel with the statutory duties. Part II of the article explains the content of the statutory and common law duties and the interplay between them. Part III examines the two criteria relevant to the question of whether a fiduciary is to be found liable for taking a corporate opportunity: the connection between discovery of the opportunity and office-holding in the corporation, and whether the opportunity falls within the scope of the corporation’s business and, after analysing recent case law from the United Kingdom, argues in favour of a re-interpretation of the former. Part IV discusses the applicability of fiduciary duties to employees, and argues that only certain classes of employee should be held to be subject to fiduciary duties. Part V discusses the circumstances in which a fiduciary may be permitted by shareholders to take a corporate opportunity, and in particular whether a fiduciary who is also a shareholder should be permitted to vote his or her shares. The article concludes in Part VI which contains recommendations for reform.

II The statutory background

Directors’ duties have been put into statutory form in ss 180-184 of the Corporations Act 2001 (Cth). However s 185 of the Act states that these provisions apply in addition

---

* BA(Mod) Dublin, LLB Rhodes, DPhil Waikato. Senior lecturer in Law, School of Accounting and Finance, Charles Sturt University.

1 The continued existence of the common law is expressly stated in s 184 of the Act.
to, and not in substation for, the common law. This means that the common law continues to operate in parallel with the statutory duties. This is useful in that existing case law can be used to give meaning to the statutory duties but, as is discussed below, also creates complexity because the common and statute law duties differ in scope, and so conduct which may not breach one type of duty may still constitute a breach of the other.

The classification of duties in the Act departs from the traditional common law taxonomy, which recognised fiduciary duties to act in the best interests of the company, to exercise powers for a proper purpose, to exercise an independent discretion and to avoid conflicts of interest, along with the tort-based duty to act with due care. Instead the Act recognises a duty of care (s 180(1)), a duty to act in the best interests of the corporation and to exercise powers for a proper purpose (s 181), a duty not to use position as a director to harm the corporation or to make a profit for oneself or for someone-else (s 182) and a similarly-phrased duty prohibiting misuse of information (s 183).

Section 181 states:

181 Good faith – civil obligations
(1) A director or other officer of a corporation must exercise their powers and discharge their duties:
(a) in good faith in the best interests of the corporation; and
(b) for a proper purpose.

Section 182 states:

182 Use of position—civil obligations
Use of position—directors, other officers and employees
(1) A director, secretary, other officer or employee of a corporation must not improperly use their position to:
(a) gain an advantage for themselves or someone else; or
(b) cause detriment to the corporation.
(2) A person who is involved in a contravention of subsection (1) contravenes this subsection.

Similarly, s 183 states:

183 Use of information—civil obligations
Use of information—directors, other officers and employees
(1) A person who obtains information because they are, or have been, a director or other officer or employee of a corporation must not improperly use the information to:
(a) gain an advantage for themselves or someone else; or
(b) cause detriment to the corporation.
(2) A person who is involved in a contravention of subsection (1) contravenes this subsection.

Whereas it is common, and unobjectionable, to use the term ‘directors’ duties’ as a convenient shorthand when referring to the duties owed to a corporation by its fiduciaries, it is important to recognise that these section impose duties on a far wider class than directors. All three sections refer to directors and officers. In addition, ss 182 and 183 impose duties on employees.

The words ‘director’ and ‘officer’ are given a broad definition by the Act. Section 9 defines ‘directors’ as including

someone appointed to the position of director (whatever called), and
someone not validly appointed as director but who
(i) acts as a director or
(ii) is someone upon whose directions the directors are accustomed to act.

People falling within sub-part (i) are commonly referred to as ‘de facto’ directors, while those in sub-part (ii) are referred to as ‘shadow’ directors. In *Deputy Commissioner of Taxation v Austin* (1998) 28 ACSR 565 the court held that whether a person was a de facto director would be determined in light of a number of factors, including the size of the corporation, its internal practices and how the person was viewed by outsiders. Thus the focus is on what tasks the person performs rather than on their nominal title or status within the corporate structure: The key question is whether the person exercised ‘top level management functions.’ So far as shadow directors are concerned, the court in *Bluecorp Pty Ltd (in liq) v ANZ Executors and Trustee Co Ltd* held that for a person could be found to be a shadow director, the board has to be found to act on their instructions, not merely stand aside for them and acquiesce in their actions.

So far as ‘officers’ are concerned, s 9 defines them as including

(a) a director or secretary of the corporation; or
(b) a person:
   (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
   (ii) who has the capacity to affect significantly the corporation’s financial standing; or
   (iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person’s professional capacity or their business relationship with the directors or the corporation).

Section 9 also states that receivers, administrators and liquidators are also officers of corporations. Sub-sections (b)(i) – (iii) have been interpreted by the courts as encompassing a broad category of persons, extending below the level of the board and including senior managers. In *Shafron v ASIC*, the High Court, focussing on people falling within the scope of (b)(i), held that in every case it will be a matter of degree as to whether what a person does within a corporation amounts to participating in decisions which affect the whole of a corporation or a substantial part. The court also emphasised that ‘participation’ in the making of decisions can occur even if the ultimate decision is made by some other person or body, and held that when the appellant, who was in-house legal counsel in a company, formulated negligent advice to the board on which the board then acted, he was someone who was ‘participating’ in the board’s decision-making within the meaning of (b)(i). The court also held that in determining whether a person is an officer within the meaning of (b)(i), the focus is not solely on whether that person was involved in the making of the particular decision which was a breach of directors’ duties – a person may be found to be an officer on the basis of making other decisions and, for that reason, be found to be an officer of the company and liable for the decision under scrutiny.

Finally, the fact that, in contrast to ss 180(1) and 181 which apply only to directors and officers, ss 182 and 183 also apply to employees, gives the statutory duties a wider applicability than the common law duties, as under the common law, employees are not automatically in a fiduciary relationship with employers. Thus conduct by an

---

2 (1994) 13 ACSR 386.
employee that would not be prohibited by the common law can amount to a breach of the statutory duties. This is further discussed in Part IV.

Which of the statutory duties are breached through the taking of a corporate opportunity depends on the circumstances of the breach. Given that, by its very nature, the taking of a corporate involves the director acting in his or her own best interests rather than those of the corporation, every act of that type would constitute a breach of s 181. If the taking of the opportunity originates in the director misusing his or her position, it will also amount to a breach of s 182. Similarly, if the breach is the result of the misuse of corporate information, s 183 will have been breached. Conceivably the taking of a corporate opportunity could amount to a breach of all three sections, where the director misuses both position and information in order to take an opportunity. Conversely, taking of an opportunity could amount to a breach only of the duty contained in s 181 if there was no connection between the opportunity and either the director’s position or the misuse corporate information.

III Identifying when an opportunity belongs to a company

The taking of a corporate opportunity is but one circumstance in which directors’ duties can be breached, and identification of what constitutes the taking of a corporate opportunity is determined through their interpretation of the statutory duties. This is why the preservation of the common law by s 185 is important, as it allows the courts to draw on existing case law in determining when the duties are breached. Courts have also drawn upon case law from other common law jurisdictions. But whereas the common law is used in giving meaning to the statutory duties, s 185 makes it clear that the common law carries on in existence independently of the statutory duties, and that proceedings can still be brought for breaches of the common law. This means that two potential sources of liability have to be considered, and that one may arise in circumstances where the other does not.

A The two conditions for liability for taking a corporate opportunity

Under current law an opportunity is said to belong to a corporation, and is thus not able to be exploited by a director, if two criteria are fulfilled: There must be a causal relationship between the director’s discovery of the opportunity and his or her position as a director (remembering that the term ‘director’ must be read as encompassing the broad class of persons identified in Part II), and the opportunity must fall within the current business activities of the corporation or into those business activities into which it might reasonably be expected to expand.

B Causal connection between office-holding and opportunity

Under the statutory regime, the language of ss 182 and 183 makes it clear that a person will be liable for taking a corporate opportunity only if the opportunity was learned of as a result of being a director. A breach of s 182 occurs only where a person has improperly used their position as a director to gain an advantage for themselves or someone else or to cause detriment to the company, while s 183 is breached only in circumstances where a person obtains information ‘because they are, or have been, a director or other officer or employee of a corporation’ and improperly uses that information to gain an advantage for themselves or someone else or to cause detriment to the company. It follows that these sections of the Act prohibit a person from taking a corporate opportunity only if the discovery of the opportunity arises from their position in the company or from the use of corporate information.
Whether a causal connection between office-holding and discovery of an opportunity is a condition of liability under the common law is unsettled. Given that the statutory duty in s 181 is likely to be interpreted in light of the common law, the same can also be said to be true of that duty. The duty to act in good faith and in the interests of the company is often expressed as encompassing two rules – the ‘conflict rule’ and the ‘profit rule’ – the first being a duty not to allow a conflict of interest to exist between the director’s personal interests and the interests of the company, the second being the prohibition on the director from making a profit as a consequence of his position. However, the courts have stated that these rules are simply dimensions of the general duty of good faith.

The conflict rule, as formulated by Lord Cranworth LC in in Aberdeen Railway Company v Blaikie Bros, is that no-one who owes fiduciary duties

.. shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect.

A director who acts in accordance with their personal interests rather than those of the company will be found to have breached the conflict rule irrespective of whether they make a profit or the company suffers a loss, but if they have made a profit as a result of the conflict they will be liable for it to the company, as was held in Furs v Tomkies. The conflict rule was subsequently refined in Phipps v Boardman, where Lord Upjohn (in dissent) held that the phrase ‘which possibly may conflict’ in Aberdeen Railway, should be interpreted as referring to circumstances where there was ‘a real sensible possibility of conflict’. This formulation was subsequently adopted in Queensland Mines v Hudson, while in Chan v Zacharia Deane J referred to a ‘significant possibility’ of conflict and in Hospital Products Ltd v United States Surgical Corp Mason J phrased the test as being whether there was ‘a real or substantial possibility of conflict.’

The profit rule prohibits a directors from making a profit as a consequence of their relationship with a corporation and which makes him or her liable to surrender such profits to the company. The leading case on the rule is Regal (Hastings) Ltd v Gulliver, in which Russell LJ held that a fiduciary must account for a profit made ‘by reason of’ and ‘in the course of’ his office holding. Under this approach, the director would be obliged to bring to the company’s attention only those opportunities which he or she discovered as a consequence of being a director, and is free to exploit those opportunities discovered in other circumstances – even if they fall within the company’s line of business. However, academic commentators have questioned whether the words used by Russel LJ were meant to impose a limitation on the profit

\[\text{References}\]

5 Jason Harris, Anil Hargovan and Michael Adams, Australian Corporate Law (Lexis-Nexis, 6th ed, 2018) 472.
6 See Grand Enterprises Pty Ltd v Aurium Resources Ltd (2009) 72 ACSR 75.
7 (1854) 1 Macq 461.
8 Harris, Hargovan and Adams, above n 5, 478.
9 (1936) 54 CLR 583.
10 [1967] 2 AC 46.
13 (1984) 156 CLR 41 at 103.
15 Ibid 145.
16 Ibid 147.
rule in such a way as to restrict the liability of a director to surrender profits to a company only if they were made as a result of his or her office-holding.\(^\text{17}\)

In determining the circumstances in which the taking of a business opportunity would amount to a breach of fiduciary duty, it is important to note that even if, in accordance with *Regal (Hastings) Ltd v Gulliver*, the profit rule operates to make a director liable for taking an opportunity only if the opportunity was connected to office-holding, the question remains as to whether liability to the company can nevertheless arise under the conflict rule even in circumstances where no connection exists between the taking of the opportunity and holding a position in the company. In addressing this question, courts have referred to the decision in *London and Mashonaland Exploration Company Limited v New Mashonaland Exploration Company Limited*,\(^\text{18}\) in which the court refused to grant an injunction prohibiting a director who sat on the board of the plaintiff company from sitting on the board of the competing defendant company. The case thus became cited as authority for the proposition that it is not a breach of fiduciary duties for a director to sit on the board of a competing company.

The rule in *New Mashonaland* has however come under criticism,\(^\text{19}\) and has also been qualified in subsequent cases which have held that a director may not use confidential information gained as a result of being a director of one company in such a way as to benefit another,\(^\text{20}\) that an express\(^\text{21}\) or implied\(^\text{22}\) term of a contract of service that an executive director has with the company may preclude him or her from being the director of another (although it would appear that, according to these authors, non-executive directors are not to be considered subject to such an implied clause),\(^\text{23}\) and that a director cannot ask customers of a company to cease dealing with it in favour of the other company of which he or she is a director.\(^\text{24}\)

More significantly for the discussion on corporate opportunities however, is the fact that the rule in *New Mashonaland* was extended in *Bell v Lever Brothers*,\(^\text{25}\) where Lord Blanesburgh held that the principle that a director could sit on the board of a competing company meant that he himself could compete personally with a company of which he was director, on the ground that ‘What he could for a rival company, he could of course, do for himself.’\(^\text{26}\) If *Bell v Lever Brothers Ltd* was correctly decided, and if *Regal (Hastings) Ltd v Gulliver* does require a causal connection between office-holding and profit-making, the implication of these decisions is that there is nothing unlawful *per se* in a director taking for himself an opportunity which falls into the area of business in which the company is engaged. Is this correct?

\[\text{C Critique of the law relating to the connection between office-holding and liability}\]

---

\(^{17}\) Austin, Ramsay and Ford, above n 4, 635.

\(^{18}\) [1891] WN 165.

\(^{19}\) See for example *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324.


\(^{21}\) *Hivac v Park Royal Scientific Instruments Ltd* [1946] Ch 169.

\(^{22}\) *On The Street Pty Ltd v Cott* (1990) 101 FLR 234.


\(^{25}\) [1932] AC 161.

\(^{26}\) Ibid 195.
The fundamental problem with the decisions in *Regal (Hastings) Ltd v Gulliver* and *Bell v Lever Brothers Ltd*\(^{27}\) is that by leaving directors free to take in their private capacity opportunities that fall within the company’s area of business, they significantly undermine the protection to which companies, as fiduciaries, are entitled. To take a hypothetical example if, in his spare time, a director of a gold mining company reads an article in a mining journal which states that a geological survey indicates that there is a high likelihood of gold being found in a particular area, an application of those cases leads to the conclusion that he would be able to exploit those claims privately, rather than bring their existence to the attention of the board. This in turn means that whether the duty to avoid a conflict of interest is operative would depend on the timing of the information coming to the director’s attention – which might be quite random – and suggests that the director can ‘switch off’ his obligation to act in the interests of the company rather than in his own personal interests. This, I would argue, is fundamentally incompatible with the principle underlying the fiduciary duties which, in the words of Upjohn LJ in *Boulting v Association of Cinematograph, Television and Allied Technicians*,\(^{28}\) is that a company is entitled to ‘the undivided loyalty of its directors.’

Notwithstanding the decision in *Bell v Lever Brothers Ltd*, there has been a line of cases from the United Kingdom in which the lawfulness of directors taking opportunities that arise in a ‘private’ capacity has been reconsidered:\(^{29}\)

In *Bhullar v Bhullar*,\(^{30}\) a family-owned property-development company was in the process of being divided between two branches of the family. It was agreed that during this process, no new property would be bought. Two of the directors bought property on their own account for the anticipated benefit of their branch of the business. The court held that the directors had breached their duty to the still existing family company, even though it was no longer pursuing business opportunities and, significantly, even though they discovered the opportunity in circumstances unrelated to their duties as directors. In similar vein, in *Item Software (UK) Ltd v Fassihi*,\(^{31}\) Lady Justice Arden, referring *inter alia* to the decision in *Bhullar* said:\(^{32}\)

> These authorities go to show that the fact that a director was acting otherwise than as a director in making a secret profit is no answer to a claim by the company to recover the profits.

In *Sharma v Sharma*,\(^{33}\) the respondent, who was a director of a company that owned dental practices, bought two practices on her own account. The issue in the case was whether the shareholders had all consented to her taking the opportunities in circumstances where, at a shareholder meeting, two of the shareholders stayed silent. Although the court found that, in the particular circumstances of the case, the silence of the shareholders had amounted to consent, it is clear, in light of the following statement by Jackson LJ,\(^{34}\) that but for the consent, the defendant’s conduct would have been unlawful:

> A company director is in breach of his fiduciary or statutory duty if he exploits for his personal gain (a) opportunities which come to his attention through his

---

\(^{27}\) [1932] AC 161.

\(^{28}\) [1963] 2 QB 606 at 636.


\(^{30}\) [2003] EWCA Civ 424.

\(^{31}\) [2004] EWCA Civ 1244.

\(^{32}\) Ibid [38].

\(^{33}\) [2013] EWCA Civ 1287.

\(^{34}\) Ibid [52].
role as director or (b) any other opportunities which he could and should exploit for the benefit of the company.

Of particular significance here was Jackson LJ’s inclusion of ‘any other opportunities which he could and should exploit for the benefit of the company,’ as distinct from those opportunities learned of as a result of being a director, because it means that a director has a duty to bring to the attention of the company such opportunities as fell within the company’s area of business, rather than take them himself.

Similarly, in Wilkinson v West Coast Capital, Warren J held that if the director who wanted to take advantage of the opportunity was also a shareholder who could (in that capacity) prevent the company from taking advantage of the opportunity, then it would not be a breach of duty for him to exploit it personally. However - and what is important for purposes of corporate opportunities - Warren J also said that there might be an obligation for directors at least to bring the opportunity to the attention of the board, even if discovered ‘other than in their capacities as directors.’

Finally, and most importantly, the decision of the Scottish Court of Session in Commonwealth Oil and Gas Company Limited v Baxter and Eurasia Energy calls into question the use of London and Mashonaland Exploration Company Limited v New Mashonaland Exploration Company Limited and Bell v Lever Brothers Ltd as authority for the proposition that a director may compete with the company to which they owe fiduciary duties. In this case, a non-executive director pursued private business opportunities in the same area of business as the company. The court held that compliance with fiduciary duties required the director to bring such opportunities to the attention of the company. The Lord President rejected the argument that the duty to avoid conflicts of interest applies only when a director is acting in his capacity as a director. In discussing the decision in Bell v Lever Brothers Ltd, the Lord President noted that Lord Blanesburgh’s reliance on Mashonaland as authority for the rule that a person may be a director of competing companies was restricted to circumstances where there was no conflict between a director’s duty to a company and his own personal interests, and had no application in cases where such conflicts did exist. He also noted that neither of the other two members of the court had referred to Mashonaland in their judgments and thus could not be taken to have endorsed it. Lord Nimmo Smith adopted the same view of Mashonaland, and concluded as follows:

An attempt was made by counsel for Mr Baxter to persuade us that the principle in Aberdeen Railway Co v Blaikie Bros only applies where the conflict arises between a director’s personal interests (whether as an individual or through the medium of another company) in relation to commercial opportunities of which he had become aware in the exercise of his function as director of the company or which, as it was put, he had been "tasked" to pursue on behalf of the company. I am entirely unable to accept this argument, which is not supported by the leading authorities. To go back to Aberdeen Railway Co v Blaikie Bros, Lord Cranworth said that the directors are a body to whom is delegated a duty of managing the general affairs of the company. No doubt some members of a board may be executive directors and others non-executive, and executive

---

35 [2005] EWHC 3009 (Ch).
36 Ibid [300].
38 [1891] WN 165.
42 This was also noted by Lord Nimmo Smith in his judgment, at [77].
43 Ibid [75] - [79].
directors may have specific executive functions which have been delegated to them to perform. But the fact that he has an executive function does not alter a director’s status: he is a director of the company as a whole, and his duties to the company are to manage the general affairs of the company and are not confined to the responsibilities arising from his executive function. A director’s fiduciary duty of loyalty is owed to the company as a whole; and the duty to avoid a conflict of interest must be related to the interests of the company as a whole.

Apart from its rejection of the idea that a director is free to take corporate opportunities discovered in his private capacity, a significant feature of this dictum is that directors are affixed with the same duties in this regard irrespective of whether they are executive or non-executive directors, which runs contrary to the view of some academic writers discussed above who have taken the view that non-executive directors are free to act in ways not permitted of executive directors.44

The above cases, all decided since 2003, point to a move towards a stricter interpretation of fiduciary duties and of what amounts to the unlawful taking of a corporate opportunity in the United Kingdom. Most significantly, they stand in support of the proposition that a director may be found to be in breach of their duties even if they take an opportunity that they learned of in circumstances unconnected with their office-holding. Academic criticism has also been levelled at the traditional view of what the decision in New Mashonaland meant. Le Miere emphasises that the court in New Mashonaland was being asked to issue an injunction – a remedy which is granted only where the applicant will suffer irreparable harm for which damages would not be adequate compensation if the injunction was not granted – and that on the facts of the case, there was no evidence that an injunction was the only avenue open to the applicant which could, for example, have requested that the director not to serve on the board of the rival company, or could have removed him from its own board.45 On that view, the case was not one which decided whether a director may serve on the board of competing companies, but was rather one relating to the rules governing when an injunction should be granted. For this reason, Le Miere argues, it was incorrect for Lord Blanesburgh in Bell v Lever Brothers Ltd46 to rely on what he called ‘the New Mashonaland principle’ to formulate a rule that a director acting in his personal capacity could compete with the company to which he owes fiduciary duties.47

To refer back to the example adduced at the start of this section, it is surely consistent with the reasonable expectations of a gold mining corporation that a director who learns that a geological survey of an area indicates a likelihood that it contains gold-bearing ore should inform the company of that fact, and give it the chance to explore the opportunity before taking it himself. To say that it is only if a corporation can prove that the director learned of the opportunity in circumstances connected with his or her office-holding is to put an artificial boundary on the director’s fiduciary duties. It would also create evidentiary problems which would be very difficult to surmount.

To take another example, suppose that in a conversation at a social function unconnected with work, a guest mentions to a person who is the director of a biotech company that a particular university has developed a drug that might cure influenza. If one adopts the approach in Regal (Hastings) Ltd v Gulliver and Bell v Lever

44 Above n 23.
45 Dominique Le Miere, ‘London and New Mashonaland Exploration Co Ltd v New Mashonaland Exploration Co Ltd: Is it Authority that Directors Can Compete with the Company?’ (2017) 42 University of Western Australia Law Review 98, 102-103.
Brothers Ltd (as commonly understood), the director is obligated to bring this news to the attention of her board only if (i) her interlocutor knew that she was a director of a biotech company and (ii) the director herself knew that the interlocutor knew that she was a director. Only then could it be said that she was aware that she received the information because she was a director and was therefore under an obligation to disclose the potential opportunity to the company. In many, perhaps most, instances, it will be impossible for the director to know, or even have an opportunity to discover, what was in the mind of the person giving the information. Making the operation of the fiduciary duty contingent on something which will probably be unknowable is impractical. In these circumstances, the director’s conscience, as directed by her duty not to allow her own interests to conflict with the company or to make a profit from an opportunity lying within its area of business, should guide her and should compel her to make the company aware of the opportunity. How the statutory duties should be reformed in light of this argument is discussed in Part VI.

D The relationship between the opportunity and the company’s business

The second criterion that must be fulfilled for a director to be liable for taking a corporate opportunity is that the opportunity must be one that is connected to the company’s line of business. The law on this has been developed over a number of decades but is now well settled. In Canadian Aero Services Ltd v O’Malley, Laskin J held that whether an opportunity was one which belonged to the company depended upon whether it was a ‘maturing business opportunity which the company is actively pursuing.’ The test was subsequently expanded in SEA Food International Pty Ltd v Lam, in which Cooper J held that an opportunity belongs to a company if there is a connection between it and the ‘nature and extent of the company’s operations and anticipated future operations.’ In other words, a court must consider not only what activities a company is currently engaged in but those into which it might reasonably expand in light of its current scope of operations. Business opportunities lying outside these parameters may not be exploited by a director. Conversely, in the absence of such a connection, the director is free to keep the opportunity for him or her-self without disclosing it to the company.

IV Employees and corporate opportunities

As noted in Part I, the statutory duties differ in their scope. The duty of good faith and of acting in the best interests of the company in s 181 apply only to directors and officers, whereas the duties relating to misuse of position and information contained in ss 182 and 183 apply to directors, officers and employees. By so doing, ss 182 and 183 cast their obligations more widely than does the law of other jurisdictions which have put directors’ duties into statutory form, as for example the United Kingdom, where ss 170 - 177 of the Companies Act 2006 (UK) impose duties only on directors, and New Zealand where the same is true of ss 131-138 of the Companies Act 1993 (NZ).

In contrast to the duties imposed by ss 182 and 183, the omission of employees from the scope of s 181 means that employees are not bound by a statutory duty of good faith and to act in the best interests of a corporation. Thus an employee who takes a corporate opportunity (without using their position or corporate information), does not breach the Act.

48 (1973) 40 DLR (3d) 371.
49 Ibid 382.
51 Ibid 557.
But leaving aside the Act, are employees fiduciaries under the common law? If they are, then given that s 185 states that the common law carries on in effect notwithstanding the existence of the statutory duties, could an employee who competed with the company be held liable to surrender their profit notwithstanding parliament’s evident intent to exclude them from the scope of s 181, as distinct from ss 182–3?

The question of whether employees owe a fiduciary duty to employees is complex and fact-specific.52 In *Hospital Products Ltd v United States Surgical Corp*,53 Mason J stated that a fiduciary relationship is one in which

... the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position.

Mason J included the relationship between employees and employers in his list of relationships that were fiduciary in nature, although he stated that the scope of the duty was to be ‘moulded according to the nature of the relationship and the facts of the case,’54 which suggests that not all employer-employee relationships are automatically fiduciary.

The question of whether employees owe a fiduciary duty to employees has been clouded by the existence of a duty of good faith and fidelity that has long been implied in contracts of employment but differs from fiduciary duty.55 This point was discussed at length by Elias J in the English case of *Nottingham University v Fishel*,56 where he stated as follows:

It is true that in *A.G. v Blake* [1998] Ch 439 Lord Woolf, giving judgment for the Court of Appeal said that the employer-employee relationship is a fiduciary one. But plainly the Court was not thereby intending to indicate that the whole range of fiduciary obligations was engaged in every employment relationship. This would be revolutionary indeed, transforming the contract of employment beyond all recognition and transmuting contractual duties into fiduciary ones. In my opinion the Court was merely indicating that circumstances may arise in the context of an employment relationship, or arising out of it, which, when they occur, will place the employee in the position of a fiduciary. In Blake itself, as I have indicated, it was the receipt of confidential information. There are other examples. Thus every employee is subject to the principle that he should not accept a bribe and he will have to account for it (and possibly any profits derived from it) to his employer. Again, as Fletcher-Moulton L.J. observed in *Coomber v Coomber* [1911] 1 Ch.723 at 728, even an errand boy is obliged to bring back my change, and is in fiduciary relations with me. But his fiduciary obligations are limited and arise out of the particular circumstances, namely that he is put in a position where he is obliged to account to me for the change he has received. In that case the obligation arises out of the employment relationship but it is not inherent in the nature of the relationship itself.

---

54 Ibid 102.
55 The distinction between the two is discussed in Andrew Frazer, ‘The employee’s contractual duty of fidelity’ (2015) 131 *Law Quarterly Review* 53.
As these examples all illustrate, simply labelling the relationship as fiduciary tell us nothing about which particular fiduciary duties will arise. As Lord Browne-Wilkinson has recently observed in *Henderson v Merrett Syndicates Ltd* [1994] UKHL 5; [1995] 2 AC 145 at 206: "... the phrase ‘fiduciary duties’ is a dangerous one, giving rise to a mistaken assumption that all fiduciaries owe the same duties in all circumstances. This is not the case”. This is particularly true in the employment context. The employment relationship is obviously not a fiduciary relationship in the classic sense. It is to be contrasted with a number of other relationships which can readily and universally be recognised as “fiduciary relationships” because the very essence of the relationship is that one party must exercise his powers for the benefit of another. Trustees, company directors and liquidators classically fall into this category which Dr. Finn, in his seminal work on fiduciaries, has termed “fiduciary offices”. (See PD Finn, “Fiduciary Obligations” (1977)). As he has pointed out, typically there are two characteristics of these relationships, apart from duty on the office holder to act in the interests of another. The first is that the powers are conferred by someone other than the beneficiaries in whose interests the fiduciary must act; and the second is that these fiduciaries have considerable autonomy over decision making and are not subject to the control of those beneficiaries.

By contrast, the essence of the employment relationship is not typically fiduciary at all. Its purpose is not to place the employee in a position where he is obliged to pursue his employer’s interests at the expense of his own. The relationship is a contractual one and the powers imposed on the employee are conferred by the employer himself. The employee’s freedom of action is regulated by the contract, the scope of his powers is determined by the terms (express or implied) of the contract, and as a consequence the employer can exercise (or at least he can place himself in a position where he has the opportunity to exercise) considerable control over the employee’s decision making powers. This is not to say that fiduciary duties cannot arise out of the employment relationship itself. But they arise not as a result of the mere fact that there is an employment relationship. Rather they result from the fact that within a particular contractual relationship there are specific contractual obligations which the employee has undertaken which have placed him in a situation where equity imposes these rigorous duties in addition to the contractual obligations. Where this occurs, the scope of the fiduciary obligations both arises out of, and is circumscribed by, the contractual terms; it is circumscribed because equity cannot alter the terms of the contract validly undertaken. The position was succinctly expressed by Mason J in the High Court of Australia in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR ...

Elias J’s approach has been adopted in several Australian cases. In *Prestige Lifting Services Pty Ltd v Williams*,57 Beach J cited *University of Nottingham v Fishel* in support of the proposition that that an employment relationship does not in itself give rise to fiduciary obligations and, while noting Mason J’s inclusion of employees in his list of fiduciaries in *Hospital Products v United States Surgical Corp*,58 held that the scope of any fiduciary obligations will depend on the particular relationship.59 The same was said by Ball J in *Blue Visions Management Pty Limited v Chidiac*60 and by Collier J in *Investa Properties Pty Ltd v Nankervis (No 7)*.61 Similarly, in both *Woolworths Limited v Olson*62 and *Victoria University of Technology v Wilson*63 it was held that the employer-employee relationship is not a fiduciary one as a matter of general principle, but that an employee may become subject to fiduciary duties because of his or her role. An example of this is provided by *Colour Control Centre v Ty*,64

---

57 [2015] FCA 1063, [196].
59 [2015] FCA 1063, [210].
60 [2017] NSWSC 255, [135].
61 [2015] FCA 1004, [66].
where Santow J held that employees below the level of senior executives may owe a corporation a fiduciary duty, and that the more senior the employee, the more likely that will be. In Singtel Optus v Almad, a middle manager was held to owe a fiduciary duty to the company which employed him.

However, in the recent High Court case of Ancient Order of Foresters in Victoria Friendly Society Limited v Lifeplan Australia Friendly Society Limited, Gageler J stated that an employer-employee relationship is fiduciary. Does this pronouncement by the High Court mean that all employer-employee relationships are indeed fiduciary and that statements to the contrary in the cases mentioned above are incorrect? I would submit not, for the following reasons: First, Gageler J made his statement without comment and without analysing, much less over-ruling, those cases which have said that whether a relationship is fiduciary in nature is fact-specific. Second, the authorities cited by Gageler J in explaining the content of the duties owed by and employee do not support his broad characterisation of the relationship as inherently fiduciary. The first case, Gibson Motorsport Merchandise Pty Ltd v Forbes, related to a joint venture rather than a contract of employment, while the second, Hospital Products Ltd v United States Surgical Corp is also, as stated above, not authority for the broad proposition advanced by Gageler J, because Mason J’s statement that the employer-employee relationship is fiduciary was subject to the qualification that the scope of the duties was to be ‘moulded according to the nature of the relationship and the facts of the case.’

I would therefore argue that the common law does not impose a general fiduciary duty on employees, but rather that the existence of such a duty will depend on the specifics of the relationship. This was eloquently stated by Lord Greene MR in Hivac v Park Royal, where he said:

I can very well understand that the obligation of fidelity, which is an implied term of the contract, may extend very much further in the case of one class of employee than it does in others. For instance, when you are dealing, as we are dealing here, with mere manual workers whose job is to work five and a half days for their employer at a specific type of work and stop their work when the hour strikes, the obligation of fidelity may be one the operation of which will have a comparatively limited scope. The law would, I think, be jealous of attempting to impose on a manual worker restrictions, the real effect of which would be to prevent him utilizing his spare time ... On the other hand, if one has employees of a different character, one may very well find that the obligation is of a different nature.

Based on this reasoning, I would argue that whether a fiduciary duty attaches to employees under the common law – and thus whether an employee is prohibited from taking opportunities which lie within the corporation’s area of business - depends on the level of responsibility held by the employee and his or her capacity to affect the corporation as a whole. Thus, to take a hypothetical example a checkout-operator employed by a corporation that owns a chain of supermarkets who works three days a week for that corporation should not be said to be subject to a fiduciary duty which would prevent him or her from working for another supermarket chain on two other days each week – an occurrence which is surely not uncommon. I would go further and say that such a checkout operator would not be acting unlawfully if they noticed and

---

65 [2013] NSWSC 1427.
67 Ibid [67].
68 [2006] FCAFC 44.
70 Ibid 102.
exploited an opportunity to open a convenience store that sold groceries and which thus competed with the supermarket chain. These conclusions are based on the fact that a checkout operator is at the bottom of the hierarchy in a supermarket chain and, apart from the obligation to discharge their duties as a checkout operator faithfully, is not vested with the capacity or responsibility to make decisions that affect the corporation’s business. Their responsibility is wholly confined to following instructions. By contrast, one could imagine a person who is a mid-level employee in the marketing division of the same supermarket corporation and who is vested with the responsibility of planning advertising campaigns and buying advertising space in newspapers and time on TV stations. Even though that person’s role would not meet the definition of an ‘officer’ of the corporation under s 9 of the Act, I would argue that by virtue of the discretion inherent in their role and their capacity to affect the corporation, they would be under a fiduciary duty not to work for another corporation.

\[V\]

**Circumstances in which a director is permitted to take a corporate opportunity**

Assuming that an opportunity does belong to a corporation, under what circumstances may the corporation relinquish the opportunity, thereby allowing the officer to take it for him or herself?

It is well-established that disclosure to, and consent by, the board is insufficient to allow a director to take a corporate opportunity. This is because of the risk of collusion between board members, which could take the form of the board agreeing to surrender an opportunity to one of their number, with that person then participating in the relinquishment of an opportunity to another board member, and so on. This has led to the rule that acquiescence by the board in an officer’s taking of an opportunity is insufficient to shield the officer from liability to the corporation, and that the approval of shareholders in a general meeting is also required, as held in *Furs v Tomkies*.\(^72\)

May a director who is seeking that permission and who is also a shareholder him or herself vote their shares? In *North-West Transportation Co Ltd v Beatty*\(^73\) it was held that a director does not owe a fiduciary duty in their capacity as shareholder and may therefore participate in a vote which validates conduct that would otherwise be a breach of duties. Ford argues that this precedent still stands.\(^74\) However, the court’s statement in *North-West Transportation* was subject to the qualification that that the approval not be ‘fraudulent or oppressive to those shareholders who oppose it.’\(^75\) Given that taking a corporate opportunity will be oppressive other than in circumstances where the other shareholders unanimously approve surrender of the opportunity, a director’s self-condonation by means of the use of his or her voting power will be oppressive under s 232 of the Act. Furthermore, in the later case of *Cook v Deeks*,\(^76\) the court held that where directors who collectively owned 75% of the shares in a company had used their voting power in a general meeting to validate the diversion of

\(^{72}\) (1936) 54 CLR 583. The case of *Queensland Mines Ltd v Hudson* (1978) ALR 1 is sometimes cited as authority for the proposition that the board on its own may relinquish an opportunity to a director. However that is to overlook a key fact of the case which was that collectively the board members owned 100% of the shares in the company and so consent by the board also amounted to consent by shareholders. See Austin, Ramsay and Ford, above n 4, 665-6.

\(^{73}\) (1887) 12 App Cas 589 (PC), 593. See also *Burland v Earle* [1902] AC 83.

\(^{74}\) Austin, Ramsay and Ford, above n 4, 663.

\(^{75}\) (1887) 12 App Cas 589 (PC), 593.

\(^{76}\) [1916] 1 AC 554.
an opportunity to a separate company they had set up, their ratification of their own breach of duty was ineffective and they and were liable to surrender their profit to the company.

The better view which I would argue that the courts should adopt, is therefore that any vote by shareholders to authorise the taking of a corporate opportunity by a director must be by disinterested shareholders only, and that the director seeking the authorisation may not vote his or her shares.77

VI Conclusion and suggested reforms

The argument in this article is that the law in relation to corporate opportunities in Australia is both too narrow and too broad. It is too narrow in that by restricting the liability of fiduciaries for the taking of corporate opportunities only to those opportunities discovered in circumstances where there is a connection between the opportunity and the fiduciary’s office-holding, it reduces the fiduciary’s obligation always to act in the best interests of the corporation to a ‘part-time’ one and creates evidentiary problems that will in many instances make it impossible to determine whether such a connection exists, particularly where that depends on the state of mind of a person informing the fiduciary of the opportunity and of the fiduciary when he or she receives that information.

Liability is also too narrow in that there is residual authority to the effect that, when seeking permission from shareholders to take an opportunity, a fiduciary who is also a shareholder may vote their shares. This amounts to the fiduciary validating what would otherwise be his or her own harm to the company.

On the other hand, the law is too broad if one reads the word ‘employee’ in ss 182 and 183 of the Act as imposing a fiduciary duty on all employees, irrespective of their level and function in the corporation, because this would be to impose liability on a class of people who, according to the common law, do not automatically owe a fiduciary duty to their employer.

In light of this, I would suggest that the following approaches be adopted by the courts in interpreting this area of the law:

- In developing the common law duty of good faith, and in interpreting the s 181 duty to act in the best interests of a corporation, the courts should adopt the rule that directors and officers are under an obligation to bring to a company’s attention opportunities that falls within the company’s line of business, irrespective of the circumstances in which the opportunities were discovered. There are two ways in which this could be done: The first is by departing from the precedent in *Regal (Hastings) Ltd v Gulliver* that breach of the profit rule applies only in cases where a profit is made as a result of office-holding. The second is by abandoning the traditional view of the conflict rule contained in *London and Mashonaland Exploration Company Limited v New Mashonaland Exploration Company Limited*78 and *Bell v Lever Brothers Ltd*79 and adopting instead the new approach in *Commonwealth Oil and Gas Company Limited v Baxter and Eurasia Energy*.80 Whether the courts changed their approach to either the profit rule or the conflict rule (or both) the effect would be to cast upon directors and officers a duty to draw to the

77 Hanrahan, Ramsay and Stapledon, above n 23, 328.
78 [1891] WN 165.
80 [2009] CSIH 75.
attention of a company any opportunity falling within the scope of its business irrespective of the circumstances in which it was discovered.

- Where a director seeks the permission of shareholders to take a corporate opportunity in circumstances where the director is also a shareholder him or her-self, the courts should resolve the inconsistency between *North-West Transportation Co Ltd v Beatty*[^81] and *Cook v Deeks*[^82] in favour of the latter, and should hold that shareholder approval for the taking of a corporate opportunity is invalid if a fiduciary who is also a shareholder and who is seeking permission to take the opportunity votes his or her own shares.

- In interpreting ss 182 and 183 of the Act and the common law, the courts should interpret the term ‘employees’ as applying only to those employees whose relationship with the corporation is such as to require that they be subject to the statutory duties and to the common law duty of good faith, which should depend on the particular circumstances of the relationship, and in particular on the scope of authority given to employees and their level within the corporation.

***

[^81]: (1887) 12 App Cas 589 (PC). See also *Burland v Earle* [1902] AC 83.
[^82]: [1916] 1 AC 554.
The Associate Judge Of The Supreme Court Of
The Australian Capital Territory

Hon Justice David Mossop*

The purpose of this article is to outline the history of the position of Master, now referred to as Associate Judge, of the Supreme Court of the Australian Capital Territory (ACT). The article will demonstrate how the nature of the position has evolved as a result of changes in the Court rules and, only latterly, with legislative intervention. The Associate Judge now performs a role very close to that of a resident judge of the Court. A principled consideration of the structure of the Court may indicate that the maintenance of a separate position, Associate Judge, as distinct from resident judge, is no longer appropriate.

Historical basis for the position of Master

The position of Master has a long history in England going back to before the Norman conquest of England in 1066. However, the early history of the official staff of English courts is obscure. The functions of Masters varied over time, as did their status. The Masters in the Court of Chancery were subject to much criticism as their positions carried with them the capacity to obtain substantial fees from litigants and the offices were sold for substantial sums.

In 1815 the duties of Masters included:

- To examine into any alleged impertinence or scandal in any bill or answer.
- The sufficiency of any bill or answer.
- The regularity of all proceedings.
- To settle all interrogatories for the examination of the parties.
- To take accounts of executors, trustees and guardians.
- To examine the claims of all creditors and legatees.
- To fix the salaries of receivers and examine their accounts.
- To sell estates.
- To inquire for heirs and next of kin.

By the time of the publication of the first edition of Halsbury’s Laws of England in 1909, there were in the United Kingdom seven Masters of the Supreme Court in the King’s Bench Division. Their functions included: the control of the Central Office of the Supreme Court, judicial work in chambers and issuing directions on points of practice. Three Masters sat daily in chambers, where they adjudicated on summonses, subject to an appeal to a judge. They exercised the jurisdiction of the Court under the rules. In the Chancery Division, there were 12 Masters of the Supreme Court. They had no independent jurisdiction and all their authority was derived from the judge to whom

---

* The Hon Justice David Mossop BSc, LLB, LLM was sworn in as the 22nd resident judge of the ACT Supreme Court in 2017.
3 See Jacobs (n 1) 3.
they were assigned. The duties of these Masters were to make investigations and take accounts under the direction of the judge. There were also 11 Masters of the Supreme Court dealing with matters of taxation.\(^5\)

In New South Wales, the office of Master dated from the Third Charter of Justice in 1823. That established the Supreme Court of New South Wales and provided:

\[
\text{AND WE DO hereby ordain appoint and declare that there shall be and belong to the said Court the following Officers that is to say a Registrar a Prothonotary a Master and a Keeper of Records ...}
\]

Although the position was intended to have all of the functions of Masters in England performed by the Masters in Chancery and the Masters of the Court of Kings Bench, as well as the function of the taxation of costs, the breadth of the office appeared to have been overlooked and the office was carried out as if it was limited to the role of Master in Chancery.\(^6\) The office was briefly abolished between 1832 and 1840 and then re-established as the office of the Master in Equity. This office continued to exist until 1970.\(^7\)

In 1970 when the Supreme Court Act 1970 (NSW) was passed, the position of Master was maintained with the capacity of the Governor to assign a Master to one or more of the divisions of court. The powers of the Masters were those given by the rules under a miscellany of Imperial and local Acts as well as under specified provisions of the rules. There were also powers for the Court to direct that assessments of damages be tried before a Master and that trials of proceedings involving interpleader and matters other than trials be referred to a Master by order of a judge or of the Court of Appeal.\(^8\) The position and role of Masters in New South Wales formed the context in which the position was established in the ACT.

**Establishment of the position**

The position of Master was established in the Territory as a result of amendments to the Australian Capital Territory Supreme Court Act 1933 (Cth) (Supreme Court Act)\(^9\) by the Statute Law (Miscellaneous Provisions) Act 1988 (Cth). This Act inserted Pt III of the Supreme Court Act (ss 30-33F).

The appointment of a Master “was not a bold step, but it managed to relieve the pressure on the government for the appointment of a fourth resident judge.”\(^10\) In the Second Reading Speech for the Statute Law (Miscellaneous Provisions) Bill 1988 (Cth), the Minister said:

There is a pressing need for an additional judicial officer on the Court, which has had three resident judges since 1972. During this period, the ACT’s population has increased from about 158,000 to over 260,000. The judges of the Court are also required to serve from time to time on the Federal Court of Australia and other tribunals. This situation has resulted in a backlog of civil matters.

The appointment of a Master will alleviate this problem. The position will be equivalent to similar positions, which exist with the same title, in State Supreme Courts in the United Kingdom and, from last year in the High Court of New

---

5 Ibid 67-68.
6 Bentham and Bennett (n 2) 509-510.
7 Ibid 511-516.
8 Supreme Court Act 1970 (NSW) s 118; Supreme Court Rules 1970 (NSW) pt 60, schs D, E.
9 The Australian Capital Territory Supreme Court Act 1933 (Cth) became an Australian Capital Territory enactment as a result of the A.C.T. Supreme Court Transfer Act 1992 (Cth) and is now referred to as the Supreme Court Act 1933 (ACT). In this article, the Act, both before and after transfer, is referred to as the Supreme Court Act.
10 J Miles, A History of the Supreme Court of the Australian Capital Territory: The First 75 Years (Thomson Reuters, 2009) 37-38.
Zealand. The Master will do a substantial part of the Court’s interlocutory work and some other civil matters.

The appointment of a Master—which would cost much less than the appointment of another judge—will result in a reduction of the waiting time in the Court and also enable the judges to devote more time to the Court’s criminal lists. In the longer term, the judicial work of the Court will be made more attractive, since the judges would be enabled to concentrate on more important matters.

Four points can be noted about this extract from the Second Reading Speech:

a. First, the need for the appointment of an additional judicial officer was driven by the increase in population and, hence, the increase in the overall workload of the Court.

b. Second, what was intended was a Master performing a similar role to that in other state jurisdictions and New Zealand.

c. Third, a point significant enough to be emphasised by the Minister was the reduced cost of appointing a Master rather than appointing a fourth judge.

d. Fourth, the Minister refers to a desire to make “the judicial work of the Court ... more attractive” which, interestingly, appears to reflect a concern on the part of the Minister about the capacity to obtain suitable candidates for appointment as resident judges11 of the Court.

The purpose of the appointment of the Master was also reflected in the other speeches made during the second reading debate. The Member for Flinders, Mr Peter Reith, said:12

The Australian Capital Territory Supreme Court Act is also interesting because it provides for the appointment of a master with powers similar to those vested in masters of State supreme courts. The appointment of a master will lighten the workload of judges, and that is a good idea.

The Member for Fisher, Mr Michael Lavarch, said: 13

The decision to install the office of master of the Supreme Court in this Territory is a recognition of the delays being experienced currently not only in the Australian Capital Territory Supreme Court but also in courts throughout Australia. The master will relieve judges from hearing a number of applications and normally uncontentious matters which presently are heard by judges. As a result, the time of the three Supreme Court judges more properly will be able to be used in hearing actual cases. The sorts of matters which the master will hear include those of an interlocutory nature, such as applications for discovery, further and better particulars and simple applications concerning summary or default judgments. By doing this, the judges will be freed from hearing such matters.

The Master could be appointed for a term not exceeding seven years, specified in the instrument of appointment, or until the age of 65 years.14 The Master ceased to hold office upon attaining the age of 65 years.15 The conditions of appointment were otherwise determined by the Governor-General16 and, after transfer of responsibility for the Supreme Court after self-government, the Australian Capital Territory Executive.17 Unlike the resident judges of the Court who have the same entitlement to

---

11 A “resident judge” is a judge appointed under s 4 of the *Supreme Court Act*. The expression “resident judge” is intended to distinguish such judges, whose only commission is as a judge of the Supreme Court, from those “additional judges” appointed under s 4A whose principal commission is another State or federal superior court (in practice, the Federal Court).


13 Ibid 2952.

14 *Supreme Court Act*, s 33(1).

15 *Supreme Court Act* s 33(2).

16 *Supreme Court Act* s 33E, as at 1989.

17 *Supreme Court Act* s 41B.
a pension as a judge of the Federal Court, the Master and later the Associate Judge has received a superannuation payment.

In 1993 the compulsory retirement age was increased to 70 years. The amendment was explained on the basis that: “This rationalises the retiring ages of Judges and Master.” Each of the Masters and Associate Judges have in fact been appointed until the statutory retirement age.

Reviewing the position in 1993, Miles CJ noted the relatively broad jurisdiction of the Master compared with other jurisdictions and said:

Because a substantial proportion of the Supreme Court workload can be borne in this way, there is considerably less cost to the public purse. There is, however, the danger that in continuing to decline to appoint a fourth judge and to rely on the outstanding performance of the master, the Government is virtually getting a judge on the cheap. Whatever attraction that has for the time being, it cannot last indefinitely.

**Constitutional protection in the Territory**

In 1992 when responsibility for the Supreme Court was transferred from the Commonwealth to the Territory, the *Australian Capital Territory (Self-Government) Act 1988* (Cth) (‘Self-Government Act’) was amended by the *A.C.T. Supreme Court (Transfer) Act 1992* (Cth) so as to insert constitutional protections for certain judicial officers. These amendments, unlike some later amendments to the self-government legislation, were made at the request and with the consent of the Legislative Assembly. The amendments protected certain judicial officers from changes in their retirement ages and from removal from office other than following the report of a judicial commission. The Master was treated in the same way as resident judges of the Court.

**The change of name**

The *Court Legislation Amendment Act 2015* (ACT) had the effect of changing the name of the Master to that of Associate Judge. The manner in which that was achieved was by the insertion of s 45 into the *Supreme Court Act* which provided simply, “The Master is to be known as the Associate Judge.” Thus, the substantive position of Master and all of the legislative infrastructure associated with that position remained, but as a practical matter the title of the office was changed.

This change had two clear benefits. First, it gave to the office a title which ordinary people could understand was a judicial office. As one former Master of the Supreme Court of Victoria put it in 1969:

One of the disadvantages suffered by a present day holder of the office of Master of the Supreme Court of Victoria is that people are apt to inquire of him: “What is a Master? What is his job? What’s he got to do with the Law?” This curiosity, whilst it comes mainly from laymen, is not confined to them.

---

18 *Supreme Court Act* s 37U, which picks up the entitlements under the *Judges’ Pensions Act 1968* (Cth).
19 *Supreme Court (Amendment) Act* (No 2) 1993 (ACT) cl 17.
20 Explanatory Memorandum, Supreme Court (Amendment) Bill (No 2) 1993 (ACT) 6.
22 *Australian Capital Territory (Self-Government) Act 1988* (Cth) ss 48A-48D.
23 Jacobs (n 1) 1.
Second, it made the title of the office more obviously gender neutral. The change was consistent with what had previously occurred in NSW in 2005\textsuperscript{24} and Victoria and Tasmania in 2008.\textsuperscript{25} The Northern Territory followed suit in 2017.\textsuperscript{26}

The reason that the change was achieved by leaving in place the existing office of Master was to ensure that the only consequence was a change of name and that there was continuity in the office and the constitutional protections of that office under the \textit{Self-Government Act}.\textsuperscript{27} Had, as initially contemplated, the Act simply repealed and replaced the office of Master with that of Associate Judge, not only would that have denied the new office existing protections under the \textit{Self-Government Act}, it would have required reappointment of the Master as Associate Judge. The approach adopted avoided these issues.

**Occupants of the office**

There have been five occupants of the office created by s 0 of the \textit{Supreme Court Act}:

(a) Alan Hogan: 1989-1996;
(b) Terry Connolly: 1996-2003;
(c) David Harper: 2003-2013;
(d) David Mossop: 2013-2017; and
(e) Verity McWilliam: 2017 to date.

**History of the jurisdiction**

The amendments to the Supreme Court Act establishing the office of Master came into effect on 9 November 1988.\textsuperscript{28} In anticipation of that commencement, the judges of the Court made rules which inserted in the \textit{Supreme Court Rules 1937 (ACT)}, ord 61A entitled “Master”.\textsuperscript{29} The scope of the jurisdiction of the Master was defined by ord 61A, r 1.01. Because it defines the scope of the role of Master at the point where the office was introduced, it is worth setting the rule out in full:

1.01 The jurisdiction of the Court that is exercisable in accordance with sub-section 8 (1) of the Act may be exercised by the Master—

(a) in trials (except with a jury) of suits in which damages are claimed in respect of the death of, or bodily injury to, any person or damage to property caused by, involving, or arising out of, the use of a motor vehicle;
(b) in trials (except with a jury) of suits where the only matters in question are the amount of damages and costs;
(c) in trials (except with a jury) of suits where the only matters in question are the value of goods and costs or the amount of damages, the value of goods and costs;
(d) in trials of suits where the only matters in question are interest under section 53A of the Act and costs;
(e) any matter (other than a trial of the whole proceedings, or a matter in proceedings tried or to be tried with a jury) referred to the Master by order of the Court or a Judge;
(f) in trials and hearings of matters which if commenced in the Magistrates Court would have been within the jurisdiction of that Court pursuant to the Magistrates Court (Civil Jurisdiction) Ordinance 1982;

\textsuperscript{24} Courts Legislation Amendment Act 2005 (NSW).
\textsuperscript{25} Courts Legislation Amendment (Associate Judges) Act 2008 (Vic); Supreme Court Amendment Act 2007 (Tas).
\textsuperscript{26} Supreme Court Amendment (Associate Judges) Act 2017 (NT).
\textsuperscript{27} See Explanatory Statement, Courts Legislation Amendment Bill 2015 (ACT) 12.
\textsuperscript{29} See \textit{Rules of the Supreme Court of the Australian Capital Territory (Amendment) 1988} (Cth).
(g) in trials or hearings of suits (except with a jury) where the only matters in question are the possession of land and costs or the possession of land, the amount of damages or other money and costs and the trial or hearing may be dealt with under Order 38, rules 10 and 11;

(b) in any suit in which an order, judgment or direction is sought with the consent of all parties to the suit;

(i) subject to the other paragraphs of this sub-rule, in the hearing and determination of applications under any of the provisions of these Rules except:

- Order 6
- Order 19, rules 11 and 27
- Order 29, rule 5
- Orders 36 and 37
- Order 39, rules 4, 5, 38, 40 and 42
- Orders 45, 47 and 52
- Order 53, except in the circumstances described in paragraph (g)
- Orders 55, 57, 58, 59, 60 and 61
- Order 65, rules 66, 82 and 83
- Order 72

(j) in the hearing and determination of applications for an order under section 11 or leave under section 16 of the Service and Execution of Process Act 1901;

(k) in the hearing and determination of applications pursuant to sub-section 11 (1) of the Criminal Injuries Compensation Ordinance 1983;

(l) in the hearing and determination of applications arising under the Foreign Judgments (Reciprocal Enforcement) Ordinance 1954; and

(m) in any matter in which the Registrar may exercise the powers of Court under Order 75A, rule 69.

Order 61A, r 4.01 also provided that:

In any matter in which the jurisdiction of the Court may be exercised by the Master pursuant to a provision of this Order, the Master may exercise the Court’s inherent jurisdiction relating to the matter.

Even with this rule, the power to exercise inherent jurisdiction of the Court remained practically limited because it was confined to matters strictly ancillary to the power granted to the Master.\(^{30}\)

In 1991 the jurisdiction was expanded by the Rules of the Supreme Court of the Australian Capital Territory (Amendment) 1991 (ACT) (‘Supreme Court Rules’) to permit the Master to hear, with the leave of the Court or a judge, any matter where all the parties to the matter consent to the jurisdiction being exercised by the Master.\(^{31}\) The jurisdiction was also expanded so as to permit the Master to exercise the jurisdiction under the Corporations Act 1989 (Cth) that was exercisable by the Registrar.\(^{32}\)

In the same year, additional powers were given to the Master in relation to proceedings under the Commercial Arbitration Act 1986 (ACT), although these were located in ord 83 (later relocated to ord 88) rather than ord 61A.\(^ {33}\)

Immediately prior to the repeal of the Supreme Court Rules and their replacement with the Court Procedures Rules 2006 (ACT) (‘Court Procedure Rules’), the items in ord 61A r 1 had expanded from (a)-(m) to (a)-(zd). Significant among the components of the Master’s jurisdiction which had been added since the office was first created were the making of orders in relation to caveats, applications for orders under the Family

---

\(^ {30}\) Exell v Exell [1984] VR 1, 7-8.

\(^ {31}\) Rules of the Supreme Court of the Australian Capital Territory (Amendment) 1991 (Cth) cl 6.

\(^ {32}\) Ibid cls 8-13.

\(^ {33}\) Rules of the Supreme Court of the Australian Capital Territory (Amendment) 1991 (Cth) div 3.
Provision Act 1969 (ACT) and various applications under the Limitation Act 1985 (ACT) and the Trustee Act 1925 (ACT).34

Prior to the intervention by the legislature in 2018, the most dramatic change to the jurisdiction of the Master was that made by the introduction of the Court Procedures Rules in 2006, following the enactment of the Court Procedures Act 2004 (ACT), that provided in r 6200(1) that:

The civil jurisdiction (including the inherent jurisdiction) of the Supreme Court that is exercisable by a single judge may be exercised by the master.

Rule 6200(2) also permitted the Master to hear and decide applications for an extension of time in which to file an appeal from a decision of the Magistrates Court in criminal proceedings and also orders for substituted service in those proceedings.35

Excluded from the jurisdiction given by r 6200(1) was (obviously) the power to hear and decide an appeal from an interlocutory judgment of the Master as well as the capacity to exercise the jurisdiction of the Supreme Court under the Legal Profession Act 2006 (ACT) (‘Legal Profession Act’).36 A judge was empowered to make an order requiring a matter in which jurisdiction was being exercised by the Master to be determined by a judge.37 The Master also had power to refer proceedings or an issue in the proceedings to a judge.38

Although these changes were very significant, and altered the structure of the grant of jurisdiction from one defined by its inclusions to one which was defined only by limited exclusions, the change received little mention in the Explanatory Statement of the Court Procedures Rules, which provided simply:

The jurisdiction of the Master has been enlarged in order to facilitate the work of the Court.

The effect of these changes was to permit the vast bulk of the civil work of the Court to be dealt with by the Master. The nature of the work being done was such that in a practical sense, so far as the legal profession was concerned, the Master had, except in relation to appeals from his or her decisions, the same function and status as a judge in civil matters. It is because of that functional equivalence that it made sense to amend the appeal provisions (dealt with below) so as to put the Master in the same position as a judge.

The limitation upon the Master exercising the powers of the Court in relation to matters under the Legal Profession Act was removed in 2008.39 This permitted the Master to deal with matters by consent or interlocutory applications. Section 11 of the Supreme Court Act preserved to a Full Court matters relating to admission or disciplinary proceedings under the Legal Profession Act.

In February 2009, the Master commenced hearing applications under the Bail Act 1992 (ACT) (‘Bail Act’). Apart from the limited provisions relating to extensions of time and service in criminal proceedings, this was the first occasion when the Master was given jurisdiction in criminal matters. This was done under s 39 of the Supreme Court Act. That section provided (as at November 2010):40

---

34 Supreme Court Rules 1937 (ACT) ord 61A, r 1(q), (y), (z) and (za).
36 Court Procedures Rules 2006 (ACT) r 6200(3).
37 Ibid r 6201.
38 Ibid r 6202.
39 Court Procedures Amendment Rules 2008 (No 3) (ACT).
40 Supreme Court Act s 39.
The master has power to administer oaths and may exercise the other functions given to the master under this Act, another Territory law or a special order of the court.
(Emphasis added.)

On 16 February 2009, the then Chief Justice, Higgins CJ, made an order permitting the Master to exercise jurisdiction in applications under the Bail Act. The power in s 39 would appear to be designed so as to permit a judge to make an order in a specific case permitting some part of the jurisdiction of the Court to be exercised by the Master. For example, it was a traditional function of the Master in Equity to undertake accounting work or other business so as to give effect to orders made by a judge. However, s 39 was used as a means by which a judge of the Court could expand, in a general manner, the jurisdiction of the Master. Notwithstanding the uncertain jurisdictional footing for the exercise of power under the Bail Act, that aspect of the jurisdiction of the Master was never challenged and it enabled the work of the Court in relation to bail applications to be shared equally amongst the judges and the Master.

In 2017 the jurisdiction of the Master, by then referred to as the Associate Judge, was further expanded. This was done by adding to r 6200 of the Court Procedures Rules, which defines the jurisdiction of the Associate Judge, the capacity to hear and decide applications under the Bail Act and presiding at pre-trial hearings under div 4.2.2B of the Evidence (Miscellaneous Provisions) Act 1991 (ACT). 41 The first of these amendments was significant in that it avoided the necessity for ongoing reliance upon s 39 of the Supreme Court Act to support the jurisdiction of the Associate Judge to determine bail applications. The second permitted the Associate Judge to preside at the pre-trial hearing of evidence given by complainants in a range of proceedings involving sexual offences. In the case of such evidence, the Associate Judge could be required to give rulings on the admissibility of evidence during the course of examination-in-chief, cross-examination and re-examination. The evidence given at the pre-trial hearing then became evidence in the trial which would be conducted by a judge. 42 The change to the jurisdiction was significant because it was the first substantive involvement of the Associate Judge in criminal trials.

In April 2018 the legislature took ownership of the expanded jurisdiction of the Associate Judge by amending s 9 of the Supreme Court Act to define the scope of the Associate Judge’s jurisdiction rather than simply permitting the jurisdiction of the Associate Judge to be determined by the Court Procedures Rules. The amendments made by the Courts and Other Justice Legislation Amendment Act 2018 (ACT) involved a further expansion of the jurisdiction of the Associate Judge so that it was the same as the jurisdiction of a resident judge, subject only to excluding trials on indictment and participation in the Court of Appeal. The exclusion of jurisdiction to conduct trials on indictment was qualified in that s 9(2) continued to permit the Associate Judge to conduct pre-trial hearings in sexual assault cases. This expanded jurisdiction permitted, for example, the Associate Judge to sentence offenders for indictable offences. Because it involved the grant of the full jurisdiction of a single judge of the Court subject only to limited exclusions it represented a shift from reliance upon the rules or legislation to define the power in fact exercised to control by the Chief Justice through listing decisions made pursuant to s 7 of the Supreme Court Act.

In 2018 the Crimes Legislation Amendment Act 2018 (No 2) (ACT) provided powers to the Associate Judge, equivalent to those of judges, acting as a persona designata, to issue warrants under the Confiscation of Criminal Assets 2003 (ACT), the Crimes Act 1900 (ACT), the Crimes (Surveillance Devices) Act 2010 (ACT), and the Drugs of Dependence Act 1989 (ACT). These changes further enhanced the role of the Associate

41 Court Procedures Amendment Rules 2017 (No 3) (ACT).
Judge in relation to criminal matters and assimilated the status of the office to that of a resident judge.

However, although as a result of the amendments made in 2018 the Associate Judge was given the jurisdiction sufficient to permit the sentencing of offenders who had pleaded guilty to indicatable offences, when drug and alcohol treatments orders were introduced, s 9 of the Supreme Court Act was amended so as to exclude from the jurisdiction of the Associate Judge the jurisdiction to make such orders.43 No particular reason was identified for this exclusion.

Reflecting these changes, s 9 of the Supreme Court Act in its current form is as follows:

9 Exercise of jurisdiction by associate judge

(1) The jurisdiction (including the inherent jurisdiction) of the court that is exercisable by a single judge may be exercised by the associate judge, other than for—
(a) a trial on indictment; or
(b) a matter before the Court of Appeal; or
(c) the jurisdiction of the court under part 2AA (Drug and alcohol treatment order jurisdiction).

(2) However, the associate judge may exercise the jurisdiction of the court in presiding at a pre-trial hearing under the Evidence (Miscellaneous Provisions) Act 1991, division 4.3.4 (Giving evidence at pre-trial hearing).

(3) For the exercise of jurisdiction given to the associate judge under this section, the Act has effect as if the court consisted of the judges and the associate judge.

(4) A person who is dissatisfied with an order of the associate judge made in the exercise of jurisdiction given under this section may appeal as prescribed under the rules to the Court of Appeal.

Appeals from the Master

When the position of Master was first established, s 9 of the Supreme Court Act provided that appeals from an “interlocutory judgment” of the Master were to a single judge but appeals from any other judgment were to a Full Court constituted by not less than three judges.44 This contrasted with the position in relation to judgments of single judges where appeals on both interlocutory and other judgments were to a Full Court of the Federal Court.45 However, appeals from interlocutory judgments of a judge could only be brought with the leave.46

Following self-government, judges appointed to the ACT Supreme Court were no longer also given a commission as a judge of the Federal Court. This, in turn, led to the alteration of the appeal arrangements in relation to the ACT Supreme Court. In 2001 the Court of Appeal was established. Initially, the Court of Appeal only heard appeals from the Master as its operation in relation to appeals from single judges was dependent upon Commonwealth legislation altering the appellate jurisdiction of the Federal Court. Appeals from the ACT Supreme Court to the Court of Appeal were made possible by the Jurisdiction of Courts Legislation Amendment Act 2002 (Cth) which removed the jurisdiction of the Federal Court to hear appeals from the ACT Supreme Court. However, even when the Commonwealth legislation was amended so as to preclude appeals from the ACT Supreme Court, a similar regime to that previously in place was continued in relation to the Master, namely, appeals from interlocutory judgments remained to a single judge as of right and appeals on other judgments were to the Court of Appeal.

43 Supreme Court Act s 9(1)(c) inserted by the Sentencing (Drug and Alcohol Treatment Orders) Legislation Amendment Act 2019 (ACT).
44 Supreme Court Act 1933 (ACT) s 9(2), as at 1989.
46 Federal Court of Australia Act 1976 (Cth) s 24(1A), as at 1989.
In 2010 Penfold J questioned the necessity of the two levels of appeal in Vatarescu v Commonwealth and the Australian Capital Territory [2010] ACTCA 7 at [54]:

> In the current circumstances of the Supreme Court, there must be a real question whether two levels of appeal are really necessary for an interlocutory order merely because it is made by the Master, especially given that non-interlocutory decisions of the Master are appellable as of right straight to the Court of Appeal. It may be that the distinction drawn in the Supreme Court Act between the Judges and the Master as to appeals in respect of interlocutory decisions is now outdated, and no longer justified in terms of policy or court efficiency. It might make sense to eliminate the appeal as of right from the Master to a single Judge in favour of a common rule for Judges and Masters to the effect that all appeals from interlocutory orders go straight to the Court of Appeal, but only by leave.

In 2013, during the Ceremonial Sitting for his retirement, Master Harper commented as follows:47

> During my time as Master ... the jurisdiction of the Master has greatly expanded. The Master now has the same civil jurisdiction as a judge at first instance. When the office was created in 1989 with the appointment of Master Alan Hogan, who we still refer to affectionately as “the old Master”, the jurisdiction was then very limited. The Master could not hear personal injury actions other than motor vehicle claims in which liability was in issue and could not deal with interlocutory applications arising under legislation other than the Supreme Court Rules.

That has changed greatly over the years, and I am going to take advantage of my captive audience to make one plea for legislative amendment. It is time to do away with the right of appeal to a single judge from an interlocutory decision of the Master. Such an appeal should, as is the case with interlocutory decisions of judges, lie only to the Court of Appeal and only by leave. The present system exposes litigants to an unnecessary extra level of appeal and whether they are exposed to that or not depends purely on whether the interlocutory application happens to have been listed to be heard by a Master or by a judge.

> The Supreme Court Act should, in my opinion, be amended to make this change in the interests of reducing the workload of the court and in the interests of saving legal expense to litigants.

The appeal regime was changed by the Courts Legislation Amendment Act 2015 (ACT). As well as changing the name of Master to Associate Judge, the Act substituted s 9 of the Supreme Court Act so that it provided that a person who was dissatisfied with an order of the Associate Judge could appeal “as prescribed under the rules” to the Court of Appeal. It also amended s 37E(4) which provided that an appeal from an interlocutory order of the Court constituted by a single judge could only be brought with leave of the Court of Appeal, so that it applied also to an interlocutory order of the Associate Judge.

The effect of these changes was that there was no longer an appeal from the Associate Judge to a single judge of the Court and that appeals from the Associate Judge and from a single judge were treated in the same way. This change reflected the assimilation of the position of Associate Judge with that of a resident judge by removing those appeal provisions which were indicative of the Associate Judge’s subordinate status.

The Attorney-General said in his presentation speech:48

> Part 6.4 of the Court Procedures Rules 2006 confers on the master the same civil jurisdiction exercisable by a single judge of the Supreme Court. This supports the proposed amendment and also promotes the efficient use of court resources. It is

---

48 Australian Capital Territory, Parliamentary Debates, Legislative Assembly, 19 February 2015, 562.
not a necessary or efficient use of court resources to require a single judge to hear an appeal of an interlocutory order made by the master and has the effect of diminishing the master’s authority.

What is notable about this approach is that the expansion of the jurisdiction of the Master under the Rules had led to the position where the status of the office was such that the differential regime for appeals on interlocutory matters appeared to be inappropriate and inefficient. The practical reality created by the expansion of jurisdiction by subordinate legislation was the driver for the reconsideration of legislative regime governing appeals.

**Comparison with other jurisdictions**

Masters or Associate Judges exist in New South Wales, Victoria, Northern Territory, South Australia, Tasmania, and Western Australia. In each jurisdiction, the jurisdiction that can be exercised by a Master or Associate Judge is significantly more limited than the jurisdiction which may be exercised by the Associate Judge in the ACT.

In New South Wales, the *Supreme Court Act 1970* (NSW) provides for the Associate Judges in the Court of Appeal and for Divisional Associate Judges.\(^49\) The powers of an Associate Judge are defined by the Rules which permit them to exercise powers under the rules as well as particular New South Wales and Commonwealth Acts.\(^50\) Associate Judges are entitled to a pension.\(^51\) There is, in fact, only one remaining Associate Judge, and it is unlikely that any more will be appointed.

In Victoria, there are currently nine Associate Judges. The jurisdiction of an Associate Judge is similar to New South Wales in that it is defined by the rules and extends to duties, powers and authorities imposed or conferred by specific statutes or court rules.\(^52\) The matters in which Associate Judges have jurisdiction include a variety of civil interlocutory matters and a limited range of final hearings. Associate Judges are entitled to a pension.\(^53\)

In the Northern Territory the Associate Judge has powers given under the rules or by order of the Court.\(^54\) The Associate Judge has no entitlement to a pension under the *Supreme Court (Judges Pensions) Act 1980* (NT).

In Tasmania\(^55\), the default jurisdiction of the Associate Judge in civil matters is that it is the same as a single judge without a jury, although a variety of exceptions apply to that jurisdiction.\(^56\) Like judges of the Court,\(^57\) the Associate Judge has an entitlement to superannuation rather than a pension.\(^58\)

In South Australia, the Master of the Supreme Court is, while holding that office, also a District Court Judge and entitled to salary and allowances applicable to a District Court Judge.\(^59\) The jurisdiction of a Master is significantly limited, having no power to deal with matters involving “the liberty of the subject” and a confined power to conduct

---

\(^{49}\) *Supreme Court Act 1970* (NSW) ss 117A, 118.

\(^{50}\) *Supreme Court Rules 1970* (NSW) ord 77, sch D.

\(^{51}\) *Judges’ Pensions Act 1953* (NSW) s 17.

\(^{52}\) *Supreme Court Act 1986* (Vic) ss 110, 111; *Supreme Court (General Civil Procedures) Rules 2005* (Vic), ord 77.

\(^{53}\) *Supreme Court Act 1986* (Vic) s 104A.

\(^{54}\) *Supreme Court Act 1979* (NT) s 41K.

\(^{55}\) The history of the position of Master in Tasmania is set out in CG Brettingham-Moore, 'The Office of Master’ (1963) 1 *University of Tasmania Law Review* 842.

\(^{56}\) *Supreme Court Rules 2000* (Tas) r 962.

\(^{57}\) *Supreme Court Act 1887* (Tas) s 8.

\(^{58}\) *Supreme Court Act 1959* (Tas) s 4AA.

\(^{59}\) *Supreme Court Act 1935* (SA) ss 7(4), 12(2).
final hearings. Masters are entitled to a pension under the Judges Pensions Act 1971 (SA).

In Western Australia, the jurisdiction of the Master is defined by the rules. It includes the jurisdiction of a single judge sitting in chambers and matters which the Chief Justice directs the Master to hear. That jurisdiction is subject to a significant number of limitations. A Master is able to qualify for a pension under the Judges Salaries and Pensions Act 1950 (WA).

As is apparent from the above discussion, the role of Associate Judge or Master in each other jurisdiction where the position exists is more limited than the role of the Associate Judge in the ACT. The ACT is the only jurisdiction where the jurisdiction of the Associate Judge or Master is so closely assimilated to that of a judge of the Supreme Court. Notwithstanding that the scope of their work is more limited than that of the Associate Judge in the Australian Capital Territory, in most jurisdictions an Associate Judge or Master has a post retirement entitlement to pension or superannuation of the same type as that afforded Supreme Court judges.

Observations about the change in jurisdiction

At the same time as the jurisdiction of the Associate Judge has been expanded, there have been other changes which have affected the scope of the work that the Associate Judge actually performs. Of principal significance are those changes which have altered the workload of the Supreme Court in relation to minor personal injury claims. In 2011, the Courts Legislation Amendment Act 2011 (ACT) increased the civil jurisdiction of the Magistrates Court from $50,000 to $250,000. That significantly increased the scope of personal injury proceedings that are appropriately commenced and conducted in the Magistrates Court. It removed from the Associate Judge’s workload a significant number of motor vehicle and personal injury proceedings. That occurred in parallel with the changes brought about by the Civil Law (Wrongs) Act 2002 (ACT) and the Road Transport (Third Party Insurance) Act 2008 (ACT) which were designed to increase the rate of settlement of cases prior to the commencement of proceedings. The reduction in the work of the Supreme Court in these kinds of personal injury proceedings will only be reinforced as the Motor Accidents Injuries Act 2019 (ACT) captures accidents which previously would have resulted in common law claims in the Supreme Court and the number of common law cases arising prior to the Act’s commencement tapers off.

The combined effect of these changes has been to remove from the Associate Judge’s workload a number of relatively straightforward motor vehicle and personal injury matters resulting in the Associate Judge doing a variety of more complex work. This has obviously had benefits for the judges in that these matters are removed from their workload. However, it has meant that the majority of the civil work of the Court is dealt with by the Associate Judge. This has in some respects been an effective way to ensure a degree of consistency of approach and, hence, predictability of outcome in such cases. On the other hand, it has meant that the judges of the Court hear relatively few civil cases.

---

60 Supreme Court Act 1935 (SA) s 48(2)(c); Supreme Court Civil Rules 2006 (SA) r 15, Supreme Court Criminal Rules 2014 (SA) r 16.
61 Rules of the Supreme Court 1971 (WA) ord 60, r 1(1)-(2).
62 Rules of the Supreme Court 1971 (WA) ord 60, r 1(3).
63 See Supreme Court Act 1935 (WA) s 11B(3).
64 Magistrates Court Act 1930 (ACT) s 257.
The future

The purpose of this article has been to illustrate how the jurisdiction and functions of the Associate Judge have changed incrementally over time, largely as a result of the exercise of the rule-making power. The expansion of the jurisdiction pursuant to the exercise of that power has been driven by the pressure of the business of the Court and the desire of those exercising the rule-making power to have as broad as possible a pool of judicial officers to which work can be allocated. Recent amendments have given a proper statutory basis for the expanded role of the Associate Judge. The Legislative Assembly does not, however, appear to have considered in a principled way the appropriate, longer term structure of the Court. In 1988 the motivating force behind the establishment of the position of the Master was to provide additional judicial resources at a lower cost than would be involved in the appointment of an additional judge. That is because unlike resident judges whose remuneration and pension entitlements are those of a Federal Court judge, the conditions of appointment of the Associate Judge are determined by the Executive and have not included the potential for a judicial pension. The financial motivation for the maintenance of the position of Associate Judge will undoubtedly remain. However, in the light of the fact that the Associate Judge is no longer performing a subordinate and ancillary role to the role performed by the judges, and has been largely assimilated to the position of a judge in relation to all civil matters and a substantial number of criminal matters, it is worth considering whether it remains appropriate to retain the two-tier structure within the Court.

***

65 Supreme Court Act s 37U(2).
66 Supreme Court Act s 41B.
Transactional Sex and the Peacekeeping Economy: Examining the Practical Application of United Nations Policy on Women in Post-Conflict Societies

Nicholas Felstead

The United Nations (‘UN’) zero-tolerance policy response to sexual exploitation and abuse has ostensibly laudable intentions which are not fulfilled in practice. Women in post-conflict societies are rational and autonomous economic actors and the real operation of the policy has a deleterious impact, stripping these women of their economic autonomy. There has been substantial research into transactional sex, peacekeeping economies and the zero-tolerance policy. The objective of this paper is to reconcile the breadth of research into these three topics in order to examine the impact of the policy on local women who participate in the market for transactional sex in the peacekeeping economy. The UN must consider the lived experience of local women in order to create policy directives which achieve their protective goals.

Introduction

The United Nations (‘UN’) deploys peacekeeping operations in post-conflict societies with the aim of restoring peace through providing humanitarian aid, fostering the rule of law and protecting and promoting human rights.1 Peacekeeping operations have profound economic consequences for the post-conflict societies in which they are deployed. Relevantly, the sudden influx of international personnel fuels demand for low-skilled services and associated infrastructure; this is the problem of the ‘peacekeeping economy’.2 The issues within the peacekeeping economy are exacerbated by the application of the UN’s zero-tolerance policy to sexual exploitation and abuse. The focus of this article is not the causes and responses to sexual exploitation and abuse.3 While of course sexual exploitation and abuse is abhorrent, and the UN should take an active stance to abolish its occurrence, I argue that the zero-tolerance policy is a disproportionate and flawed response. The policy suffers from issues of scope and definition, capturing conduct which its intended beneficiaries do not necessarily consider to be exploitative. Within the peacekeeping economy, the market for transactional sex serves as a forum for local women to act as rational economic actors.

---

1 See, eg, United Nations Department of Peacekeeping Operations and Department of Field Support, United Nations Peacekeeping Operations: Principles and Guidelines (Guidance Document, March 2008) 6; United Nations Department of Peacekeeping Operations and Department of Public Information, United Nations Peacekeeping (Background Note, April 2014).


economic agents, taking advantage of the opportunity presented to them. However, transactional sex is prohibited by the zero-tolerance policy.

I contend that the scope of the UN’s zero-tolerance policy is too wide; through capturing and prohibiting transactional sex, it restricts the ability for women in post-conflict societies to engage in the peacekeeping economy as rational economic agents. I aim to reconcile the body of research on transactional sex, peacekeeping economies and the zero-tolerance policy to critically analyse the impact of the policy on women who engage in the market for transactional sex. As will be discussed in Part II, a key challenge in undertaking this research is the distance between theoretical discussions and their practical application. The UN’s current approach is based on rhetoric and theoretical assumptions that simply do not align with the practical and lived experience of women in post-conflict societies. Therefore, I proceed with cognizance of the limitations of applying specific international law methods, to do so may lead to a discussion which has little practical utility. Notwithstanding this concession, I have written this article within a loose framework of the ‘law and economics’ method, which concerns the implications of certain preference-maximising behaviour.

Without drawing out the analogy to economics further than is necessary, I am not advocating for a laissez-faire approach where the UN plays no role in the market for transactional sex in the peacekeeping economy. Rather, I argue that the UN must facilitate the transactions and cease to turn a blind eye to the reality of peacekeeping operations. To elucidate this thesis, I intend to offer clarity on fundamental concepts and provide substantive discussion and examination on the effect of the zero-tolerance policy.

Part II notes that many papers in this area suffer from a lack of statistical fortitude; I also concede my own similar methodological challenges I faced when undertaking this research. As Part II considers, the academic discussion on the zero-tolerance policy is often stuck at a level of abstraction too far removed from reality; as demonstrated by the policy itself. In accepting this common issue, Parts III and IV provide an applied overview of the zero-tolerance policy as a response to sexual exploitation and abuse in peacekeeping operations.

Parts V, VI and VII critically examine the impact that the zero-tolerance policy has on women in the peacekeeping economy, in particular those women participating in the market for transactional sex. In doing so, I argue that the net effect of the policy is that it strips women of their agency and ability to act rationally, thereby reinforcing damaging stereotypes of women as vulnerable victims in need of protection.

Part VIII introduces a potential way for the UN to redefine the zero-tolerance policy, collaborating with locals in order to devise a policy that can achieve its goals. However, this is just one of many aspects of my forthcoming discussion that merit further deliberation and exploration.

---


Challenges in Research

There were significant challenges in undertaking this research. As I discuss throughout this article, the UN’s zero-tolerance policy demonstrates a disconnect between theory and practice. The theoretical bases for prohibitive policies appear justified when discussed at a certain level of abstraction, but evidence from women in peacekeeping economies illustrate a different story. For example, a basic justification for the broad zero-tolerance policy is that transactional sex is inconsistent with UN development goals. However, Beber et al posit that women who engage in transactional sex actually convey the highest level of satisfaction with the contribution of peacekeeping operations. Simić’s research also gives a voice to these women and exemplifies the disconnect between policy and practice. The breadth of discourse also depicts peacekeeping economies as being anywhere from a positive place where women are able to take advantage of opportunities, to the more germane representation of inequality and destitute. This is an example of the difficulty inherent in relying on statistics — two equally qualified bodies can come to contrasting conclusions using the same datasets.

These challenges exist alongside the other significant difficulty commentators face when undertaking research on sexual exploitation and abuse in peacekeeping operations: insufficient data. Moreover, the UN does not take an active role in monitoring compliance with the zero-tolerance policy, it instead relies on an allegation-based system. This system is only effective if locals, peacekeepers and other international personnel diligently report instances of sexual interaction. As will be discussed, the UN have not hidden the desire to protect its institutional reputation. Therefore, examining certain datasets must be done critically and with an understanding of the ‘function that [reporting] statistics serve for the UN’.

There are a number of issues which lead to inaccurate reporting. Grady makes particular note of methodological challenges such as the report from one victim of abuse by two peacekeepers being reported as a single incident. Jennings contends that women who are affected by misconduct fear that the UN will simply take the peacekeeper’s side to protect the institutional reputation and will thus refrain from

---

7 Beber et al, ‘Transactional Sex in Monrovia’ (n 4) 4–5 n 23.
8 Simić, Regulation of Sexual Conduct (n 4).
13 Beber et al, ‘Transactional Sex in Monrovia’ (n 4) 23.
14 See below Part IV(B).
16 Grady (n 12) 936.
reporting.  

17 Beber et al astutely note that the UN’s Conduct and Discipline Unit have the responsibility to both prevent misconduct and solicit allegations. As such, there is a reluctance to solicit and process allegations because doing so could be viewed as an admission of the Unit’s own negligence.

Moreover, definitional constraints which blur the line between consensual and non-consensual interactions pose a challenge to accurate reporting. 18 This is a particular focus of this article and creates issues for reporting. For example, transactional sex largely goes unreported because many women do not regard it as exploitative. 19 However, it falls within the zero-tolerance policy and should therefore be reported and form part of the UN’s statistics.

The data provided by the UN may accurately reflect the number of complaints or communications, but may not accurately reflect the breaches of the zero-tolerance policy. This poses a difficulty in assessing the efficacy of the policy. Without conducting my own primary research, it is difficult to draw conclusions. However, I have sought to undertake a balanced and critical approach to the existing literature.

Sexual Exploitation and Abuse in Peacekeeping Operations

The core principles which underscore all peacekeeping operations are that peacekeepers must be impartial, refrain from the use of force unless required for self-defence or to defend their mission mandate and that parties must consent to their presence. 20 The wealth of literature on peacekeeping operations suggest that they achieve ‘core security objectives’, 21 and empirical findings indicate that the presence of peacekeepers increase the likelihood of enduring post-conflict peace. 22 Unfortunately, the reputation of UN peacekeeping operations has been tarnished by, inter alia, the persistence of peacekeepers engaging in sexual exploitation and abuse of the women and children they are tasked with protecting. 23

Moreover, there are increasing concerns about the peacekeeping economies which develop during a peacekeeping operation; critics note that these two-speed economies accommodate for the preferences of international personnel to the long-term detriment of locals and the local economy. 24 As I intend to discuss throughout this

---

18 Olivera Simić, ‘Distinguishing Between Exploitative and Non-Exploitative Sex Involving UN Peacekeepers: The Wrongs of “Zero Tolerance”’ (Expert Analysis, Norwegian Peacebuilding Resource Centre, November 2013) 1 (‘Wrongs of Zero Tolerance’). See also Grady (n 12) 940.
19 Simić, Regulation of Sexual Conduct (n 4) ch 6. See below Part VII.
23 See below Part IV(B).
24 Beber et al, ‘Transactional Sex in Monrovia’ (n 4) 2. See below Part V(B).
article, the institutional response to sexual exploitation and abuse contributes to the problems associated with the peacekeeping economy.

**Sexual Exploitation and Abuse**

The issue of sexual exploitation and abuse (‘SEA’) has been alive in peacekeeping operations as far back as the United Nations Emergency Force in the Sinai in 1956. However, formal allegations were not lodged against peacekeepers until 1992’s United Nations Transnational Authority in Cambodia (‘UNTAC’). The Secretary-General’s Special Representative, Yasushi Akashi’s responded with acquiescence, remarking ‘boys will be boys’. This was the UN’s first institutional response to allegations of sexual exploitation and abuse, and it was repudiated by the international community. Kofi Annan claimed that sexual exploitation and abuse have ‘always been unacceptable behaviour … for [UN] staff’. Akashi’s deference acts as a reminder that sexual exploitation and abuse was once accepted as a norm of institutional behaviour.

**Causes**

The problem of sexual exploitation and abuse is insidious and there is no single basis for its occurrence. The recurring themes in the discourse are the physical conditions of the operations and the fragile nature of the post-conflict state, the composition of peacekeeping personnel and the insufficient accountability measures. These issues are complex, and this article is not the appropriate forum for a comprehensive discussion. I briefly introduce two purported causes to illustrate the institutional issues that plague peacekeeping operations.

**Peacekeeping Personnel**

There are two fundamental problems with the composition of peacekeeping personnel which contribute to the occurrence of sexual exploitation and abuse: gender disparity

---


26 See, eg, Oswald (n 3) 146.


and re-hatted troops. Gender norms and the role of gender in peacekeeping operations more generally have been authoritatively discussed in a large body of qualitative and quantitative research.\textsuperscript{32} It is not my intention to either conduct a literature review or challenge this body of work.

The problem of re-hatted troops provides an interesting point of discussion. Re-hatted troops are personnel from non-UN deployments who are transferred into peacekeeping operations to ensure an immediate start.\textsuperscript{33} Allegations of sexual exploitation and abuse from re-hatted troops are wholly disproportionate to their place in a peacekeeping operation. In the Multidimensional Integrated Stabilization Mission in Mali (‘MINUSMA’) and the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (‘MINUSCA’), over 77% of allegations were against re-hatted troops who only constituted ~50% of mission personnel.\textsuperscript{34} Re-hatted troops are used by the UN as a matter of operational convenience and they do not undertake the same training as UN peacekeepers which covers institutional conduct standards in relation to sexual exploitation and abuse.\textsuperscript{35}

The Secretary-General flagged the different training standards as problematic in 2014.\textsuperscript{36} However, it is significant to revive the discussion as the Secretary-General’s 2019 Report explicitly states that the ‘unevenness between the standards ... has an impact on the [UN’s] ability to fully integrate a victim-centred approach’.\textsuperscript{37} The UN’s decision to continue to deploy undertrained personnel is made with the knowledge that they are statistically more likely to engage in sexual exploitation and abuse. This


\textsuperscript{33} See Mathias (n 3) 149.


\textsuperscript{36} 2014 Report (n 35) 7 [24].

\textsuperscript{37} Report of the Secretary-General: Special Measures for Protection from Sexual Exploitation and Sexual Abuse, UN Doc A/73/744 (14 February 2019) 13 (‘2019 Report’).
indicates that the benefit of quickly deploying re-hatted troops outweighs the risk they pose to local civilians.\textsuperscript{38}

\textbf{Lack of Accountability}

The insufficient governance of peacekeepers has contributed to the sexual exploitation and abuse crisis in peacekeeping operations. In order to fulfil operational mandates and perform their duties, certain ‘immunities and jurisdictional bars’ protect peacekeepers from host state interference.\textsuperscript{39} Similar protections are afforded to diplomats operating in foreign countries, but are offset by bilateral agreements which aim to ensure accountability for potential criminal actions of diplomats.\textsuperscript{40} For example, where a sending state does not exercise its jurisdiction to prosecute its diplomatic personnel,\textsuperscript{41} the receiving state may declare them persona non grata and order for their removal.\textsuperscript{42} However, in the context of UN peacekeeping operations, such an offset does not exist.\textsuperscript{43} Freedman’s recent article provides a critical examination of accountability measures and I do not seek to summarise or critique her approach in this forum. It suffices to state that in practice, the legal and governance frameworks have developed the very culture of impunity that the Secretary-General now seeks to abolish.\textsuperscript{44}

\textbf{Institutional Response and the Zero-Tolerance Policy}

The institutional response to allegations of sexual exploitation and abuse in peacekeeping operations has been driven by the Secretary-General’s \textit{Special Measures for the Protection from Sexual Exploitation and Sexual Abuse} (‘Bulletin’).\textsuperscript{45} The Bulletin was produced in response to a report published by the UN High Commissioner for Refugees (‘UNHCR’) and Save the Children United Kingdom which uncovered ‘chronic and entrenched’ patterns of mission personnel trading humanitarian aid for sexual services.\textsuperscript{46} Although the Bulletin is in its late adolescence, it remains operative in modern peacekeeping operations and it is the starting point for the development of the zero-tolerance policy, which remains the UN’s firm institutional approach.\textsuperscript{47}

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{38}] How this cost–benefit analysis is being conducted is an incredibly interesting discussion and I endeavour to research this topic in the future.
\item[\textsuperscript{39}] Freedman (n 3) 965.
\item[\textsuperscript{40}] See, eg, Eileen Denza, \textit{Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations} (Oxford University Press, 4\textsuperscript{th} ed, 2016); Rosalyn Higgins, ‘The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience’ (1985) 79(3) \textit{American Journal of International Law} 641.
\item[\textsuperscript{41}] \textit{Vienna Convention on Diplomatic Relations}, signed 18 April 1961, 500 UNTS 95, (entered into force 24 April 1964) art 31(4).
\item[\textsuperscript{42}] See Higgins (n 40) 5; Freedman (n 3) 966.
\item[\textsuperscript{43}] Freedman (n 3) 966.
\item[\textsuperscript{45}] Secretary-General’s \textit{Bulletin}: \textit{Special Measures for Protection from Sexual Exploitation and Sexual Abuse}, UN Doc ST/SGB/2003/13 (9 October 2003) (‘Bulletin’).
\item[\textsuperscript{47}] See \textit{Bulletin} (n 29). See also \textit{2019 Report} (n 37); \textit{Letter Dated 9 February 2005 from the Secretary-General Addressed to the President of the Security Council}, UN SCOR, UN Doc S/2005/79 (9 February 2005) 1; Bruce Oswald, Helen Durham and Adrian Bates, \textit{Documents
\end{itemize}
\end{footnotesize}
Zero-Tolerance Policy

Since the Secretary-General published the Bulletin in 2003, there have been annual reports from the Secretariat and resolutions adopted by the General Assembly and Security Council; a commitment to the zero-tolerance policy is either explicitly or implicitly embedded in all such responses. I note that the policy may be implicitly embedded because, contrary to conventional wisdom, the Bulletin did not explicitly discuss a policy of zero-tolerance. Regardless of nomenclature, the principles and prohibitions set out in the Bulletin are those which are aptly described as the zero-tolerance policy. The zero-tolerance policy establishes a per se proscription on sexual exploitation and abuse in peacekeeping operations, which the Bulletin states violate ‘universally recognised international legal norms and standards’.

Definitional Issues

In this article, I argue that the broad definition of sexual exploitation and the scope of the zero-tolerance policy is problematic and can hinder the agency and autonomy of local women. The zero-tolerance policy seeks to prohibit all forms of sexual exploitation and abuse being committed by peacekeepers against local women and children. The definition of sexual abuse is a reflection of ‘international norms and standards’, and refers to ‘actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions’. This definition sets clear thresholds and is demonstrably unproblematic.

The challenging definition is sexual exploitation, which encompasses ‘any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another’. This creates a presumption that sex between peacekeepers and local women is harmful and coercive, disregarding the context of the peacekeeping economy, the agency of women and the scope for legitimate relationships. An exception to the zero-tolerance policy demonstrate its problematic abstraction and its failure to account for reality. The Bulletin prohibits sexual activity with ‘persons under the age of 18’, but creates an exception in cases where the peacekeeper is legally married to the person under the age of 18 ‘but over the age of majority or consent in their country of citizenship’. It is difficult to conceive of a scenario where a peacekeeper legally marries a girl under the age of 18 without either having already engaged in sexual activity with her, or exploiting their position in an exchange — both of which are prohibited.

---

50 See Oswald (n 3) 159.
51 Bulletin (n 29) s 3.1
52 Ibid.
53 Ibid s 1.
54 Ibid.
55 Ibid s 3.2(b).
56 Ibid s 4.4.
57 Ibid s 3.2(b)–(c).
Prohibition on Transactional Sex

A primary focus of this article is the role of transactional sex in the peacekeeping economy. Transactional sex is explicitly prohibited by the Bulletin; the language used in the prohibition is particularly intriguing:

In order to further protect the most vulnerable populations, especially women and children ... [e]xchange of money, employment, goods or services for sex, including sexual favours or other forms of humiliating, degrading or exploitative behaviour, is prohibited. This includes any exchange of assistance that is due to beneficiaries of assistance.\(^{58}\)

The inclusion of the emphasised selection creates an implication that where a ‘transactional exchange is involved’, sex is itself humiliating, degrading or exploitative.\(^{59}\) The lack of distinction between non-consensual sexual exploitation and consensual sexual interactions is perhaps its fatal failure.\(^{60}\) As will be discussed in Part VII, this is an example of how the zero-tolerance policy invalidates consent and removes the ability for women to act as rational economic agents.\(^{61}\)

Impact of Zero-Tolerance

Ban Ki-moon, the former Secretary-General, portrayed sexual exploitation and abuse as a ‘cancer in the [the UN] system’.\(^{62}\) Critics of the zero-tolerance policy contend that while the ostensible aim of protecting women from grave harm is laudable, the ulterior motive is to instead protect and restore the UN’s institutional reputation.\(^{63}\) The President of the Security Council in 2005 made a statement condemning sexual exploitation and abuse.\(^{64}\) The statement appears not to have been scrutinised by academic commentators. However, its language and content are problematic. It reports that the UN’s ‘distinguished and honourable record’ is being ‘tarnished by the acts of a few individuals’, that conduct and discipline is ‘primarily the responsibility of Troop Contributing Countries’ and that fostering an environment of zero-tolerance is ‘primarily the responsibility of managers and commanders’.\(^{65}\) Moreover, the statement does not make any mention of the victims of exploitation. The net effect of the response is to shift the attention away from an entrenched institutional problem, to an issue of ‘delinquent individuals’.\(^{66}\) The statement blames peacekeepers for tarnishing the UN’s reputation, Member States for not holding them accountable and managers for not promoting the policy. While these are all justified denunciations, it is incumbent on the UN to take responsibility for the actions of its representatives.

---

\(^{58}\) Ibid s 3.2(c) (emphasis added).

\(^{59}\) Carmichael (n 25) 29, cited in Simić, ‘Wrongs of Zero Tolerance’ (n 18) 2.

\(^{60}\) See Simić, ‘Wrongs of Zero Tolerance’ (n 18) 2; Grady (n 12) 953.

\(^{61}\) See below Part VI(A).


\(^{64}\) Statement by the President of the Security Council, UN SCOR, UN Doc S/PRST/2005/21.

\(^{65}\) Ibid.

Otto rejects even the ostensible goals of protecting women, arguing that the Bulletin and its zero-tolerance policy serve a ‘sexually conservative agenda’ which restricts the progressive appeal for realising fundamental human rights for women. In seeking to protect the UN’s institutional reputation and ostensibly protect and rescue women from the inherent danger of sexual interactions, the zero-tolerance policy fails to address underlying factors causing inequality.

Conclusion

In the next section, I will explore the concept of the peacekeeping economy. This serves two purposes: it will demonstrate the impact that a peacekeeping operation can have on a post-conflict society; and it sets the foundation for the remaining substantive discussion which focuses on the impact of the zero-tolerance policy on women and the market for transactional sex.

Peacekeeping Economies

The ‘peacekeeping economy’ refers to economic activity that would not occur, or would occur at a much smaller scale, without the presence of a peacekeeping operation. Although peacekeepers live in the same area as locals, Jennings and Bøås pose that they do not live in the same world. The term ‘peacekeeping economy’ was first used to describe the service-based businesses which were established upon the arrival of peacekeeping operations. It has developed since 2002 and was the topic of focus in a 2015 symposium of the Journal of Intervention and Statebuilding, where Jennings and Bøås authoritatively defined the term. The agreed working definition is loosely as follows: the peacekeeping economy encompasses the unskilled and informal work that locals do for international individuals; the jobs available to staff in UN offices; jobs in establishments catered towards internationals; and participation in the sex industry. Moreover, it is uncontroversial to assert that the peacekeeping economy impacts: labour markets; the building or rehabilitation of infrastructure, including housing and office stock, airports and ports, and accommodation and leisure facilities; the cost-of-living, primarily in terms of housing, leisure activities, and certain goods and services; the built environment; and the way space is configured or controlled.

As such, it is evident that the peacekeeping economy has a holistic impact on the host country. The recent statistical analysis from Beber et al determined that a majority of

---

68 Otto (n 49) 270–1.
69 Jennings and Bøås (n 9) 281. See also Jennings and Nikolić-Ristanović (n 66) 5; Beber et al, ‘The Promise and Perils of Peacekeeping Economies’ (n 2); Beber et al, ‘Transactional Sex in Monrovia’ (n 4); Bernd Beber et al, ‘Challenges and Pitfalls of Peacekeeping Economies’ (Research Paper, New York University, July 2016) 1. It is of note that the sources I have referenced for this section are all secondary. While the UN have identified sexual exploitation and abuse as an issue which must be addressed, no organ of the UN makes mention of peacekeeping economies.
70 Jennings and Bøås (n 9) 282. See also Séverine Autesserre, Peaceland: Conflict Resolution and the Everyday Politics of International Intervention (Cambridge University Press, 2014).
73 Jennings and Bøås (n 9) 282–3.
economic activity catered to internationals is concentrated in the low-skill service sector.\textsuperscript{75} As will be discussed, this creates only transient economic benefits and opportunities for locals — the long-term effect of such a sudden low-skill employment boom can be deleterious.

The following part of this article examines the operation and components of the peacekeeping economy. I assert that but for the existence of the peacekeeping economy, local women would not have the ample employment opportunities that equip them with economic agency and autonomy. In doing so, I am cognisant that such opportunities are fleeting and cannot be the foundation for consistent economic development.

**Impact on the Local Economy**

I have posited that peacekeeping operations necessarily lead to the development of peacekeeping economies. It is now pertinent to examine the impact of the peacekeeping economy on the economic development of host countries. Like many issues in economic discourse, this topic has been discussed at length with little consensus.\textsuperscript{76}

A starting point is Rolandsen’s normative claim that peacekeeping operations should not be the sole implementation vehicle for programmes of social and economic change — they should instead create the space where such developments can thrive.\textsuperscript{77} I agree with this approach as it seeks to foster collaboration between the actors in the local economy and the peacekeeping operation. As will be discussed, putting the onus solely on the peacekeeping operation could lead to a dependency and sense of content. Bove and Elia contend that the peacekeepers’ role in economic development is merely facilitative; peacekeeping operations should merely seek to bolster the safety and security of the social environment, which thus results in a fertile ground for economic development.\textsuperscript{78} This argument is convincing as foreign investors are unlikely to invest resources into an unstable political atmosphere. However, Bove and Elia seemingly ignore the statistical evidence which suggests that peacekeeping operations are ‘large-scale economic interventions’.\textsuperscript{79}

The peacekeeping economy creates an economic bubble fuelled by demand for non-traded products; in most circumstances, these non-traded products are low-skilled services.\textsuperscript{80} While windfall gains resulting from foreign aid are often minimal in similar circumstances due to the prevalence of corruption,\textsuperscript{81} the money flowing in a peacekeeping economy directly fosters economic growth through job and infrastructure creation.\textsuperscript{82} The impact of the peacekeeping economy on the host economy is demonstrated by the United Nations Mission in Liberia (‘UNMIL’). There,

\textsuperscript{75} Beber et al, ‘Transactional Sex in Monrovia’ (n 4).
\textsuperscript{78} Bove and Elia (n 76) 714–17.
\textsuperscript{79} Beber et al, ‘The Promise and Perils of Peacekeeping Economies’ (n 2) 364; Beber et al, ‘Challenges and Pitfalls of Peacekeeping Economies’ (n 69) 7. See also Jennings and Nikolić-Ristanović (n 66) 2.
\textsuperscript{80} Beber et al, ‘The Promise and Perils of Peacekeeping Economies’ (n 2) 364.
\textsuperscript{82} Beber et al, ‘Challenges and Pitfalls of Peacekeeping Economies’ (n 69) 6.
the peacekeeping economy amounted to 6% of Liberia’s 2004 Gross Domestic Product.\textsuperscript{83} The financial stimuli provided in the aftermath of the Global Financial Crisis provide the context which illustrate the remarkable nature of UNMIL's impact in Liberia. The American Recovery and Reinvestment Act of 2009 amounted to a one-off 5.5% stimulus to the United States and the first Rudd Government’s $42b injection was a 4.53% stimulus to the Australian economy during the Global Financial Crisis.\textsuperscript{84} Beber et al concede that although the nominal size of the interventions of peacekeeping economies are minimal, the state of the host economy is in such dilapidation that the real impact is outstanding.\textsuperscript{85}

**Withdrawal and Collapse**

Peacekeeping economies lead to the ‘regeneration of a certain degree of infrastructure’.\textsuperscript{86} However, they are inherently transitory — the peacekeeping economy lasts only as long as the peacekeeping operation. Upon withdrawal of the peacekeeping operation, Jennings and Nikolić-Ristanović stress that the temporary nature of peacekeeping economies is problematic as the newly established infrastructure and services will be left without any suitors, leaving many women and men unemployed and in a similar financial position as before the peacekeeping operation.\textsuperscript{87}

The key to understanding the problematic nature of the peacekeeping economy is that the jobs and infrastructure it creates are primarily based around non-tradeable, low-skill services.\textsuperscript{88} Attractive wages in the non-traded sector can ‘crowd out’ manufacturing and contract the traded sector throughout the life of a peacekeeping economy.\textsuperscript{89} This apparent causal relationship is known as ‘Dutch Disease’ and is traditionally observed where the inflow of foreign exchange for a natural resource results in net decline in tradeable goods.\textsuperscript{90} Here, the foreign investment resulting from the peacekeeping operation leads to a neglect for local manufacturing and tradeable goods.\textsuperscript{91}

Upon withdrawal of the peacekeeping operation, the demand-side of the peacekeeping economy no longer exists as this is purely comprised of peacekeepers and other

\textsuperscript{83} Ibid 8.
\textsuperscript{85} Beber et al, ‘Challenges and Pitfalls of Peacekeeping Economies’ (n 69) 5.
\textsuperscript{86} Jennings and Nikolić-Ristanović (n 66) 5.
\textsuperscript{87} Ibid.
\textsuperscript{88} See, eg, Beber et al, ‘Challenges and Pitfalls of Peacekeeping Economies’ (n 69) 5–6; Beber et al, ‘The Promise and Perils of Peacekeeping Economies’ (n 2) 366; Jennings, ‘WPS and Peacekeeping Economies’ (n 74) 239
international personnel. Moreover, the decline in non-peacekeeping enterprises during the operation means that the economy is unable to absorb the low-skilled service workers who find themselves suddenly unemployed. Excess capital inhibits the growth of a developing economy and the excess supply of labour can lead to economic downturn.

**Selfish Investment**

The observation that the local economy is unable to sustain the levels of employment and business that existed in the peacekeeping economy demonstrates a greater problem. The services and infrastructure generated by the peacekeeping operation are truly only created to meet the specifications and demand of peacekeepers. The growth of infrastructure and industry associated with the peacekeeping economy occurs ‘instead of, rather than in addition to’ the developments in the local economy; there is little thought given to the long-term local effect of the stimulus.

It is troubling that the economic stimulus of the peacekeeping economy is not invested with the goal of facilitating sustainable economic development. However, it also reinforces damaging ideas of women who are unknowing victims, where many locals are pragmatic and understand that the economic stimulus resulting from peacekeeping operations is not perpetual. The transience of the economic boost is outweighed by the benefits provided to locals throughout the life of an operation — locals are both able to take advantage of the opportunities available to them and prepare for withdrawal.

**Entertainment Infrastructure and Transactional Sex**

The previous section focused on the observed phenomenon of the ‘peacekeeping economy’ and the impact that peacekeeping operations can have on the local economy. I noted that the basic infrastructure established within the peacekeeping economy is service-based. This section continues the discussion by examining the ‘entertainment infrastructure’ as a sector of the peacekeeping economy, within which the market for transactional sex exists.

---


94 See, eg, Jennings, ‘WPS and Peacekeeping Economies’ (n 74) 239, 241; Beber et al, ‘The Promise and Perils of Peacekeeping Economies’ (n 2) 365.


96 See McGill (n 46) 22; Jennings and Boás (n 9) 290; Béatrice Pouligny, Peace Operations Seen From Below: UN Missions and Local People (Kumarian Press, 2006), cited in Jennings and Nikolić–Ristanović (n 66) 5.

97 Jennings and Nikolić–Ristanović (n 66) 5.
Entertainment Infrastructure

‘Entertainment infrastructure’ refers to the central zone in which social interactions and economic transactions take place between locals and peacekeepers. Jennings describes this as the ‘most visible manifestation of peacekeeping as enterprise’, meaning that it acts as a symbol of the intervention that the peacekeeping operation has on the local economy. The infrastructure, consisting of businesses such as bars, hotels and restaurants, exemplify the service-based nature of the peacekeeping economy. Transactional sex as a specific product of the entertainment infrastructure in peacekeeping economies has been likened to the growth of sex tourism in South East Asian countries such as Thailand and Vietnam. Carter and Clift describe the emergence of sex-related entertainment in Thailand as an ‘articulation of a series of unequal social relations’.

While the observations of peacekeeping economies are in their relative infancy, we can look to the entertainment infrastructure of the wartime economy for guidance. For example, during the Vietnam War, Thailand was used as a ‘rest and relaxation area’ for American servicemen. Those military personnel dramatically drove up the demand for entertainment and sexual services — almost half a century later and Thailand is still regarded as the epicentre for global sex tourism. In a similar vein, True argues that the effects of the peacekeeping economy outlast the peacekeeping operation and continue to shape ‘gendered economic and social power relations’.

Gendered Structure of the Peacekeeping Economy

Although the peacekeeping economy stimulates the economy and is a catalyst for job creation, the services and infrastructure do not immediately benefit the local population. The majority of consumers and beneficiaries in a peacekeeping economy are peacekeepers and peacekeeping staff. Although there is an institutional drive to deploy more female peacekeepers, males still comprise a majority of peacekeepers on

---


99 Jennings, ‘Peacekeeping as Enterprise’ (n 2) 251.

100 See Jennings, ‘Encounters with the Peacekeeping Economy’ (n 2) 305–6.

101 Jennings and Nikolić-Ristanović (n 66) 18–19.

102 Carter and Clift (n 98) 10. See also TD Truong, Sex, Money and Morality: Prostitution and Tourism in Southeast Asia (Zed Books, 1990) 129; Full Metal Jacket (Warner Brothers Pictures, 1987).


105 Jennings, ‘Encounters with the Peacekeeping Economy’ (n 2) 307. See also Beber et al, ‘Challenges and Pitfalls of Peacekeeping Economies’ (n 69) 1–3.

106 Jennings, ‘Peacekeeping as Enterprise’ (n 2) 244.
missions.\textsuperscript{108} As such, the services and industries that flourish are targeted towards the male client.\textsuperscript{109} It is generally agreed that as a result, any of the employment opportunities made available in the peacekeeping economy are service-based and considered ‘women’s work’.\textsuperscript{110} Jennings cites the combination of the scarcity of paid care work and the growth of the sex industry as factors which make the peacekeeping economy ‘not just gendered, but also heavily sexualised’.\textsuperscript{111} Aning and Edu-Afful note that the occurrence of women being employed in hospitality and the transactional sex industry has the effect of propagating the understanding of what jobs are ‘appropriate’ for women.\textsuperscript{112} This gender-stratification is not an intended outcome of peacekeeping operations; rather, it becomes normalised by the behaviour of peacekeepers and their economic interactions with locals.\textsuperscript{113} The most evident illustration of the gendered economy is the market for transactional sex.

Transactional Sex

A Congolese professional offered that ‘[t]he only impact of MONUSCO has been in the night’.\textsuperscript{114} This anecdotal account demonstrates the not-insignificant role that transactional sex has in the service-driven peacekeeping economy. Within the entertainment infrastructure of peacekeeping economies is the market for transactional sex. As discussed, the zero-tolerance policy explicitly prohibits such interactions between peacekeepers and locals.\textsuperscript{115} The abhorrent extremes of the industry, survival sex and trafficking, are well-documented but are not the focus of this article. While there is ‘no single paradigm for transactional sex in peacekeeping economies’,\textsuperscript{116} the ‘dominant dynamic’ in peacekeeping economies is the transactional relationship between local women and male peacekeeper clientele.\textsuperscript{117}

The Role of Women

The Liberian Nationals AIDS Commission found that in the peacekeeping economy of UNMIL, there were three groups of local women engaging in transactional sex.\textsuperscript{118} Women who consider themselves professional sex workers and cite money from transactional sex as a primary source of income.\textsuperscript{119} Women who intermittently sell sex as income supplement.\textsuperscript{120} The final grouping are women who seek transactional sex

\begin{thebibliography}{9}
\bibitem{109} Jennings, ‘WPS and Peacekeeping Economies’ (n 74) 240; Edu-Afful and Aning (n 4) 402.
\bibitem{110} See Jennings and Boås (n 9) 290; Jennings and Nikolić-Ristanović (n 66) 6.
\bibitem{111} Jennings, ‘WPS and Peacekeeping Economies’ (n 74) 241.
\bibitem{114} Interview with Congolese Professional (Kathleen M Jennings, Kinshasa, 22 July 2002), quoted in Jennings, ‘Encounters with the Peacekeeping Economy’ (n 2) 305.
\bibitem{115} \textit{Bulletin} (n 29) s 3.2(e).
\bibitem{117} Jennings, ‘Service, Sex, and Security’ (n 17) 319.
\bibitem{119} Ibid 22.
\bibitem{120} Ibid.
\end{thebibliography}
and relationships with internationals in order to ‘maintain or improve their standard of living’.\textsuperscript{121} Jennings compares the nature of the transaction in this final grouping to the ‘open-ended exchange’ observed in sex tourism.\textsuperscript{122}

While Jennings preferred to discuss the differences between the three groups, I argue that it is useful to look for the overarching similarity. Transactional sex is ‘underpinned by the logic of market exchange’.\textsuperscript{123} Women engaging in transactional sex are rational actors who are cognisant, and able to take advantage, of the demand created by the peacekeeping economy. Beber et al conducted the ‘first systematic quantitative study of the association between a UN peacekeeping operation and transactional sex’,\textsuperscript{124} finding that more than 50\% of women in Monrovia have engaged in transactional sex, more than 75\% of them have done so with UN personnel.\textsuperscript{125} These findings, along with Simić’s research, express the view that voluntary transactional sex is not inherently exploitative and is a legitimate opportunity for women to engage in the peacekeeping economy.\textsuperscript{126}

\textbf{Cause and Effect}

An important question is whether peacekeeping operations increase the incidence of transactional sex, or whether the supply would otherwise be met with non-UN demand. Where prostitution was scarce prior to international intervention in Bosnia, international personnel accounted for ‘70\% of profits made from prostitution’.\textsuperscript{127} Limanowska observed a similar phenomenon in Kosovo, where peacekeepers comprised an estimated ‘40\% of the clientele of brothels’.\textsuperscript{128} Moreover, Beber et al noted that close to 3\% of UNMIL’s contribution to the Liberian economy was through UN staff engaging in transactional sex.\textsuperscript{129}

Beber et al conclude that the arrival of UNMIL ‘led to an increase in the volume of transactional sex’ rather than peacekeepers ‘merely displacing non-UN buyers from an otherwise stable transactional sex market’.\textsuperscript{130} This aligns with my earlier discussion regarding the impact of the peacekeeping economy, where I noted that the establishment of infrastructure occurs ‘instead of, rather than in addition to’ local economic development.\textsuperscript{131} The market for transactional sex thrives in the peacekeeping economy and is a vehicle for local women to find financial stability and personal autonomy. I argue that the blanket prohibition on transactional sex imposed by the zero-tolerance policy unnecessarily inhibits the ability of local women to engage in the peacekeeping economy.

\textbf{Conclusion}

There are demonstrable problems with the peacekeeping economy; the entertainment infrastructure is an exemplar of the issues surrounding low-skill services, gender

\begin{footnotesize}
\begin{enumerate}
\setcounter{enumi}{121}
\item \textsuperscript{121} Ibid. See also Jennings, ‘Service, Sex, and Security’ (n 17) 319; Jennings, ‘Unintended Consequences of Intimacy’ (n 98) 233.
\item \textsuperscript{122} Jennings and Nikolić-Ristanović (n 66) 8. See also Julia O’Connell Davidson, \textit{Prostitution, Power and Freedom} (Polity Press, 1998) 78; Carol Pateman, \textit{The Sexual Contract} (Blackwell, 1998) 191.
\item \textsuperscript{123} Jennings, ‘Peacekeeping as Enterprise’ (n 2) 252. See also Jennings and Boås (n 9) 290; Simić, \textit{Regulation of Sexual Conduct} (n 4) 169.
\item \textsuperscript{124} Beber et al, ‘Transactional Sex in Monrovia’ (n 4) 2.
\item \textsuperscript{125} Ibid 3.
\item \textsuperscript{126} See Simić, \textit{Regulation of Sexual Conduct} (n 4) 169.
\item \textsuperscript{127} Westendorf and Searle (n 105) 373.
\item \textsuperscript{129} Beber et al, ‘Challenges and Pitfalls of Peacekeeping Economies’ (n 69) 3 n 2.
\item \textsuperscript{130} Beber et al, ‘Transactional Sex in Monrovia’ (n 4) 3.
\item \textsuperscript{131} Jennings, ‘WPS and Peacekeeping Economies’ (n 74) 239–40. See above Part III(C).
\end{enumerate}
\end{footnotesize}
stratification and transience. In the alternative, the market for transactional sex within the peacekeeping economy presents an opportunity for women to participate and act as rational economic agents. The next substantive part of this article uses the foregoing discussion to examine the impact of the zero-tolerance policy on women.

The Practical Application of Policy

As discussed in Parts V and VI, the encounters between peacekeepers and locals in the peacekeeping economy are grounded in individual choice and market forces. The zero-tolerance policy is ostensibly laudable, aiming to prevent sexual exploitation and abuse. However, the policy perpetuates representations of women in need of protection. Such characterisations are ‘inconsistent with the realisation of women’s equality and human rights’. It also fails to address the Dutch Disease caused by the peacekeeping economy which leads to the growth of the market for transactional sex. It is easier to consecrate a broad, wide-reaching policy than it is to spend time understanding the causes of the issue and the nuances involved. Transactional sex involves rational decision-making and a level of agency and negotiation that distinguishes it from abuse and exploitation. Participation in transactional sex is more than a theoretical avenue for women to participate in peacekeeping economies; participation is high and the benefits for the women involved are commensurate. Rigidly enforcing the zero-tolerance policy would deprive women in peacekeeping economies of both their capacity to act as rational economic agents and a major source of income.

Women as Economic Agents

Economic agency describes one’s ability to use resources in an efficient market. Women who participate in the market for transactional sex in a peacekeeping economy are economic agents. They are able to take advantage of international demand and utilise sex as a means to gain ‘significant income and status’ by participating in the market for transactional sex.

Sex as Agency

Sex can present itself as an ‘active attempt to overcome socioeconomic limitations’, and is much more than mere pleasurable experimentation. As previously noted, the informal and unskilled service-based opportunities in the peacekeeping economy are often described as ‘women’s work’. Oldenburg’s analysis of Goma demonstrates that women are able to take advantage of the demand for sex driven by international

---

132 See, eg, Jennings, ‘Service, Sex, and Security’ (n 17) 318, 320; Jennings, ‘Peacekeeping as Enterprise’ (n 2) 252; Jennings and Boås (n 9) 290; Simić, Regulation of Sexual Conduct (n 4) 169.
137 Jennings and Boås (n 9) 290.
138 Ibid. See also Jennings and Nikolić-Ristanović (n 66) 6.
personnel in order to ‘achieve resources, connections and mobility’. But for the international presence, many women in post-conflict states would remain either unemployed or unable to realistically search for gainful employment. As such, Edu-Afful and Aning argue that women derive the greatest benefits in the peacekeeping economy. The notion of women as the greatest beneficiaries of the peacekeeping economy stands in contrast to the implications that the zero-tolerance policy imputes onto women. The policy treats beneficiaries of assistance as submissive and vulnerable women lacking the ‘agency to decide whether to be [sexually] involved’ with peacekeepers.

For the women who are rational actors in the peacekeeping economy, the imagery of victimhood evoked by the term ‘survival sex’ is far removed from reality. However, the counterargument is that the nature of the transaction — male peacekeepers procuring sexual services from female workers — fortifies a regressive and ‘traditional’ idea of femininity and gender roles. Such an argument demonstrates the problematic level of abstraction that peacekeeping discourse often conveys. On a theoretical level, I agree that the baseline transaction places the male peacekeeper in the position of power; without him, the female local would be unable to sustain a livelihood. However, I argue that this is ostensibly problematic only on that theoretical level. Jennings uses field-work to express the attitude shared among locals in peacekeeping economies: ‘get while the getting is good’. To impose a zero-tolerance policy with the intention of preventing sexual interactions based on an inherent power imbalance is to suggest to women that they are not ‘smart girls, bandits and adventurers’ or ‘tactic agents’, but are instead vulnerable and in need of protection.

**Deprivation of Livelihood**

A rigid application of the zero-tolerance policy does more than signal to women that an available avenue for economic autonomy is prohibited, it has the real effect of depriving women of their livelihood. The act of local women engaging in a sexual transaction with peacekeepers is often referred to as ‘survival sex’. This connotes ideas of desperate, Fantine-esque women who are willing to sell their bodies for a few dollars.

---


140 Edu-Afful and Aning (n 4) 400, cited in Jennings and Bøås (n 9) 290. This contention does not eliminate the role of men in the transactional sex industry of the peacekeeping economy; while women tend to comprise a greater part of the industry, positions of power in the transactional sex industry are often occupied by men. This is particularly the case in Bosnia and Kosovo, where the transactional sex industry controlled organised crime is led by men: Jennings and Nikolić-Ristanović (n 66) 6.

141 Simić, ‘Wrongs of Zero Tolerance’ (n 18) 2.


143 Jennings, ‘WPS and Peacekeeping Economies’ (n 74) 242; Jennings and Nikolić-Ristanović (n 66) 17.

144 See also Oldenburg (n 139) 317.

145 Jennings and Boša (n 9) 290. See generally Simić, *Regulation of Sexual Conduct* (n 4).

146 Oldenburg (n 139) 322–8.


148 See Jennings, ‘Conditional Protection? Sex, Gender, and Discourse in UN Peacekeeping’ (n 32) 36–8.

149 Simić, *Regulation of Sexual Conduct* (n 4) 169.

150 See, eg, McGill (n 46); Zeid Report (n 63) 9 [10]; Jennings and Nikolić-Ristanović (n 66) 8.

While on a superficial level, this transaction could be construed as a means of survival, there is much more depth involved. Jennings observed that in the Democratic Republic of Congo, many women in the industry are business-savvy and charge more for international peacekeepers than local men, more for Europeans than Africans. These women are able to participate in the peacekeeping economy and truly engage as rational actors in transactional negotiations.

The zero-tolerance policy is reactionary. When faced with allegations of peacekeepers having sex with 13-year-old girls in return for ‘two eggs’, it is a proportionate response to simply prohibit such interactions. However, the policy’s wide reach does not provide for the reality of transactional sex in peacekeeping economies. In Monrovia, Beber et al conclude that close to 93% of women receive money as consideration for sex. Moreover, 76% of all women who engage in transactional sex earn more than double the national average income. The 2016 study is the only one of its kind, so the results may need verification in the future. However, if the statistics are to be taken as factual, then it is demonstrable that strictly prohibiting transactional sex would have a ruinous impact on the livelihood of women.

Removing Rationality

Rational choice theory finds its foundation in the hypothesis that individual actors make their own decisions, the aggregate of which comprise social interactions. In the context of transactional sex in the peacekeeping economy, female locals and male peacekeepers make their own decisions to engage in transactional sex. The zero-tolerance policy is in direct opposition with this argument; the policy is driven by ‘sexual negativity’ and regards all sexual interactions as harmful to women. Moreover, the policy locates agency in men, implying that only male peacekeepers can make rational decisions to engage in transactional sex.

Invalidating Consent

Although the circumstances of economic engagement are odious, the decision to enter into the transactional sex industry ‘involves a level of agency and negotiation that distinguishes it from ... rape [and] sexual assault’. Two basic operative elements of rape are the victim’s lack of consent and the perpetrator’s lack of reasonable awareness of consent. The zero-tolerance policy has no regard for whether consent exists in the sexual interaction; the policy ‘blur[s] the distinction’ between consensual and non-

---


152 Jennings, ‘Encounters with the Peacekeeping Economy’ (n 2) 304–5.


154 Beber et al, ‘Transactional Sex in Monrovia’ (n 4) 13.


157 See Simić, Regulation of Sexual Conduct (n 4); Otto (n 49) 261; Carmichael (n 25) 29, 65. See also Gayle Rubin, ‘Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality’ in Carole S Vance (ed), Pleasure and Danger: Exploring Female Sexuality (Routledge, 1984) 11.


159 Otto (n 49) 260.

160 See, eg, Crimes Act 1958 (Vic) ss 38(1)(b)–(c). See also ibid 268.
consensual sex. A woman’s ability, as a rational agent, to say yes and consent to sex, is stripped by the application of the zero-tolerance policy. The effect of denying women the ability to demarcate the boundaries of their own relationships and imputing a presumption of exploitation is problematic. It frames the decision to participate in transactional sex as irrational and perpetuates the perception that local women are victims. This poses a further problem insofar that the peacekeepers are ‘responsible for protecting locals from the threat of sexual harm that he himself presents’.

**Application to Relationships**

The Bulletin notes that sexual relationships ‘undermine the credibility and integrity’ of the UN because they are based on ‘inherently unequal power dynamics’. I argue that this default position of a power imbalance and inequality does not reflect the subjective belief of locals. Simić interviewed women involved in relationships with peacekeepers in the United Nations Mission in Bosnia and Herzegovina (‘UNMIBH’), where common reasons for entering into such relationships were that the male peacekeepers were a ‘combination of ... personality, ... experiences, education and knowledge’, ‘attraction and friendship’ and ‘humour’. This is far removed from the inherent power balance suggested by the Bulletin. Moreover, Simić’s research revealed that most power differences in the local–peacekeeper relationships were constructed in terms of age or intellect, rather than financial dependency or ‘inherent dynamics’.

The rhetoric of power imbalance which underpins the zero-tolerance policy strips woman of their ability to act as rational agents; the policy instead suggests that women who enter such relationships must be acting irrationally as a result of some undue influence. In its application to legitimate relationships, the zero-tolerance policy abrogates the women’s fundamental rights of privacy and dignity. This merely imputes and perpetuates ‘colonial ideas about girls and women in peacekeeping host countries as “Third World” women who are unknowing victims in need of rescue’.

**Going Underground**

Through the zero-tolerance policy’s prohibition on transactional sex, there is a real risk that the industry will be driven underground, free from even the appearance of legitimacy and regulation. When this occurs, it becomes difficult to draw the line between legitimate, consensual entry into the sex industry, and forced prostitution. Following reports of sex slavery and human trafficking in Bosnia, the United States House of Representatives Subcommittee on International Operations and Human Rights heard testimony from a former UN Human Rights Investigator who provided the following account:

> Virtually all of the prostitutes in Bosnia are foreigners, mostly from Romania, Ukraine, Moldova, and surrounding countries. They are brought into Bosnia to

---

161 Otto (n 49) 268.
162 Simić, ‘Wrongs of Zero Tolerance’ (n 18) 2.
164 McGill (n 46) 23.
165 Bulletin (n 29) s 3.2(d).
166 Simić, Regulation of Sexual Conduct (n 4) 111.
168 McGill (n 46) 22. See also Jennings, ‘Conditional Protection? Sex, Gender, and Discourse in UN Peacekeeping’ (n 32) 37.
169 Jennings and Nikolić-Ristanović (n 66) 23; Simić, Regulation of Sexual Conduct (n 4) 163.
170 Westendorf and Searle (n 105) 373.
provide services to a paying clientele, a large component of which is foreign workers and peacekeepers. In Bosnia, the trafficking and forced-prostitution trade is not separate from a ‘legitimate’ prostitution trade; it is all the same operation. Therefore, anyone who is patronizing prostitution in Bosnia is supporting the sex slave trade. This fact is not acknowledged or is disregarded by many UN peacekeepers who involve themselves with prostitution in Bosnia. Others knowingly become deeply involved in the sex slave trade in partnership with organized crime.\footnote{Hearing Before the Subcommittee on International Operations and Human Rights of the House of Representatives, 107th Cong 2 (2002) (statement of David Lamb).}

Westendorf and Searle assert that similar accounts were produced in Kosovo, where forced prostitution and trafficking for sex ‘was [not] a significant issue before the arrival of peacekeepers’.\footnote{Westendorf and Searle (n 105) 374. See also Jennings and Nikolić-Ristanović (n 66) 9; Claire Morris, ‘Peacekeeping and the Sexual Exploitation of Women and Girls in Post-Conflict Societies: A Serious Enigma to Establishing the Rule of Law’ (2010) 14(1–2) Journal of International Peacekeeping 184, 195.} This not only demonstrates the difficulty in separating consensual entry into the sex industry from forced prostitution, but it also serves as a reminder of the obstacle in writing on this topic. It is easy to hypothesise and attempt to apply political, legal and economic theory at a high level; but to truly understand the impact of peacekeeping operations, a hands-on approach is required. Instead of prohibiting transactional sex and turning a blind eye to its persistence, the UN should instead develop a policy in collaboration with local people and decision-makers. Taking into account the lived experience of women will work towards ensuring that transactional sex is conducted in a safe and consensual manner, free from the intense stigma promulgated by the zero-tolerance policy.\footnote{Ibid 168.}

**Conclusion**

Despite its apparent intentions of protecting women, the zero-tolerance policy has the real effect of stripping local women of their ability to engage and participate in the peacekeeping economy. The market for transactional sex not viewed in a negative light by locals and is considered a realistic aspect of peacekeeping operations.\footnote{Committee on the Elimination of All Forms of Discrimination Against Women, ‘Violence Against Women’ (General Recommendation No 19, 1992) [15]; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, signed 12 December 2000, 2237 UNTS 319 (entered into force 25 December 2003) art 3. See also Otto (n 49) 269.} This demonstrates the detachment between the UN’s policy and the reality and reflections of those affected by the policy. In the final part, I introduce the discussion surrounding the need for the UN to devise a collaborative approach to redefine the zero-tolerance policy.

**Redefining the Zero-Tolerance Policy**

Definitional issues plague the effective implementation and enforcement of the zero-tolerance policy. Its inclusion of transactional sex is but one example of the incongruity between theory and practice. I have expressed that it is difficult to adequately discuss the complex issues associated with transactional sex and peacekeeping economies from a theoretical perspective. However, it appears that the UN’s response strives to do just that — despite the ample reporting and fieldwork which has been conducted in peacekeeping economies, the zero-tolerance policy disregards the subsisting experiences of local women who are the intended beneficiaries of the policy.\footnote{Ibid 147–8.} Moreover, the policy is inconsistent with other international approaches, which do not necessarily view transactional sex as inherently exploitative and harmful to women.\footnote{Ibid 168.}
The most recent response from the UN Secretary-General builds on the 2017 Special Measures for Protection from Sexual Exploitation and Abuse: A New Approach (‘New Approach’), which introduced a four-part policy to address and prevent sexual exploitation and abuse in peacekeeping operations.\textsuperscript{177} Relevantly, the New Approach introduced a Victims’ Rights Advocate to ‘give a voice to the victims’\textsuperscript{178} and revisited the terms of the trust fund which provides for the financing of support and assistance for victims.\textsuperscript{179} While such measures are both necessary and laudable, they demonstrate the reactionary nature of the UN’s approach to the issue. I contend that the UN must implement proactive measures to prevent the occurrence of sexual exploitation and abuse, and develop these policies alongside those who are the intended beneficiaries. This is not to say that the UN are not being proactive: the screening process for peacekeepers has recently been bolstered, requiring disclosure of prior misconduct;\textsuperscript{180} there has also been an increased emphasis on combating gender-based violence in the UN’s internal induction and training programmes.\textsuperscript{181}

The 2019 Report states that the Bulletin’s guidance and rules for UN personnel are being updated.\textsuperscript{182} Moreover, the UN’s Joint Inspection Unit is currently undertaking a review which aims to examine the ‘ability of investigation functions to address the zero-tolerance approach’.\textsuperscript{183} The proactive emphasis of the 2019 Report is on ‘risk mitigation and ending impunity’;\textsuperscript{184} this does not suggest an intention to reconsider the scope of the zero-tolerance policy.

To create an effective policy, the UN must collaborate with locals and reconcile their values and concerns with the UN’s institutional goals. The investment of resources into prohibiting transactional sex ostensibly achieves the UN’s goal of protecting women. However, as has been discussed, this does more harm than good and strips women of their ability to participate in a market as rational economic agents. Therefore, if the UN are persistent in their desire to reduce the occurrence of transactional sex, policies should be investigated that will help create alternative employment opportunities for women.\textsuperscript{185}

**Conclusion**

The zero-tolerance policy’s prohibition on transactional does not reflect the complexity of what occurs in peacekeeping operations. The market for transactional sex should not be construed as an inherently harmful derivative of the peacekeeping economy. It presents an opportunity for local women to engage and participate in the market and act as rational economic agents. While Beber et al are correct to argue that peacekeeping economies are transient, an attempt to restrict women from engaging in the market under the guise of protection is erroneous. Jennings’ observation that local women ‘get while the getting is good’ is an excellent illustration that they appreciate the transitory nature of the opportunity and can act with autonomy.\textsuperscript{186}

The UN’s continued promotion of the zero-tolerance policy ignores the real experience of the policy’s intended beneficiaries. The UN have little reason to ignore the growing

\textsuperscript{177} New Approach (n 31).
\textsuperscript{178} Ibid 9 [27]; 2019 Report (n 37) 7–9 [22]–[37].
\textsuperscript{179} New Approach (n 31) 34; 2019 Report (n 37) 9 [37].
\textsuperscript{180} 2019 Report (n 37) 10 [40]–[42].
\textsuperscript{182} 2019 Report (n 37) 2 [3].
\textsuperscript{183} Ibid 11 [49].
\textsuperscript{184} Ibid 9–13
\textsuperscript{185} Simić, Regulation of Sexual Conduct (n 4) 168.
\textsuperscript{186} Jennings and Boås (n 9) 290. See generally Simić, Regulation of Sexual Conduct (n 4).
body of research examining lived experiences and reflections from women in post-conflict societies. To do so, and to uphold the zero-tolerance policy is to perpetuate ‘conservative and imperial stereotypes about vulnerable women’.\textsuperscript{187} I do not contend that many women in post-conflict societies are not victims — but as Simić argues, the UN must acknowledge that they are also survivors whose voices must be taken into account.\textsuperscript{188} Relevantly for my discussion, this must include a realisation that consent can exist in transactional sex and that women are able to freely choose to participate in the market for economic gain.

It is incorrect to state that this article is authoritative. I have sought to reconcile the breadth of research into transactional sex, peacekeeping economies and the zero-tolerance policy. There is still progress to be made in this area of research. Importantly, the long-term impact of the peacekeeping economy on local economic structure and development is yet to be determined. The ongoing work of Beber et al is promising; its empirical approach draws upon Grady’s important caution on the use of UN-provided data.\textsuperscript{189} Moreover, a comprehensive examination of the causes of sexual exploitation and abuse would be invaluable and allow the UN to direct future policy to those causes.\textsuperscript{190}

\textsuperscript{187} Simić, \textit{Regulation of Sexual Conduct} (n 4) 7.
\textsuperscript{188} Ibid 168–73.
\textsuperscript{189} See generally Grady (n 12).
\textsuperscript{190} See, eg, Rodriguez and Kinne (n 30).
Distributing the legal aid dollar - effective, efficient, and quality assured?

John Boersig and Romola Davenport*

This article discusses the ways in which Australian Legal Aid Commissions monitor the quality of legal aid work, and how a national scheme could be remodelled in light of the experiences of other jurisdictions and emerging evidence as to best practice. It argues that peer review is the ‘gold standard’ of quality control. Legal Aid Commissions must evaluate the existing evidence base, implementing a peer review system that operates in parallel to existing performance and financial audits while minimising costs through targeted audits. In this way the Commissions will fulfil not only their statutory obligation to provide efficient and effective legal services, but also their ethical obligation to promote access to justice through delivering high quality legal services to disadvantaged people.

Introduction

The challenges for Legal Aid Commissions (LACs) in Australia are significant and numerous, including high demand for services, insecure and increasingly austere funding arrangements and growing unrest in the legal profession over stagnant fee rates. In this context, LACs must be able to demonstrate that their services provide value for money and value for clients. Developing comprehensive and reliable quality control mechanisms is an essential part of demonstrating the value of legal aid work.¹

The quality of legal aid services is also an important access to justice issue. All legal aid services must be of an equivalent quality to the services provided by private practitioners to fee-paying clients. This ensures ‘equality of arms’ in the courtroom where legal aid clients may be facing self-funded clients, public prosecutors, or government lawyers.

This article discusses the ways in which LACs already monitor the quality of legal aid work, and how a national scheme could be remodelled in light of the experiences of other jurisdictions and emerging evidence as to best practice. International trends, and some experience within Australia, indicate that peer review is the ‘gold standard’ of quality control. Above all, in developing a model of risk-targeted peer review, LACs must evaluate the existing evidence base and adapt these principles to the Australian context - implementing a system of peer review that operates in parallel to existing performance and financial audits, while minimising the costs through targeted audits.

It is argued that in this way LACs will fulfil not only their statutory obligation to provide efficient and effective legal services, but also their ethical obligation to promote access to justice through delivering high quality legal services to disadvantaged people.

International Perspectives

Quality control and value for money are recurring themes in legal aid research, regardless of the service delivery model that is used. Notably, systemic reviews undertaken in the UK and New Zealand have identified quality issues both in private practices and Public Defenders’ offices.

* John Boersig LLB, BA (Macq), PhD (USyd) is Chief Executive Officer, Legal Aid ACT and Adjunct Professor of Law, University of Canberra. Romola Davenport is a Research Assistant, Legal Aid ACT.
In New Zealand, the Bazley Review\textsuperscript{2} found serious quality issues amongst private practitioners performing legal aid work. Lawyers were found to be ‘gaming the system’ by encouraging a client to delay a plea or change pleas part-way through proceedings in order to maximise legal aid payments.\textsuperscript{3} The review found that the ‘fee for service’ model used by the Legal Services Agency encouraged lawyers to do more and take longer than necessary.\textsuperscript{4} In areas with no Public Defenders service, the lack of competition exacerbated this problem.\textsuperscript{5} Other quality issues included lawyers failing to appear at court or failing to adequately prepare due to overbooking.\textsuperscript{6} The report recommended the use of Public Defenders services in busy courts where high volumes of cases made Public Defenders efficient, as well as using Public Defenders in areas with serious quality issues, so as to spark competition.\textsuperscript{7} The findings of this report reinforce the benefits of promoting quality and efficiency through public-private competition. Additionally, the report emphasised the need for government oversight of legal aid services in order to counteract information asymmetry from consumers\textsuperscript{8} and potentially unscrupulous practices by lawyers. Following the Bazley review, the New Zealand Ministry of Justice implemented a comprehensive audit process involving peer review of legal aid files.

Similarly, a United Kingdom review of legal aid procurement\textsuperscript{9} found that Public Defenders’ services generated cost savings and often led to the earlier resolution of criminal matters.\textsuperscript{10} However, the report found that there was a risk of quality declining where Public Defender services were overloaded with cases.\textsuperscript{11} The report ultimately recommended that legal aid suppliers should be subject to peer review to monitor quality.\textsuperscript{12}

Effective legal practice is an essential component of value for money. Significantly, a number of international reviews have uncovered serious cases of ineffective legal practice. For example, the Bazley Review, as noted above, identified widespread evidence of practitioners intentionally prolonging proceedings in order to maximise payments.\textsuperscript{13} Similarly, a review of the Scottish Public Defenders’ Office found that criminal cases handled by that Office were more likely to be resolved at a plea hearing or at an intermediate hearing, while cases handled by private practitioners were more likely to resolve at or after a final hearing.\textsuperscript{14} The evaluators theorised that privately handled cases took longer because private solicitors had an incentive to encourage not

\textsuperscript{3} Ibid 101 at [330].
\textsuperscript{4} Ibid 39.
\textsuperscript{5} Ibid.
\textsuperscript{6} Ibid 100 at [324]-[326].
\textsuperscript{7} Ibid 118.
\textsuperscript{8} Ibid 34 at [37].
\textsuperscript{10} Ibid 39.
\textsuperscript{11} Ibid 62.
\textsuperscript{12} Lord Carter’s Review of Legal Aid Procurement, Legal Aid: A Market-Based Approach to Reform (July 2006) 7.
\textsuperscript{13} Above n 15, 79 at [330].
guilty pleas – namely that they would be issued with a legal aid certificate for the client.\textsuperscript{15} This theory was largely confirmed by interviews with solicitors.\textsuperscript{16}

In England and Wales, research and policy literature indicates that there is significant concern about ‘supplier-induced demand.’\textsuperscript{17} Lawyers are frequently blamed for ever-increasing legal aid costs, and governments often accuse solicitors of providing unnecessary services in order to increase profits. However, these claims can be difficult to substantiate as litigants usually seem to desire the extra services,\textsuperscript{18} and because in England and Wales there are no in-house practices to provide benchmarks for effectiveness and quality.

These reports, and the reforms that were subsequently implemented, provide important guidance on the kinds of quality issues that Australian legal aid providers should be aware of. The New Zealand review indicates that legal aid providers should be conscious of the risk that private practitioners may over-service to maximise income. Conversely, the UK review suggests that Public Defenders are not a panacea for quality issues, especially when they are overloaded with cases.

The ‘Mixed Model’ of Legal Aid Service Delivery in Australia

LACs receive the vast majority of their funding (86% in 2017-18)\textsuperscript{19} from state and federal governments, and have a statutory obligation to utilise these funds to provide legal services to disadvantaged people as efficiently, effectively, and economically as possible.\textsuperscript{20} However, LACs have a broad discretion as to how this objective is achieved.

The Mixed Model

All LACs in Australia use a ‘mixed model’ of service delivery, meaning that services are provided both through salaried, ‘in-house’ lawyers, and through private practitioners working at legal aid rates. Private practitioners are remunerated through a fixed scale of fees that varies by case type, while in-house lawyers receive a salary that is determined independently of work volume. Regardless of the means or quantity of their remuneration, all legal aid lawyers are expected to provide high quality services to legal aid clients. Thus, relative accountability and quality are key issues in a mixed model.

Nationally, all LACs follow similar guidelines for the allocation of work between in-house and private lawyers. However, these guidelines produce notably different outcomes between jurisdictions; for example, 67% of grants are assigned to in-house practitioners at Legal Aid ACT, whereas only 23% are allocated to in-house practitioners at Legal Aid Queensland.\textsuperscript{21} On one level, these figures reflect the fact that Australia is a large and heterogeneous country, and that there are a multitude of ways in which efficient and effective legal services can be delivered under a mixed model. However, these figures could also reflect the underlying tensions in the mixed model, which manifest differently in each jurisdiction. These undercurrents include complex

\textsuperscript{15} Ibid.
\textsuperscript{16} Ibid.
\textsuperscript{18} Ibid 4.
\textsuperscript{20} Legal Aid Act 1977 (ACT) s 10 (1) (a); Legal Aid Commission Act 1979 (NSW) s 12 (a); Legal Aid Act 1978 (Vic) s 4 (a); Legal Aid Queensland Act 1998 (Qld) s 3 (1) (a); Legal Aid Commission Act 1990 (Tas) s 6 (1) (g); Legal Aid Act (NT) s 8 (a); Legal Services Commission Act 1977 (SA) s 11 (a); Legal Aid Commission Act 1976 (WA) s 15 (1) (a).
relationships between LACs and Law Societies, as well as ongoing difficulties in measuring relative quality and efficiency.

From an economic standpoint, and with a view to quality, LACs have been under increased stress in recent years due to funding levels which are stationary or decreasing in real terms.22 As a result, the fees paid to private practitioners for legal aid work have not increased, in some jurisdictions for over a decade.23 Many private practitioners have long claimed that it is economically unviable to perform legal aid work,24 and for many years there have been concerns about ‘juniorisation’25 (a trend towards legal aid work being performed by inexperienced private practitioners). Some private lawyers argue that low rates of remuneration for legal aid work mean that they must either lower their quality standards and deliver a second-rate service, or put in unpaid work on legal aid cases.26 These issues demonstrate that work allocation decisions cannot be governed only by considerations of relative efficiency and cost – work allocation decisions should also be closely informed by reliable data on quality and effectiveness. Many of these challenges are also recognised in international research. While there are a range of sources indicating that the mixed model facilitates greater efficiency than using either in-house or private lawyers alone,27 there is also evidence to suggest that relative quality under a mixed model can be highly variable. Quality of work may be influenced by a range of factors including case volumes, means of remuneration28 and the opportunity cost for private practitioners.29 Jurisdictions that use the mixed model must therefore consider how to ensure equivalent quality when lawyers experience different labour market incentives.

While it is now orthodoxy (at least in Australia), that legal aid is most efficiently provided through a mix of in-house and private practitioners, questions remain about the relative effectiveness and quality of these services, especially in light of the ever-expanding gap in profitability between private work and legal aid.30 Law Societies in Australia have traditionally not favoured any kind of external regulation, preferring to regulate the profession with internal measures such as barriers to entry, professional education requirements, and complaint mechanisms. External regulation, even when its scope is strictly limited to legal aid work, can be viewed as an encroachment on the autonomy of the legal profession as a whole. Nonetheless, despite the concerns of Law Societies, the rising tide of public sector accountability is pushing all public agencies, including LACs, towards developing transparent mechanisms of demonstrating efficiency and quality. In light of these trends, it is clear that governments, as the major investor in legal aid services, must be able to impose quality standards on their suppliers and ensure that these standards are met.31 It remains to be seen whether the successful implementation of quality control in legal aid will raise broader questions about quality control for the legal profession as a whole.

---

22 National Legal Aid, Submission to Attorney-General’s Department, Review of the National Partnership Agreement on Legal Assistance Services 2015-2020 (5 October 2018), 11.
25 Ibid 38.
26 Ibid 3.
27 Flood Report (n 8) 6 [11]; Bazley Report (n 1) 118.
30 National Legal Aid (n 21) 11.
31 Bazley Report (n 1) 98 [316].
Work Allocation Principles

When designing mechanisms for accountability, it is important that the underlying reasons for using the mixed model are clearly articulated to legal practitioners and the public. All LACs maintain publicly available guidelines for the allocation of legally assisted cases, based on the principles explained below. These guidelines are used by administrative staff within legal aid when determining whether to allocate a case to an in-house lawyer or a private practitioner. The transparency of these guidelines is crucial to the mixed model.

The principles that underpin Work Allocation Guidelines (WAGs) are:

- To ensure adequate geographical coverage of services;
- To avoid conflicts within LACs;
- To capitalise on the expertise of private practitioners;
- To allow for specialisation within legal aid practices;
- To allow for choice of lawyer; and
- To provide price and quality benchmarks.

It is important to note that the mixed model has a significant impact on the overall landscape of legal service provision in Australia. In some cases, the mixed model compensates for market failure – for example, welfare law (as a service provided to clients with little or no capacity to pay and no prospect of windfall gain) is practised almost exclusively by LACs, while private practitioners specialise in areas that are more commercially viable. Additionally, in-house practices aim to model 'best practice' in legal aid work to set a quality benchmark for panel practitioners who only undertake legal aid work sporadically as part of a wider practice.

The mixed model also creates complex dynamics between LACs, who must seek to maximise efficiency, and Law Societies, who are concerned about low rates of remuneration and the volume of work allocated to private lawyers. The very existence of in-house lawyers is often questioned by Law Societies and private lawyers, who resent the competition brought about through the mixed model.

On the whole, it is clear that the argument for both in-house and private practitioners in Australian legal aid is well made out. Significantly, in-house lawyers provide important quality and price benchmarking, particularly for high volume services, while also specialising in areas of law that are generally not profitable for private practitioners. Conversely, private practitioners allow LACs to avoid conflicts, have a comprehensive spread of services (geographically and by law type), and allow for choice of lawyer in some cases. Thus, the challenge for LACs is to develop a sustainable and reliable model of work allocation that ensures a consistent level of quality and value for money whether clients receive legal services in-house or externally.

Current Methods of Quality Control in Australian Legal Aid

All LACs have procedures in place for auditing private practitioners. The main issue with these schemes is that they often do not measure the substantive quality of legal work. Although all LACs have the authority to perform file audits with respect to quality, in practice this power is rarely used. Most audits instead focus on procedural

---

32 Victorian Legal Aid, Submission to Productivity Commission, Inquiry into Access to Justice (November 2013) 8.
matters such as the quality of file maintenance and compliance with billing procedures. There are several interesting features of audit processes as they currently stand:

**Overview of Audit Process**

In general, financial and performance audits are carried out by non-legal staff who specialise in managing grants of legal assistance. Audits are mostly carried out on a pass/fail basis, and in some cases practitioners do not receive feedback if they pass the audit.

The majority of staff carrying out audits do not need legal qualifications as they are not judging the quality of the advice given or the adequacy of the service provided in the circumstances (in other words, the quality or effectiveness of the legal work). Non-legal audit staff focus primarily on whether the work that was billed to legal aid was actually undertaken. In order to pass a routine audit, the practitioner must maintain the file so that it demonstrates evidence of key events, including:

- That the lawyer made appropriate and timely contact with the client regarding their case;
- That the lawyer communicated important matters to the client in an appropriate way; and
- That the lawyer actually attended the court events.

Consequently, a practitioner who undertakes the required work but performs the work to an unsatisfactory standard (for example, by giving inaccurate advice) may still pass a routine audit. In this way, routine audits may sometimes fail to protect clients from low quality lawyers. This raises questions about the utility of these audits – in some ways, an audit process that only has a punitive function is a missed opportunity to promote continuous improvement and reward good practices.

The main reason for performing audits in this way is to ensure that practitioners are aware that their work is under scrutiny and to maximise the number of practitioners who can be audited. Historically, LACs have prioritised high-volume audits that promote value for money by detecting fraud and over billing. Substantive reviews of quality are rarely undertaken because of the high cost and low availability of senior lawyers capable of performing such a review.

Most LACs only perform audits on private practitioners (although some do audit their in-house practices as well[33]). While it could be said that in-house lawyers do not need to be audited because they are subject to internal supervision and performance review, this also means that it is more difficult to monitor the relative quality of each practice. In the context of discussions about work allocation and efficiency, relative quality is an important concept. For example, data on relative quality may demonstrate that cost savings attained through changes to work allocation have in fact led to the provision of lower quality services. This information would inform policy decisions about work allocation and government funding of legal services.

In-house legal aid practices have a strong culture of supervision, mentoring and staff development. Practice managers within LACs ensure quality through a range of activities including file audits, pre-trial conferences, in-court observation, judicial feedback, and feedback from in-house mentors. Through these activities, practice

managers can ensure that all legal aid lawyers are performing high quality work while also fostering a culture in which lawyers strive to improve their own skills and those of their colleagues. LACs usually have a mix of junior, intermediate, and senior lawyers that facilitates information sharing and development. This enables LACs to implement comprehensive systems of training and mentoring within their legal practices.

Emerging directions in best practice

Current trends in Australian legal aid indicate a shift towards more intensive, quality-focused auditing. A number of LACs are moving towards implementing a comprehensive system of peer review of files in order to monitor quality. For example, Victorian Legal Aid (VLA) has developed detailed practice standards for each area of law\(^\text{34}\) and has established a Quality Audit Team that periodically reviews files from different areas of law.\(^\text{35}\) Practitioners then receive feedback on their compliance with the practice standards, and aggregate results are published on the VLA website.\(^\text{36}\) Legal Aid Western Australia (LAWA) has implemented an Audit and Compliance Policy under which LAWA undertakes integrated quality and compliance audits on private practitioners.\(^\text{37}\)

More recently in Australia, Legal Aid New South Wales (the largest LAC in Australia, with an annual expenditure of $280 million\(^\text{38}\)) commissioned a study comparing the performance of in-house and private practitioners when handling legal aid cases. The study was initiated due to concerns that low fee rates and a system of payment based on 'billable hours' were providing an incentive for private practitioners to maximise the number of hours spent on each case. The results supported this hypothesis. The numbers indicated significant disparities in effectiveness: cases handled by private lawyers were less likely to be dealt with summarily; less likely to be committed for sentence; and more likely to result in a late guilty plea.\(^\text{39}\)

These examples provide ample evidence to infer that payment based on stage-of-matter or on billable hours can provide incentives to over-service. It is therefore important for LACs to monitor whether practitioners use dispute resolution processes effectively so as to minimise (a) the length of proceedings and (b) the number of case events (including court events and alternative dispute resolution processes).

In criminal matters, for example, effectiveness could be monitored by reference to proxies such as:

- Stage of guilty plea;
- Use of late guilty pleas;
- Use of summary courts (in matters that can be dealt with either summarily or as indictable offences);


\(^{38}\) National Legal Aid (n 18).

• Early use of plea and/or charge bargaining;
• Number of grant extensions requested and/or granted; and
• Total number of case events.

It is important to note that these measurements would only yield valuable data over a long period of time. A large pool of data is required because there are many different variables (outside a lawyer’s control) which may prolong a case or increase the number of case events. These variables may include, for example, variations in judicial practice and the other party’s willingness (or unwillingness) to settle.

This policy shift toward higher levels of accountability is being driven by a number of factors, including community expectations and an increasing awareness that poor legal outcomes have high social and economic costs. While these negative externalities may be less obvious than the immediate financial costs of fraud and over-billing, they are nonetheless significant. Low quality work has particularly high costs in legal aid work because grants of aid are only given in the most serious cases where individuals risk significant loss, including loss of liberty, livelihood, housing, or family. If these cases are dealt with ineffectively, vulnerable individuals may be plunged further into a cycle of poverty and disadvantage which will be increasingly difficult to break. Consequently, one of the major concerns for LACs is to control not only for the economic costs of fraudulent billing, but also for the social costs of low quality work.

One of the most significant challenges faced by LACs in pivoting to a more substantive form of review is the increased cost associated with employing senior lawyers (rather than auditors or grants staff) to review files, as well as the increased time required per file. Most LACs will need to control these costs by conducting targeted and efficient quality audits, directed at the most high-risk practitioners. Ideally, targeted quality audits would work alongside an ongoing system of comprehensive procedural audits. In this way, LACs could control the costs of auditing while also protecting against fraudulent billing and low quality work.

LACs could also counteract the increase in costs per file by allocating work to firms, rather than individual practitioners. This would increase efficiency by reducing the total number of entities that need to be reviewed. This change could also reduce the likelihood of unsatisfactory work by allocating less work to sole practitioners (who generally present a greater quality risk than firms) and more work to firms. In most jurisdictions, sole practitioners are over-represented in complaint numbers. This is most likely because sole practitioners have more difficulty delivering a high quality service due to a lack of supervision, support, and infrastructure. By shifting to a model that allows firms to receive panel accreditation, LACs could mitigate the risk created by unsupervised sole practitioners while also reducing the costs associated with quality control.

The subsequent sections will discuss what a best practice model of quality control might look like in the Australian context, focussing on the use of peer review and client surveys.

**Monitoring the Quality of Legal Services**

The measurement of quality in legal services has been the subject of discussion and research for over forty years.\(^4\) A broad range of quality control mechanisms have been developed, and have been trialled with varying success in Australia and abroad. Over time, peer review of legal aid files has come to be recognised as one of the most (if not

the most effective means of monitoring quality of legal services in comparison to other methods such as self-assessment, direct observation, analysis of complaints, or analysis of court documents. Although it is also one of the most expensive methods of quality control, its effectiveness is so great that it has been adopted in a range of countries including England and Wales, Scotland, New Zealand, the Netherlands, South Africa, Chile, and China. Overall, international trends appear to indicate a convergence towards peer review as the ‘gold standard’ of quality control.

This section will draw on the early work of Paterson and Sherr, and more recent developments in England, New Zealand, Australia, and the EU, to suggest a model of peer review that is adapted to Australia’s jurisdictional conditions (specifically in the context of the mixed model), and that is financially viable to implement. The following sections will explore the proposed model including: the development of practice standards; the selection and training of reviewers; and the selection of review subjects and files. The integral role of an appeal pathway will also be discussed. In setting out how a re-modelled review might look it is also important to take into account the inevitable challenges of implementing comprehensive peer review.

Development of practice standards

The EU guidelines for developing quality measures suggest that the local Law Society or Bar Association should be closely involved in the development of performance criteria. In the context of the Australian mixed model, it would be appropriate to involve legal aid lawyers, private practitioners who perform legal aid work, and private practitioners who only work for paying clients. This would ensure that the guidelines are developed consultatively, as well as helping to attain ‘equality of arms’ for legal aid clients by developing quality standards that reflect the standard of service provided to paying clients.

Recent research has demonstrated that the content of the guidelines should aim to ensure quality across three areas: technical competence, client care, and utility.

Technical competence requires a practitioner to have knowledge of the relevant law and procedural requirements, and to provide advice that is accurate in the circumstances.

Client care includes catering to a client’s individual needs (for example, by using an interpreter or explaining concepts in simple English), as well as identifying personal circumstances linked to the presenting issue, and providing referrals to relevant non-legal services.

Utility is a combination of technical competence and client care – it involves providing advice that is useful to the client in the circumstances and helps them to move forwards in a meaningful way. The Legal Aid Agency for England and Wales measures utility by the extent to which a lawyer’s actions help to ‘achieve the client’s reasonable

42 Ibid.
43 Ibid 27.
45 QUAL-AID Report (n 40) 16.
objectives\(^47\) (recognising that a client’s instructions may not always be reasonable or achievable in the circumstances). Therefore, the concept of utility embodies an expectation that legal advice or assistance should have a positive (not neutral or detrimental) impact on the client’s position. However, a positive impact will not always align with the client’s expectations – for example, a positive result in a matter with no prospects may be for the client to abandon the matter or enter a plea of guilty.

Within each law type, the various quality criteria can be grouped by stage of matter (for example, in a criminal matter: pre-charge; committal; and trial) to measure the quality of work at each stage. The criteria should consider whether the action taken was timely, correct, appropriate (and appropriately communicated), and helpful to the client in the circumstances. Practice standards should also reflect the expectations of the government as a purchaser of legal services – for example, standards should consider how efficiently the work was carried out, the reasonableness of any disbursements or extensions, and the clarity and composition of the file.

Practice standards may also include an explanation of how a given quality standard should be demonstrated within a file. For example, Victorian Legal Aid, in addition to providing practice standards which describe a practitioner’s obligations, also provides a list of practice standard measures which set out how a practitioner can demonstrate compliance with a particular standard.\(^48\) This ensures that practitioners have a clear understanding of the standard of record-keeping that is required for effective peer review.

**Selection and training of reviewers**

The process for selecting reviewers should have a range of criteria. Most importantly, reviewers should be experienced practitioners who do not have a conflict of interest with the providers subject to review.

In England and Wales, reviewer positions are publicly advertised according to the area of law in which reviewers are required.\(^49\) Where there is shortage of reviewers in a particular area of law, individuals may be invited to apply for a position.\(^50\)

Reviewers should be experienced legal aid practitioners (for example, in England a reviewer must be a supervisor under a current legal aid contract\(^51\)) who consistently produce high quality work. The screening process may include reviewing a sample of the applicant’s work to ensure that it is of a high quality.\(^52\)

The avoidance of conflicts is an essential part of developing a peer review model that is trusted and objective. For the purposes of peer review, a conflict includes any situation in which the peer reviewer may have already formed an opinion about the provider’s work or developed any kind of bias for or against the provider.\(^53\) The Legal Aid Agency in England and Wales avoids conflicts in three ways:\(^54\)

---


\(^49\) Sherr, Moorhead, and Paterson (n 43) 12.

\(^50\) Ibid.

\(^51\) Legal Aid Agency (n 46) 13.

\(^52\) Ibid.

\(^53\) Ibid 23.

\(^54\) Ibid.
• Peer reviewers do not review firms with which they have had previous dealings, including working for, acting against, or where a family member or spouse has previously worked at the firm;

• Peer reviewers do not review firms within their ‘geographic area’ unless both the reviewer and the firm consent; and

• Firms are given a list of peer reviewers and asked to identify any relevant conflicts.

In the Australian context, this model would have to be adapted to each jurisdiction, noting that the eight LACs vary significantly in size (the largest LAC serves a population of 7.9 million, while the smallest LAC serves a population of just 247,000\(^{55}\)). Therefore, in more populous jurisdictions, the legal community may be large enough to enable reviewers to audit providers from a different area of the same state. However, smaller LACs may need to recruit reviewers from interstate in order to avoid conflicts.

Reviewers should be trained on pre-reviewed model files, and discrepancies in marking should be discussed and eliminated where possible. Where it is not possible to reduce discrepancies through training and discussion, it may be necessary to remove the candidate from the pool of reviewers.\(^{56}\) LACs could also consider appointing senior reviewers who can provide benchmarks for appropriate marking and investigate the reasons for any discrepancies.\(^{57}\)

**Selection of review subjects**

There are three methods of selecting practitioners for review: random selection; risk-based selection; and a combination of both.\(^{58}\)

Risk can be conceptualised in several different ways. One of the primary ways in which LACs define risk is through the identification of financial risk. Under this model, high-risk providers are classified as those who undertake a high volume of work, have a high cost per case, or a high total amount of billing. However, risk can also take into account the interests of clients, including the risk that a practitioner poses to clients through failure to comply with ethical and professional standards. Risk to clients is more difficult to quantify but can be identified through measures such as the number of client complaints or the frequency of adverse judicial comment. In New Zealand, the legal aid agency develops a ‘risk profile’ for each provider based on a combination of financial risk and risk to clients. Some of the factors taken into account include: \(^{59}\)

- Total amount paid to the provider in the last year;
- Number of files assigned in the last year;
- Cost per file;
- Number of extensions sought;
- Number of case approvals rejected/refused;

---


\(^{56}\) Legal Aid Agency (n 46) 16.

\(^{57}\) Legal Services Board (n 45) 18.

\(^{58}\) QUAL-AID Report (n 40) 32.

- Percentage increase in fees or files over last two years;
- Number of substantiated complaints;
- Adverse judicial comment; and
- Progression to a new provider level or area of law.

Similarly, LAWA performs targeted audits on a percentage of the firms listed as ‘top earners’ in the LAWA Annual Report. Additionally, LAWA performs ‘targeted’ audits on firms where serious quality issues or concerns have been raised, as well as randomly auditing a percentage of firms that are not top earners and have not had serious quality concerns raised with regards to their work. This is an example of a mixed risk-based and random selection process that considers financial risk and risk to clients, as well as randomly selecting some other firms.

These approaches are indicative of how a best practice model might be further developed in Australia. In the development of best practice, risk assessment must be foundational; for instance taking into account the potential for small practices to have serious quality issues (noting these small-scale providers may be classed as low-risk under the New Zealand model, but would most likely have to have concerns raised about their practice under the LAWA model). As noted above, sole practitioners may pose a higher risk because they lack the level of support and infrastructure necessary to provide high quality services. Accordingly, a selection method that takes into account this increased risk is necessary. Additionally, a provider’s risk profile could include information on client demographics (for example, the percentage of clients that have a disability or come from a culturally diverse background) to ensure that the review process protects the most vulnerable clients from low quality providers.

Risk-based selection is likely to be the most cost-effective method of identifying quality issues. This is because it allows legal aid agencies to focus their limited resources on auditing the practitioners that pose the greatest financial risk to the legal aid agency or the greatest risk to clients’ interests. Risk-based selection is particularly important when utilising peer review because it is one of the more expensive form of quality control.

Arguably, quality control should not be based solely on a risk-based selection method as this can create problematic dynamics. For example, in a system where only high-risk providers are audited, providers that receive an audit request may feel that they are being targeted because their work is perceived to be of low quality. This perception can create an incentive to tamper with files or retrospectively alter them in order to manipulate the review process. Such a result would obviously be undesirable as it would detract from the integrity and reliability of the process. Random selection could mitigate this risk. However, while random audits would reduce the risk of file-tampering, they would also reduce efficiency and increase costs because LACs would have to undertake more reviews in order to identify the same number of quality issues.

Accordingly, the third option (a combination of both random and risk-based selection) is likely to be the most appropriate. The LAWA model is a good example of a combined risk-based and random selection approach which encompasses a broad definition of risk (including both financial risk and the risk to clients’ interests). Under a partly risk-based and partly random model of selection, practitioners will not know whether they have been randomly selected or whether they have been identified as high-risk, and so have less incentive to tamper with files. Concomitantly, LACs will also be able to direct limited resources towards the practitioners who pose the greatest risk.

60 Legal Aid Western Australia (n 36) 5.
An integrated high volume/random and risk-based selection model could readily be introduced in Australian LACs using the existing models of financial and performance auditing. Under an integrated system, LACs could continue to undertake relatively high-volume financial auditing on a combined risk-based and random basis. The risk calculation for financial auditing should be based primarily on a consideration of financial risk to LACs. In addition, LACs could peer review a smaller selection of files. The selection criteria for peer review would be based primarily on risk to clients, although some files, including in-house files, should be randomly peer reviewed in order to establish a quality benchmark. Importantly, the system should be fully integrated into a single audit process so that providers do not know whether they are being audited randomly or based on risk, or whether their files will be subject to financial audit or peer review. This system would control the costs and volume of peer review while also ensuring the integrity of the process.

**Selection of files for review**

The number of files selected should be enough to provide a representative sample of the provider’s work, but not so many that the costs of review escalate and only a small number of providers can be reviewed. Determining the files selected for an initial review will usually depend on whether it is an individual lawyer or a firm that is being audited. For example, in New Zealand and Scotland (both jurisdictions in which individual practitioners receive panel accreditation) an initial review covers at least five files per lawyer. Alternatively, in jurisdictions where legal aid work is contracted to firms, an initial review may cover up to 12 files per provider. In Australia, while some LACs can authorise firms to do legal aid work (for example, Queensland’s ‘preferred supplier’ system), other jurisdictions can only authorise individual lawyers. Therefore, the number of files reviewed should vary according to the nature of the provider, in order to balance efficiency with the need for statistically valid review.

The number of files selected for review could also reflect a provider’s risk profile. This protocol is used by LAWA. Under LAWA’s current audit policy, the number of files reviewed reflects both the size of the provider and its risk profile (for example, a large firm or a firm that is considered high risk will be asked to provide more files for review). However, as set out above, it may not be desirable to put firms or practitioners on notice that they are considered high risk, as this creates an incentive to tamper with files.

Initial reviews can be undertaken remotely (meaning that the provider sends the files to the reviewer, rather than the reviewer attending the provider’s office) so as to minimise costs. Reviewers should mark each file according to the established criteria, and then allocate an overall mark to the file (which may or may not be the average of the marks for each criteria). Finally, the reviewer allocates an overall mark to the provider based on all of the files reviewed. Paterson, Moorhead, and Sherr propose that this overall grade should be marked on a 5-point scale in which a mark of 3 indicates competence, equivalent to a practitioner of ordinary skill and ability. A mark of 1 or 2 indicates failure of performance, equivalent to professional negligence.

---

61 New Zealand Ministry of Justice (n 58) 9.
63 Legal Aid Agency (n 46) 6.
65 Legal Aid Western Australia (n 36) 8.
66 Ibid.
67 Sherr, Moorhead, and Paterson (n 43).
68 Paterson and Sherr (n 61) 8.
A mark of 4 or 5 indicates work above minimum competence or of an excellent calibre. Most importantly, the reviewer should provide reasons for the final mark. This is important for two reasons: firstly, so that all firms, even excellent firms, can improve their performance based on the feedback provided; and secondly so that practitioners who receive fail grades have grounds on which to contest the mark if necessary. The Scottish model also suggests that 25% of files marked in the initial review should be double marked. Additionally, under some models, a firm must reimburse the legal aid agency for the costs of the review where the firm fails the initial review.

**Appeals**

An appeal process is essential to ensure balance and uniformity. In the interests of fairness and transparency, providers should have rights of review and reconsideration. This should occur at three stages: firstly, at the stage of a draft report; secondly, at the stage of a final report; and finally, at the stage of applying sanctions.

The audit process in New Zealand requires the auditor to forward a draft report to the provider, and then allows the provider to make comments on the draft. The auditor then reviews the comments prior to writing the final report. Once the final report is published, the provider may be required to formally respond to any issues raised. Through this two-step process, a provider can respond to any issues that result due to miscommunication or other error at an early stage, and avoid having these findings permanently recorded. This provides some measure of procedural fairness and protection for firms' reputations.

In England and Wales, a final finding of ‘incompetence’ can be appealed through the ‘representations’ process. This is appropriate where the issues were not resolved at the draft report stage and result in a fail grade. Under this process, a provider who receives an overall grade below ‘competence’ can make representations as to why they should have received a higher mark. These representations are then considered by the initial reviewer and either a senior reviewer or an additional ordinary reviewer. The initial mark may be confirmed or revised, or a new review may be ordered. Where the reviewers do not agree, the disagreement will normally be resolved in the provider’s favour. A second review will be scheduled immediately (in the case of providers who receive the lowest possible mark), or after six months (for providers who fall just below the ordinary standard of competence).

Victorian Legal Aid also provides firms with rights of reconsideration and review with respect to certain sanctions. This additional appeal mechanism promotes fairness by ensuring that the response to the review is proportional to any negative finding.

By combining all these models, providers would have three important rights: the right to comment on the draft report; the right to appeal a finding of incompetence through ‘representations’; and the right to seek review of certain sanctions. These rights promote fairness and transparency and ensure that providers are not unfairly sanctioned. This in turn will enhance the perceived legitimacy of the process.

---

69 Ibid 6.
70 Legal Aid Agency (n 46) 31 [6.38].
72 Legal Aid Agency (n 46) 29.
73 Ibid 30.
74 Ibid.
75 Victorian Legal Aid, *Section 29A Panels Conditions: Quality Audit Terms and Conditions (Schedule 3)* <https://www.legalaid.vic.gov.au/information-for-lawyers/practitioner-panels/panels-conditions> note that not all sanctions can be appealed – Schedule 6 of the Panels Conditions contains a full list of sanctions that can be appealed.
Improving the Quality of Legal Services

Just as providers are expected to improve the quality of their services over time, peer reviewers should also aim to improve the quality, accuracy, and consistency of their reviews over time. Under the Scottish model, this is achieved through debrief and feedback sessions in which reviewers can discuss variations in results and the reasons they might have occurred. Paterson and Sherr observed that, under this model, the percentage deviation from the average declined over time, indicating more consistent marking practices. A similar model of continuous review and improvement is already used in various forms in some Australian jurisdictions. This system should be adopted as part of all quality control processes, so that the profession can have confidence in the integrity and consistency of the peer review system.

By implementing a comprehensive system of quality control, LACs should be able to raise the overall quality of services and ensure that legal aid clients are not disadvantaged by their lack of means. The results of peer review processes should be used to remove underperforming practitioners from legal aid panels and direct more matters to practitioners who have a record of providing high quality services. Under the current system, LACs struggle to remove underperforming practitioners and reward high quality work for a number of reasons.

Removal of underperforming practitioners

Law Societies govern the admission and ongoing eligibility of legal practitioners. However, the standard of malpractice required for the revocation of a practising certificate is generally high, and LACs may want to remove practitioners from panels for lesser transgressions which nevertheless endanger the LAC’s financial security or the wellbeing of clients.

In the absence of a peer review system, there are few reliable, evidence-based methods of removing panel practitioners for low-quality work. In general, it is easy for practitioners to be appointed to panels, but it is difficult for LACs to remove them. This is partly because Law Societies have advocated heavily for all legal practitioners to be allowed to perform legal aid work, regardless of their ability.

A high volume, random system of financial and performance audits can facilitate the removal of underperforming lawyers notwithstanding that these types of audits generally only seek to satisfy a list of procedural criteria. However, most providers who fail a routine audit will do so on procedural grounds such as non-compliance with an audit request, non-compliance with billing procedures, or failure to maintain the file to an appropriate standard. Failure of a routine audit on the basis of low quality work is a rarity.

Aside from routine audits, LACs can gather data on quality through complaints from judges, practitioners, or clients. However, judges and other practitioners will usually be reluctant to formally record a complaint against another lawyer, so these comments tend to be unhelpful in initiating a formal process of removal. Client complaints are rare and often rely on limited and subjective evidence. A decision to remove a practitioner based on a complaint is therefore more likely to be appealed, and the appeal more likely to succeed, than a decision based on a comprehensive, objective peer review of a practitioner’s files.

---

76 Legal Aid Western Australia (n 36) 12.
77 Ibid 13.
78 QUAL-AID Report (n 40) 41.
As has been argued above, the clearest way of remedying the limitations of high volume, random auditing is to implement a system of peer review. This would strengthen the current system by providing better quality evidence to justify removal of underperforming practitioners.

**Selective distribution of work to high quality lawyers**

Secondly, many LACs are limited in their ability to selectively distribute work to high quality lawyers. In general, Law Societies take the view that all practitioners should have the right to perform legal aid work, with no more stringent quality controls than those that apply generally. As a result of this view, some LACs even have provisions in their Legal Aid Acts which provide that work should be distributed ‘equitably’ amongst all panel practitioners.79 This creates issues where LACs are aware that certain practitioners provide lower quality services, but are nevertheless obliged to distribute work to these practitioners.

Moreover, these provisions are inconsistent with the principles of public sector accountability and the government’s rights as a purchaser of legal services. In addition, the idea that all practitioners should be allowed to undertake legal aid work fails to take into account the vulnerability of legal aid clients and the fact that they may require a higher standard of care than other clients.

In this situation, evidence gathered from peer review, in conjunction with changes to legislation and policy, could be used to provide more work to high quality lawyers who will provide greater value to the government and to clients. Once a peer review system is established it could also be used as a screening tool to restrict entry onto panels.

**Supplementary review methods**

One potential limitation of peer review is that reviewers rely on clients to self-identify as having special needs such as disability or mental health issues. However, there is evidence to suggest that rates of self-identification for these conditions are very low.80 A lack of reliable information on client needs could limit the effectiveness of peer review in terms of evaluating the quality of client care.

One solution for this issue may be to supplement peer review with client surveys, in order to gather first-hand data on how effectively legal aid lawyers communicate with vulnerable clients. While clients cannot be expected to provide feedback on the quality of legal work itself, they can provide important feedback on the way in which the lawyer interacted with them and was responsive to their needs.

In analysing the results of client surveys, LACs should bear in mind that survey results can be distorted by low rates of client uptake and clients’ dissatisfaction with the results of their case. Reliability can be increased by using client surveys as one of a range of quality control methods.

**Efficiency and cost control**

One of the major challenges for Australian LACs will be the cost associated with peer reviewing large panels of practitioners. Historically, most legal aid panels were

---

79 Legal Aid Act 1977 (ACT) s 31B (3).
established in consultation with Law Societies, who advocated for inclusive, not exclusive models. Therefore, low thresholds for panel accreditation were set and panels quickly became very large and difficult to monitor. In implementing a system of peer review, LACs will have to develop solutions to control the costs associated with auditing so many practitioners. One important measures to lower the costs of review would be to alter the makeup of panels to include firms.

Placing firms on panels could decrease costs and increase efficiency and quality. Costs would decrease because there would be fewer providers on the panel and therefore a smaller number of entities to be audited. Efficiency would be increased because some responsibility for quality assurance would be devolved to firm managers, who would have to ensure that all their solicitors are competent, at the risk of losing the firm’s accreditation. Overall quality could potentially be improved because firms on average have fewer quality issues than sole practitioners, due to increased support and oversight. In light of these benefits, some LACs, including Queensland, Victoria, and Western Australia have already altered their procedures to place firms on panels. Other jurisdictions may wish to consider this measure in the interests of developing an efficient system for quality control.

Conclusion

The Australian mixed model of legal aid service delivery presents particular challenges for quality control: large panels of lawyers, high volumes of work, and complex relationships with Law Societies around the administration of professional standards. Against this background the article has argued for the implementation of a risk-based process of auditing and peer review of all legal aid work. A targeted, transparent and comprehensive national approach to auditing is supported by research and experience in a range of jurisdictions. The growing evidence-base from within Australia and overseas suggests that a legal aid system will provide better outcomes for clients, whether delivered by in-house lawyers or private legal practitioners, by utilising comprehensive auditing processes that drill down on quality issues. In this context, the LAC legal practices have an opportunity to provide the benchmark standard for service delivery, given the controls available to an in-house practice and the depth of experience in auditing.

Importantly, in concluding that an integrated auditing system would be best practice, it is recognised that the assessment of quality assurance in legal aid services requires a risk management process encompassing both work performance and financial accountability. This re-modelled approach could build on the strengths of Australia’s existing audit processes. In terms of the accountabilities necessary for real quality control this article has demonstrated that a range of strategies utilising risk assessment are proven to identify and target underperformance: peer review by experienced legal and financial practitioners must be moved into the centre of risk assessment. Random high volume auditing should occur alongside risk-targeted peer reviews by experience legal and financial practitioners.

Furthermore, the longstanding complementary methods of quality control - client survey/complaints and supervision/mentoring - should remain part of an integrated system of auditing. Importantly, this article also acknowledges that in order to reduce the costs of quality control high volume random auditing by paralegal staff and stage of matter payment should continue; the movement of placing firms rather than individual lawyers on panels should also be encouraged.

Quality assurance will be promoted through transparency and accountability. There are strong professional and financial imperatives for re-modelling current auditing processes with more comprehensive quality control measures. LACs must not be deterred by the inevitable high costs of peer review – instead, they seek to create
efficiency within a system of peer review. A comprehensive approach should pay dividends in reducing the economic and social costs of inefficient and low quality legal aid work. Indeed, the implementation of risk-targeted peer review will necessarily also have implications for the functioning of the wider legal aid system in Australia. Overall, higher quality services provide value for money to the government as the major investor in legal aid, as well as improving access to justice and ‘equality of arms’ for legal aid clients.

***
The Legality of Denial of Service to Same-Sex Partners and Organisations: Developments in the United Kingdom, United States and Australia

Anthony Gray*

In recent decisions, the highest courts of the United Kingdom and the United States have considered refusals of service in the context of same-sex marriage. In the former case, this was a refusal to bake a cake containing a support same-sex marriage message. In the latter, it was a refusal to bake a cake for a same-sex wedding. This article explains these decisions, as well as an Australian Court of Appeal decision which considered similar, though not identical issues. After outlining existing anti-discrimination and free speech protection in Australia, the article considers how such conflicts would likely be resolved according to Australian law. In so doing, it includes some general reflections on the recent decisions, in the context of larger trends in how the law views homosexuality, as well as the relationship between law and religion.

Introduction

In recent years, the debate over the rights of homosexual individuals has shifted. Past laws criminalising homosexual activity are long gone.1 Laws providing for equal access to superannuation and in succession legislation are well established.2 Anti-discrimination legislation generally forbids discrimination on the basis of sexual orientation in the workplace, in relation to accommodation, and the provision of goods and services. A plebiscite in 2017 heralded the acceptance by a majority of Australians of the concept of same-sex marriage, leading to amendment of the Marriage Act 1961 (Cth).3 Many of these reforms have been mirrored around the world, particularly in Western nations.4

A new frontier of disagreement has, however, become apparent. This frontier involves the refusal of some business owners to provide services to same-sex couples or organisations representing or supporting same-sex individuals. Often, these refusals are based on genuinely and strongly held religious objections. These disputes have recently attracted the attention of the highest courts in the United Kingdom and the United States. This article will explain the recent decisions in those jurisdictions, summarise a somewhat equivalent precedent in Australia, and then consider the likely legal outcome if a business owner were today to refuse to provide a service to a same-sex couple. Given that the two overseas decisions involved a refusal to provide a service to a same-sex wedding, I will use that factual scenario for discussion purposes, to see how Australian law would likely resolve that conflict. This will involve consideration of anti-discrimination legislation, including exemptions involving religious freedoms, as well as constitutional arguments about freedom of speech. It will be borne in mind in this discussion that, although international legal comparative analysis is interesting and may be useful, appropriate differences in the legal framework in which these decisions are made overseas must always be borne in mind.

---

* Professor Anthony Gray is Associate Head (Research) at the USQ School of Law and Justice
1 Human Rights (Sexual Conduct) Act 1994 (Cth).
2 Same Sex Relationships (Equal Treatment in Commonwealth Laws) Act 2008 (Cth); Family Law Amendment (Defacto Financial Matters and Other Measures Act 2008 (Cth);
3 Section 5 definition of marriage no longer contains reference to gender.
4 On the legalisation of same-sex marriage, see Marriage (Same Sex Couples) Act 2013 (UK) s1; Civil Marriage Act 2005 (Canada). In the United States, this occurred through the decision of the Supreme Court in Obergefell v Hodges 576 US 644 (2015), by virtue of the Fourteenth Amendment to the United States Constitution.
United Kingdom Decision in *Lee v Ashers Baking Co Ltd*

Gareth Lee was an existing customer of a bakery owned by the respondent. He is homosexual. During a time when there was intense community debate about whether or not same-sex marriage should be legalised, he approached the bakery. He was aware that they offered a bespoke cake service, where customers could ask for a particular cake design. He asked them to make a cake with the words ‘Support Gay Marriage’. He intended to take the cake to a community event. Mr Lee was not aware that the bakery’s owners had strong religious views, and objected to gay marriage on religious grounds. They declined to make the cake ordered by Mr Lee. Mr Lee brought legal action, arguing that he had been discriminated against on the basis of sexual orientation and because of his political beliefs. All members of the United Kingdom Supreme Court rejected his argument.

The judgment of most interest here was that of Baroness Hale, with whom Lord Kerr, Lord Hodge, Lady Black and Lord Mance agreed. Baroness Hale rejected an argument that Mr Lee had been discriminated against on the basis of his sexuality. The evidence was that the bakery would have refused to make the cake with the requested message, regardless of the sexual orientation of the person who requested it. This meant that they had not discriminated on the basis of sexual orientation. The court made the point that the reason for the refusal, the message, was not a proxy for sexual orientation since, as the result of various referenda and plebiscites had made clear, many heterosexual people were also in favour of same sex marriage.

The Court stated that the argument that Mr Lee had been discriminated against because of his political opinion was stronger. Support for gay marriage was clearly a political opinion. However, the Court determined that Mr Lee could not legally compel the bakery’s owners to express a message with which they disagreed. This would amount to compelled speech. Baroness Hale stated that the anti-discrimination law

> Should not be read or given effect to in such a way as to compel providers of goods, facilities and services to express a message with which they disagree, unless justification is shown for doing so.

This notion of ‘compelled speech’ was relatively new to the law of the United Kingdom. The court referred to the recent decision of the United States Supreme Court in *Masterpiece Cakeshop v Colorado Civil Rights Commission* in adopting the notion of ‘compelled speech’. That doctrine is well established in the American *First Amendment* law. It is now appropriate to discuss the decision in *Masterpiece Cakeshop*, upon which the United Kingdom Supreme Court relied in rendering its decision in *Ashers Baking*, and explore in some more depth the concept of ‘compelled speech’, and whether in fact it was implicated in the factual scenarios involved in *Ashers Baking* and *Masterpiece Cakeshop*.

**United States Supreme Court Decision in *Masterpiece Cakeshop***

A same-sex couple approached the owner of a bakery, Mr Phillips, and asked him to make a cake for their upcoming wedding. Mr Phillips refused to make the cake, stating that his religious views precluded him from providing a service to a gay wedding. He indicated he would make another type of cake for the couple, but not a wedding cake. His religious views also influenced other choices he made in his business, refusing to make cakes containing alcohol, or in relation to Halloween, for example. The same sex couple brought the situation to the attention of the Colorado Civil Rights Commission.

---

5 [2020] AC 413.
6 The other judgment was based on technical grounds of no current relevance.
7 439.
During public hearings of the complaint, two commissioners expressed views that might be taken to be hostile towards religion, stating that the owner of a business could not expect to bring their religious views into the commercial sphere, that religion should not be used to hurt others, and that religion had been used in the past to justify atrocities such as the Holocaust and slavery. The Commission upheld the couple’s complaint. Mr Phillips appealed the Commission’s decision on the basis of two aspects of the *First Amendment*, arguing that the state anti-discrimination statute infringed his freedom of religion and freedom of speech.

One barrier to the freedom of religion claim was that the United States Supreme Court had in an earlier decision determined that laws of general application that incidentally impacted religious freedoms and did not specifically target them were valid.9 Mr Phillips sought to attack this existing precedent, but a majority of the Supreme Court upheld it.10 This meant that Mr Phillips’ argument that the state anti-discrimination law unconstitutionally interfered with the free exercise of his religion was unsuccessful – the anti-discrimination law was clearly of general application, it (arguably) incidentally impacted religious freedom, but did not specifically target it. Thus, the freedom of religion argument on that basis did not succeed. However, a majority of the Court also accepted that the state needed to be neutral towards religion. The statements made by the Commissioners during the public hearing indicated animus and hostility towards religion.11 This was inconsistent with the *First Amendment* and the requirement for neutrality. That finding is not of particular importance to current discussion.

Of more interest was the Court’s consideration of the freedom of speech argument, including Mr Phillips’ claim that the application of the anti-discrimination law here meant that he was being compelled to articulate a message with which he disagreed, which was contrary to his *First Amendment* freedoms.

A majority of the Court did not accept this argument. The main reasons were delivered by Kennedy J, a judgment in which Roberts CJ, Breyer, Alito, Kagan and Gorsuch JJ joined. Kennedy J stated:

> The free speech aspect of this case is difficult, for few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech.12

Thus, the majority did not think that freedom of speech was implicated on the facts, because it found that the making of a cake was not expressive activity. Admittedly, there are differences between the factual scenario in *Masterpiece Cakeshop*, where the customers requested no specific message on the cake, and *Ashers Baking*, where the customer did. However, Mr Phillips had argued in *Masterpiece Cakeshop* that by the very fact of making the cake, he was being asked to communicate support for a same-sex wedding and/or a message that such unions should be supported. The majority did not agree.

On the other hand, Thomas J (with whom Gorsuch J agreed) found in favour of Mr Phillips on the free speech argument:

---


11 1731.

12 1723.
Forcing Phillips to make custom wedding cakes for same-sex marriages requires him to, at the very least, acknowledge that same-sex weddings are ‘weddings’ and suggest that they should be celebrated, the precise message he believes his faith forbids.¹³

First Amendment jurisprudence requires that, in cases of compelled speech, the government must demonstrate a compelling justification for its regulation. Thomas J found that there was no compelling justification for the Colorado law. As a result, he found for Mr Phillips on First Amendment free speech grounds.

Thus, although the United Kingdom Supreme Court in Ashers Bakery relied on the judgment of the United States Supreme Court in Masterpiece Cakeshop for its decision that ‘compelled speech’ was involved, in fact this was only the position of two of the justices in Masterpiece. The majority denied that the cake in Masterpiece involved expressive conduct, and actually decided on grounds that have no relevance to the situation in Ashers Bakery. That this is the position is borne out by the fact that subsequent case law has split as to whether the provision of a service to a wedding involves compelled speech of a kind that implicates the First Amendment.¹⁴

Australia: Christian Youth Camps Ltd v Cobaw Community Health Services Ltd

The closest equivalent Australian decision involved not cakes but camping grounds. In Christian Youth Camps,¹⁵ the relevant grounds were owned and operated by the appellants, established by the Christian Brethren Trust, and connected with the Christian Brethren Church. The respondents were a support group for same-sex attracted youth. The website of the appellant advertised to the public that it was available for hire to a broad range of groups, including those with a connection to religion, and those with no connection to religion.

A representative of the respondent contacted the appellants, seeking to book one of their resorts for a weekend. A representative of the appellant asked about the nature of the respondent, and what type of activities it proposed to conduct on-site. After the respondent told the appellant about its nature, and of its view that same-sex attraction was within the natural range of human sexualities, the appellant indicated that they did not know what the Board’s response would be to the request. Later, he indicated the Board would have difficulties renting the premises to the respondents, and they should look for alternative accommodation, because the appellants were a ‘Christian organisation that supports young people’.

The relevant legislation, the Equal Opportunity Act 2010 (Vic) generally prohibited discrimination in the provision of goods, services and accommodation in relation to protected ‘attributes’. These attributes include sexual orientation and lawful sexual activity. Religious freedoms were partly accommodated in the exemptions in the legislation. At the relevant time, s75 applied to ‘religious bodies’. It exempted things done by a religious body that (a) conformed with the doctrines of the religion, or (b) was ‘necessary to avoid injury to the religious sensitivities of adherents (to) the religion. Section 77 contained an exemption where the discrimination was ‘necessary for the (person discriminating) to comply with the person’s genuine religious beliefs or

---

¹³ 1744.
¹⁴ So, for example, in Telescope Media Group v Lucero 936 F. 3d 740 (Eighth Circuit, 2019) the Court found that a photographer could not be forced to provide service to a gay wedding, on the basis of free speech. In First Amendment. A similar result occurred in Brush and Nib Studios v City of Phoenix 448 P. 3d 890 (2019). On the other hand, other cases have found that a denial of service in such circumstances is not defensible on First Amendment grounds: State v Arlene’s Flowers 389 P. 3d 543 (Washington, 2017), 441 P. 3d 1203 (Washington, 2019); Elane Photography v Willock 309 P. 3d 53 (New Mexico, 2013).
principles. Cobaw argued that the appellants had breached the *Equal Opportunity Act 2010* (Vic). The appellants denied that it was engaged in unlawful discrimination, and sought to rely on the religious exemptions. Thus, an important difference between this case, on the one hand, and *Ashers Bakery* and *Masterpiece Cakeshop*, on the other, is that the Victorian case was determined purely on religious freedom grounds, while the others were determined in accordance with freedom of speech principles.

It should be borne in mind in this context that Victoria does not have a constitutionally enshrined religious freedom, in a way equivalent to the *First Amendment* of the *United States Constitution*. Article 9 of the European Convention on Human Rights protects freedom of religion to some extent.\(^\text{16}\)

The Victorian Court of Appeal found against the appellant on both counts. The appellants argued they did not unlawfully discriminate on the basis of sexual orientation. They claimed their position was based on opposition to pre-marital sex, and to the message that it understood the proposed workshop would convey – that homosexuality was part of the natural range of human activity. They denied their position was based on discrimination against sexual orientation per se. However, the Court of Appeal found it was artificial to separate sexual orientation and sexual attraction; one was inextricably bound with the other. In effect, Cobaw was discriminated against on the basis of the sexual orientation of its members. Thus, a prima facie breach of the *Equal Opportunity Act 2010* (Vic) had occurred.

Further, the Court found that neither of the exemptions applied. The section 75 defence was not applicable, because Christian Youth Camps was not a ‘body established for religious purposes. Its activities were broad, some involving outdoor type activities and others with religious connections. Its websites did not prominently indicate that it was a religious body, and there was no suggestion its facilities were reserved for religious-based events.

Even if Christian Youth Camps were a religious body, a majority of the court found that the organisation’s refusal to provide the service did not conform with the doctrines of the relevant religion. Nothing in the religious texts required refusal to provide accommodation to a same-sex support group, or same-sex individuals. The court disagreed that same-sex sexual activity was against God’s will, indicating many Biblical passages (such as those in Leviticus) ought not to be read literally.\(^\text{17}\) It was necessary that the particular activity under consideration have ‘an intrinsically religious character’. Refusing accommodation to a gay youth support group did not meet this standard. This was interpreted narrowly to mean that the adherent had ‘no alternative’ other than to comply with it. There was no evidence that religious adherence required preventing others from expressing their sexuality.\(^\text{18}\)

Nor did the court believe that the discrimination here was *necessary* to avoid the religious sensitivities of adherents to that faith, in terms of the alternative limb of s75. There was no evidence the CYC had previously only rented its premises to married couples, or ever asked any previous renter whether any of the group seeking accommodation was homosexual. A majority of the Court found that the requirement of necessity should be applied objectively, not subjectively.\(^\text{19}\) It was not sufficient that a particular adherent believed that she or he was required to act as they did due to their religious faith; it would be necessary for the defence to apply that the belief have an objective basis. It would need to be shown that, in order to comply with the relevant anti-discrimination law, the subject of the complaint would be required to act in a

---

16 The *Charter of Rights and Responsibilities 2006* (Vic) was not in operation at the time of the factual scenario considered in *Christian Youth Camps Ltd*.  
17 672-673 (Maxwell P).  
18 674 (Maxwell P).  
19 Maxwell P (676); Neave JA (709); contra Redlich JA (733).
manner amounting to an affront to the reasonable expectations of adherents of that faith.\textsuperscript{20}

Neave JA, in the majority, concluded that where religious freedom was sought to be exercised in the commercial realm, less protection would typically be accorded to it.\textsuperscript{21} It would be more difficult in such a context for the adherent to demonstrate that discrimination in that context was necessary in order to comply with the person’s genuine religious beliefs. They would be free to maintain that belief, or practice it in their own life, by living in accordance with it. Neave JA noted this distinction was similar to that pertaining in European law, where Article 9 of the European Convention protected religious belief absolutely, as well as strongly protected acts closely connected with (or, in other words, ‘at the core of’) religion such as worship and prayer. However, the Court had permitted more extensive interference with manifestation of religious belief that was less closely connected with religious observance.\textsuperscript{22} She concluded it was not ‘necessary’ for the Christian Youth Camp to refuse to provide the accommodation to the complainant in order to comply with genuine religious beliefs. For example, the Court did not interpret Article 9 so as to permit the owners of a pharmacy to refuse to supply birth control pills to a customer due to their religious views.\textsuperscript{23} Similarly, the United Kingdom Supreme Court had found unlawful direct discrimination where the owners of a hotel refused to provide a double bedded room to a homosexual couple.\textsuperscript{24}

That having been acknowledged, it is worthwhile to note the dissenting views of Redlich JA, particularly regarding the manifestation of religious belief in a commercial environment. He said nothing in the legislation indicated that it was intended that manifestation of religious belief be confined narrowly to worship. It could to some extent be applied in the commercial sphere. He said it was an insufficient answer to someone’s claim to manifest religious belief in a commercial environment to say that they could manifest that belief in other ways.\textsuperscript{25} He said it was artificial and unrealistic to draw a clear distinction between a person’s religious belief and the manifestation of that belief, as the majority had done. He indicated that, for persons of faith, their religious identity was often intrinsic. Practically, they could not separate their beliefs from their actions, as the majority suggested. Redlich JA believed \textit{Christian Youth Camps Ltd} was entitled to rely on the religious exemption:

> What enlivened the applicants’ obligation to refuse Cobaw the use of the facility was the disclosure of a particular proposed use of the facility for the purpose of discussing and encouraging views repugnant to the religious beliefs of the Christian Brethren. The purpose included raising community awareness as to those views. It was the facilitation of purposes antithetical to their beliefs which compelled them to refuse the facility for that purpose. To the applicants, acceptance of the booking would have made them morally complicit in the message that was to be conveyed at the forum and within the community … to knowingly provide a forum for the purpose of discussing, developing and disseminating a particular message can be seen as condoning, if not encouraging, that message.\textsuperscript{26}

\textsuperscript{20} 678-679 (Maxwell P).
\textsuperscript{21} ‘Where the act claimed to be discriminatory arises out of a commercial activity, it is less likely to be regarded as an interference with the right to hold or manifest a religious belief than where the act prevents a person from manifesting their beliefs in the context of worship or other religious ceremony. This is because a person engaged in commercial activities can continue to manifest their beliefs in the religious sphere’: [430](Neave JA).
\textsuperscript{22} 710-711.
\textsuperscript{23} \textit{Pichon and Sajous v France} [2001] ECHR 898.
\textsuperscript{24} \textit{[2013]} UKSC 73.
\textsuperscript{25} 741.
\textsuperscript{26} 745.
Redlich JA concluded it was in fact ‘necessary’ to conform with their views that the Christian Youth Camps refused the request.\(^{27}\)

The High Court of Australia refused leave to appeal against this decision.\(^{28}\)

The article will now turn to consider how Australian anti-discrimination legislation might apply to the factual scenarios in Ashers Baking and Masterpiece Cakeshop. It is appropriate to consider them separately, because to some extent they raise separate issues. It will then consider possible freedom of speech arguments.

Outline of Relevant Provisions of Anti-Discrimination Legislation

There is a high degree of overlap in the relevant aspects of the nine relevant pieces of discrimination legislation in Australia, and some difference. Specifically, all of them prohibit, as a general rule, discrimination on the basis of sexuality or sexual orientation.\(^{29}\) Some of them also prohibit discrimination on the basis of political belief or activity.\(^{30}\) This general prohibition on discrimination applies in the area of goods and services, and includes refusing to provide a service to a person for the prohibited reason, or where the prohibited reason is a substantial part of the reason.\(^{31}\) There is some variety in how religious exemptions from the general provisions of the legislation are framed. The position in seven of the jurisdictions is that the religious exemption only applies to bodies established for religious purposes.\(^{32}\) Thus, the exemption would clearly not apply in the commercial environment of a bakery. The position in the other two jurisdictions, Victoria and Tasmania, differs.

As the Christian Youth Camps case made clear, in respect of Victoria, and in respect of Tasmania as well, an individual can claim a religious exemption. This applies, in the case of Victoria, where the discrimination is ‘reasonably necessary for the ... person to comply with the doctrines, beliefs or principles of their religion’.\(^{33}\) In the case of Tasmania, the provision states it is lawful to discriminate on the ground of religious belief or activity in relation to acts (a) carried out in accordance with the doctrine of a particular religion; and (b) are necessary to avoid offending the religious sensitivities of any person of that religion.\(^{34}\)

\(^{27}\) Transcript of Proceedings, Christian Youth Camps Ltd v Cobaw Community Health Services Ltd [2014] HCA Trans 289 (Crennan, Kiefel and Bell JJ).

\(^{28}\) Transcript of Proceedings, Christian Youth Camps Ltd v Cobaw Community Health Services Ltd [2014] HCA Trans 289 (Crennan, Kiefel and Bell JJ).

\(^{29}\) Sex Discrimination Act 1984 (Cth) s 5A; Anti-Discrimination Act 1977 (NSW) s49ZG; Equal Opportunity Act 2010 (Vic) s 6(g); Anti-Discrimination Act 1991 (Qld) s 7(n); Equal Opportunity Act 1984 (SA) s 29; Equal Opportunity Act 1984 (WA) s 35O; Anti-Discrimination Act 1998 (Tas) s 16(c); Discrimination Act 1991 (ACT) s 7(w); Anti-Discrimination Act 1992 (NT) s 19(c). This is replicated in those jurisdictions with specific human rights legislation: Human Rights Act 2004 (ACT) s 8; Charter of Human Rights and Responsibilities Act 2006 (Vic) s 8; Human Rights Act 2019 (Qld) s 15.

\(^{30}\) Equal Opportunity Act 2010 (Vic) s6(k); Anti-Discrimination Act 1991 (Qld) s 7(j); Equal Opportunity Act 1984 (WA) s 53; Anti-Discrimination Act 1998 (Tas) s 16(m) and (n); Discrimination Act 1991 (ACT) s 7(j); Anti-Discrimination Act 1991 (NT) s 19(n). See also Human Rights Act 2004 (ACT) s 8; Charter of Human Rights and Responsibilities Act 2006 (Vic) s 8; Human Rights Act 2019 (Qld) s 15.


\(^{33}\) Equal Opportunity Act 2010 (Vic) s 84.

\(^{34}\) Discrimination Act 1998 (Tas) s 52.
Application of the Law to Factual Scenarios in Ashers and Masterpiece

I will now consider application of these principles to the factual scenarios in Ashers and Masterpiece, involving refusal to provide a cake with a ‘support gay marriage’ message on it, and a general refusal to provide a service to a gay wedding on religious grounds.

(a) Discrimination on the Basis of Sexuality or Sexual Orientation

In relation to refusing to supply a cake with the relevant message, as discussed above, the United Kingdom Supreme Court found that the customer had not been discriminated against on the basis of his sexuality. The bakery would also have refused to provide the cake to a heterosexual person who requested a similar cake. This is similar to the comparator used in Australian discrimination law, comparing how the provider treats a person with the protected attribute, as opposed to a person without the protected attribute. The baker could argue that, regardless of the sexuality of the customer, the bakery would refuse to supply such a cake. In other words, that the customer was not being discriminated against because of his sexuality.

The United Kingdom Supreme Court also considered whether indirect discrimination was occurring. It considered whether support for same-sex marriage was a kind of proxy for homosexuality. However, given that a large number of heterosexual people clearly support same-sex marriage, it found it could not be so considered. This finding would also make it difficult for the customer to argue that the refusal to supply the cake with a message was indirect discrimination, because it impacted more significantly on a same-sex individual than someone not of that sexuality. It is possible to argue that it was more likely that a same-sex person would request a cake with such a message than would a heterosexual person, thus there is indirect discrimination in the refusal to provide anyone with such a cake. However, that argument was not successful in Ashers.

The discrimination seems more apparent in the refusal to supply a service to a gay wedding, as was the position in Masterpiece Cakeshop. Clearly, the baker would provide a wedding cake to a heterosexual couple, but not a homosexual couple. This is direct discrimination on the basis of a prohibited attribute, and would not be permitted. In this way, the case would be more similar to the factual scenario considered by the United Kingdom Supreme Court in Preddy v Hall; Hall v Same.35 There the court considered hotel owners who refused to provide a double-bed room to a same-sex couple. All members of the Supreme Court found that the hotel owners were guilty of unlawful discrimination against the couple. They had used a person’s sexuality as the criterion for determining whether or not services would be provided, and this was unlawful.36 Similarly here, a baker who refuses to provide a cake for same-sex wedding, in circumstances where they would agree to provide a cake for a heterosexual wedding, is clearly applying a criterion of sexuality in determining whether or not services are provided. This is unlawful.

(b) Discrimination on the Basis of Political Belief

This would be most applicable to the situation in Ashers, where a person is asked to make a cake with a particular message. An expression of support for same-sex marriage is clearly the expression of a political belief. The United Kingdom Supreme Court accepted for the purposes of argument that there may have been discrimination on the basis of political belief when Ashers refused to provide the cake with the requested message. Thus, at least if the refusal occurred in Victoria, Queensland, Western Australia, Tasmania, Australian Capital Territory or the Northern Territory, it seems that the refused customer would be able to demonstrate they had been discriminated

35 [2013] 1 WLR 3741.
36 3750 (Baroness Hale).
against on the basis of their political beliefs. This is not a ground of prohibited discrimination in the New South Wales legislation, or federally.

It is more difficult to make this argument in relation to refusal to supply a service for a gay wedding, unless it can be argued that the marriage itself amounts to reflection of a political belief, such that it can be said that a refusal to supply to it in effect amounts to discrimination on the basis of political belief. In relation to such a scenario, it would be simpler to argue discrimination on the basis of sexual orientation, since it is only same-sex individuals who are refused the service.

(c) Specific Religious Exemptions

We must deal with the two jurisdictions in which specific religious exemptions could potentially apply to a refusal by a commercial service provider to provide a service for a same-sex wedding, Victoria and Tasmania.

In Victoria, this occurs where it is reasonably necessary to comply with the doctrines, beliefs or principles of their religion. As framed today, the section clearly imposes an objective test. It is not sufficient that the person believes it is necessary to act as they did in order to comply with their religion; the section includes an objective component with the use of the word ‘reasonably’.

The reasoning employed by the majority of the Victorian Court of Appeal in *Christian Youth Camps* is persuasive here. The Court found that nothing in the Christian Brethren’s beliefs required them to enforce norms of behaviour on others. The beliefs reflected how an individual adherent should act, not how they should get others to act. Similarly, though some faiths may believe that gay marriage is contrary to the word of God, the argument might be this belief would preclude the adherent from being party to such a marriage. However, it would not (should not) preclude them from providing a service to such a marriage. There was nothing in religious texts that said that adherents should not provide accommodation to groups that might believe things that were anathema to the religion, according to the court in *Christian Youth Camps*. Similarly, there is nothing in religious texts to the effect that a commercial enterprise owned by someone of faith should not provide a service to an occasion of which the adherent does not personally approve. If it was not necessary to refuse to provide accommodation for same-sex attracted youth and their support group, it is hard to see how refusal to provide a cake to a gay wedding, or to make a cake with a pro-same-sex wedding message, would be necessary. On the test given in *Christian Youth Camps*, that it would have to be an ‘affront’ to religious adherents to comply with the anti-discrimination requirement, making a cake, with or without message, does not qualify.

As discussed above, Redlich JA, dissenting in *Christian Youth Camps*, held that this defence was applicable to the facts in the case. He determined that by forcing the organisation to provide a service to a group whose mission and values were not approved by the organisation, the organisation was in effect being made complicit in the message of the organisation. For this reason, Redlich JA determined that it was necessary to comply with their religious beliefs that the organisation through its officers refused the request. As noted above, the High Court refused leave to appeal this decision. I will consider the question of whether the forced provision of a service makes the provider ‘complicit’ in a message being provided, or to be provided, by the requester, in the following section. For current purposes, it can be said that there is no specific provision in the anti-discrimination provisions making it generally unlawful to refuse to provide a service because the requester has one of the protected attributes that provides an exemption in cases where the provider believes that to comply with the request would make them ‘complicit’ in the activities of the requester.
The Tasmanian exemption is more difficult to fit within, requiring that the person wishing to rely on it demonstrate that their actions were carried out in accordance with religious doctrine and were necessary to avoid offending the religious sensitivities of adherents to that religion. This phrasing, which appeared in a previous iteration of the Victorian provision, was considered in Christian Youth Camps, and applied narrowly. The court found that the relevant matter have an intrinsically religious character, in order to be seen as ‘necessary’. It is hard to think of a wedding cake in these terms. At its very highest, the service itself might have an intrinsically religious character, at least to adherents. However, even then, one would have to acknowledging that many (perhaps most) weddings are civilian and secular, rather than religious, in character. The wedding cake, typically unveiled at a reception where the formalities of the wedding are over, surely has no ‘intrinsically religious character’.

In relation to those jurisdictions with a human rights charter, specific protection for religious freedom is also narrowly constructed, applicable to freedom of thought, the right to adopt a religion, and to demonstrate it through worship, observance, practice and teaching. Clearly, this would not extend to refusing someone a service in a commercial context.

In summary, none of the religious exemptions in any of the anti-discrimination would apply to the refusal to make a cake for a same-sex wedding, or refusal to provide a cake with an expression of support for same-sex marriage. In the case of seven of the nine jurisdictions in Australia, the religious exemption does not apply in the commercial sphere at all. In the case of the other two, the exemption is cast and has been interpreted narrowly, to apply to activities with high religious significance and within the core values and beliefs of particular adherents of faith. Making a wedding cake hardly qualifies. In so concluding, I mean no disrespect to those who continue to disagree with the concept of same-sex marriage. Although same sex marriage was legalised in Australia in 2017 following a strong public vote in favour of it, there remains a significant number of Australians who disagree with same-sex marriage. They are entitled to their views, and they should be respected.

**(d) Freedom of Speech**

There is one remaining argument that the commercial premises might make. This is the argument that was successful for the Ashers Baking Co, and which attracted the support of two justices in Masterpiece Cakeshop. This argument is that, by requiring a baker to bake a cake for a same-sex wedding, or requiring them to add the phrase ‘support gay marriage’ to a cake, that the anti-discrimination laws are in effect compelling the baker to speak. The argument is that this is contrary to their freedom of speech. Freedom of speech is enshrined and protected in Article 10 of the European Convention on Human Rights and in the First Amendment to the United States Constitution. It is accepted for current purposes that the right to freedom of speech includes the right to refrain from speaking. Baroness Hale in Ashers said that the anti-discrimination legislation should not be interpreted ‘so as to compel providers of goods, facilities and services to express a message with which they disagree, unless justification is shown for doing so’. She concluded that ‘no justification has been shown for the compelled speech which would be entailed for imposing civil liability for refusing to fulfil the order’. Could an Australian baker argue that, by requiring them to supply a cake for a same-sex wedding or to supply a cake with a ‘support same-sex marriage’ message, that the law would in effect be compelling them to utter a message with which they disagreed? Redlich JA (dissenting) in Christian Youth Camps seemed to accept such an argument, concluding that ‘to the applicants, acceptance of the

---

39 [2020] AC 413, 441.
booking would have made them morally complicit in the message that was to be conveyed at the forum and within the community’.\(^{40}\) Are these views correct?

Prior to answering that question, a quick summary of the extent of free speech protection in Australia is in order. Australia generally followed the common law tradition in terms of rights protection. This meant that rights existed, to the extent they were not abrogated by statute.\(^{41}\) Statutes would be interpreted so as not to interfere with fundamental human rights, or to interfere with them to the most limited extent, in cases of ambiguity.\(^{42}\) However, in 1992 the High Court of Australia found that Australia’s Constitution contained an implied freedom of political communication, arising from Australia’s status as a representative democracy.\(^{43}\) It found that inherent in our system of representative government, individuals needed access to a range of views about political matters – to share and hear opinions, with minimal governmental interference. In the past 30 years, some of the contours of the freedom have been established. Relevantly for current purposes, the freedom is a negative freedom, in that laws that inhibit the freedom may be struck down on the basis of the implied freedom, or their operation circumscribed so that they do not impact the freedom.\(^{44}\)

So far, there has not been a case involving the implied freedom that has involved compelled speech of the kind arguably at issue in the present situation. Thus, this is a novel argument. However, a baker for current purposes might argue that, if the anti-discrimination legislation were applied to in effect force them to articulate a message with which they disagreed, the law would breach their implied freedom about political matters. It is accepted for current argument that the question of same-sex marriage remains ‘political’, as that term has been broadly defined in the case law.

A majority of the High Court applies a three-stage test in relation to cases involving the implied freedom of political communication.\(^{46}\) Firstly, it considers whether the law burdens a person’s freedom of political communication. Secondly, it considers whether the law is passed for a purpose that is compatible with representative and responsible government. Thirdly, it considers proportionality – whether the law is suitable to achievement of a legitimate objective, necessary in order to attain it, being minimally invasive of human rights, and adequate in its balance.\(^{47}\) I will now apply this three-stage test in relation to a law which might require a baker to supply a wedding cake, with or without message.

In my opinion, the challenge falls at the first hurdle. Such a law does not burden the baker’s freedom of political communication. In essence, this is because, a simple

\(^{40}\) Lange v Australian Broadcasting Corporation (1997) 189 CLR 520, 564 (all members of the Court).

\(^{41}\) Coco v The Queen (1994) 179 CLR 427, 437 (Mason CJ Brennan Gaudron and McHugh JJ);

\(^{42}\) R v Secretary of State for the Home Department; Ex Parte Simms [2000] 2 AC 115, 131-132 (Lord Hoffmann).

\(^{43}\) Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 1; Nationwide News Ltd v Wills (1992) 177 CLR 1.

\(^{44}\) Eg Coleman v Power (2004) 220 CLR 1, 77 (Gummow and Hayne JJ)(statutory provision read down so as only to apply where impugned behaviour likely to lead to a breach of the peace).


\(^{46}\) McCloy v New South Wales (2015) 257 CLR 178, 194-195 (French CJ Kiefel Bell and Keane JJ). The joint reasons clarified there that a law would be suitable if it had a rational connection to the purpose of the provision, necessary where there was no obvious and compelling alternative, reasonably practicable of achieving the purpose that had a less invasive impact on the freedom. The question of adequacy of balance was a value judgment, where the court considered the balance between the importance of the objective of the relevant provision, compared with the extent to which it impacted the implied freedom (195).
wedding cake does not contain any communication at all. This was the position taken by a majority of the Supreme Court of the United States in *Masterpiece Cakeshop*.48

Regarding the request to make the cake with message of support for same-sex marriage, the issue is who is communicating the message. With respect, the United Kingdom Supreme Court was wrong in *Ashers*, and Thomas and Gorsuch JJ were wrong in *Masterpiece Cakeshop*, to conclude that this was an instance of compelled speech. The speech is not that of the baker. The speech is that of the customer.

A number of examples might assist to make this point. Consider a customer who asks a baker to bake a specific cake for an upcoming birthday. The customer asks them to write 'Happy Birthday Alex' on the cake. The baker does so. Of course, when Alex sees the cake, she or he realises that the sentiment expressed on the cake is that of their family or friends who ordered the cake. It is not a personal message from the baker.

Similarly, I might purchase a card for a special occasion. When I send my parents a card that contains the pre-printed message ‘Happy Anniversary’, they know that the message is mine. It comes from me. I have simply used a business as a conduit to express my message.

The examples could be multiplied, but enough have perhaps been given to demonstrate the simple point that when a customer requests that a purchased product contain a particular message, the most reasonable interpretation to place upon the message is that it conveys the sentiment of the customers. It says nothing about the private or personal views of the person who happened to make the product. For similar reasons, the rights to freedom of expression contained in the existing sub-national human rights legislation in Australia49 would not be implicated at all if the law were applied to effectively require a bakery to provide these requested services.

Thus, with great respect it is not correct to conclude, as the United Kingdom Supreme Court did in *Ashers*, that the bakers were being ‘compelled to speak’. They were not. Nor was the baker who was asked to make the cake for the same-sex marriage. They were asked to provide a product. They were not asked to express personal support for gay marriage, or to state that they personally believed the event was worth celebrating. On a practical level, it is likely the guests would be unaware of whom had made the cake. This makes it untenable to argue the existence of the cake, or any message on it, reflected the personal views of the maker. Further, if these businesses would like to in fact communicate their views about political issues like same-sex marriage, they are of course free to do so on their websites, in their packaging, or in store.50 What the law precludes them from doing is refusing service. This law leaves their ability to communicate their actual views entirely unconstrained.

I am fortified in reaching this conclusion by a consideration of the United States case law that has elaborated at some length on what is meant by ‘compelled speech’. Of course, care must always be taken when referring to the case law from another jurisdiction. The Australian implied freedom is narrower than the *First Amendment* freedom. That said, examples of occasions when the United States Supreme Court have

---

48 (2018) 138 S. Ct. 1719, 1723: ‘the free speech aspect of this case is difficult for few persons who have seen a beautiful wedding cake might have thought of the creation as an exercise of protected speech’ (Kennedy J, with whom Roberts CJ, Breyer, Alito, Kagan and Gorsuch JJ joined).


50 This formed part of the United Kingdom Supreme Court’s reasoning in *Preddy v Hall; Hall v Same* [2013] 1 WLR 3741. In denying that the hotel owners’ religious freedoms should permit them to refuse service to a gay couple, Baroness Hale noted the owners were free to manifest their religion in other ways (3752).
found that speech is being compelled have included where students were required to
sing the national anthem,\textsuperscript{51} where parade organisers were required to include a
particular float,\textsuperscript{52} and where the owner of a vehicle was required to carry number plates
with a particular government message.\textsuperscript{53} Just as importantly, example where the
Supreme Court has found that speech is not being compelled have included where a
mall owner was required to permit students to distribute flyers within a shopping
mall,\textsuperscript{54} where law schools were required to permit military recruiters to attend
recruitment events,\textsuperscript{55} and where cable television operators were required to carry
particular broadcasts.\textsuperscript{56} Relevant to determining which side of the lines these cases fall
is whether an ordinary observer would interpret the speech to be the person or
organisation claiming to be compelled to speak, or would realise they were (merely)
conveying the speech of another. Here, the case of the bakery is surely in the latter
category.\textsuperscript{57}

If I am wrong on this point, and the making of a cake for a same-sex wedding, or the
inscription on a cake of a message supporting same-sex marriage is in fact a
communication by the baker, it is readily accepted that compelling them to speak
against their will would infringe their implied freedom to communicate. As indicated,
this has not been specifically determined yet in Australian law, but compelled speech
in other jurisdictions has been held to infringe free speech rights.

It would then need to be considered whether the relevant laws, here the anti-
discrimination legislation, was passed for a legitimate reason compatible with
representative government. Clearly, it is a laudable objective to seek to have
individuals treated equally, and to avoid discrimination on irrelevant grounds. These
laws have a legitimate objective.

We would then consider proportionality testing. These laws are considered to be
suitable towards achieving a legitimate objective. It is suitable to a goal of achieving
equality that individuals and businesses refrain from discriminating on irrelevant
grounds. The ends and means are rationally connected. They are also considered
necessary – if laws did not prohibit discrimination on irrelevant grounds, some
businesses and individuals would continue to act in this manner. There is no other
practical way to achieve this purpose other than to prohibit the discrimination.

Finally, arguably they are adequate in their balance – the courts typically provide some
kind of margin of appreciation for legislatures here. The legislature has sought to weigh
up a range of different considerations, including the importance of equality and non-
discrimination, while providing some exemptions including in the religious area.
However, the legislation generally has recognised a distinction between religious
organisations, who are given broader scope to discriminate, and non-religious
organisations, which might be owned by those of religious faith. The court might
conclude that, in attempting to craft some religious exemptions but in generally
requiring a business operating in a commercial environment to avoid discriminating in
relation to serving customers, the law has struck a reasonable balance between, on the
one hand, the dignitary harm that would be caused to a would-be customer by being

\textsuperscript{51} West Virginia State Board of Education v Barnette 319 US 624 (1943).
\textsuperscript{52} Hurley v Irish American Gay 515 US 557 (1995).
\textsuperscript{53} Wooley v Maynard 430 US 705 (1977).
\textsuperscript{54} Pruneyard Shopping Centre v Robins 447 US 74 (1980).
\textsuperscript{56} Turner Broadcasting System v FEC 512 US 622 (1994).
\textsuperscript{57} See similarly Robert Wintemute 'Message-Printing Businesses, Non-Discrimination and Free
348, 353; Mark Strasser ‘Masterpiece of Misdirection’ (2019) 76 Washington and Lee Law Review
963, 1002; Rene Reyes 'Masterpiece Cakeshop and Ashers Baking Company: A
Comparative Analysis of Constitutional Confections' (2020) 16 Stanford Journal of Civil Rights
and Civil Liberties 113, 132.
refused service on this basis and, on the other, the genuinely-held religious freedoms and views of a business person.

Somewhat similar issues would be ventilated if the matter were brought under any of the existing sub-national human rights instruments. All acknowledge that human rights are not absolute, and reasonable limits are acceptable. Relevant factors will include the nature of the right impacted, the importance of the purpose of the limit, the nature and extent of the limit, the relationship between the limit and its purpose, and whether means less restrictive of human rights are available in order to meet the legitimate objective of the legislation.\footnote{Human Rights Act 2004 (ACT) s 28; Charter of Human Rights and Responsibilities Act 2006 (Vic) s 7(2); Human Rights Act 2019 (Qld) s 13.}

**Final Reflections**

1. Coherence in the Law

Interesting insights may be gained when comparing the decision reached in *Ashers Baking* with larger developments in this area of the law. As noted at the beginning, there have been monumental developments in the law applicable to homosexuality.\footnote{Baroness Hale noted that homosexuals ‘were long denied the possibility of fulfilling themselves through relationships with others. This was an affront to their dignity as human beings which our law has now ... recognised’: *Preddy v Hall; Hall v Same* [2013] 1 WLR 3741, 3756.}

Advances in Australian law were noted at the commencement of the article. These have mirrored advances in the United Kingdom law, including the decriminalisation of homosexual activity,\footnote{Buggery Act 1533 (Eng); Lord Wolfenden Report of the Departmental Committee on Homosexual Offences and Prostitution (1957)(leading to decriminalisation in 1967).} and legislative implementation of gay marriage,\footnote{Marriage (Same Sex Couples) Act 2013 (UK) s 1.} together with evident concern with equality and avoidance of discrimination on irrelevant grounds, as reflected in equality legislation.\footnote{Equality Act 2006 (UK); Equality Act 2010 (UK).} This legislation does not specifically exempt a person with religious views from general non-discrimination requirements in relation to the provision of services. These indications of parliamentary intent are particularly important in a jurisdiction such as the United Kingdom, which recognises a parliamentary sovereignty model of government. This was noted by Baroness Hale in her leading judgment in *Preddy v Hall; Hall v Same*:

Now that, at long last, same sex couples can enter into a mutual commitment (she was speaking of a civil commitment because at the relevant time the United Kingdom had not legislated to permit same-sex marriage, which it now has) ... the suppliers of goods, facilities and services should treat them in the same way.\footnote{3752.}

She concluded that the law ‘should be slow to accept that prohibiting hotel keepers from discriminating against homosexuals is a disproportionate limitation on their rights to manifest their religion’.\footnote{3756.}

In this statutory context of greater acceptance of homosexual individuals, acceptance of homosexual relationships and real moves towards equality of individuals, reflected in rule of law ideals, the decision in *Ashers Baking Co* sets a jarring note. There is an unfortunate irony in respect of judgments of Baroness Hale, with respect. On the one hand, her judgment in *Preddy* rightly notes the change in the law towards full acceptance of same-sex individuals and same-sex marriage, and that service providers were now required to treat such individuals in exactly the same way as they would treat others. However, then in *Ashers Baking Co*, her judgment effectively gives the green
light to refusals to provide a particular service, because it might indicate support of same-sex marriage.

The judgment in Ashers surely undermines, at the very least, parliament’s efforts to legalise same-sex marriage and to legitimize same-sex relationships to permit business owners to effectively refuse service to those who wish to express support for such relationships, or to express that such individuals should be entitled to marry. It is not known whether the United Kingdom Supreme Court would also permit a baker to refuse to bake a cake for a same-sex marriage because it was such a marriage, though its references to Masterpiece Cakeshop suggest that it may well do so. On the other hand, the judgments in Preddy v Hall suggest the Court might view this as discrimination on the basis of sexual orientation. Pun intended, one cannot have one’s cake and eat it too. Frankly, we get into a difficult position when those of religious faith seek, in effect, dispensation from generally applicable rules. In so saying, of course those with religious beliefs are entitled to respect for themselves and their views.

However, religious views per se cannot legitimise disregard for the law of the land.65 If religiously minded individuals wish for the law to change so that they effectively have the right to refuse service in a commercial realm based on their religious views, they are perfectly entitled to do so. However, unless and until this occurs, individuals should not be encouraged to ignore generally applicable legal principles based on their religious views. Frankly, a nation governed by the rule of law cannot tolerate such behaviour. As Laws LJ noted in McFarlane v Relate Avon Ltd:

The Judaeo-Christian tradition, stretching over many centuries, has ... exerted a profound influence upon the judgment of lawmakers as to the objective merits of this or that social policy. And the liturgy and practice of the established Church are to some extent prescribed by law. But the conferment of any legal protection or preference upon a particular substantive moral position on the ground only that it is espoused by adherents of a particular faith, however long its tradition, however rich its culture, is deeply unprincipled. It imposes compulsory law, not to advance the general good on objective grounds, but to give effect to ... subjective opinion ... the promulgation of law for the protection of a position held purely on religious grounds cannot therefore be justified. It is irrational ... (and) divisive, capricious and arbitrary. We do not live in a society where all the people share uniform religious beliefs. The precepts of any one religion – any belief system – cannot, by force of their religious origins, sound any louder in the general law than the precepts of any other. If they did, those out in the cold would be less than citizens, and our constitution would be on the way to a theocracy, which is of necessity autocratic.66

This mirrors the position of the Australian High Court67 and of the Supreme Court of the United States that laws of general application apply to those with religious views that might suggest to the contrary of what the law requires.68

2. Relation Between Religion and the Law

The relation between religion and the law has a long and deep history. Obviously, at one time the church had its own courts. Monarchs sometimes denied that the ordinary law applied to them. The supremacy of the parliament over the monarch, the putative head of the state church, was established in 1688. Since that time, the influence of

65 Preddy v Hall; Hall v Same [2013] 1 WLR 3741, 3752: ‘We do not normally allow people to behave in a way which the law prohibits merely because they disagree with the law. But to allow discrimination against persons of homosexual orientation ... because of a belief, however sincerely held, and however based on the biblical text, would be to do just that’ (Baroness Hale).
66 [2010] EWCA Civ 880, [23]-[24].
67 Church of the New Faith v Commissioner of Payroll Tax (Vic)(1983) 154 CLR 120, 136: ‘religious conviction is not a solvent of legal obligation’ (Mason ACJ and Brennan J).
religion over the law has waned, though clearly many of the legal doctrines we currently enforce have some kind of religious basis.

There continue to be scholars who lament the increasing incursion of the state into fields previously occupied by religion. Julian Rivers is one of these, lamenting that the ‘rational rejection’ of religion in the legal space is almost complete:

The effect is to turn religion into another hobby. One can devote one’s spare time, energy and money to it; one can meet with other like-minded people, set up clubs and societies, network, produce literature, employ people, buy property, try to persuade others how wonderful it is, introduce one’s children to it, run holiday camps promoting it, and the law will even treat all this activity as publicly beneficial. One can be very religious, if one feels like it. But the law need make no space for the idea that there might actually be a God, who might really be calling people into relationship with himself, who might make real demands on his worshippers.

Religion thus acquires all the moral weight of stamp-collecting or train-spotting.69

Respectfully, it is not correct to state that the law ‘need make no space for the idea that there might actually be a God’. In each of the jurisdictions studied, the importance of religion is recognised in legal instruments. It is recognised in Article 9 of the European Convention on Human Rights, the First Amendment to the United States Constitution, and in the express human rights instruments of two states and a territory in Australia. The law has made space for the idea there might actually be a God.

On the other hand, the law has also made space for other ideas – the idea that individuals should be treated with dignity and respect, and should not be subjected to discrimination on arbitrary grounds. This idea also has deep roots in our legal system, reflecting the rule of law. Legislatures in the United Kingdom and Australia have had to make difficult decisions as to the reconciliation between these various important rights, in recognition of the fact that they sometimes clash. In the United States, courts have had more responsibility in making these decisions. Difficult choices have to be made by decision makers in this space, and lines drawn. Parliaments, human rights instruments drafters and courts have drawn a distinction between religious belief, which is absolute and inviolate, and the manifestation of that belief through conduct, which is limited, partly because it may implicate others. And, as established by the Glorious Revolution, the law of parliament prevails, and should prevail, over religious belief and authority. Professor Rivers may not like where some legislatures and courts have drawn the lines. He and others may complain that it is impossible to separate belief from conduct.70 However, it is not accurate to assert that religion has become a hobby or the equivalent of stamp collecting. No hobby enjoys express protection in the above-named human rights instruments. If Professor Rivers, or others, believe that the decision makers have not drawn the lines in the correct place, they are of course free to lobby them to alter the rules, by creating more exemptions from generally applicable laws in favour of religious interests. But the primary right of the legislature to make such difficult decisions cannot be gainsaid.

As the law stands, as discussed above it generally requires those who enter into the commercial realm to serve customers on a non-discriminatory, non-judgmental basis. This position has been arrived at through legislative and constitutional reform. It is

thought that these changes generally reflect societal values about such issues. This
difficult compromise should be respected by those who wish to offer commercial
services to the public. They are not free to choose which laws to obey or not obey
according to their conscience. In our system of government, law passed by parliament
overrides any strongly and genuinely held personal views, whether animated by
religion or otherwise. And this is how it should be.

Conclusion

This article has used the factual scenarios involved in recent decisions of the highest
courts in the United Kingdom and the United States, to determine how they would
likely be determined in Australian law. It was determined that a refusal to provide a
wedding cake for a same-sex wedding in any jurisdiction in Australia would amount to
unlawful discrimination on the basis of sexual orientation. It was determined that
refusal to provide a message on a cake to which the baker objected would amount to
unlawful discrimination on the basis of political belief, in all jurisdictions other than
New South Wales, which does not make this a prohibited ground of discrimination.
This makes the situation in that state of a refusal to provide such a message on the basis
of religious belief somewhat uncertain. That state’s parliament may wish to consider
amendment to its discrimination legislation to protect political belief.

In most states, religious exemptions in discrimination legislation do not apply to the
commercial environment, so they would not be applicable to the present scenarios.
Victoria and Tasmania do have such protections, but it would be very difficult for the
business to successfully argue that refusing to provide a service to a same-sex marriage
was in accordance with religion doctrine and/or necessary to meet the religious
sensibilities of adherents, given how those requirements were interpreted by the
Victorian Court of Appeal in Christian Youth Camps.

The final argument for the service provider would be that to compel them to provide
the cake for a same-sex wedding or to write a message supportive of same-sex marriage
would be to infringe their freedom of speech. However, it is unlikely that any message
on a cake would reasonably be taken to be the speech of the baker, and the mere fact of
supplying a cake probably does not contain expressive content. Even if it were accepted
that expression was involved, freedom of speech is not an absolute freedom, and limits
are acceptable if pursuant to a legitimate objective, and suitable, necessary and
adequate in their balance. There is good reason to think that the limited extent to which
such anti-discrimination laws would impose on freedom of speech in such a case would
meet these requirements.

This article thus respectfully reaches a different conclusion to the United Kingdom
Supreme Court in Ashers, and of two of the justices in the United States Supreme Court
in Masterpiece Bakery. All of the jurisdictions studied have come a long way in relation
to homosexuality, removing past laws criminalising homosexual acts, progressively
removing discrimination, and recognising the validity of same-sex marriage. These
developments risk being undermined if commercial businesses are able to refuse
service to such marriages, or expressions of support for them. Coherence in the law
suggests that the law has taken a wrong turn with parts of these recent decisions, which
Australian courts should not follow, and which future United Kingdom and United
States decisions should correct. The law has sought to reach an accommodation
between two important rights, anti-discrimination norms and religious freedoms.
Those in the commercial space must respect this accommodation, even though they
might privately disagree with it.

***
NOT YOUR STANDARD SMOOTHIE: PLACENTOPHAGY, INFLUENCERS AND REGULATION

Bruce Baer Arnold*

Placentophagy, ie consumption of raw or processed human placenta, poses challenges for health law, consumer law, community education and health practitioner ethics. Is it a matter of personal autonomy? A social-media fueled practice akin to vaginal eggs and healing crystals that does not require regulation? Are potential harms sufficient to justify intervention through regulation by therapeutic goods regulators or consumer protection agencies? This article highlights legal concerns such as potentially misleading claims by providers of encapsulated placenta services in an era of ‘fake health news’. It discusses regulatory incoherence and suggests responses as part of broader educational measures to foster community health.

Introduction

The liberal democratic state’s abhorrence of eating humans, whether alive or dead, is evident in judgments such as *Dudley v Stephens*.¹ It is also evident in popular culture, including films such as *Silence of the Lambs*² and *The Cook, the Thief, His Wife and Her Lover*³ or in tabloid accounts of criminals such as Armin Meiwes and Jeffrey Dahmer.⁴ Australian instances might now be addressed as under criminal law provisions regarding interference with a corpse, as unnecessary given that an offender might be convicted of a more serious offence⁵ or as indicia of a psychiatric problem sufficient for involuntary confinement.⁶ Historically law accommodated the ingestion of *mumia*, that is therapeutic consumption of what was claimed to be remnants of Egyptian mummies.⁷ In Australia there is one exception to restrictions on eating

---

¹ *R v Dudley and Stephens* (1884) 14 QBD 273 DC; and A W Brian Simpson, *Cannibalism and the Common Law: The story of the tragic last voyage of the Mignonette and the strange legal proceedings to which it gave rise* (University of Chicago Press, 1984).
⁵ The offender in *Regina v Knight* [2001] NSWSC 1011 was for example convicted of killing the victim rather than preparing him as a meal intended for his children.
human flesh. The exception is placentophagy, the ingestion of raw or processed human afterbirth in the form of drinks (‘raw placenta smoothies’), capsules and other products. That consumption is claimed to have ‘wellness’ benefits for mothers and newborn infants, is propagated by New Age influencers and the mass media, and is attracting investment by commercial service providers. Irrespective on taboos about what law regards as waste, placentophagy raises questions about both health (infection affecting vulnerable people), consumer protection (misleading statements regarding goods and services) and the role of law in shaping community understanding of health in the latest era of ‘fake news’.

This article begins by providing an overview of placentophagy, a practice that is evident in pre-modern cultures and has reappeared – and been commercialised – since the 1970s as an aspect of what is sometimes characterised as wellness or New Age thinking in which emotion and intuition are prized ahead of verifiable scientific data. Part Two highlighting issues that might justify regulatory intervention. Part Three considers placentophagy within Australian legal frameworks, noting the absence of references in statute and judgments alongside scope for action under Commonwealth and state/territory powers. Part Four contextualises the preceding discussion by considering belief, health and regulation within a broader framework of digital fake news.

I  Consumption

Unconventional Intake

Consumption of the placenta, whether raw or in a prepared form (and by a mother or others) is a feature of many cultures. It was a folk practice in parts of pre-modern Eastern Europe and is discernible in other locations such as Melanesia and Central Africa, with ingestion by mothers and others within a ritual framework. It was not evident among colonists within the Australian settler state. Accounts of childbirth at home (predominant in the period before increasing medicalisation of birth alongside easy access to medical practitioners and hospitals) thus often refer to disposal through burial or burning of the placenta, sheets and clothing.

In contemporary Australia, there appears to be a revival of placentophagy, sufficient for the provision of commercial services rather than merely breathless items in tabloids, magazines, womens’ health sites and social media. The incidence and demographics of placentophagy practice are unclear. There has for example been no authoritative survey, comprehensive independent health study or specific report by a parliamentary committee or regulatory body. The Therapeutic Goods Administration (TGA), the arm of Australia’s national Health Department that functions as the equivalent of the US Food & Drug Administration (FDA) has issued a general caution, discussed below, but there has been no concerted education or inspection campaign by public health bodies.

---


9 For example Gina Escandon, ‘Kailyn Lowry & 10 Other Celebs Who Ate Their Own Placentas After Giving Birth’ SheKnows (5 August 2020); Alicia Vrajial, ‘Triple J Alum Veronica Milsom Cooked Her Placenta Into Sausage Rolls For A Dinner Party: Introducing the 'pla-sausage roll’ HuffingtonPost (1 October 2020); ‘Hilary Duff speaks out after drinking her placenta in a smoothie’ 7News (25 September 2020).

Postmodern placentophagy can be considered as a manifestation of what Hobsbawm dubbed the invention of tradition,\textsuperscript{11} practice legitimised through claims of continuity with an idealised suppressed past.\textsuperscript{12} It might more usefully be understood as a manifestation of the wellness movement over the past fifty years that features language about self-actualisation and mindfulness, disregard of (and at times express hostility to) ‘conventional medicine’, reference to a spiritual dimension of health, respect for celebrities as sources of expertise and legitimacy, ‘mcMindfulness’ and susceptibility to exploitation by vendors of ‘alternative medicine’ products and services that encompass jade vaginal eggs, magnetic beds, the palaeo diet, ‘energy medicine’ and denial that COVID-19 is viral.\textsuperscript{13}

In commenting on wellness merchandising by celebrity Gwynneth Paltrow, Crockford thus comments

The message of Goop is that there is a way to perfect oneself. By using the right products, it is possible to curate the perfect neoliberal self: energized, tight, fashionable, radiant, glowing. It does, however, require plenty of money to access this route to perfection, as Goop sells primarily luxury fashion and accessories. ... Goop is not alone in offering a series of products, opaque in purpose and complexity, invoking grand visions of personal enhancement. The wellness industry both fuels and profits from the idea that physical beauty is proof of inner righteousness as well as health. Those perfect on the outside are assumed to be equally perfect inside. In a capitalist society, those that are able to afford this level of purchasable perfection are the wealthiest. There is, therefore, a strong vein of classism and elitism running through not only Goop but the ideology of wellness that informs the industry.

Wellness is an unregulated industry that capitalizes on people’s desperation and insecurities, offering them cures for all ills and imperfections at high prices.\textsuperscript{14}

One route to wellness is placentophagy. That consumption has been valorised as a manifestation of personal authenticity, agency and discovery – by the astute – of unrecognised ‘treasure’.\textsuperscript{15} It is one mechanism for self-affirmation, virtue signalling and assertion of status or to ‘spiritualise’ the birth.\textsuperscript{16} It has also been valorised as mechanism for natural wellness or avoidance of ills such as postpartum depression,\textsuperscript{17} alongside the embrace of practices such as facilitation of childbirth by a doula.\textsuperscript{18} One Australian vendor offers to turn the dried umbilical cord into a ‘dream catcher’ and offers


\textsuperscript{12} Sharon M Young, and Daniel C Benyshek, ‘In search of human placentophagy: a cross-cultural survey of human placenta consumption, disposal practices, and cultural beliefs’ (2010) 49(6) \textit{Ecology of Food and Nutrition} 467, 472 and 482.


\textsuperscript{14} Susannah Crockford, ‘What Do Jade Eggs Tell Us about the Category “Esotericism”? Spirituality, Neoliberalism, Secrecy, and Commodities’ in Egil Asprem and Julian Strube (eds), \textit{New Approaches to the Study of Esotericism} (Brill, 2020) 201, 203


\textsuperscript{17} Emily Hart Hayes, ‘Consumption of the Placenta in the Postpartum Period’ (2016) 45(1) \textit{Principles and Practice} 78.

Placenta Tincture – $40 ... Putting part of your placenta in tincture form is another way to stretch out its longevity. A small portion of placenta is added to alcohol and steeped for 6 weeks. Some of the benefits may include hormone stabilization in your postpartum cycles, less bleeding during those cycles, energy and for menopause years down the road. The female child may also benefit from placental tincture once she begins her menstruation cycles.

Placenta Cream – $30 ... A skin cream of our placenta and a variety of healing herbs and oils may offer healing properties to c-section scars once they are healed, haemorrhoids, perineal tearing, cracked or blistered nipples, eczema, sun burn, nappy rash (can be made cloth nappy safe!), skin irritation and more.

Placentaphagy has been promoted in cookbooks, alternative health websites, social network services such as Facebook or Twitter and in other media. It also appears to be espoused by some doulas and ‘foodies’, with enthusiasts making various claims such as placentaphagy will foster lactation and endow the consumer with nutrients such as iron and hormones such as progesterone, prostaglandin, oxytocin and estrogen. Use of placenta products is appearing in other contexts, with The Guardian for example in 2009 offering an irreverent view by an anonymous general practitioner – pseudonymised as Dr Crippen, Dr Lector presumably having negative connotations – regarding the use of ‘placenta fluid’ in treatment of an injured footballer.

Given the mixture of demand, low processing costs, light touch (or absent) regulation and novelty the emergence of a range of commercial placentaphagy services that co-exist with the do-it-yourself preparation featured in some websites and magazines is discernible in Australia and other advanced economies.

Services will for example collect the placenta from a home or hospital, steam and dry it, and provide it to the mother intact or in capsule form. Those services do not appear to have encountered difficulty in dealing with hospitals, including those affiliated with religious bodies, or questions about the status of the placenta as property, something potentially addressed under regulatory frameworks such as the 15 February

---

19 See for example Katie DiBenedetto, DIY Placenta Edibles: Smoothies + Tinctures + Chocolates, (CreateSpace, 2014) and Annie Daly (27 January 2015), 4 Ways To Eat Your Placenta: Placenta ... It’s What’s For Dinner, WomensHealth Magazine, https://www.womenshealthmag.com/life/a19894847/placenta-recipes/
24 See Rasdien at note 15 above.
2016 NSW Policy Directive on Donation, Use and Retention of Tissue from Living Persons\textsuperscript{27} and the 2016 South Australian Clinical Practice Directive.\textsuperscript{28}

Overall at least 100 Australian businesses, most small and typically emphasising alternative medicine, offer encapsulation of placentas at a cost of around \$300, with the processing apparently being done by a handful of larger businesses. There is no national register of placentophagy service providers and no statistics on the number of mothers who are engaging in DIY processing.

Service provision is not covered by the Commonwealth under the Pharmaceutical Benefit Scheme or under Medicare as a scheduled medical service. It does not appear to be covered by private health insurance. It thus lacks the perceived authority provided by inclusion in those schemes, with consumers having to pay out of their own pocket. However, as with complementary health products, the cost may function as a sign of status. The absence of official endorsement may be seen by consumers as validating their decision to trust in an unqualified influencer rather than 'big pharma' and 'big medicine'.\textsuperscript{29} The salience of trust for public health is highlighted in the final part of this article.

\section*{II Harms}

\textbf{Hands off my body?}

Placentophagy has not been specifically addressed in Australian law and has not attracted judicial attention. There are no express references in statute or contemporary judgments. Overall we can infer that individuals are engaging in consumption but that consumption is not apparent in official records. It is in essence an archival silence.

Some advocates appear to have taken the view that the state has no role: a consumers have a right to do what they wish with their bodies (or what was once part of the body) as long as there is no harm to anyone else. Others appear to emphasise self-help and by extension consider that commercial services are merely providing assistance for a legitimate aspect of self-expression, particularly one that has a spiritual value and contributes to the woman's wellbeing. In Europe there has been disagreement about calls to regulate commercially processed placentas as a novel food, with the European Food Safety Authority (and national food standards bodies such as the UK Food Standards Agency in implementing EU-wide standards) seeking to prevent harms through an accreditation process for foods that were not in use in Europe prior to 1997.\textsuperscript{30} That proposal would not restrict entities that do not sell placenta products or engage in commercial processing.

Most criticisms of placentophagy have centred on the potential harm to the mother or other person who ingests a contaminated raw or processed placenta, for example eats an encapsulated placenta, placenta lasagna, roasted placenta or drinks an uncooked placenta smoothie (three minutes in the blender with a dollop of organic yogurt and

\begin{thebibliography}{9}
\bibitem{27} NSW Health, Policy Directive on Donation, Use and Retention of Tissue from Living Persons (2016).
\bibitem{28} SA Maternal & Neonatal Community of Practice, 'Management of the Release of a Placenta for Private Use Clinical Directive (Clinical Directive: compliance is mandatory) (South Australia Health Department, 2016).
\bibitem{29} Katherine Cao, 'The Constructed Lifestyle Image: An Examination of Mass Media, Online Social Influencers, and the Commodification of the Self' (2020) \textit{4 Crossings} 137; Stephanie A Baker and Chris Rojek, \textit{Lifestyle Gurus: Constructing Authority and Influence Online} (Wiley, 2020); and Rebecca Lewis, "'This Is What the News Won't Show You': YouTube Creators and the Reactionary Politics of Micro-celebrity' (2020) \textit{21(2) Television & New Media} 201.
\end{thebibliography}
the inevitable turmeric).\textsuperscript{31} That other person would typically be the newborn and in contrast to pandemic diseases the harm will not be a matter of viral transmission across the population at large.

From the perspective of traditional consumer protection and fake health news, it may however be appropriate to look beyond injury attributable to infection or other contamination and instead ask whether products have the therapeutic properties espoused by champions such as the Kardashians and encapsulation service agents. In essence, are those products as described and thus addressable under both the advertising code and the Australian Consumer Law? If the marketing of products is deceptive there is scope for action by the ACCC. Consumer protection in the health space is not necessarily confined to regulation by the TGA.

There is disagreement about the psychological and physical benefits of placentophagy in human and non-human animals.\textsuperscript{32} Contrary to claims about beneficial hormones acquired through ingestion of prepared placenta products, in particular encapsulated placenta, there is little reason to believe that processing sufficient to alleviate concerns regarding potential infection will retain hormones or other therapeutic agents on a scale that would be efficacious for the consumer.\textsuperscript{33} Freezing, steaming, drying, encapsulation or other processes either eliminate or fundamentally reduce the attributes that feature in claims by enthusiasts and some service providers.

There has not been a comprehensive testing of products from all Australian encapsulated placenta service providers, for example. In the absence of a strong evidence basis in favour of therapeutic efficacy, it would be wise for health professionals, including nurses rather than merely clinicians, to alert potential consumers to the likelihood that they will be paying several hundred dollars for what is in essence a ‘feel good’ or fashion statement rather than something with medicinal value.

That is a consumer issue, one properly addressable at an official level under consumer law and under practitioner self-regulation founded on the Health Practitioner Regulation National Law 2009 rather than narrowly under the TGA’s biologicals framework or the historically weak market intervention by Food Standards Australia New Zealand (FSANZ)\textsuperscript{34} under the Food Standards Australia New Zealand Act 1991 (Cth) and state/territory food safety agencies.\textsuperscript{35} Placentophagy does not fit neatly into regulatory boxes: not a medical device, not a recognised pharmaceutical, not a food – or not a food offered to the public at large.

Farr et al commented:

\begin{quote}
in response to a woman who expresses an interest in placentophagy, physicians should inform her about the reported risks and the absence of clinical benefits associated with the ingestion. In addition, clinicians should inquire regarding a history of placenta ingestion in cases of postpartum maternal or neonatal infections such as group B Streptococcus sepsis. In conclusion, there is no professional
\end{quote}


\textsuperscript{32} Mark B Kristal, Jean M DiPirro and Alexis C Thompson, ‘Placentophagia in humans and nonhuman mammals: causes and consequences’ (2012) 51(3) Ecology of Food & Nutrition 177.


\textsuperscript{35} See for example Food Act 2003 (NSW), Food Act 1984 (Vic) and Food Production (Safety) Act 2000 (Qld).
responsibility on clinicians to offer placentophagy to pregnant women. Moreover, because placentophagy is potentially harmful with no documented benefit, counseling women should be directive: physicians should discourage this practice. Health care organizations should develop clear clinical guidelines to implement a scientific and professional approach to human placentophagy.  

III Regulation

Representations of placentophagy in social media and works such as placenta recipe books are under-theorised, with no reference to harm, law or regulation. A rights advocate might however persuasively argue that a woman’s self-ownership extends to all aspects of disposal of what was her body and that now, in conventional medico-legal terms, would be characterised as ‘waste’. Such an argument would be consistent with emerging concerns regarding property rights in surgically excised tissue as the basis for cell lines, for example controversy over commodification over material removed from Henrietta Lacks, and more generally in ownership of genomic data (discussed in a forthcoming monograph by Bruce Baer Arnold and Wendy Bonython).

Australian law’s respect for individual autonomy does not require consumers to be especially astute in informing themselves about the lack of evidence for what appear to be claims regarding food and other products. Any ‘right to health’ is in practice restricted to remedies addressing arbitrary exclusion from health services. There is no constitutional requirement for the national government or the state/territory governments to ensure health through community education programs and through initiatives that go beyond the Australian Consumer Law or other enactments such as the Therapeutic Goods Act 1989 (Cth).

Soft regulation as a reflection of uncertain responsibility?

The preceding part argued that placentophagy does not fit neatly into conceptual and administrative boxes. It involves the consumption of what was once human flesh but there have been no Australian criminal prosecutions regarding what might be construed as cannibalism, particularly because it is not associated with violence and does not challenge the state’s monopoly of the legitimate use of lethal force. It falls uncertainly within the ambit of regulatory agencies that do not regard it as having a high priority, given that there have been no placentophagy-based disasters (and

36 Ibid, 401-e1.
subsequent class actions) akin to the Garibaldi smallgoods and Nippy’s fruit juice food poisoning cases.\footnote{Dowdell v Knispel Fruit Juices Pty Ltd (trading as “Nippy’s”) [2007] FCA 650. See also Craig B Dalton and Robert M Douglas, ‘Great expectations: the coroner’s report on the South Australian haemolytic–uraemic syndrome outbreak’ (1996) 164(3) Medical Journal of Australia 175.}

The general caution issued by the TGA,\footnote{Therapeutic Goods Administration (19 January 2018) Human Placenta Ingestion, https://www.tga.gov.au/human-placenta-ingestion} noted above, advises that expectant mothers should be aware of the potential risks associated with placenta consumption. It indicates that claims regarding therapeutic benefits of prepared placenta products for mothers and/or children potentially brings those products under the biologicals facet of the \textit{Therapeutic Goods Act 1989}.\footnote{Therapeutic Goods Act 1989 (Cth) Part 3-2A. See also the Australian regulatory guidelines for biologicals at https://www.tga.gov.au/publication/australian-regulatory-guidelines-biologicals-argb} The TGA Act prohibits the making of therapeutic biological products without a licence, alongside the TGA’s approval of products classed as therapeutic goods.

In considering the role of education and health practitioners in offsetting fake news it is salient to note that some women are unlikely to encounter (and to heed) the TGA’s brief statement. That meanings advice from general practitioners, obstetricians, hospital administrators, community nursing personnel and midwives is important. Fake news might be offset by counter narratives from other influencers. In the US, there have been calls for stronger and more comprehensive regulation by the FDA; those calls might be usefully heeded by both the TGA and Food Standards Australia New Zealand.\footnote{In particular see Greer Donley, ‘Regulation of Encapsulated Placenta’ (2019) 86(2) Tennessee Law Review}

\section*{IV Consumption in the era of digital fake news}

Contemporary placentophagy can be construed in relation to digital fake health news, where consumers are influenced by celebrity endorsements, novelty and resentment of authority rather than nuanced advice by medical practitioners and nutritionists based on empirical data.\footnote{Carole A Bisogni, Margaret Connors, Carol M Devine and Jeffery Sobal, ‘Who We Are and How We Eat: A Qualitative Study of Identities in Food Choice’ (2002) 34(3) Journal of Nutrition Education & Behavior 128.} Such behaviour is not new and not restricted to reliance on digital media; contemporary food and pharmaceutical regulators trace their origins to fin de siècle responses to ‘snake oil’ merchandising\footnote{Richard Curtis Litman and Donald Saunders Litman, ‘Protection of the American consumer: the muckrakers and the enactment of the first federal food and drug law in the United States’ (1981) 36 Food, Drug & Cosmetics Law Journal 647; and Daniel Carpenter, \textit{Reputation and Power: Organizational Image and Pharmaceutical Regulation at the FDA} (Princeton University Press, 2010).} and legal scholars might look to landmark judgments such as Carbolic Smokeball.\footnote{Carlill v Carbolic Smoke Ball Company [1892] EWCA Civ 1; and A W B Simpson, ‘Quackery and Contract Law: The Case of the Carbolic Smoke Ball’ (1985) 14(2) Journal of Legal Studies 345.}
As in the past, ‘influencers’48 such as celebrity chef Pete Evans, film star Gwyneth Paltrow, supermodel Elle Macpherson, wellness guru Belle Gibson and the Kardashians have shaped consumer perceptions, gaining international attention and on occasion accruing substantial financial benefits through the promotion of ‘wellness’ services and products.53 These include ‘superfoods’ based on exotics herbs or fruit, ‘alkaline water’,54 vaginal eggs and dietary lifestyle regimes that will supposedly defeat ailments such as cancer, dementia, attention deficit disorders or old age.55 Overseas, some businesses have thrived by offering products such as ‘young plasma’, promoted on the basis that the blood of young people has uniquely health-giving or anti-ageing properties or is able to addresses ‘serious diseases like dementia, Parkinson’s disease, multiple sclerosis, Alzheimer’s disease, heart disease or post-traumatic stress disorder’.56

The impact of such claims in part reflects a desire for simple solutions to complex problems and a reliance on a populist ‘folk wisdom’ that is contrary to the expertise and authority inherent in contemporary high-tech medicine, instead valorising ‘authenticity’, ‘nature’, the supposed ‘wisdom of the crowd’ and the ‘tradition’ that means homeopathy (despite a plethora of adverse reports) is a resilient social practice.57

It also reflects deficiencies in primary/secondary education and a regulatory regime that tacitly encourages aggressive marketing by vendors of lifestyle supplements that few consumers need on an ongoing basis (and whose ostensible benefits might be more economically achieved through exercise, reduced alcohol consumption or sleep).58

---

50 Timothy Caulfield, Is Gwyneth Paltrow wrong about everything?: How the famous sell us elixirs of health, beauty & happiness (Beacon Press, 2015) and ‘From Kim Kardashian to Dr. Oz: The future relevance of popular culture to our health and health policy’ (2016) 47(2) Ottawa Law Review 369.
54 Tanis R Fenton and Tian Huang, ‘Systematic review of the association between dietary acid load, alkaline water and cancer’ (2016) 6(6) BMJ Open 1; and Shelley Young, The pH miracle: balance your diet, reclaim your health (Warner Books, 2002).
55 For Gibson see Director of Consumer Affairs Victoria v Gibson [2017] FCA 240; Director of Consumer Affairs Victoria v Gibson (No 3) [2017] FCA 1148; and Nick Toscano and Beau Donnelly, The Woman Who Fooled the World: Belle Gibson’s Cancer Con (Scribe, 2017).
56 Catherine Oakley, ‘Towards cultural materialism in the medical humanities: the case of blood rejuvenation’ (2018) 44(1) Medical Humanities 5; and Food & Drug Administration (19 February 2019) ‘Statement from FDA Commissioner Scott Gottlieb, M.D., and Director of FDA’s Center for Biologics Evaluation and Research Peter Marks, M.D., Ph.D., cautioning consumers against receiving young donor plasma infusions that are promoted as unproven treatment for varying conditions’.
58 Ken Harvey, Viola Koreczak, Loretta Marron and David Newgreen, ‘Commercialism, choice and consumer protection: regulation of complementary medicines in Australia’ (2008) 188(1)
COVID-19 has focused public attention on community understandings of disease and ‘wellness’, fake health news and faith-based consumption of products that are claimed to have therapeutic value. The pandemic is not unprecedented: epidemiologists have pointed to what has been characterized as ‘the Spanish Flu’ (echoed in contemporary tagging of COVID-19 as the ‘Chinese Virus’ or ‘Wuhan Flu’), outbreaks of poliomyelitis, SARS and HIV. The pandemic has featured attention-seeking by Australian politicians such as colourful entrepreneur Clive Palmer and Craig Kelly whose statements are scientifically unpersuasive but widely disseminated through digital platforms such as Facebook and Twitter alongside traditional media. That populist attention-seeking, weakly condemned by the Prime Minister as a matter of ‘free speech’, is a reprehensible local version of behaviour by US President Donald Trump and Brazilian President Jair Bolsonaro. Given the cultural, commercial and personal costs of COVID-19 – deaths, unemployment, health-based restrictions on civil liberties, erosion of trust in government, embrace of conspiracy theories about 

---


microchipping and $5G$ – there is thus increasing interest in the regulation of ‘fake health news’ alongside fake political news.

**Fake health news?**

Fake news is a matter of uncritical reception and dissemination of harmful news, as distinct from advertising. There is disagreement about its characterization but it is often identified as ‘disinformation’ (false information created/disseminated with the intent of causing harm) and ‘misinformation’ (information that is inaccurate but not created with the intent of causing harm). Both disinformation and misinformation may result in harm, with political fake news for example serving as a potential mechanism for personal/state advantage through manipulation of political processes in order to influence an election and government policies or more subtly to erode the legitimacy of public administration and justice systems.

Fake news about health is arguably just as important but has received less attention by politicians and regulators. It can be construed as encompassing what is scientifically uninformed but essentially harmless (there will be no injury, other than to a consumer’s pocket, if advice is followed) and without a commercial motivation. It also can encompass communication where there is a direct financial benefit to the originator of the communication (in particular the vendor of particular goods or services that are claimed to have some preventative or curative properties), where the recipient of the communication is unable to verify the accuracy of claims or faces substantial difficulty with verification (so-called credence claims), and where the product or advice may cause harm.

That harm might be attributable to use of a product such as black salve, a toxic nostrum that causes physical injury. The harm might instead be attributable to consumers’ reliance on advice and forgoing fact-based medicine (such as vaccination) and thereby

---

71 Sharn Hobill and Jay Sanderson, ‘Not free to roam: Misleading food credence claims, the ACCC and the need for corporate social responsibility’ (2017) 43(1) Monash University Law Review 113.
injuring other people, (a major concern with the ‘anti-vax’ movement) or denying themselves conventional therapies until treatment was too late.\(^{73}\) Such communication has featured recently in Australian litigation involving the controversial guide Serge Benhayon and more broadly in the extensive litigation regarding representations by accredited health practitioners. Fake health news might however have a broader impact, salient for example in community responses to COVID-19, through disregard of legitimate rules regarding infection control.

Fake health news, just like fake political news, is not a new phenomenon. It is indeed distinctly traditional, with registered health practitioners over the past 130 years warning consumers about bogus practitioners/treatments, consumer advocates campaigning against the marketing of ‘snake oil’\(^{74}\) and publishers – the equivalent of global digital platforms such as Twitter and YouTube – on occasion pre-empting state intervention through a self-regulation that saw them refuse to disseminate health product advertisements that were deemed to be deliberately misleading, outright harmful or merely in bad taste. That self-regulation is reflected in the weak contemporary Australian advertising standards regime\(^{75}\) and, more subtly, in scope for action by the ACCC, state/territory fair trading agencies, state health commissions and practitioner boards regarding statements that are deceptive/harmful.\(^{76}\)

**Responses**

‘Fake news’, in particular claims that governments have sought to subvert democratic processes in the United States of America and United Kingdom,\(^{77}\) has resulted in proposals for greater regulation of digital platforms, such as Facebook and Google, through which people are increasingly gaining news and making sense of the world or claims about specific products and phenomena, including vaccination and stem cell therapies.\(^{78}\)

In Australia, those proposals are evident in submissions to the recent Digital Platforms inquiry by the ACCC,\(^{79}\) the national consumer protection agency that co-exists with the TGA and FSANZ. From a consumer protection perspective, the ACCC has historically taken a more activist stance than the TGA in addressing misleading claims about health services/goods.

**Conclusion**

One conclusion might be that fake health news is inevitable: a function of regulatory incapacity, public naivety and commercial opportunity. A corollary is that it might be addressed through a mix of community education, greater responsibility on the part of


\(^{75}\) Ken Harvey, Mal Vickers and Bruce Baer Arnold, ‘Complementary medicines advertising policy Part II: unethical conduct in the Australian market after July 2018’ (2020) Australian Health Review 76.

\(^{76}\) Australian Competition and Consumer Commission v Homeopathy Plus! Australia Pty Limited (No 2) [2015] 1090.

\(^{77}\) Brian McNair, Fake news: Falsehood, fabrication and fantasy in journalism (Routledge, 2017).


journalists and media organisations, alongside a more activist approach by multiple regulators.\textsuperscript{80} The ACCC cannot be expected to solve all problems. On occasion it, along with the TGA, has encountered difficulties with advertising by major complementary medicine vendors,\textsuperscript{81} As Harvey and Vickers have argued, that difficulty might be addressed through adequately funding the TGA and reshaping the legislation.\textsuperscript{82}

The susceptibility of consumers to problematical claims about health services and goods, including modes of diagnosis/therapy by registered or other practitioners and products that do not necessarily perform as described (and thus might generously be characterised as instances of ‘puffery’) is unsurprising given confusing messages by gatekeepers, Australia’s labelling of much practice as traditional or complementary medicine,\textsuperscript{83} use of disclaimers\textsuperscript{84} and the incapacity of regulators whom consumers might expect to intervene if there were substantive potential harms.

Consumption of prepared or raw placenta is a practice that is best addressed through action by a range of stakeholders (including public education). It involves a public recognition, fostered by midwives and journalists rather than merely by clinicians that the needs of some consumers would more appropriately be satisfied through conventional medicine. In particular, we should discourage perceptions that placentophagy is a substitute for a nuanced response to postpartum depression or other ills. It requires greater responsibility on the part of mainstream media organisations that echo problematical claims by enthusiasts. It also requires greater emphasis in primary/secondary school teaching regarding critical thinking about health, political and economic claims.

***

\textsuperscript{81} Swisse Vitamins Pty Ltd v The Complaints Resolution Panel [2012] FCA 536 and Nature’s Care Manufacture Pty Ltd v Australian Made Campaign Limited [2018] FCA 1936.
\textsuperscript{83} R Barker Bausell, Snake oil science: the truth about complementary and alternative medicine (Oxford University Press, 2009).
\textsuperscript{84} Goop for example promotes wellness products – apparently Elderberry chews are good for COVID-19 – with wording such as ‘These statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure, or prevent any disease.’ No therapeutic value, just empties your wallet?
The internet era has spawned a novel form of agreements known as browsewrap contracts. These contracts operate without any explicit act of assent, but generate agreement from the notice of terms and the purported acquiescence to those terms. While browsewrap contracts have been controversial in the United States there is yet to be a case in Australia. However, the Australian Government has emerged as an unlikely actor in the browsewrap contract space through its prolific use of Creative Commons licences. The Australian Government makes content available under CC licences and users knowingly take these materials on that basis. This article considers whether browsewrap contracts could legitimately arise in this context.

I Introduction

Contract and copyright law house both share the burden of having their roots within trade and commerce, but having expanded so successfully that they each now cater to a disparate group of actors. Notably, commercial contractual disputes have pushed the boundaries of assent within contract law.¹ This has happened through the rise of acceptance by conduct cases and the emergence of novel forms of contract such as browsewrap.² While the cases are commercial in nature, the rules articulated by the courts must be set at a level of abstraction that would allow them to apply in many other contexts. It is here that the Australian Government might find itself an unwitting passenger with a rising tide of contract law doctrine. The one area where this will likely play itself out is in the assertion that CC licences are contracts. After the report of the Government 2.0 Taskforce’s report, ‘Engage: Getting on with Government 2.0’³ the Australian Government began the widespread use of Creative Commons (CC) licences so as to to facilitate access to public sector information (PSI).⁴

¹ See for example Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council [1990] 1 WLR 1195 and Brambles Ltd v Wail; Brambles Ltd v Andar Transport Pty Ltd [2002] VSCA 150. See also Modahl v British Athletics Federation [2002] 1 WLR 1192. Modahl was cited with approval in CSR Limited v Adecco (Australia) Pty Limited [2017] NSWCA 121. Modahl is something of an outlier in the implied contracts cases and is symbolic of the expansionary effect of the commercial disputes vis-à-vis contractual assent. In Modahl an athlete was found to be in an implied contract with the British Athletics Federation due to the widespread promulgation of the Federation’s rules at all relevant athletic event. In contrast, in cases such as Adecco and Brogden v Metropolitan Railway Co (1877) 2 App Cas 666, an implied contract was found to exist after commercial parties continued to deal with each other on terms referable to a contract after an initial contract had expired.

² In the context of acceptance by conduct cases, see Empirnall Holdings Pty Ltd v Machon Paull Partners (1988) 14 NSWLR 523. With regard to browsewrap contract cases see below nn 38-49.


The recently released IP Manual declares that CC licences are ‘in effect ready-made contracts for the use of copyright material.’ The assertion of CC licences as contracts is a puzzling development. This article explores the question of how the use of CC licences by the Australian Government might give rise to contracts over the use of PSI. There is an explanatory gap that lies between the Government 2.0 Report’s failure to address the question of contracts and the IP Manual’s assertion that they exist. This article seeks to address that gap. Given the size and complexity of the Australian Government, not to mention the audience for its materials, the issue of CC licences as contracts is potentially a major issue. The Public Governance Performance and Accountability Act 2013 (Cth) lists 186 Commonwealth entities and companies. All of these entities would be subject to the IP Manual and the IP Guidelines.

The consequences of creating contractual obligations via CC licences are mixed. On the one hand a contractual obligation can be enforced. Consequently, the Crown would be able to protect its copyright and related interests via contract. While copyright law does provide a suite of remedies, including injunctive relief, contract law supplements the available causes of action and provides similar remedies. Yet, on the other hand, if CC licences do create contractual obligations then they must run both ways. Further, a contractual obligation is a chose in action and in turn the latter is technically a property right. It follows then that by using CC licences the Crown might have unwittingly bound itself in contract and in turn vested small property rights in certain users. Needless to say, this was not the stated aim of the Government 2.0 Report nor of the Crown in its endorsement of CC licences.

**Browsewrap Contracts**

The internet era has provided modern commerce with three different forms of online contracts of which browsewrap has been the third category to emerge. These categories effectively track the movement from the sale of chattel goods in the store to online commerce.

For example, a shrinkwrap contract broadly refers to a ‘licence agreement’ that is included within a box containing a software disk or similar item. A clickwrap


The Manual defines PSI to include text-based publications, legislation and legislative instruments, forms of data, audio visual and visual material containing government information. Whether data would have copyright protection is debatable.

5 See also the Department of Communications and the Arts, IP Manual, op cit 175.


7 See Torkington v Magee [1902] 2 KB 427.


Where a shrinkwrap agreement is concerned, the box is shrink-wrapped so that the consumer does not actually see the detailed terms of the licence contract until he or she has purchased the software and opened the box. However, there should be a label on the box stating that use of the discs indicates assent to the terms of the contract contained within the box. In ProCD, Easterbrook J noted, “The "shrinkwrap licence" gets its name from the fact that retail software packages are covered in plastic or cellophane “shrinkwrap,” and some vendors, though not ProCD, have written licences that become.” See Step-Saver Data Systems Inc v Wyse Technology 939 F.2d 91 (3rd Circuit, 1991). With the development of the internet shrinkwrap contracts have all but disappeared. Nevertheless, the early jurisprudence on shrinkwrap agreements demonstrated the ability of the courts to adapt the rules of contract law to new
agreement involves a web user click on a box on a webpage in order to indicate assent to the terms and conditions that accompany the online purchase of some goods or services. Where clickwrap contracts are concerned it would seem that on a prima facie basis it would be easier to argue that the user has assented to the relevant contract.

Where browsewrap agreements are concerned the user is taken to have manifested assent to the terms and conditions of the website by using that site with the knowledge that there are applicable terms. In *TopstepTrader, LLC v. OneUp Trader, LLC*, Judge Leinenweber stated:

> A “browsewrap” agreement, on the other hand, is an agreement where users are bound to the website’s terms by merely navigating or using the website; the user is not required to sign an electronic document or explicitly click an “accept” or “I agree” button. ... Courts enforce browsewrap agreements only when there is actual or constructive knowledge of terms.

Browsewrap agreements are not without controversy. In the United States there has been some disquiet about the employment of choice of forum clauses in browsewrap agreements. While the imposition of such terms by stealth should be a genuine source of concern, in Australia such terms in a consumer transaction would be mediated by the Unfair Contract Terms scheme in the *Australian Consumer Law*. Moreover, despite the controversy over forum selection clause, courts in the United States have shown a willingness to accept the principle that a contract can form via a browsewrap agreement.

In the immediate context, there are three reasons as to why CC licences might serve as browsewrap contracts. First, the global model of contract formation does not require a precise moment of formation. Second, the ticket cases serve as a viable formation model. Third, there is a nascent body of jurisprudence in the United States on browsewrap contracts that could influence courts in Australia. Fourth, consideration might be easier to find under the common law of Australia.

**A. A precise moment of formation does not need to be identified**


9 See *CompuServe Inc v Patterson* 89 F.3d 1257 (6th Circuit, 1996).


12 See Michelle Garcia, ‘Browsewrap: A Unique Solution to the Slippery Slope of the Clickwrap Conundrum,’ (2013) 36 *Campbell Law Review* 31, 32. Garcia writes, “Imagine entering into a contract where you have no knowledge of the terms, no way to decline acceptance, and no knowledge you have entered into an agreement. This is not some dystopian fantasy; it is the world of Browsewrap.” In some respects, Garcia’s characterisation of browsewrap agreements is unduly alarmist. A contract cannot really form unless the user of a website knows that the site has terms, regardless of whether they read them or not, and manifests assent to be bound by the terms presumably by continuing the browse the site.


doctrines. The second is the global model which assesses contract formation on the basis of a holistic assessment of the dealings between the parties. In *Mushroom Composters Pty Ltd v IS & DE Robertson Pty Ltd*, Sackville AJA stated:

15 It is not necessary, in determining whether a contract has been formed, to identify a precise offer or acceptance; nor is it necessary to identify a precise time at which an offer or acceptance can be identified.

However, those scholars who hold to the view that open access licences are not contractual in nature have seized on this requirement to suggest that their absence defeats the contract argument. Sapna Kumar has pointed to the lack of a clear act of acceptance as a barrier to the argument that a contract has formed. Kumar states:

19 It is worth noting that mere users may use GPL-licenced software without accepting the licence. The licence is not signed, nor does the offeree click an “I accept” button before obtaining the software. Thus, as long as the user does not modify or distribute the program, no acceptance has occurred. It is also possible that a user would receive a copy of the software without receiving the terms of the licence. In either case, no contract is formed.

Kumar’s argument appears predicated on the requirements of offer and acceptance, which in turn is roughly reflected in the processes around clickwrap agreements. Yet, as aptly demonstrated by the global model, contract law has regularly evinced a degree of flexibility in order to circumvent the need for a clear offer and acceptance.

This is reflected in the global model contract formation, which has found favour in the intermediate appellate courts of Australia, and also in the ticket cases. Justice McHugh’s statement in *Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd*, neatly encapsulates the global view of formation:

22 It is often difficult to fit a commercial arrangement into the common lawyers’ analysis of a contractual arrangement. Commercial discussions are often too unrefined to fit easily into the slots of ‘offer’, ‘acceptance’, ‘consideration’ and ‘intention to create a legal relationship’ which are the benchmarks of the contract of classical theory. In classical theory, the typical contract is a bilateral one and consists of an exchange of promises by means of an offer and its acceptance together with an intention to create a binding legal relationship ... it is an error ‘to suppose that merely because something has been done then there is therefore some contract in existence which has thereby been executed’. Nevertheless, a contract may be inferred from the acts and conduct of parties as well as or in the absence of their words. The question in this class of case is whether the conduct of the parties viewed in the light of the surrounding circumstances shows a tacit

---

15 *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256.
16 In *Gibson v Manchester City Council* [1978] 1 WLR 520, 523, Lord Denning MR stated, “to my mind it is a mistake to think that all contracts can be analysed in the form of offer and acceptance ... You should look at the correspondence as a whole and at the conduct of the parties.” While Lord Denning’s argument was rejected on appeal by the House of Lords in *Gibson v Manchester City Council* [1979] 1 All ER 972, his views have attracted support in Australia. See Ormwave Pty Ltd v Smith [2007] NSWCA 210. See also *Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd* (1988) 5 BPR 11; *Universal Music Australia Pty Ltd v Pavlovic* [2015] NSWSC 791 and *Mushroom Composters Pty Ltd v IS & DE Robertson Pty Ltd* [2015] NSWCA 1.
17 Op cit.
18 [2015] NSWCA 1, [60].
20 Ibid.
21 Kumar, op cit.
understanding or agreement. The conduct of the parties, however, must be capable of proving all the essential elements of an express contract.23

While it would be difficult to rely upon the global view of formation to suggest that the Crown’s use of CC licences gives rise to contractual obligation it does at least establish the fact that formation can be achieved in a number of ways. Moreover, binding legal obligations can be imposed simply because one party presents a work or subject matter with accompanying terms, as happens with copyright and C licences, and the other party takes the work or subject matter knowing that there are terms, but not necessarily having read them. The ticket cases, discussed below, suggest that contract formation can occur in this manner.

B. The ticket cases support formation in the context of browsewrap contracts

In the present context, the ticket cases are relevant because they offer a pathway into contract formation by virtue of the presentation of materials with conditions attached. The ticket cases that emerged in the late 19th and early 20th centuries set out the fundamental rules by which a party might come to be bound in contract by terms offered to them as conditions of carriage.24 The principles developed therein subsequently expanded to cover car parks,25 sale of goods contracts,26 lottery tickets,27 dry cleaning receipts28 and the like. For the most part these cases have concerned themselves with the question of whether the acceptor has assented to unusual terms.29

However, the core principle underpinning these cases, which is that of reasonable notice, is relevant in the context of browsewrap contracts.30 In this context, notice serves a dual function of evidencing incorporation and formation. In effect, the ticket cases demonstrate that the issues of contract formation and the incorporation of terms are intertwined. The ticket cases have established that those terms that a party wishes to impose upon others must be incorporated into the contract by notice. There are three requirements that must be satisfied in order for the terms to be incorporated into the contract. First, the other party must be able to view the terms before the contract is formed.31 Second, the terms must be contained in a document that is intended to have contractual effect.32 Third, the party who seeks to rely on the terms must have taken reasonable steps to bring them to the attention of the other party.33 That is, the party that seeks to rely upon the terms must have given the other party reasonably sufficient notice of the terms.34 Moreover, clear evidence that proper and adequate notice has been given is required to justify the incorporation of particularly onerous or unusual terms.35 In Oceanic Sun Line Special Shipping Brennan J held that the test for whether

24 See Parker v South Eastern Railway Co (1877) 2 CPD 416.
26 L’Estrange v F Graucob Ltd [1934] 2 KB 394. Also, D J Hill Co Pty Ltd v Walter H Wright Pty Ltd [1971] VR 749.
27 New South Wales Lotteries Corp Pty Ltd v Kuzmanovski (2011) 195 234.
29 Ibid.
30 See above n 28.
31 Oceanic Sun Line Special Shipping Co Inc v Fay (1988) 165 CLR 197; Olley v Marlborough Court Ltd [1949] 1 KB 532.
32 See Oceanic Sun Line Special Shipping. See also Chapleton v Barry UDC [1940] 1 KB 532.
33 Parker v South Eastern Railway Co (1877) LR 2 CPD 416.
34 Balmain New Ferry Co Ltd v Robertson (1905) 4 CLR 379, 386 (Griffith CJ).
‘reasonable steps’ were taken was whether the party who sought to rely on the terms, 'had done all that was necessary to bring it to notice.'

It is notable that there is no obiter comment contained in any of the ticket cases that would prevent the application of the relevant principles to browsewrap contracts. Indeed, in ProCD Easterbrook J relied upon the ticket cases to find an enforceable agreement in relation to shrinkwrap licences. In relation to shrinkwrap agreements Easterbrook J in ProCD stated:

... consider the purchase of an airline ticket. The traveller calls the carrier or an agent, is quoted a price, reserves a seat, pays, and gets a ticket, in that order. The ticket contains elaborate terms, which the traveller can reject by cancelling the reservation. To use the ticket is to accept the terms, even terms that in retrospect are disadvantageous. ... Just so with a ticket to a concert. The back of the ticket states that the patron promises not to record the concert; to attend is to agree. A theatre that detects a violation will confiscate the tape and escort the violator to the exit. One could arrange things so that every concertgoer signs this promise before forking over the money, but that cumbersome way of doing things not only would lengthen queues and raise prices but also would scotch the sale of tickets by phone or electronic data service.

It follows then that the principles in the ticket cases might also be extended to browsewrap agreements. As has been noted, a browsewrap licence is in essence a written agreement which does not require signature. Whether these agreements, and CC licences attached to Crown materials, will be enforceable depends upon three factors.

C. Browsewrap

The emerging jurisprudence on browsewrap contracts in the United States may well provide some guidance on how Australian courts will address these issues.

Three important propositions emerge from the various US cases that have dealt with browsewrap contracts. First, assent must manifest itself in some manner in order for a contract to form. In Nguyen v Barnes v Noble Inc, Noonan J stated that the, ‘mutual manifestation of assent, whether by written or spoken word or by conduct, is the touchstone of contract.’ It is notable that Noonan J refers to conduct as a means of establishing intent. In effect, this preserves the application of the ticket cases with regard to browsewrap agreements. Noonan J further stated:

Unlike a clickwrap agreement, a browsewrap agreement does not require the user to manifest assent to terms and conditions expressly ... [a] party instead gives his assent simply by using the website.

That is not to say that use of the website alone manifests assent. Noonan J qualified his statement by observing that the user of the website must have either ‘actual or constructive notice of a website’s terms or conditions.’ It follows then that the taking of copyright materials from a website in the knowledge that some terms apply should make a contract about the use of that material binding between the parties.

---

36 165 CLR 197, 229.
37 86 F.3d (7th Circuit, 1996), [13].
39 Ibid, 1175.
The second proposition, which follows logically from the requirement of assent, is that the user of the website must be given a reasonable opportunity to see the link to the terms. That is, it must be clear that the use of the website involves contractual terms. In *Nguyen v Barnes & Noble*, the attempt to enforce a browsewrap contract failed because a hyperlink at the bottom left-hand side of a webpage failed to provide constructive notice of the terms and conditions of the site. Notably, in *Nguyen* the hyperlink was not accompanied by a clear instruction that purchases made on the website were governed by the terms included in the hyperlink. Where the terms are hidden or obscured the user has not been afforded a reasonable opportunity to inspect the terms.\(^{42}\) While a failure to read the terms will not protect the user from being bound in contract,\(^{43}\) they must at least be aware that terms apply and be afforded the opportunity to study those terms.\(^{44}\) Where there has been actual notice of terms in a browsewrap agreement the courts in the United States have found a binding contract to exist.\(^{45}\)

Third, in the absence of actual notice, ‘the validity of the browsewrap agreement turns on whether the website puts a reasonably prudent user on inquiry’ as to the terms of the contract.\(^{46}\) It might be surmised that a prominent notice would be sufficient to put the reasonable user on inquiry.\(^{47}\)

It is notable that despite these concerns there has been no great reluctance on the part of the courts of the United States to find that browsewrap agreements are enforceable contracts.\(^{48}\) Where the US courts have expressed reluctance has been in relation to the enforcement of harsh dispute resolution clauses.\(^{49}\) Notwithstanding different results as to enforcement of the actual contract itself, degree of uniformity of principle has emerged in the browsewrap cases. However, whether an Australian court would find in the same way depends largely upon their application of the formation doctrines. Indeed, it is notable that all of the browsewrap cases in the United States pertain to commercial and consumer transactions. It is possible that an Australian court would view the receipt of PSI by a member of the Australian public as a non-commercial service, but one inclusive of contractual terms.

**D. Consideration**

Consideration exists as a requirement within the formation doctrines of contracts only to ensure that a bargain is enforceable.\(^{50}\) Those scholars who suggest that open access licences are not contractual the argument suggest that consideration is lacking in the context of CC licences.\(^{51}\) In the context of the GNU Public Licence, Kumar has written:

\(^{42}\) *Specht v Netscape Communications Corp*, 306 F.3d 17 (2d Cir. 2002).


\(^{44}\) See *Specht* 306 F.3d 17 (2d Cir. 2002).


\(^{46}\) *Nguyen v Barnes & Noble*, 1177 (Noonan J).


\(^{48}\) For example, in *Plazza v Airbnb Inc*, 289 F. Supp 3d 537, 548 (SDNY. 2018), Broderick J noted that it was easier to identify assent in clickwrap cases, but nonetheless noted that, “browsewrap agreements are not presumptively unenforceable.”

\(^{49}\) Ibid.

\(^{50}\) *Gay Choon Ing v Loh Sze Ti Terence Peter & Another* [2009] 2 SLR 332, [98] (Phang JA).

The Bargain Theory does not support the GPL being a contract. ... the public, is not offering anything back as consideration to the licensor.\textsuperscript{52}

The objection raised by Kumar is heavily dependent upon the role that the bargain theory plays within the doctrine of consideration in the United States. However, the Australian concept of consideration differs from the North American version. The role of the bargain theory in the latter version of consideration is less flexible than it is in Australia. As Atiyah noted:

The American Restatement (§4) defines a bargain as 'an agreement of two or more persons to exchange promises or to exchange a promise for a performance', but Corbin adopts a narrower definition for the purposes of his great work. He regards a bargain as involving not merely an exchange, but an exchange of equivalents.\textsuperscript{53}

This version of consideration requires a more explicit exchange between the parties.\textsuperscript{54} In contrast, in \textit{Waltons Stores (Interstate) Ltd v Maher},\textsuperscript{55} Mason CJ and Wilson J stated:

... we may be willing to imply consideration in situations where the bargain theory as implemented in the United States would deny the existence of consideration.\textsuperscript{56}

Similarly, in commenting upon the reasoning of the High Court in \textit{Australian Woollen Mills Pty Ltd v The Commonwealth},\textsuperscript{57} McHugh JA stated in \textit{Beaton v McDivitt}:\textsuperscript{58}

The reasoning of the High Court may not amount to an adoption of the extremes of the bargain theory of contract as understood in the United States.\textsuperscript{59}

In Australia, the doctrine itself says nothing about the value of the bargain, or, more pointedly, the value of the actual consideration. In \textit{Chappell & Co Ltd v Nestle Co Ltd} the House of Lords held that consideration could be satisfied by a mere peppercorn.\textsuperscript{60} Likewise, in \textit{Woolworths Pty Ltd v Kelly},\textsuperscript{61} Kirby P, then in the New South Wales Court of Appeal, pointed out that courts are ill-placed to ascertain or assess the value of a given bargain.\textsuperscript{62}

It follows then that the concept of consideration is somewhat easier to manipulate in Australia than it is in the United States. This is important in the context of browsewrap because it means that consideration can be more easily identified.

Moreover, as the formation doctrines now countenance the creation of an agreement in ways that stretch far beyond a classical negotiated contract an automated agreement derived via a browsewrap process might well be enforceable. Further, if a peppercorn is sufficient consideration because it may have value in the eyes of the promisor, then the dissemination of materials on terms, which clearly is a benefit to the Australian Government, can also be sufficient consideration.

Kumar also states:

\textsuperscript{52} Kumar, above n 19, 22.
\textsuperscript{54} Yet, American courts have been willing to recognise browsewrap contracts.
\textsuperscript{55} (1988) 164 CLR 387.
\textsuperscript{56} (1988) 164 CLR 387, 402.
\textsuperscript{57} (1954) 92 CLR 424.
\textsuperscript{58} (1988) 13 NSWLR 162, 182.
\textsuperscript{59} Ibid.
\textsuperscript{60} [1960] AC 87.
\textsuperscript{61} (1991) 22 NSWLR 189.
\textsuperscript{62} Ibid, 193.
A nonexclusive licence that is supported by consideration constitutes a contract. For the contract to be valid, however, the buyer must “accept and pay in accordance with the contract.” But what burden does the licencee of GPL software undertake that benefits the licencee? Contract proponents argue that the licencee’s obligation to make modified source code available to the community constitutes sufficient payment or consideration. For several reasons, however, this argument ultimately fails. Though the licence restricts how a licencee can use the licensor’s work, there is no clear benefit to the licensor. Second, the GPL is not likely valid as a third-party beneficiary contract. Finally, there is no meeting of minds with regard to consideration.\footnote{Kumar above n 19, 20.}

The first argument put forward by Kumar suggests that the licensor receives no benefit. Yet, why then would the Australian Government seek to use CC licences? Why have other parties sought to use CC licences or GNU licences? There must be some benefit that the licensor perceives in employing these terms. Were it to be otherwise then then the licensor would refrain from using them. Kumar’s argument might well be that a user who agrees to use a GNU licence,\footnote{It should be noted that Kumar’s arguments specifically address the GNU GPL licence. However, the arguments employed by Kumar can be extrapolated to Creative Commons licences.} and by extension then a CC licence, is really not agreeing to do anything more than to abide by the existing rules of copyright law. However, ratio in \textit{ProCD} has demonstrated that a party can validly agree to abide by copyright law under a private contractual agreement notwithstanding the fact that it essentially restates the law that exists under the Copyright Act. The benefit to the licensor or copyright owner may well be the extra level of assurance with respect to the observance of copyright rights.\footnote{See above n 51.}

This proposition can be restated along the lines that there is a lack of a positive obligation on the part of the licensee. Pallas-Loren has written:

\begin{quote}
... the Creative Commons licences permit uses far beyond those permitted under the Copyright Act and therefore clearly provide consideration on the part of the copyright owner. As for the consideration offered by the user, the licence purports to identify the consideration: “The licensor grants you the rights contained here in consideration of your acceptance of such terms and conditions.” The promise to abide by the restrictions contained in the licence could suffice to be consideration on the part of the user of the work. However, it is also possible to view those promises as lacking any value, because they are merely promises to not engage in actions that are otherwise prohibited by law.\footnote{By providing access to his or her copyright protected materials the licensor provides consideration. The issue as Pallas Loren and Woods note is whether the licensee also provides consideration. The crux of the argument put forward by Pallas Loren is that the licensee is only agreeing to refrain from what they would otherwise be prohibited from doing under the Copyright Act. However, this ignores the ‘share and share-alike’ obligation in the CC-BY-3.0 AU Share Alike licences. The share-alike obligation effectively requires that adaptations, which include the licensor’s original content and the licensee’s original content, must be made available under the same CC licence. This imposes an obligation on the licensee that goes beyond the Copyright Act. Even the ordinary CC-BY 3.0 Attribution licence has terms that may in effect amount to a de facto share-alike obligation.}
\end{quote}

By providing access to his or her copyright protected materials the licensor provides consideration. The issue as Pallas Loren and Woods note is whether the licensee also provides consideration. The crux of the argument put forward by Pallas Loren is that the licensee is only agreeing to refrain from what they would otherwise be prohibited from doing under the Copyright Act. However, this ignores the ‘share and share-alike’ obligation in the CC-BY-3.0 AU Share Alike licences. The share-alike obligation effectively requires that adaptations, which include the licensor’s original content and the licensee’s original content, must be made available under the same CC licence. This imposes an obligation on the licensee that goes beyond the Copyright Act. Even the ordinary CC-BY 3.0 Attribution licence has terms that may in effect amount to a de facto share-alike obligation.

The CC-BY-3.0 AU Attribution licence provides:

4. Restrictions

The licence granted above is limited by the following restrictions.

4A Restrictions on Distribution and Public Performance of the Work

---

\footnote{Kumar above n 19, 20.}

\footnote{It should be noted that Kumar’s arguments specifically address the GNU GPL licence. However, the arguments employed by Kumar can be extrapolated to Creative Commons licences.}

\footnote{See above n 51.}
(a) You may Distribute and publicly perform the Work only under the terms of this Licence.

4B Attribution and Notice Requirements
(b) When You Distribute or publicly perform the Work or any Derivative Work or Collection You must keep intact all copyright notices for the Work.66

Where the licensee mixes his or her work with that of the licensor to create a ‘derivative work’.67 A ‘derivative work’ is defined under the CC-BY 3.0 licence to mean:

... material in any form that is created by editing, modifying or adapting the Work, a substantial part of the Work, or the Work and other pre-existing works. Derivative Works may, for example, include a translation, adaptation, musical arrangement, dramatisation, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which the Work may be transformed or adapted, except that a Collection will not be considered a Derivative Work for the purpose of this Licence. For the avoidance of doubt, where the Work is a musical composition or sound recording, the synchronization of the Work in timed-relation with a moving image (“synching”) will be considered a Derivative Work for the purpose of this Licence.68

Item 4A(a) still applies and unless the licensee can meaningfully disengage the content of the licensor from that of their own, they are more or less required to redistribute their own content and that of the licensor on the original terms of the CC licence. In effect, there is a implied ‘share-alike’ obligation contained within the CC-BY-3.0 AU Attribution licence.

Distributing the licensor’s work under the terms of the CC-BY-3.0 AU licensors imposes an obligation to act on behalf of the licensor in distributing the materials. It is true that distribution of the licensor’s materials on terms other than the CC licence would likely amount to copyright infringement. Nevertheless, the act of distributing the original licensor’s materials on the terms of the CC licence is capable of dual characterisation as both an act within the terms of the licence and act done on behalf of the licensor. Unless the act of distributing the original content under the terms of the licence is seen as an act done on behalf of the licensor a privity of contract problem will arise. However, distributing the materials under the CC licence terms is clearly beneficial for the original licensor. Moreover, abiding by the terms of the licence is not simply a negative act in the sense that the licensee is refraining from breaching the Copyright Act. It is also positive action in the sense that the licensee must take steps to distribute copies of the licensor’s materials on the terms of the CC licence.

I. Does the Australian Government’s use of CC licences give rise to contractual relationships with users?

On balance, it does appear likely that the Australian Government’s use of CC licences can and will lead it into contractual relationships with the users of its materials. Taking together all of the doctrinal analysis in Part II of this article, the bare bones of that argument is set out below. It leads to a disconcerting conclusion that for the simple act of sharing and disseminating government materials, the Crown is engaging users in contracts by stealth. To put it mildly, this is not the sort of thing envisaged by the duty to disseminate under the copyright prerogative. As government reports and the like are not of a radically different genus to prerogative materials it is odd that a contract must be pressed into service to facilitate access and sharing.

---

66 The CC-BY-3.0 AU licence is available here: https://creativecommons.org/licenses/by/3.0/au/legalcode.
67 Ibid.
68 Ibid.
A. The Contract Argument

First, the fact that Australian Government copyright materials are offered on the terms of a CC licence is prominently displayed on most of the relevant webpages. Accordingly, the display of the notice ought to put the reasonable internet user on notice that there are terms that apply to the usage. Whether these terms are simply a restatement of existing copyright rules or whether they constitute something further or more detailed is in actual fact irrelevant. The fact that property rules apply under the Copyright Act is no barrier to private parties relying upon the same substantive terms in a contractual agreement.

Second, the user has the opportunity to fully explore the terms. It does not actually matter whether the user reads the terms or not, but rather that they have had the opportunity to read the terms. The complete terms of the browsewrap licence are available in full by following the links on the relevant website. In the context of the Crown’s use of CC-BY-3.0 AU licences or the CC-BY-4.0 licences, the full terms are available on the copyright notice page. That said, it is clear on the webpage where the PSI materials are available that the materials are made available subject to a CC licence.

Third, at this point CC licences have been well publicized in the broader community. These have been promulgated on the internet. It follows then that the reasonable internet user, despite not having any specific knowledge of either copyright law or Creative Commons, would be aware that there are terms that are contained in the CC licence. To read the webpage is to read that notice. In this sense, the browsewrap licence scenario is not dissimilar to the ticket cases. For example, a train ticket or entry into a parking lot, may well be governed by a contract whose terms are not going to be presented to the customer in written form for signature.

Fourth, the case law has established that a precise moment of formation need not be identified. Nevertheless, neutral actions, to which no discernible assent can be attributed, will not reach the threshold of acceptance by conduct. Formation must occur at some point if there is to be a binding agreement. It could be said that formation occurs when in a single instance of usage an internet user takes copyright materials from an Australian Government website knowing that CC licence terms apply. This might have been so in the ticket and browsewrap cases, though these cases were largely consumer transactions, and the accessing of government PSI by a member of the public is substantively different.

Alternatively, many of those who use the Australian Government’s websites to download copyright protected materials might be regular or intermittent visitors. In *Balmain New Ferry Co Ltd v Robertson*, it was established that the repeated use of a service, knowing that there were terms, amounted to an assent to those terms. By extrapolation the repeated use of CC licenced materials, regardless of whether they are re-worked and shared, will eventually amount to an assent to a contract. Whether this occurs immediately or on later uses is open to debate. For the most part, we are concerned with a multitude of users most likely making repeated use of CC licenced materials on the Crown’s websites. This is more analogous to the *Balmain Ferry* scenario, thereby making it more likely that the acceptance scenario has been satisfied.

Fifth, the action of taking copyright protected materials in the knowledge that terms apply to them is not an act without context. That is, the user is not acting in a neutral matter and the assent to terms is not being derived from what might be regarded as a colourless silence. It is a fundamental principle of contract law that silence and nothing
more cannot amount to acceptance. In *Felthouse v Bindley*, an express attempt to cast an offeree’s silence as acceptance was rejected by the House of Lords. This principle is well-established, but its application has been conditioned by later cases which have held that the overall context of dealings between the parties might signal assent. To take copyright material in the knowledge that some terms do apply to their use is not the same as merely being silent to a contractual offer. It is instead a conscious choice to run the risk of being bound by those terms.

**B. The Contract Flaw?**

A crucial matter in the present context is just how a user might come across the terms on a website. It has to be conceded that knowledge of the existence of terms and knowledge of those terms are not the same thing. Moreover, it is not guaranteed that either of those things will actually occur. Yet, the browsewrap and ticket cases, birthed in commercial and consumer contexts, almost assume knowledge on the part of the user. Whether this is appropriate for the user of a government website is very debatable.

It is understandable that a passenger on a train or a concertgoer would understand that their use of a service is subject to some contractual terms. Their ignorance of those terms most likely constitutes a risk that they are willing to run. Much the same can be said of consumers who operate in a browsewrap context. Even here, the case law is very mixed in the United States due to the preponderance of problematic arbitration clauses.

The user of a government website would not necessarily expect to encounter contract terms. In fact, it is highly unlikely that this would occur to most users. The imposition of terms then proceeds almost on the basis of stealth. It seems contrary to the principles of open government and open access to ensnare an unwitting user of a government website in contract. In copyright terms, the needs of the government are rather modest. A simpler tool will suffice. In all, the Australian Government, in seeking to address issues around copyright, has entirely ignored the very malleable nature of formation under Australian contract law. Having perhaps then conceded in recent times that CC licences are contracts, there would appear to have been no review as to whether this is a useful development. In sum, a reconsideration is required for the reasons set out above.

**II. Conclusion**

This article has explored the question of whether the Australian Government’s use of Creative Commons licences in relation to public sector information can in fact give rise to contractual obligations. The Government 2.0 Taskforce’s report, ‘Engage: Getting on with Government 2.0,’ which recommended the use of CC licences, did not address the issue of contracts. Likewise, the Creative Commons Attribution 3.0 Australia licence, which the Australian Government initially used, and still uses in some instances, does not contemplate that it might form the basis of a contract. Yet, there was a discernible shift in language in the Creative Commons Attribution 4.0 licence where this possibility

---

71 See Allied Marine Transport Ltd v Vale do Rio Doce Navegacao S.A. (The Leonidas D) [1985] 1 WLR 925. See also Westpac Banking Corporation v ZH International Pty Ltd; Bronte Properties Pty Ltd v ZH International Pty Ltd [2015] NSWSC 607.

72 (1862) 142 ER 1037. See also Westpac Banking Corporation v ZH International Pty Ltd; Bronte Properties Pty Ltd v ZH International Pty Ltd [2015] NSWSC 607. Also Taste of Tuscany Restaurant Pty Limited v Papantoniou [2017] NSWSC 932.

73 See Empirnall Holdings (1988) 14 NSWLR 523. See also Kovan Engineering (Aust) Pty Ltd v Gold Peg International Pty Ltd [2006] FCAFC 117.

74 Though contract law does of course have a number of rules that would alleviate the harshness of unfair terms.
was considered. There is a colourable argument that a contract can exist, though it does push at the boundaries of contractual assent. Whether this is the case in Australia is an open question. Nonetheless, it has significant ramifications for the sharing of Australian Government copyright materials.

On the basis of the foregoing discussion, it does seem likely that the analysis in the ticket cases may influence Australian courts to find that browsewrap agreements are binding. In turn, this would have to be the basis upon which the Australian Government’s use of CC licences in relation to PSI would give rise to contracts. However, both browsewrap agreements and CC licences remain largely untested by Australian courts. If the Australian Government has found itself in contract with a multitude of users in relation to copyright in PSI then this has occurred without much public debate or discussion. Nevertheless, the individual liability to each user would likely be very small, though in total the quantum of contractual liability now being run by the Australian Government would not be insubstantial. Lastly, whether it is suitable for the Australian Government to require its citizens and others to enter into a contract in order to access PSI is open to debate.
University of Canberra
Student Contributions
Searching for Self: Realising the Right of Self-Determination for the Palestinian People

Huw Warmenhoven*

This article explores the principle and right of self-determination, applies the international law concerning self-determination to the Palestinian context and identifies key limitations of scope, status and subject. Occupation of Palestinian territory by Israel raises the issue of whether the status of an occupying power can move from lawful to unlawful as a result of actions contrary to international law. The article discusses the applicability of international legal enforcement mechanisms available to the Palestinian people, including UN Resolution 377 (Uniting for Peace) and its potential application in the contemporary Palestinian context through the realisation of the latent potential of the General Assembly to maintain peace and security where the Security Council has failed to execute its responsibilities.

Introduction

Self-determination is a principle of international law, regarded as a *jus cogens* rule, that grants all peoples the ability to freely determine their political status and pursue their economic, social and cultural development. The development of this principle can be seen in a movement from nationalistic, state-sovereign origins towards the contemporary, collective right that is recognised today. A significant body of international law has also enshrined the principle as a fundamental right, which has been applied in a wide variety of contexts by the international community. The contemporary articulation of the right of self-determination states ‘all peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.’ The right of the Palestinian people to self-determination has been recognized by the international community. This article will explore this contemporary understanding of the right of self-determination, apply the international law concerning self-determination to the Palestinian context and identify key limitations concerning the scope, status and subject of self-determination. The application of self-determination beyond a mere theoretical concept and into the reality of realpolitik considerations is one of significant complexity.

---

* Huw Warmenhoven’s LLB Honours (University of Canberra) dissertation in 2020 dealt with self-determination.

1 Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res 1514, UN Doc A/RES/1514 (14 December 1960) (‘Granting of Independence Declaration’).
3 Charter of the United Nations, art 1; ICESCR (n 2), art 1; ICCPR (n 2), art 1; Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, 3rd session, 183 plen mtg, UN Doc A/810 (10 December 1948), art 15 (‘UDHR’); Granting of Independence Declaration (n 1).
4 See, for example: Basque Country, Biafra, Catalonia, Crimea, Chechnya, Eastern Ukraine, Falkland Islands, Gibraltar, Hong Kong, Kashmir, Kosovo, Kurdistan, Northern Cyprus, Quebec, South Africa, West Papua, Western Sahara.
5 ICCPR (n 2), art 1; ICESCR (n 2), art 1.
Therefore, the discussion will be guided by two key challenges to the realisation of self-determination by the Palestinian people: occupation and statehood.

International human rights and humanitarian law extends to peoples under occupation and populations within conflict. Protected populations under occupation are therefore accorded a variety of rights, including social, economic, cultural, civil and political rights including a right of self-determination. The international community has affirmed the occupation of Palestine by Israel since 1967. As Israel is an occupying power, the Palestinian people are classified as protected people and are entitled to specific humanitarian protections as enshrined in international law. This article will analyse the occupation of Palestinian territory by Israel through a pertinent question in international law: whether an occupying power can move from lawful to unlawful occupation as a result of acting contrary to international law. An occupying power can only act as temporary administrator of the territory until it is returned to the protected population in as short a time as reasonably possible, acting in the best interests of the protected people and controlling all occupied territory in good faith. The occupying power bears responsibility to respect and preserve the fundamental rights of the protected population. To this end, three key responsibilities are enshrined within international law: administration, transfer of population and good governance. Analysing the occupation of Palestine by Israel, and whether these responsibilities have been upheld, a four-part test will be utilised. The four-part test includes criteria of annexation, temporariness, best interests and good faith. The determination of the status of occupation by Israel will also include a brief analysis of International Court of Justice (‘ICJ’) advisory opinions on Namibia and Palestine.

Considering that a number of the enforcement mechanisms within international law are only open to states, the statehood status of Palestine remains a central impediment to freedom from occupation, self-determination and the realisation of genuine autonomy. Whilst the international community has recognised the right of the Palestinian people to exercise their right to self-determination in addition to pursuing national independence and sovereignty, the Palestinian people remain without the formal status of statehood. This discussion will articulate statehood requirements and the current status of the Palestinian people as an observer state; explore the impact of recognition by international bodies on the status of Palestine; and the relationship between recognition of statehood and the application of the right of self-determination. This will focus on the traditional criteria for statehood as outlined by the Montevideo Convention, including: permanent population; defined territory; government; and

---

7 Wall Advisory Opinion (n 2), 112.
8 ICCPR (n 2), art 1(1); ICESCR (n 2), art 1(1).
10 For example, see Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), opened for signature 12 August 1949, 75 UNTS 28 (entered into force 21 October 1950), art 4.
11 The principal instruments of international humanitarian law, such as the 1907 Hague Regulations, the 1949 Fourth Geneva Convention and the 1977 Additional Protocol to the Geneva Conventions, are silent on such issues concerning lawful to unlawful occupation.
13 Ibid.
16 Wall Advisory Opinion (n 2), 88.
18 on Rights and Duties of States, opened for signature 26 December 1933, 164 LNTS 19 (entered into force 26 December 1934), art 1 (‘Montevideo Convention’). International law does not require the structure of a state to follow any particular pattern: Western Sahara
capacity to enter into relations with other states. It will also include the requirements of membership of, and recognition by, the United Nations under article 4(1) and article 4(2) of the Charter of the United Nations. The application of these requirements will draw to light two issues: defining the subject and authority of Palestinian statehood. A brief application of these requirements will also be made and critiqued in light of the potential impact of the geo-political agendas of permanent members of the Security Council on the outcome of statehood for peoples seeking to express self-determination.

Finally, the analysis of Palestinian attempts to enforce their right of self-determination, and associated rights, through international judicial mechanisms will include applications made before the International Criminal Court (‘ICC’) and the ICJ. Potential issues concerning jurisdiction of these courts will be explored, as well as the capacity for the enforcement of decisions of these courts. Of significance to this discussion is the recognition of Palestine as a ‘non-member observer’ state,\textsuperscript{19} which combined with its treaty practice engagement since the General Assembly resolution,\textsuperscript{20} has resulted in a new prevailing understanding that the ICC can accept jurisdiction over crimes committed in Palestinian territory.\textsuperscript{21} This jurisdiction will be supported by a discussion based on collective recognition (including Palestinian membership of the UNESCO) by the international community, and the resultant capacity to engage with international legal instruments through the Vienna Formula.\textsuperscript{22} This discussion will culminate with an articulation of Resolution 377 – Uniting for Peace\textsuperscript{23} – and its potential application in the contemporary Palestinian context. Resolution 377 reveals the latent potential of the General Assembly that resides within the United Nations and constructs a procedural framework for this power to be exercised by the General Assembly in situations where the Security Council fails to exercise its responsibilities to maintain international peace and security.

**Research questions**

This article explores the challenges associated with the application of the right of self-determination in a way that can promote genuine autonomy for the Palestinian people. This will include discussion that will answer the following questions:

1. Does the current context of the Palestinian people have any impact on their ability to exercise the right of self-determination?
2. What is the relationship between the application of the right of self-determination and the recognition of statehood for the Palestinian people?
3. What issues arise in the formulation of the scope, subject and status of the right of self-determination in its application to Palestine?
4. How has the international community (including United Nations organs, international judicial mechanisms, regional bodies and international agencies) addressed the right of self-determination in the case of Palestine?
5. Are there any additional avenues available to the Palestinian people for enforcement of their right of self-determination and attainment of genuine autonomy?

---


\textsuperscript{20} Party to over 15 international treaties since General Assembly recognition.


\textsuperscript{22} Vienna Convention on the Law of Treaties, opened for signature 23 Mat 1969, 1155 UNTS 331 (entered into force 27 January 1980) (‘VCLT’).

\textsuperscript{23} Uniting for Peace, GA Res 377, UN Doc A/RES/377 (3 November 1950).
Scope

Due to practical and length limitations, the article will only focus on the right of self-determination as expressed in major international legal instruments and interpreted by the international community. The research will be limited in the depth of historical analysis in order to focus on the current impasse and challenges of occupation and statehood within the contemporary context of Palestine.

The discussion regarding the law of occupation will be limited to the occupation of Palestine by Israel. Whilst significant applicable case law and opinion exists, the exploration of the proposed four-part test to identify a potential threshold by which an occupying power can move from legal to illegal occupation will be limited to the Namibia Advisory Opinion and Wall Advisory Opinion of the ICJ.

The discussion on the statehood of Palestine will focus on the traditional criteria for statehood as outlined by the Montevideo Convention as well as those required by the Charter of the United Nations under articles 4(1) and 4(2). A brief application of these articles will be made and critiqued in light of the potential impact of the geo-political agendas. Further discussion could be made regarding the geo-political narrative concerning this issue.

Research Design

a. Methodology

The primary focus of this article is doctrinal research that provides an understanding of the law in its current context, whilst allowing for a systematic exposition of the current international humanitarian and human rights law as interpreted by the international community. The article provides a cross-disciplinary angle to research, incorporating sociological concepts, such as irresolvable conflict theory, within international law. This will occur through an evaluation of the right of self-determination through a qualitative research analysis, analysing contemporary literature on the case of Palestine. This analysis will then directly address two key challenges posed by the literature to the realization of self-determination for the Palestinian people: occupation and statehood. These challenges will be substantiated through a process of evaluation. First, focusing on the challenges and their application to the current impasse experienced by ‘modern Palestine.’ Then, the elimination of contradictory interpretations through an investigation into contemporary sources and findings found in the academic discourse. The findings obtained will be interpreted and coded in order to reiterate the applicability of the right of self-determination to the Palestinian people, before addressing avenues for Palestine to assert the right before the international community.

To identify the issues that arise out of this conceptual framework, a multifaceted case study analysis of the right of self-determination as exercised by the Palestinian people will be explored. This case study will include a brief overview of the comprehensive and interrelated reasons for the current context, including a mapping of the context to present, including recent actions before the ICC and ICJ as well as resolutions made by the United Nations Security Council and General Assembly, to update the literature.

---

24 ICCPR (n 2); ICESCR (n 2).
25 Including through the International Court of Justice as well as resolutions pass by the United Nations Security Council and General Assembly.
26 Lynk (n 12); Namibia Advisory Opinion (n 15); Wall Advisory Opinion (n 2).
27 Montevideo Convention (n 18), art 1.
Within the case study, the application of Resolution 377 will be explored to determine the validity of the resolution in the Palestinian people’s efforts of self-determination.

**Research Utility**

This article will make an original and worthy contribution to the literature concerning the application of the right of self-determination for the Palestinian people. Firstly, it will seek to articulate the underlying reasons for the perpetuation of the Israeli occupation of Palestine. In the discussion, it will update the literature on the current context of the Palestinian people so as to set the context for the legal discourse. To achieve this, the integration of sociological theory – irresolvable conflict theory – within the application of international humanitarian and human rights law will provide a unique insight of the challenges associated with perpetuation of the occupation and the escalation of the conflict.

Secondly, the article will provide an opportunity for a multifaceted analysis of issues in international law in the Palestinian context. Noting that the right of self-determination is a right of process and not outcome, the exploration of processes available to Palestine within international judicial mechanisms (the ICC and ICJ) and principal organs and agencies of the international community (the United Nations Security Council, General Assembly and UNESCO) will be explored in light of the contemporary challenges experienced by the Palestinian people (occupation and statehood). This article provides an opportunity to update the literature on recent actions taken on the situation in Palestine including initiating actions before the ICJ.29

Finally, the article will explore issues concerning the creation, implementation and enforcement of international law. The origin and perpetuation of the challenges associated with the Palestinian application of the right of self-determination will be viewed in light of these broader issues of international humanitarian and human rights law. As a result, the contemporary application of Resolution 377 to the Palestinian context will be made. This conceptual understanding may provide insight into areas of legal reform, including the framing of legislative instruments, the interpretation of the right of self-determination and the actions available to occupied peoples and those seeking to exercise this right. Considering that the challenges to self-determination outlined in the Palestinian context are not isolated to Palestine, the application of the analysis in this article may extend well beyond the Palestinian context.

The Unrepresented Nations and Peoples Organisation currently has 41 members, including members that have made attempts to self-determination such as Taiwan, Tibet and West Papua.30 The contemporary application of Resolution 377 to the Palestinian context, especially in the context of occupied states whose occupying power has failed the threshold test of legal occupation, could provide a unique avenue for these non-state entities seeking an outcome to their right of self-determination, and a new line of inquiry for further research.

---


The Palestinian Context: A Search for Self-Determination

a. The Emerging Reality of ‘Modern Palestine’

This Part seeks to address the question: does the current context of the Palestinian people have any impact on their ability to exercise self-determination? In order to answer this question, the contemporary context of Palestine must be clarified. The territory of ‘modern Palestine’\(^{31}\) has a significant history across religious, cultural, commercial and political domains. It is a place of immense significance to Judaism, Christianity and Islam and is geo-politically located between Europe, Asia and Africa. As a result, the tumultuous history of Palestine has included a series of geo-political contestations and changes in control over the region. A number of historical powers have controlled the area, including Ancient Egypt, Persia, the Roman Empire, Islamic and Christian powers and more recently, the Ottoman Empire and the United Kingdom.\(^{32}\) The contemporary context of Palestine has been significantly shaped by the Palestine – Israel (or Arab – Israel) conflict, which can be traced to the 19th century emergence of modern Zionism and Arab nationalism. This conflict has focussed primarily on territorial disputes and identity disparity between Jews and Arabs.

It has raised significant issues of international law especially in regard to the right of self-determination for both Israel and Palestine, occupation and annexation of Palestinian territory by Israel, and status of Palestinian statehood. Through a series of decisions taken by the international community in the early 20th Century,\(^{33}\) Israel was established and recognised as a state. These actions provide a conceptual understanding of modern Palestine. The process of establishment and recognition of Israel as a state was arguably a progressive shift towards supporting self-determination. But as has been the reality ever since, new challenges have emerged concerning territorial claims over the region.\(^{34}\) These challenges can be seen in a series of conflicts that, when tracked, identify significant territorial losses for Palestine since 1946.\(^{35}\) Despite significant international efforts to support the Palestine – Israel peace process,\(^{36}\) these agreements have not been successful in ending the occupation of Palestine by Israel or the active conflict between Palestine and Israel.

These challenges to self-determination, and factors involved in the continuance and escalation of the conflict, have been articulated in a variety of ways throughout the

\(^{31}\) Taken to be the geographic region in the Southern Levant between the Mediterranean Sea and the Jordan River.

\(^{32}\) Ilan Pappe, A history of modern Palestine: One land, two peoples (Cambridge University Press, 2004)

\(^{33}\) International level including the Sykes-Picot Agreement (1916) and regional level including the Hussein-Mcmahon Correspondence (1916) and the Balfour Declaration (1926).


\(^{35}\) The Palestine – Israel conflict has been seen in wars beyond the contested territories and included other states, including: United Kingdom, France, Egypt, Jordan, Syria, Lebanon, Saudi Arabia, Yemen, Iraq, Iran and military groups such as the South Lebanon Army, Unified National Leadership of the Uprising, Palestinian Authority, Hamas. These can be seen across a number of specific conflicts including: the War of Independence (1947-49), Sinai War (1956), Six Day War (1967), the Yom Kippur War (1973), Operation Litani (1978), First Lebanon War (1982 – 1985), First Intifada (1987 - 1993), Second Intifada (2000 - 2005), Operation Cast Lead (2008 - 2009), Operation Pillar of Defence (2012), Operation Protective Edge (2014).

literature. Whilst an in-depth literature review is beyond the scope of this article, it is worth noting two key ways to categorise these factors. The first is the presence of both concrete and non-concrete factors in the Palestine–Israel conflict.\textsuperscript{37} Concrete factors allow for the external representation of the conflict to occur, such as issues of territory and borders. Non-concrete factors often refer to the internal motivations of people in conflict, and include differences in identities, values, beliefs, historical narratives and collective memories. These two factors interact in that the escalation and perpetuation of the conflict is motivated by non-concrete factors and observed through concrete factors. In assessing the current context of Palestine in relation to the Israel and the broader international community, both factors must be considered. Much of the peace building efforts of the international community have focused on concrete factors, such as addressing territorial boundaries, enforcing restrictions on conflict-based actions and establishing forums for dialogue. However, the right of self-determination is also innately connected to non-concrete factors. The right provides that a group has the ability to determine their political status and pursue their economic, social and cultural development.\textsuperscript{38} Such determination is driven by group identity and their motivations.

The factors may also be categorised in strategic, structural and psychological terms.\textsuperscript{39} As delineated by Kelman,\textsuperscript{40} the content of the right of self-determination remains a core feature across all three of these categories. Strategic factors encompass an inability of one group to make territorial concessions in the face of security risks from the other group. Structural factors can be seen in the ongoing political instability between Palestine and Israel, as well as between the two groups and the international community. Psychological factors include the cognitive and emotional beliefs and attitudes that come from entrenched ethno-cultural identities.

In the case of Palestine, these factors have been perpetuated by a failure to gain state recognition which has often been attributed to a lack of legitimate authority, territorial legitimacy,\textsuperscript{41} and failed diplomatic and peace-building efforts focused on the establishment of territorial borders.\textsuperscript{42}

An imbalance in status of international recognition has brought additional challenges for the Palestinian people.\textsuperscript{43} These discussed factors are examples of how the ability of the Palestinian people to exercise self-determination is closely linked to the Palestine–Israel conflict. Therefore, the status of this conflict will be briefly examined.

\textsuperscript{37} Eran Halperin, ‘Emotional barriers to peace: Emotions and public opinion of Jewish Israelis about the peace process in the Middle East’ (2011) 1\hspace{1em}Peace and Conflict 17.
\textsuperscript{38} ICESCR (n 2), art 1.
\textsuperscript{39} Herbert Kelman, ‘The political psychology of the Israeli-Palestinian conflict: How can we overcome the barriers to a negotiated solution?’ (1987) Political Psychology, 347.
\textsuperscript{40} Ibid.
\textsuperscript{41} This includes losing territory to other Arab nations including Israel, Egypt and Transjordan. See Virginia Held, ‘Legitimate authority in non-state groups using violence’ (2005) 36, Journal of social philosophy, 175.
\textsuperscript{42} For example, the Madrid Conference (1991), the Oslo Accords (1993-1995) and the Roadmap for Peace (2002).
\textsuperscript{43} Oren Yiftachel, Ethnocracy: Land and identity politics in Israel/Palestine. (Universal, 2006)
The Current Impasse: Palestine and the Irresolvable Conflict

Throughout the literature, the Palestine – Israel conflict has been defined as ‘irreconcilable and irresolvable.’ According to Snow and Kelman, irresolve conflicts generally occur when groups who identify as ‘states,’ who are reinforced by a broader diaspora that share a common identity, are engaged in a ‘zero-sum’ conflict: a type of conflict where one state’s gain is balanced by another state’s loss. Snow demonstrates seven key characteristics of these conflicts:

1. **Territory:** both groups claim sovereign control over shared territory. Often one group maintains recognised sovereign control at the expense of the other.

2. **Culture and Emotion:** the internal motivation of the groups engaged in the conflict involves an emotional connection to key external factors (e.g. territory) that give rise to the group identity (such as the territory). Often rooted in historical, religious or ethnic significance, the other group does not understand the significance, resulting in cultural misunderstanding arising out of ‘inconsiderateness and insufficient familiarity.’ It is in this context that the process of ‘othering’ can become a normalised practice against the people who do not share in this group identity.

3. **Exclusive:** the group’s positions become mutually exclusive and viewed as zero-sum in nature. This is as a result of the expression of distinct and fundamental values, often seen as sacred within the group identity, that cannot be compromised, abandoned or replaced.

4. **Intractable:** intractability is the predominant sentiment felt by both groups. A resolute position of group leaders in relation to external factors reinforces the impossibility of compromise.

5. **External Failure:** external efforts at mediation or negotiation fail, leading to an increasing sentiment of disillusionment amongst the group. This can result in further challenges of negative perceptions concerning the motivations of the external parties upon failure of the negotiations.

6. **Geopolitical Failure:** the inability to reach a geopolitically viable or acceptable outcome or a physically decisive outcome. This is essentially a characteristic of political failings, which can also be a consequence of an imbalance in political status.

---

45 Donald Snow. *Cases in international relations* (Longman, 2012); Rafi Nets-Zehngut, and Daniel Bar-Tal, *The intractable Israeli-Palestinian conflict and possible pathways to peace. Beyond bullets and bombs: Grassroots peacebuilding between Palestinians and Israelis* (Greenwood, 2007)

46 Ibid.

47 Kelman, (n 34).

48 Ibid, 363.

49 Israel belongs to the Jewish community and Palestine to the Arab community. Yiftachel (n 43).

50 Nets – Zehngut (n 45)

51 Snow (n 45).


54 Bar – Siman – Tov (n 53).

55 Nets – Zehngut (n 45).


57 Bar – Siman – Tov (n 53).
7. *Duration*: the inverse correlation between the duration of the conflict and the desire for compromise. The longer the conflict endures, the more it hardens into an unacceptable solution for compromise.\(^{58}\)

Similarities exist between the criteria for irresolvable conflicts and the Palestine – Israel conflict: an extended geopolitical conflict, grounded in religious, ethnic and historical difference combined by an imbalance in status between Palestine and Israel and ongoing occupation of Palestine by Israeli forces. A chasm exists between the Palestinian people and their perception of significant components of the international community which, whilst having sought peaceful outcomes,\(^{59}\) have failed.\(^{60}\) This has perpetuated the non-concrete factors, seen in the narrative of the group identity of the Palestinian people.\(^{61}\) This preliminary understanding of the current context of the Palestinian people, including the articulation of factors present within the ‘irresolvable’ conflict with Israel, leads to an exploration of the right of self-determination as articulated in international law.

**Self-determination in International Law**

The right of a people to self-determination is a principle of international law, regarded as a *jus cogens* rule,\(^{62}\) that grants all peoples the ability to freely determine their political status and pursue their economic, social and cultural development.\(^{63}\) The capacity to exercise this right allows all people to:

> ... freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.\(^{64}\)

As the principle of self-determination has become enshrined within international law, it has developed significantly. The emergence of the term across Europe, and specifically Germany, in the mid-19th Century originally focused on a context of sovereign independence, rather than an individual or group right.\(^{65}\) The movement from the nationalistic, state-sovereign origins of self-determination towards the modern, collective right currently acknowledged can be seen in key changes in the international community in the early 20th century. The reaction to the impact of nationalism in the context of World War I provided world leaders with an opportunity to promote self-determination principles.\(^{66}\) United States president, Woodrow Wilson, articulated this when he said ‘national aspirations must be respected; people may now be dominated and governed only by their own consent.

Self-determination is not a mere phrase; it is an imperative principle of action.’\(^{67}\) Whilst not enshrined within international law, self-determination was becoming a necessity

\(^{58}\) Snow (n 45).


\(^{60}\) Alan Dowt, and Michelle Gawerc, ‘The Intifada: Revealing the Chasm.’ (2001) 3 Middle East 5, 39.


\(^{63}\) ICESCR (n 2) art 1(1); ICPCR (n 2). See also: Portugal v. Australia (n 2), para 29; and Wall Advisory Opinion (n 2), para 88.

\(^{64}\) ICESCR (n 2) art 1(2).


\(^{66}\) See, for example, the declaration of independence by both Poland and Czechoslovakia in 1918.

in the context of the new, modern world.\textsuperscript{68} This was advanced in the aftermath of World War II, with the recognition of self-determination central to the formation of the United Nations. The emergence of self-determination in international law has also seen a progression from principle to right. Whilst an accepted principle of international law does not necessarily confer a right under international law;\textsuperscript{69} the principle of self-determination has given rise to a significant body of international law that has enshrined the principle as a fundamental right.\textsuperscript{70} The right of self-determination has since been applied in a wide variety of contexts by the international community, including to the case of Palestine.\textsuperscript{71}

The contemporary articulation of the right of self-determination can be found in the \textit{International Covenant on Civil and Political Rights}\textsuperscript{72} and the \textit{International Covenant on Economic, Social and Cultural Rights}, which states ‘all peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.’\textsuperscript{73} The right has been subsequently incorporated within a variety of international and regional legal instruments\textsuperscript{74} and interpreted by the ICJ.\textsuperscript{75}

The right of self-determination is a right of process – not outcome. It is the process that is accorded to a group of people who seek to determine their own identity.\textsuperscript{76} The articulation of the right does not state how the right is to be enforced, nor the outcome of such an enforcement. Whilst the outcome expected by the party exercising their right is dependent on the context, the outcome often includes some form of recognition by the international community, which can also incorporate elements of independence, federation, protection, autonomy or assimilation.\textsuperscript{77} It is in the application and enforcement of the process of self-determination that limitations concerning the scope, subject and status of the right arise.

Firstly, the scope of the right of self-determination is not necessarily an ‘absolute right’; although similar elements have been emphasised in cases of significant power imbalance situations over contested non-contiguous territory where the party exercising the right is an indigenous population.\textsuperscript{78} It would be amiss not to note an obvious tension that arises in regards to the right of self-determination: the balance between self-determination and territorial integrity.\textsuperscript{79} This limitation will be addressed

\begin{itemize}
  \item \textsuperscript{68} \textit{Covenant of the League of Nations} (1919), art 22.
  \item \textsuperscript{69} Frederic Kirgis, ‘The degrees of self-determination in the United Nations era.’ (1994) 88(2) \textit{American Journal of International Law} 304.
  \item \textsuperscript{70} ICCPR (n 2), art 1; ICESCR (n 2) art 1.
  \item \textsuperscript{71} For example: Basque Country, Biafra, Catalonia, Crimea, Chechnya, Eastern Ukraine, Falkland Islands, Gibraltar, Hong Kong, Kashmir, Kosovo, Kurdistan, Northern Cyprus, Quebec, South Africa, West Papua, Western Sahara.
  \item \textsuperscript{72} ICCPR (n 2).
  \item \textsuperscript{73} ICESCR (n 2).
  \item \textsuperscript{75} \textit{Namibia Advisory Opinion} (n 15); \textit{Western Sahara Advisory Opinion} (n 18).
  \item \textsuperscript{76} \textit{Charter of the United Nations}, art 1(2).
  \item \textsuperscript{77} This was the case with cases such as East Timor, Estonia, Georgia and Latvia. Such outcomes need not necessarily be two-state solutions, with successful recognition in single-state solutions cases also occurring.
  \item \textsuperscript{78} Hannum (n 68), 32.
  \item \textsuperscript{79} The literature supports the position that territorial integrity takes precedence over self-determination. For a recent discussions on this topic, see Theodore Christakis, ‘Self-determination, territorial integrity and fait accompli in the case of Crimea’ (2015) 75(1) \textit{ZaöRV/Heidelberg JIL}, 75.
\end{itemize}
in a discussion concerning the capacity of the Palestinian people to realise genuine autonomy from Israeli occupation.

Secondly, the subject of the right of self-determination involves the internal and external conceptualisations of the party to whom the right is subject. The internal conceptualisation refers to the distinctive, subjective identity traits of the party, whilst the external conceptualisation refers to the objective characteristics as perceived by the international community. Friedlander identifies the subject of the right as: peoples that consist of a community of individuals bound together by mutual loyalties, an identifiable tradition, and a common cultural awareness, with historic ties to a given territory. The definition of ‘peoples’ within international law still lacks clarity. In regard to self-determination, the identification of peoples is often self-evident (drawn from ethnicity, language, history or sharing some other form of mutuality). The ICJ attempted to clarify a definition for people having the right of self-determination as including: traditions, culture, ethnicity, historical ties and heritage, language, religion, sense of identity or kinship, the will to constitute a people and common suffering. Whilst the application of these criteria to the Palestinian people extends beyond the scope of this article, prima facie, the Palestinian people share a significant number of these criteria. This is supported by the repetitive emphasis placed by the international community on the ‘Palestinian people’ as the ‘principal party’ to the question of their self-determination. It is important to note that the definitional criteria for what constitutes belonging to the Palestinian people has not included a geographical distinction. As a result, the Palestinian people, and therefore those who can exercise their right of self-determination, is not limited to those residing within the Occupied Palestinian Territory. Rather, it is Palestine in the broadest sense which possess the right to self-determination and can seek to enforce it before the international community.

Given that the status of the right is one of process, not outcome, this entails the establishment of both internal and external conceptualisations of the right. As has been mentioned, a relationship exists between the exercise of self-determination and recognition of statehood. In such a scenario, the desire for the establishment of statehood by the defined population would be internal, whereas the recognition of statehood by the international community would be external. This leads us to consider the ability of the Palestinian people to apply and enforce the right of self-determination.

Self-Determination for the Palestinian People

International human rights and humanitarian law extends to peoples under occupation and populations within conflict. Both of these areas of law are complementary in

---

84 Invitation to the Palestine Liberation Organization, GA Res 3210, UN Doc A/RES/3210 (14 October 1974); Question of Palestine (n 17); Invitation to the Palestine Liberation Organization to participate in the efforts for peace in the Middle East, GA Res 3375, UN Doc A/RES/3375 (10 November 1975).
85 Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter, GA Res 1541, UN Doc. A/4651 (15 December 1960).
86 Wall Advisory Opinion (n 2), para 112.
nature and provide a broad protection of rights.\textsuperscript{87} Considering the current context of the Palestinian people, a variety of rights are accessible. These include: social, economic, cultural, civil and political rights as articulated in international legal mechanisms. At the heart of this international legal framework is the right of self-determination.\textsuperscript{88} The right of the Palestinian people to self-determination has been recognized by the international community.\textsuperscript{89} The recognition of this right has also shaped the interaction between the international community and Palestine, seen in the titles granted to Palestine\textsuperscript{90} through to the capacity to actively participate within the work of the United Nations.\textsuperscript{91} Furthermore, the international community is required to do all that it can to secure self-determination for peoples under illegal occupation,\textsuperscript{92} with an onus placed on states to ‘refrain from any forcible action which deprives peoples ... of their right to self-determination and freedom and independence.’\textsuperscript{93} As is evident, the right of self-determination belongs to the people, not any governmental institutions or structures. Occupying powers must therefore respect this right of the protected population, regardless of any contestation over the governing structures that exist. This duty to refrain from actions that could impact on the application of the right of self-determination extends to the actions of Israel. The international community has recognised that features of the Israeli occupation have ‘impeded’ the exercise of this right by the Palestinian people.\textsuperscript{94} Drawing on this brief outline of the Palestinian context and the access of the Palestinian people to self-determination, two challenges will be explored: the occupation of Palestinian territory by Israel and the potentially corresponding right of return for displaced Palestinians; and, the recognition of sovereignty of the Palestinian people via recognition of statehood.\textsuperscript{95}

**Challenges to Palestinian Self-Determination**

**a. Legal and Illegal Occupation in the International Law of Occupation**

Any discussion concerning the impact of the occupation of Palestine by Israel requires a preliminary question to be answered: does Israel occupy Palestinian territory? The international community has affirmed the occupation of Palestine by Israel since 1967.\textsuperscript{96} As Israel is an occupying power, the Palestinian people are classified as ‘protected people’ and are entitled to specific humanitarian protections as enshrined in international law.\textsuperscript{97} This has been widely accepted by the international community.\textsuperscript{98}

\textsuperscript{87} UN Committee on Economic, Social and Cultural Rights, *Concluding Observations, Israel*, 30\textsuperscript{th} sess, UN Doc E/C.12/1/Add.90 (26 June 2003) para 31.
\textsuperscript{88} ICESCR (n 2) art 1(1); ICPCR (n 2) art 1(1). Also see: *Portugal v. Australia* (n 2), para 29; *Wall Advisory Opinion* (n 2), para 88.
\textsuperscript{89} The right of the Palestinian people to self-determination (n 6).
\textsuperscript{90} The movement from the Palestinian Liberation Organisation (PLO) to the State of Palestine. *Question of Palestine : resolution / adopted by the General Assembly*, GA Res 43/177, UN Doc A/RES/43/177 (15 December 1988).
\textsuperscript{92} *Wall Advisory Opinion* (n 2), para 88.
\textsuperscript{93} *Friendly Relations and Co-operation Declaration* (n 75).
\textsuperscript{94} *Wall, Advisory Opinion* (n 2), para 122.
\textsuperscript{95} Such issues and the relationship with the right of self-determination where expressed in *Observer status for the Palestine Liberation Organization*, GA Res 3237, UN Doc A/RES/3237 (22 November 1974) (‘Observer status for the PLO’).
\textsuperscript{96} SC Res 237, UN Doc S/RES/237 (14 June 1967).
\textsuperscript{97} *Fourth Geneva Convention* (n 10).
\textsuperscript{98} See *Applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, to the Occupied Palestinian Territory, including East Jerusalem, and the other occupied Arab territories*, GA Res 71/96, UN Doc A/RES/71/96 (23 December 2016).
with such protections accorded through the law of occupation applying to the West Bank, East Jerusalem, and Gaza.\textsuperscript{99}

In regards to this international law of occupation, the situation of an occupying power moving from lawful to unlawful occupation as a result of acting contrary to international law is of particular relevance.\textsuperscript{100} Under the international law of occupation, applied to the Palestinian context, Israel can only act as a temporary administrator of the territory until it is returned to the protected population in as short and reasonable time as possible.\textsuperscript{101} Israel would, therefore, not acquire a right of territorial sovereignty over the land and is prohibited from taking any action that could result in annexation.\textsuperscript{102} Rather, the occupying power, Israel, must act in the position of trustee; acting in the best interests of the protected people and controlling all occupied territory in good faith. The occupying power bears the responsibility to respect and preserve the fundamental rights of the protected population.\textsuperscript{103} To this end, three key responsibilities enshrined within international law, are applicable to the Palestine–Israel context: administration, transfer of population and good governance.

Firstly, an occupying power can only act as administrator of the property of the occupied territory.\textsuperscript{104} All resources must be safeguarded, with the occupying power maintaining no authority over these resources that would result in benefit to the occupying power.\textsuperscript{105} This is a principle that seeks to discourage prolonged occupation and actions that would be to the detriment of the protected population.

Secondly, an occupying power cannot transfer its civilian population into the occupied territory; such an action could be considered a war crime.\textsuperscript{106} Innately linked to the first responsibility, the transfer of a civilian population from the occupying power would result in the requisition of the resources of the occupied territories. This transfer of resources may be to the detriment of the protected population and, over a prolonged period of time, result in annexation of the territory.\textsuperscript{107}

Finally, the occupying power must adhere to principles of good governance in its actions regarding the protected population.\textsuperscript{108} Principles of good governance extend to the use of the resources of the occupied territories and would prohibit discrimination in the administration of these resources.\textsuperscript{109} It is on the basis of these three responsibilities that a determination can be made as to whether Israel has moved from a lawful to unlawful occupying power as a result of its actions.

\textsuperscript{99}SC Res 2334, UN Doc S/RES/2334 (23 December 2016)
\textsuperscript{100}The principal instruments of international humanitarian law, including the 1907 Hague Regulations, the 1949 Fourth Geneva Convention and the 1977 Additional Protocol to the Geneva Conventions, are silent on such issues concerning lawful to unlawful occupation.
\textsuperscript{102}Orna Ben-Naftali et al, The ABC of the OPT: A Legal Lexicon of the Israeli Control over the Occupied Palestinian Territory (Cambridge University Press, 2018).
\textsuperscript{103}Lynk (n 12).
\textsuperscript{104}Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, International Conferences (The Hague) (18 October 2907), art 55.
\textsuperscript{106}Fourth Geneva Convention (n 10), art 49(6); Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90 (entered into for 1 July 2002), art 8(2)(b)(viii) (‘Rome Statute’).
\textsuperscript{107}Human Rights Council, Report of the independent international factfinding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem, UN Doc A/HRC/22/63 (7 February 2013).
\textsuperscript{108}SC Res 1483, UN Doc S/RES/1483 (22 May 2003).
\textsuperscript{109}Fourth Geneva Convention (n 10), art 27.
Legal Occupation Test

In assessing the status of the occupation by Israel and whether the occupying power has exceeded its legal capacity, a four-part test has been identified by the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967. The four-part test includes criteria of annexation, temporariness, best interests and good faith.

Annexation: Has the occupying power annexed the occupied territory?

Firstly, an occupying power cannot acquire the right to annex (or otherwise gain title) over the occupied territory, also known as the principle of inadmissibility of the acquisition of territory. This principle has been supported by the Charter of the United Nations that forbids members from the ‘threat or use of force against the territorial integrity or political independence of any state.’ This legal principle has been affirmed by the General Assembly and endorsed by the Security Council in specific regard to the case of Palestine. The ICJ in the Wall Advisory Opinion held that such annexation, or territorial acquisition from the threat or use of force, has acquired the status of customary law.

Temporary: Has the occupying power sought to end the occupation as soon as possible?

Secondly, the occupying power remains an administrator of the territory, with any occupation deemed to be temporary until the territory can be returned to the protected population. Whilst timeframes of occupation are dependant on the varying contexts of the occupation, the core principle is that the occupying power is prohibited from governing the protected population, and over the occupied territory, on a permanent or indefinite basis. Rather, the occupying power must work in good faith to return the land to the protected population as soon as reasonable. The longer an occupying power occupies territory, the greater the justification is required for its ongoing presence in the territory.

Best interests: Has the occupying power acted in the best interests of the protected population?

Thirdly, the occupying power is to govern in the best interests of the protected population and, subject to legitimate security requirements of the occupying power, cannot act in a self-serving matter. The occupying power must always seek to protect the human rights of the people under occupation. The best interest principle can be found in international legal instruments that require an occupying power to restore and

---

110 Lynk (n 12).
111 Ben – Naftali (n 14).
113 Charter of the United Nations, art 2.
114 Seen by some international law scholars as a binding legal principle including Malcolm Shaw, International Law, (Cambridge University Press, 2017).
117 Wall Advisory Opinion (n 2), para 87.
119 SC Res 1483 (n 12).
ensure public order and safety while respecting the laws of protected people. It is the combination of these protections and prohibitions that give rise to the best interest principle.

**Good faith: Has the occupying power acted in good faith?**

Finally, the occupying power must act in good faith;\(^{120}\) this is a foundational principle that dictates a power to carry out its duties and obligations in an ‘honest, loyal, reasonable, diligent and fair manner,’ with the aim of fulfilling its legal responsibilities.\(^{121}\) The good faith principle also prohibits acts that would be an abuse of human rights, or be contrary to the nature of the relationship with the protected people.\(^{122}\) This principle can be measured by assessing adherence to the first three parts of this test, combined with a requirement to conform with the international law that is applicable to occupation as well as the directions given by international bodies.

**Judicial Interpretations of the International Law of Occupation**

To explore these responsibilities, and support the legal occupation test, a brief analysis of the international community’s attempts to interpret legal concerns raised in cases where an occupying power moves from lawful to unlawful occupation as a result of acting contrary to international humanitarian law will be examined. One such case was heard before the ICJ on the occupation of Namibia by South Africa.\(^{123}\) The advisory opinion outlined that a number of protections and prohibitions within international law had been breached and that the occupation of Namibia was illegal. In its determination, the ICJ identified seven key findings and principles:

1. Annexation of occupied territory by an occupying power is forbidden. The actions of the occupying power must be for the benefit of the protected population, the end result of such actions must be the exercise of self-determination and independence;\(^{124}\)

2. Occupying powers must act in good faith. Actions that are contrary to the obligations outlined in the occupation mandate would qualify as failure to satisfy this obligation;\(^{125}\)

3. Protections of the protected population and prohibitions on the occupying power are imposed by the international community to ensure occupied territories do not become objects of cessions. The occupying power cannot unduly prolong the occupation, nor make a claim to annexation of the occupied territory by virtue of prolonged occupation;\(^{126}\)

4. Interpretation of international law can be influenced by subsequent developments. Where a right exists as a general principle of law, it can be implied to be an integral part to the law governing the occupation;\(^{127}\)

5. Violation of human rights or humanitarian obligations contradicts the object and purpose of occupation. Where protections are not met, the occupying

---

\(^{120}\) *Charter of the United Nations*, art 2(2); *VCLT* (n 22), art 26. See also *Nuclear Tests (Australia v. France)*, [1974] ICJ Rep 99, para 46, where the ICJ recognized that: ‘one of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith.’


\(^{122}\) Steven Reinhold, ‘Good faith in international law’ (2013) 2 *UCL Journal of Law and Jurisprudence*.

\(^{123}\) *Namibia Advisory Opinion* (n 15), para 16.

\(^{124}\) Ibid, paras 45–47, 50, 53 and 83.

\(^{125}\) Ibid, paras 53, 84, 90, 115, 116 and 128.

\(^{126}\) *Namibia Advisory Opinion* (n 15), paras 54, 55, 66, 82 and 83.

\(^{127}\) Ibid, paras 52, 53, 96–98, 100 and 133.
power cannot claim any of the rights over the territory accorded in legal occupation;\textsuperscript{128}

6. If an occupying power breaches its fundamental obligations under international law, then the continuing presence of the power in the occupied territory can be deemed illegal. An illegal occupation must end as soon as reasonable. The international community must recognize the illegality and invalidity of the occupation including upholding the duty of non-recognition;\textsuperscript{129}

7. Finally, the determination of illegal occupation does not affect the ongoing application of international human rights law applicable to the protected people, including any rights accorded by an occupation agreement. The occupying power remains accountable for any breaches of such rights.\textsuperscript{130}

The ICJ drew upon the \textit{Namibia Advisory Opinion} in its application of the right of self-determination on occupied territories including Palestine in the \textit{Wall Advisory Opinion}.\textsuperscript{131} In both the Namibia and Palestine situations, an occupying power allegedly extended its control over the occupied territory. In both cases, the occupying power: had to respect the right of self-determination; was prohibited from annexation; was subject to supervision and determinations made by the international community; and must bring the occupation to a successful conclusion. Drawing on the legality test of occupation and both the \textit{Namibia Advisory Opinion} and \textit{Wall Advisory Opinion}, a determination can be made regarding the legality of the occupation of Palestinian territory by Israel.

\textbf{Application of ‘Annexation’ Principle}

Firstly, any actions that mount to annexation of East Jerusalem and the West Bank by Israel that would solidify an Israeli claim over the territory would violate the non-annexation principle. The international community has articulated that such annexation activities have taken place and directed Israel to rescind these actions.\textsuperscript{132} Despite this, annexation efforts have continued, including extending into parts of the West Bank.\textsuperscript{133} Israeli settlers continue to live in occupied East Jerusalem, and Israel has stated that it has no intention of leaving.\textsuperscript{134}

In the area of the West Bank, the ICJ warned that actions, including the construction of a wall and establishment of settlements, constituted annexation.\textsuperscript{135} Of significance in the West Bank is the investment made by Israel in defending and expanding the settlements. Such actions result in significant benefit to the Israeli population, at the expense of the Palestinian protected population. The continued entrenchment of the occupation, coupled with a political narrative that seeks to enhance, not lessen, annexation efforts,\textsuperscript{136} indicate the ongoing annexation of the West Bank and aim of permanent occupation over the occupied Palestinian territory.

\textsuperscript{128} Ibid, paras 84, 91, 95, 96, 98, 100 and 102.
\textsuperscript{129} Ibid, paras 108, 109, 111, 115, 117, 122 and 123.
\textsuperscript{130} Ibid, paras 118 and 125.
\textsuperscript{131} \textit{Wall Advisory Opinion} (n 2), para 88.
\textsuperscript{132} SC Res 2253, UN Doc S/2015/2253 (17 December 2015); SC Res 2254, UN Doc S/2015/2254 (18 December 2015).
\textsuperscript{133} \textit{Wall Advisory Opinion} (n 2), para 121.
\textsuperscript{134} Prime Minister of Israel, Benjamin Netanyahu, said in 2015: ‘Forty-eight years ago, the division of Jerusalem was ended and we returned to be united ... We will keep Jerusalem united under Israeli authority.’ Reported by Oren Liebermann, Benjamin Netanyahu, ‘Jerusalem will remain a united city,’ \textit{CNN} (online), 18 May 2015 <www.cnn.com/2015/05/17/middleeast/israel-netanyahu-united-jerusalem>
\textsuperscript{135} \textit{Wall Advisory Opinion} (n 2), para 121.
\textsuperscript{136} Prime Minister of Israel, Benjamin Netanyahu, said in 2017: ‘We are here to stay forever. There will be no further uprooting of settlements in the Land of Israel ... This is our land.’ Reported by Noga Tarnopolsky, ‘Netanyahu says Israel wont retreat on Jewish settlements.'
Application of ‘Temporariness’ Principle

Secondly, the duration of the occupation of Palestinian territory by Israel is without equivalent amongst the modern international community. For context, international legal theorists propose an occupation beyond five years in a period of peacetime would count as prolonged occupation; most legal, modern occupations do not exceed 10 years. In contrast, the occupation of Palestinian territory by Israel has lasted over 50 years. As has been stated, the longer the occupation, the greater onus is placed on the occupying power to justify their occupation. In the case of Israel, the continued occupation has resulted in a strengthened sovereign claim over Palestinian territory. The commitment of resources to the settlement enterprise has increased its permanency since initial occupation in 1967. The resoluteness of the political narrative over the past 50 years can be seen in Israeli Government’s maintenance, or the increase, in the number of Israelis living within the settlements. This has resulted in a ‘permanent temporariness’ to the occupation, that challenges the application of the right of self-determination and impedes the genuine autonomy of the Palestinian people.

Prima facie, the Israeli occupation has exceeded the temporariness principle, with Israel taking significant actions that are contrary to the international law requirements that instruct an occupying power to bring the occupation to a close in a reasonable time. The breach of this principle is compounded by lacking a justification (that supports the best interest principle) for such prolonged occupation.

Application of ‘Best Interest’ Principle

Thirdly, the best interest principle requires that an occupying power to act in the best interests of the protected population. Actions taken by the occupying power that are deemed to be in the interests of the occupying power are prohibited. Actions taken by Israel have had a significant social and economic impact on the Palestinian people. In the West Bank, the settlement enterprise has resulted in worsening legal, civil and economic conditions imposed on the Palestinian people. This can be seen in restrictions on freedom of movement and forcible transfer of people; access to natural resources including water; and access to housing and commercial development which includes land confiscation and home demolition. The establishment of physical barriers, Israeli settlements, permit regimes and military enforced checkpoints have disconnected East Jerusalem from the West Bank. This has resulted in detachment of the East Jerusalem population from economic and cultural connections, lack of access to services and infrastructure and reduced territory for housing. The influence of Israel over the Palestinian population in Gaza, whilst formally vacating the territory in

“We are here to stay forever”, LA Times (Online), 28 August 2017, <www.latimes.com/world/middleeast/la-fg-israel-netanyahu-settlements-20170828-story.html>


2005, remains significant. Control of movement of people and resources via land, sea and air have resulted in restriction on access to fundamental human rights. A recent United Nations report indicated that the majority of the population in Gaza are reliant on humanitarian aid. Further, that Palestine is unable to secure the electricity required for the population, will exhaust its access to safe drinking water and has decreased its gross domestic product over the past decade.\textsuperscript{143}

\textit{Prima facie}, actions taken by Israel as an occupying power over Palestinian territory have not upheld the best interest principle. Restrictions and barriers have resulted in detrimental impacts on the economic and civil sustainability of the Palestinian people in both civil and commercial life,\textsuperscript{144} resulting in active discrimination through the provision of inferior civil, legal and social conditions. These actions have involved exploiting the territory and resources for the benefit of Israel, and are therefore in breach of its responsibilities under the internal law of occupation.

\textbf{Application of ‘Good Faith’ Principle}

Finally, an occupying power must act in accordance with the directions issued by authoritative and representative bodies of the international community as well as comply with international law applicable to occupation. The Security Council has adopted more than 40 resolutions that are relevant to the occupation of Palestinian territory. The Security Council has clearly expressed that settlements ‘have no legal validity’ and are a ‘flagrant violation under international law’ and has directed Israel to ‘immediately and completely cease’ all activities associated with the settlement enterprise.\textsuperscript{145} Finally, the Security Council has affirmed the illegality of the acquisition of territory,\textsuperscript{146} and censured the activity of annexation by Israel in the ‘strongest terms’ stating that these actions violate the Fourth Geneva Convention (which applies to the Palestinian territory\textsuperscript{147}) and must be therefore rescinded.\textsuperscript{148} ‘The failure of Israel to act in compliance with resolutions of the Security Council and General Assembly has also been identified by the Security Council;\textsuperscript{149} the disregard of these resolutions by Israeli political leaders has been blatant.\textsuperscript{150} Further, a number of actions by Israel on the Palestinian population could violate the good faith principle and contribute to the undermining of self-determination. Such actions include the use of collective punishment via the demolition of Palestinian properties and the forcible transfer of Palestinian people by the occupying power;\textsuperscript{151} the right not to be subject to arbitrary

\textsuperscript{143} United Nations, \textit{UN country team in the Occupied Palestinian Territory, ‘Gaza ten years later’} (July 2017) <https://unsco.unmissions.org/sites/default/files/gaza_10_years_later_-_11_july_2017.pdf>


\textsuperscript{145} SC Res 2334 (n 103); SC Res 465, UN Doc S/RES/465 (1 March 1980).

\textsuperscript{146} SC Res 2334 (n 103); SC Res 497 (n 120), SC Res 478 (n 120); SC Res 476 (n 120); SC Res 267(n 120); SC Res 252 (n 120); and SC Res 242, UN Doc S/RES/242 (22 November 1967).

\textsuperscript{147} Fourth Geneva Convention (n 10); SC Res 2334 (n 103); SC Res 478 (n 120); SC Res 476 (n 120); SC Res 465 (n 153); SC Res 452, UN Doc S/RES/452 (20 July 1979) and SC Res 446, UN Doc S/RES/446 (22 March 1979).

\textsuperscript{148} SC Res 2334 (n 103); SC Res 478 (n 120); SC Res 476 (n 120).

\textsuperscript{149} SC Res 478 (n 120); SC Res 476 (n 120); SC Res 446 (n 155).


\textsuperscript{151} Office for the Coordination of Humanitarian Affairs, \textit{Demolition and seizure of service infrastructure in Palestinian communities in Area C exacerbates risk of forcible transfer} (11 October 2017) <www.ochaopt.org/content/demolition-and-seizure-service-infrastructure-palestinian-communities-area-c-exacerbates>
arrest has been violated through arbitrary detention;\(^\text{152}\) and, the prohibition concerning freedom of movement for Palestinian people through barriers and constraints impacts civil and commercial life.\(^\text{153}\) Failure to act in accordance with the directions issued by the United Nations and failure to comply with international humanitarian and human rights law both indicate that Israel has not fulfilled the good faith principle.

This discussion has addressed the movement of an occupying power from lawful to unlawful occupation as a result of actions that are contrary to the international law. Such actions include the failure to uphold key principles including annexation, temporariness, best interest and good faith. In the case of the Israeli occupation of Palestinian territory, it is clear that actions taken by Israel contravene these principles. These actions also result in a clear restriction on the ability of the Palestinian people to exercise self-determination and place barriers to the promotion of their genuine autonomy. To enforce the international law of occupation, Palestinians face another barrier: the status of statehood. Considering that a number of the enforcement mechanisms for international law are only open to states, the lack of state recognition of Palestine is a major challenge to their self-determination.

**Realising ‘Statehood’**

One of the most discussed – and divisive – questions concerning the self-determination of the Palestinian people concerns the recognition of Palestinian statehood. Despite the international community recognizing the right of the Palestinian people to exercise their right to self-determination in addition to pursuing national independence and sovereignty,\(^\text{154}\) the Palestinian people lack the formal status of statehood. This discussion seeks to articulate statehood requirements and the current status of the Palestinian people as an observer state; explore the impact of recognition by international bodies on the status of Palestine; and discuss the relationship between recognition of statehood and the application of the right of self-determination.

**The Statehood Criteria: The Montevideo Convention**

To understand the pursuit of recognition of statehood by the Palestinian people, the contemporary understanding of a state must first be explored. The international community draws its understanding of statehood from the *Montevideo Convention*\(^\text{155}\) which establishes four clear criteria:

1. permanent population;
2. defined territory;
3. government; and,
4. capacity to enter into relations with other states.

These criteria provide a foundation for the international legal recognition of statehood. Self-determination has also been included as a criterion as has international recognition.\(^\text{156}\) This international recognition includes membership of the United Nations which is ‘open to all peace-loving States that accept the obligations contained


\(^{154}\) GA Res 3236 (n 17).

\(^{155}\) *Montevideo Convention* (n 18), art 1. International law does not require the structure of a state to follow any particular pattern: *Western Sahara Advisory Opinion* (n 18).

in the UN Charter and which, in the judgment of the United Nations, are able to carry out these obligations.\textsuperscript{157}

**International Recognition: The United Nations**

The determination for recognition by the United Nations occurs by admittance to the General Assembly and by recommendation of the Security Council. Article 4(1) of the Charter of the United Nations includes five necessary conditions for the admittance of membership to the United Nations, which include:\textsuperscript{158}

1. a state;
2. peace-loving;
3. accept the obligations of the Charter;
4. able to carry out these obligations;
5. willing to do so.

Additional factors such as political recognition of the obligations as required by the international community in a formal instrument may be factored into the determination of the United Nations.\textsuperscript{159} An obvious issue in these criteria is that a state must be ‘a state’ before it is granted membership. Considering that international recognition has become of increasing significance to statehood recognition, the circular nature of this first criteria remains of significance to the accessibility of statehood recognition and the human rights and humanitarian benefits it accords. The second, and arguably more important, judgement by the United Nations is by the Security Council. Even if the General Assembly criteria as outlined above are fulfilled, article 4(2) also requires that a positive Security Council recommendation,\textsuperscript{160} which results in unconditional membership and automatic admission.\textsuperscript{161} As a result, positive affirmation by the members of Security Council is required for the recognition of statehood. Considering these requirements, what are the barriers to Palestine achieving genuine autonomy as a state?

**The Status of Palestinian Statehood**

Following the proclamation of the *Palestinian Declaration of Independence* by the Palestinian Liberation Organisation (PLO) in 1988, Palestine was recognised by a significant portion of the international community, including by the Arab League and the *Organisation of the Islamic Conference*.\textsuperscript{162} In 1989, it was acknowledged at the United Nations Security Council that 94 states had recognised Palestine as a state, and the PLO sought membership of the United Nations and associated international agencies.

The challenges to realising this desire for statehood have had a direct impact on the ability of the Palestinian people to exercise their right of self-determination. Such challenges are often the result of significant states within the international community, including the United States acting against Palestinian statehood. Whilst issues do remain regarding the fulfilment of the *Montevideo criteria*,\textsuperscript{163} the international recognition of statehood remains a central issue to the realisation of the right of

\textsuperscript{157} Charter of the United Nations, art 4(1).

\textsuperscript{158} Admission of a State to the United Nations (Advisory Opinion) [1948] ICJ Rep 57.


\textsuperscript{160} In addition to a decision by the General Assembly which is to be made by a two-thirds majority. *Charter of the United Nations*, art 18(2).


\textsuperscript{162} John Quigley, *The statehood of Palestine: international law in the Middle East conflict*. (Cambridge University Press, 2010).

\textsuperscript{163} These include a fluctuating population, undefined borders, restrictions on the capacity of the Palestinian people to effectively govern their determined population.
Palestinian self-determination. The mechanisms available to states, as opposed to non-state entities, for the enforcement of human rights through international mechanisms is one such reason for the significance of statehood recognition. Considering that the enforcement of the right of self-determination is an underlying justification for statehood, two questions become apparent: who is the subject of the right and how will it be exercised?

**Defining the Subject and Authority of Palestinian Statehood**

These two questions are highlighted in the Universal Declaration of Human Rights, which states 'the will of the people shall be the basis of the authority of government...'. The right of self-determination itself implies that 'the people' should be free to choose how 'the authority' is exercised, that is the model of internal and external governance that promotes genuine human rights freedoms and responsibilities. In the case of Palestine, the 'who' – or the subject of the right, known as the 'principal party' that is recognised by the international community – is the Palestinian people. It is the Palestinian people that will ultimately express their right of self-determination. In this context, the international community has not drawn geographical distinctions when saying 'the Palestinian people [are] the principal party to the question of Palestine.'

The exercise of the right of self-determination, and associated rights, therefore extend to the displaced Palestinian population.

The 'how' – or the authority that will enable the processes by which the expression of self-determination can take place – is through the PLO. The mandate by which the PLO can represent the Palestinian people in both internal and external capacities incorporates efforts to realise the right of self-determination; this capacity extends to addressing issues of continuing displacement and the return of displaced people, taking action against human rights violations and establishing territorial boundaries.

The relationship between the who and the how – the representation of the Palestinian people by the PLO – raises new issues.

Of significance is who is actually represented within the international community under the ‘State of Palestine’. The risk of partial representation for part of the Palestinians is significant, for partial representation will not allow for the genuine fulfilment of the right of self-determination. For the international community, the primacy of the will of all the Palestinian people remains fundamental. A clearer articulation of the role of the PLO within the international community, including its representation of the entire Palestinian people as well as internal constitutional reform to enable adequate representation of the people within the PLO, could address these risks.

The right of self-determination, and the ensuing issues of representation, have elements that imply a requirement of a democratic system of governance. Democracy promotes equality between men and women, encourages political competition, supports non-discriminatory participation and exercises the rule of law. This goes to the question of 'how'; articulating an effective method of governance that legitimizes the avenue of

---

164 art 21(3).
165 GA Res 3210 (n 88); GA Res 3236 (n 17); GA Res 3375 (n 88).
166 Ibid.
167 Observer status for the PLO (n 99).
168 GA Res 3236 (n 17).
171 Palestine - Progress Report of the United Nations Mediator (n 179)
172 Any reform to the internal governance structures of Palestine needs to be wary of the encroachment of external ideologies that do not represent the will of the people.
173 Inter – Parliamentary Union, Universal Declaration on Democracy, (16 September 1997).
broader participation in representation before the international community. The Montevideo criteria seek a clearly defined territory, population, governance and capacity to enter into international relations. It may even be that the international community is moving to add representative government as a key precondition to statehood. How the international community recognises and engages with states is changing, as is who is recognising these states on behalf of the international community.

To explore this in context of Palestine, requires an examination of the means by which Palestine has sought to realise its right of self-determination, and the resulting impact it has had in its ability to engage with the international community and achieve genuine autonomy.

Achieving Palestinian Self-Determination through International Fora

A core aspiration in the pursuit of statehood is the capacity for accountability and enforcement of rights before the international community. This question of enforceability invokes legal theory and the nature of rights as ‘subjective’ or ‘objective.’ Subjective rights entail a set of powers and obligations local to a particular subject. In contrast, objective rights articulate forms of social interaction that are the object of approval, to be enjoyed by either anyone indeterminately or anyone who fulfils the necessary conditions of the right. The enforceability of these rights is left to others to ensure. The issue becomes apparent when determining the nature of the right in question: the assignor of that right, the structures that confine that right, the validity of that right as a way to structure society and, of significance to this discussion, the mechanisms for the enforcement of that right. Whilst an in-depth analysis of legal theory underpinning the right of self-determination falls outside the scope of this article, the following discussion will focus on this final issue: achieving self-determination through international judicial enforcement mechanisms. Whilst a number of regional and international judicial bodies exist, two are of relevance for this discussion: the ICC and ICJ.

a. International Criminal Court

The ICC has been an important forum for the international community to address the right of self-determination in the Palestinian context. Governed by the Rome Statute, the ICC investigates and, where warranted, tries individuals charged with crimes of concern to the international community. As noted elsewhere, Palestine is seeking to exercise its right of self-determination, which could include the realisation of genuine autonomy and freedom from occupation. Palestine has made declarations to the ICC that have clearly accepted ICC jurisdiction, accession to the Rome Statute, and articulated territorial boundaries in relation to which it is requesting that the ICC jurisdiction be enacted. Article 12(2) of the Rome Statute outlines the necessary preconditions for the ICC to exercise its jurisdiction, including conditions of nationality or territoriality. Necessary satisfaction of these preconditions must occur for the ICC to open an investigation on any alleged criminal acts. Therefore, without satisfaction of these preconditions, the ICC does not have jurisdiction. The question remains, has Palestine satisfied these preconditions in order for the ICC to exercise its jurisdiction?

---

176 Genocide, war crimes, crimes against humanity and the crime of aggression.
177 Rome Statute (n 106), art 19(1).
The declaration lodged by the Palestinian National Authority in 2009\(^{178}\) will first be analysed to determine satisfaction of jurisdiction. This declaration recognized the jurisdiction of the ICC ‘for the purpose of identifying, prosecuting and judging acts committed on the territory of Palestine since 1 July 2002.’ In 2012, the ICC determined that the preconditions were not met with the capacity of Palestine to exercise jurisdiction over the identified territory brought into question. The issue raised by the court was one of Palestinian statehood status, only enjoying ‘observer’ status by the United Nations. In its conclusions, the ICC said that if ‘competent organs’ of the United Nations resolved the issue of state recognition, then the jurisdiction of the court could apply to acts committed in Palestine.\(^{179}\) Subsequent to this decision, the recognition of Palestine as having non-member observer State status by the General Assembly in 2012,\(^{180}\) combined with its treaty practice engagement since the General Assembly resolution,\(^{181}\) has resulted in a new prevailing understanding that Palestine now seems to fulfil the statehood criteria required by the ICC.\(^{182}\) This was recognised in 2015 by the ICC which accepted jurisdiction over crimes committed in Palestinian territory.\(^{183}\) With this recognition, Palestine was able to accede to the *Rome Statute* in 2015.\(^{184}\) As a result, Palestine is able to refer a situation to the ICC under the declaration of article 12(3). In 2018, Palestine submitted a referral to the court, calling on prosecutors to open an immediate investigation. Whilst the ICC may have declared jurisdiction, questions concerning the validity of this declaration may still remain.

To explore these jurisdictional concerns, this article must first address the understanding of article 12(3) as a delegation-based theory of jurisdiction. This theory holds that a state delegates part of its existing jurisdiction to the ICC. For such a delegation to occur, the state must first possess the jurisdiction to delegate. The Palestinian territory in question, including the West Bank and the Gaza Strip (including East Jerusalem),\(^{185}\) is considered a single territorial unit.\(^{186}\) Within this territorial unit are competing claims made by Israel, especially over East Jerusalem and the occupation of Area C in the West Bank. A valid question can be raised regarding the ability of Palestine to cede partial jurisdiction over these contested territories, over which a recognised state (Israel) already claims sovereignty, to the ICC.\(^{187}\) The lack of a conclusive resolution to title over defined territory has been evident in major instruments, including the 1949 armistice agreements between Israel and Jordan and Israel and Egypt\(^{188}\) as well as the lack of a defined territorial scope within key General

---

\(^{178}\) Palestinian National Authority, *Declaration recognizing the Jurisdiction of the International Criminal Court*, (1 January 2015).


\(^{180}\) *Status of Palestine in the United Nations* (n 19).

\(^{181}\) Party to over 15 international treaties since General Assembly recognition.


\(^{183}\) International Criminal Court, *Preliminary Examination on alleged crimes committed in the occupied Palestinian Territory, including East Jerusalem, since 13 June 2014* (1 January 2015).


\(^{187}\) This is compounded by the lack of a definition for the term ‘state’ in the *Rome Statute*, or lack of clarity regarding the extension of the scope of the *Rome Statute* to non-state entities.

\(^{188}\) Israel and Jordan General Armistice Agreement, (3 April 1949) and Israel and Egypt General Armistice Agreement, (24 February 1949) as recognised by SC Res 89, UN Doc S/RES/89 (17 November 1950).
Assembly Resolutions and Security Council Resolutions. The Oslo II Accords determined the exercise of criminal jurisdiction by Palestinian authorities over Palestinian territory, with special restrictions made for actions made by Israeli citizens. These agreements clearly recognised Palestinian jurisdiction over defined Palestinian territory, albeit limited in how Palestine can exercise this jurisdiction. It is this jurisdiction which Palestine may delegate to the ICC. If a jurisdictional authority does exist, which the Oslo II Accords assert, another question is raised concerning the retrospectivity of this jurisdiction. Previous declarations before the ICC articulate a retrospective jurisdiction. In the case of Palestine, such retrospectivity would be limited to the point of recognition of statehood by the General Assembly, since the authority of the court is based on the existence of a State of Palestine. Palestine could at the least, bring an action before the ICC for actions committed on the defined territory of the Oslo II Accords since 2012. Extensions in time and territory could be explored from this starting position.

These issues highlight the significance of clarifying the scope and extent of Palestinian sovereign title, including clearly defined territorial borders. Whilst key aspects of genuine autonony for the Palestinian people fall beyond the jurisdiction of the ICC to grant (such as the demarcation of territorial borders), it remains an important mechanism for the enforcement of the right of self-determination and the broader array of rights enshrined in international humanitarian and human rights law. Such rights also extend to the previously identified challenge to self-determination – occupation. Particular actions associated with occupation, including the transfer of a civilian population by an occupying power, may amount to a war crime that can be taken before the ICC. In conclusion, there seems to be no evident obstacle to adjudication by the ICC on actions taken by Israel on clearly defined Palestinian territory, and after the recognition of statehood by the General Assembly in 2012, including actions of an occupying power.

International Court of Justice

The ICJ is the second international judicial mechanism available to Palestine. It acts under the Charter of the United Nations and remains the principal judicial organ of the United Nations. It has the primary function of settling legal disputes in accordance with international law, that have been submitted by states. It is also able to give advisory opinions on legal issues referred by United Nations specialized agencies or organs (including the Security Council).

Recently, Palestine has sought to access the ICJ via a declaration against the United States of America made on 28 September 2018. This declaration is governed by article 35(2) of the Charter of the United Nations. Considering that this declaration, prima facie, fulfils the procedural requirements for consideration by the ICJ, the remaining is that only ‘states may be parties in cases before the court.’ If Palestine is determined a ‘state’ before the ICJ, then it could be considered by the court under the Vienna Convention on Diplomatic Relations to which both the United States and

---

189 Status of Palestine in the United Nations (n 19).
190 SC Res 2334 (n 103).
192 Rome Statute (n 106), art 8(2)(b)(viii).
193 Palestine v. United States of America (n 30).
194 Unlike other similar cases, such as the declaration made by the former Federal Republic of Yugoslavia which did not reference the SC Res 9 or the Rules of Court.
195 Statute of International Court of Justice art 34(1).
Palestine are contracting parties, and thus provide the jurisdictional basis for hearing the dispute. The reasoning concerning the capacity of the ICJ to recognise the statehood of Palestine is similar to that explored in the context of the ICC. The recognition of non-member observer State status by the General Assembly gives clear indication that Palestine can ratify the ICJ Statute. This is also something which could have been done prior to this recognition, considering a state can become a party to the ICJ Statute without become a party to the Charter of the United Nations. Furthermore, article 35(2) of the ICJ Statute provides that the ICJ is open to states not party to the statute under conditions laid down by the Security Council. These conditions include a declaration that accepts the jurisdiction of the court in accordance with the Charter of the United Nations and the Rules of the Court; undertakes to comply in good faith with the decisions of the ICJ; and accepts all obligations of a Member of the UN under article 94 of the UN Charter.

This declaration may be particular (concerning particular disputes), or general (dealing with all or a class of disputes). A declaration made under article 36(2) of the ICJ Statute is comparable with a declaration made under article 12(3) of the ICC Statute. Further support for the achievement of self-determination through international fora may be found in the relationship between collective recognition as a basis of satisfaction of the statehood requirement of jurisdiction.

The recognition of Palestine by the United Nations Educational, Scientific and Cultural Organization (UNESCO) may impact on Palestine’s capacity to function as a ‘state’ before the ICJ. The recognition of Palestine by UNESCO, and the resultant capacities to engage with the international community, raises the theoretical distinction between the declaratory theory and constitutive theory of recognition. The declaratory theory asserts recognition does not constitute statehood, but declares an existing statehood that is satisfied by legal criteria. The constitutive theory draws a closer relationship between recognition as a key element in constituting statehood. Within the constitutive theory, a distinction should be drawn between individual recognition and collective recognition. Collective recognition may allow an entity to be treated as a state within international institutions. The value of collective recognition is highlighted in cases of self-determination. When the fulfilment of particular requirements of statehood are not met, protected populations are not denied an ability to exercise their human rights. As the impact of this recognition by UNESCO will be of increasing significance as the case before the ICJ develops, a brief examination of the requirements of statehood within the ICJ will be discussed.

Proceedings before the ICJ are open to states; therefore, if a non-state entity is heard before the court, does that imply statehood? The ICJ cannot confer statehood status on a state by virtue of exercising its jurisdiction over a case involving the entity. References to ‘statehood’ within the context of international legal instruments and relevant procedural mechanisms are not necessarily made with the intention of conferring statehood. In such cases, the application of the Vienna Formula can be...
made. The Vienna Formula identifies the functional purpose of statehood in international legal instruments that allows for participation.\textsuperscript{206} The court is not required to be satisfied of the traditional elements of statehood, but is provided a functional approach to supporting valid participation in a treaty that is open to states, without consideration of an entity’s territorial legal status and where the term statehood is not defined.\textsuperscript{207} The Vienna Formula is the default definition for treaties that refer to statehood participation. This provides the legal framework within which Palestine might participate in international legal mechanisms that are open to states, without fulfilling the necessary requirements for statehood. The proceeding brought by Palestine before the ICJ extends the nature of the Vienna Formula beyond joining a treaty to participating in consequential procedures established by the treaty. The determination of the ICJ to allow Palestine to participate in the procedural mechanisms granted by an international treaty is one of procedural law; the determination would not be substantive law, and therefore has no substantive implications on the status of Palestinian statehood. Considering UNESCO is a specialized agency of the United Nations, UNESCO membership provides the legal capacity to participate in international treaty regimes via the Vienna Formula. For Palestine, this membership is the gateway to international treaties, and the procedural mechanisms of the treaties, that constructs a legal framework to enforce their right of self-determination and protect the fundamental human rights of the Palestinian people. Whilst not constitutive of statehood, the functional capacity of a state can be accorded to Palestine for addressing the key barriers to statehood, such as the enforcement of the law of occupation. In addition to the enforcement of the right of self-determination, and related human rights, within international judicial mechanisms, another avenue may be provided to the Palestinian people through the General Assembly via Resolution 377.\textsuperscript{208}

**Enacting General Assembly ‘Resolution 377’**

Commonly known as the ‘Uniting for Peace’ resolution, Resolution 377 provides a power that resides within the General Assembly to act in response to threats to peace, breaches of peace, or acts of aggression, and when other mechanisms (including the Security Council) have failed to exercise their primary responsibility of international peace and security.\textsuperscript{209} The resolution was initially proposed by the United States and was passed by the General Assembly in 1950 in response to the Soviet Union’s veto against intervention in North Korea.

In order for the General Assembly to act under Resolution 377, four necessary pre-conditions must be met:

1. Failure of the Security Council to exercise its primary responsibility for the maintenance of international peace and security;\textsuperscript{210}
2. The failure is resultant from lack of unanimity of permanent members;
3. A threat to peace, breach of peace or act of aggression is present; and
4. The Security Council must have assessed the situation prior to General Assembly.

The foundation for Resolution 377 can be found in articles 10 and 11 of the Charter of the United Nations. These articles provide a sufficient international legal basis for the General Assembly to recommend collective measures, including the use of force against states, whilst not affecting the power balance between the two principal organs of the

\textsuperscript{206} VCLT (n 22), art 81.
\textsuperscript{207} Ronen (n 21).
\textsuperscript{208} Uniting for Peace (n 23).
\textsuperscript{209} Ibid (n 219).
\textsuperscript{210} Primary responsibilities conferred by Charter of the United Nations, art 24.
United Nations – the Security Council and General Assembly.\textsuperscript{211} Rather, Resolution 377 reveals the latent potential of the General Assembly that resides within the Charter of the United Nations and assembles a procedural framework for this power to be exercised. In other words, Resolution 377 protects against the situation of a single state preventing the Security Council, and the broader international community, from discharging its responsibility to act promptly and effectively in accordance with the Charter of the United Nations. In its contemporary application, the use of Resolution 377, viewed within the ambit of the current context of the Palestinian people, may provide an opportunity for the international community to answer this question.\textsuperscript{212} The triggering of Resolution 377 must balance the values of sovereignty and the guarantee of the protections of human rights. Such a claim is founded on a number of occasions where the United States has vetoed resolutions placed before the Security Council on the Palestinian situation.\textsuperscript{213} Such resolutions often fulfil the majority required by the Security Council, but fail due to the United States utilising its veto power to vote against the resolution.\textsuperscript{214} The significant power that the United States wields as a permanent member of the Security Council, begs the question whether its decisions have been made in good faith and with the best interests of the international community in mind – or whether there are ulterior motivations. Of concern is the articulated repudiation of tenets of international law that underpin self-determination. Recent claims made by the United States provide an insight into two of these issues: that international law is inconclusive and ambiguous; and pursuing the end of occupation and the promotion of autonomy for Palestine is futile.\textsuperscript{215}

Firstly, as has been established in this article, international humanitarian law is clear on the prohibition of territorial acquisition by force. This is a norm of customary international law which stops Israel from acquiring sovereign title over occupied Palestinian territories.\textsuperscript{216} The law of occupation, and prohibition of establishing settlement, is also a norm of international law which prevents Israel from the forceful transfer or deportation of the protected Palestinian population from, or the transfer of the Israeli population to, the occupied territory.\textsuperscript{217} In addition, the right of self-determination has clearly been established within the Charter of the United Nations, the ICCPR and the ICESCR as well as being enshrined within international customary law.\textsuperscript{218} Concerning the claim of ambiguity of international law, which need not reflect the international consensus, the international community has reiterated the relationship between lasting and comprehensive peace and the respect and implementation of international law. It is on this basis that the international community has passed resolutions on the Palestinian question, including the


\textsuperscript{212} Jean Krasno & Mitushi Das, ‘The Uniting for Peace Resolution and Other Ways of Circumventing the Authority of the Security Council’ in B Cronin and I Jurd (eds), The UN Security Council and the Politics of International Authority (Routledge 2008), 189.

\textsuperscript{213} See at least 13 occasions that the United States has been used its veto as a permanent member on the Palestinian question since March 2001. See United Nations, Security Council – Veto List, <https://www.un.org/depts/dhl/resguide/scact_veto_table_en.htm>

\textsuperscript{214} See for example the recent, sole, vote of the United States against the resolution calling for the condemnation of Israel and protection of Palestinians on 1 June 2018.


\textsuperscript{216} Wall Advisory Opinion (n 2), para 87; SC Res 478 (n 120); SC Res 497 (n 120).

\textsuperscript{217} Wall Advisory Opinion (n 2), paras. 119 – 120; SC Res 2334 (n 103), para 1.

\textsuperscript{218} Which has clearly been accorded to the Palestinian people. See Wall Advisory Opinion (n 2), paras. 119 – 120; Legal Consequences of the Separations of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion) [2019] ICJ Rep 58, para 150–153.
withdrawal of the Israeli occupation, the ending of West Bank settlement activities, and the end of measures to change the character and status of Jerusalem. On this final point, it has been Israel which has sought to change the status of Jerusalem, a series of actions that have been condemned by the international community. The original intention of the international community on sovereignty of Jerusalem was meant to be a ‘corpus separatum’ that operated under an international regime. Such a status has not happened. Instead, Israel has taken actions, including the declaration of Jerusalem as the capital of Israel, to expand its jurisdiction over Jerusalem. These actions have been deemed invalid, with the international community calling for their immediate rescission.

Secondly, the legality of Israeli occupation of the West Bank, including East Jerusalem, has been decided upon by the international community. It has called for the enforcement of international law of occupation and for Israel to ‘immediately and completely cease’ all activities associated with settlement-motivated exercises. Independence, impartiality, objectivity and universality underpin the procedures that grant international peace. It is in such cases where these fundamental tenets of international law are not present, that the four criteria of Resolution 377 can be invoked. A case where the veto power of a permanent member of the Security Council is being used on the basis of an erroneous understanding of international law, which denies access to human rights at the expense of perpetuating the acquisition of land by an illegal occupying power, cannot be seen as an action for the maintenance of international peace and security. Fulfilling the requirements of Resolution 377, such as prevention of peace and security is as a direct result of a lack of unanimity of permanent members which could result in a threat to, and ongoing breach of, peace in this context.

A final point concerns the jurisdiction of the General Assembly to take such action. The United Nations has granted the Security Council primary, as opposed to exclusive, responsibility for the maintenance of international peace and security. An implicit authority rests outside of the Security Council – residing within the General Assembly – for the enforcement of the responsibilities enshrined within the Charter of the United Nations. If the Security Council fails to exercise its responsibilities, this ‘does not relieve Member States of their obligations or the United Nations of its responsibility’ or ‘deprive the General Assembly of its rights or relieve it of its responsibilities under the Charter to maintain international peace and security.’ Whilst claims of genocide, war crimes, ethnic cleansing and crimes against humanity demand a response under the Responsibility to Protect that could form a basis for the triggering of Resolution 377, this article has established that key aspects of the realisation of the right to self-determination, as highlighted in the case of the Palestinian people, could also form a basis for action under Resolution 377. Noting that the will of the international community as articulated in decisions of the ICC and resolutions passed by both the General Assembly and the Security Council has not been enforced, may found a challenge based on the self-determination and genuine autonomy of the Palestinian people.

---

219 SC Res 242 (n 154).
220 SC Res 2334 (n 103).
221 SC Res 476 (n 120); SC Res 478 (n 120).
223 SC Res 2253 (n 134); SC Res 2254 (n 134); SC Res 252 (n 120); SC Res 476 (n 120); SC Res 478 (n 120).
224 Wall Advisory Opinion (n 2), para 101; SC Res 904, UN Doc S/RES/904 (18 March 1994); SC Res 2334 (n 103), para 12.
225 SC Res 2334 (n 103), SC Res 465 (n 153); SC Res 452 (n 155).
226 Uniting for Peace (n 22).
227 Andreas Kolb, ‘The Responsibility to Protect (R2P) and the Responsibility While Protecting (RwP): Friends or Foes?’ (2012) Global Governance Institute.
Conclusion

In conclusion, the Palestine – Israel conflict has the hallmarks of an irresolvable conflict: an extended geopolitical conflict, grounded in religious, ethnic and historical foundations. Above all, the ongoing occupation of Palestine by Israel and the imbalance in statehood status have been central point to the failed outcomes of the peace process. It is within this context that the Palestinian people aspire to self-determination, a right that has been recognized by the international community. Closely related to the realization of this right is the enforcement of international human rights and humanitarian law concerning populations under occupation and populations within conflict. There is consensus from within the international community that Israel has been occupying Palestine since 1967. This article has established that, as an occupying power, Israel has not fulfilled its responsibilities concerning administration, transfer or population and good governance. It has arguably failed to meet the criteria for legal occupation under four-part test proposed (annexation, temporariness, best interests and good faith) and has therefore moved into illegal occupation. This determination mirrors the determination of the ICJ in the advisory opinions on Namibia and is supported by its Wall advisory opinion. The Palestinian people can therefore seek to enforce their rights under the law of occupation, to seek self-determination and genuine autonomy free from Israeli occupation. In regard to the enforcement of their rights, this article has addressed another challenge: the status of statehood.

Whilst the comprehensive application of the Montevideo criteria to the Palestinian context falls outside the scope of this article, this discussion has clearly identified the subject of the right of self-determination, known as the ‘principal party’ that is recognised by the international community, is the Palestinian people. It has also asserted that the authority that will enable the processes by which the expression of self-determination can take place, is through the PLO. Whilst the international community has recognised the right of the Palestinian people to exercise the right to self-determination and pursue national independence and sovereignty, key areas for further discussion have been identified including: the need for adequate representation of all Palestinian people within authority structures, a clearer articulation of the role of the PLO within the international community, and the analysis of a principle of democracy within the Palestinian context and its relation to recognition by the international community.

This article has sought to analyse Palestinian attempts to enforce their right of self-determination and associated rights through international judicial mechanisms including applications made before the ICC and the ICJ. In the current context, the

---

229 The right of the Palestinian people to self-determination (n 6).
230 Wall Advisory Opinion (n 2), para 112.
231 SC Res 237 (n 100).
232 Lynk (n 12). See also Ben-Naftali (n 14).
233 Namibia (n 15), para 16.
234 Wall Advisory Opinion (n 2), para 88.
235 These include a fluctuating population, undefined borders, restrictions on the capacity of the Palestinian people to effectively govern their determined population.
236 GA Res. 3210 (n 88); GA Res. 3236 (n 17); GA Res. 3375 (n 88).
237 GA Res. 3236 (n 17).
238 Ibid.
240 Any reform to the internal governance structures of Palestine needs to be wary of the encroachment of external ideologies that do not represent the will of the people.
241 Universal Declaration on Democracy (n 179).
recognition of Palestine as a ‘non-member observer’ state,242 combined with its treaty practice engagement since the General Assembly resolution, has resulted in the understanding that the ICC can accept jurisdiction over crimes committed in Palestinian territory, which was recognised in 2015 by the ICC.243 With this recognition, Palestine has been able to accede to the Rome Statute in 2015, and refer situations to the ICC under the declaration of article 12(3).

On the ICC jurisdiction, this article has articulated the proposition that there seems to be no evident obstacle to adjudication by the ICC on actions taken by Israel on clearly defined Palestinian territory after the recognition of statehood by the General Assembly in 2012, including actions of an occupying power. On the Palestinian initiation of ICJ proceedings against the United States made in 2018,244 a similar justification can be made as to the jurisdictional capacity of the ICC. The ratification of the ICJ statute could also be made without becoming party to the UN Charter.245 The jurisdiction of the court could be invoked under article 35(2) of the ICJ Statute, which provides that the ICJ is open to states not party to the Statute under conditions laid down by the Security Council.246

In addition, the collective recognition of Palestine by UNESCO has allowed for the application of the Vienna Formula which identifies the functional purpose of statehood in international legal instruments that allows for participation.247 A claim before the ICJ is not required to satisfy the traditional elements of statehood, but may utilise a functional approach to support the valid participation in a treaty that is open to states, without consideration of an entity’s territorial legal status and where the term statehood is not defined. Therefore, the ICJ does not need to consider Palestine’s status under the law of statehood when deciding on its jurisdiction. The decision of the ICJ to exercise its jurisdiction will also not result in any constitutive effect on Palestinian statehood. Therefore, both the ICC and ICJ are valid avenues for the application and enforcement of the right of self-determination and associated rights for the Palestinian people.

Potential issues concerning the jurisdiction of these courts have been explored, as well as the capacity for the enforcement of decisions of these courts. Of significance to this discussion is the recognition of Palestine as a ‘non-member observer’ state.248 Jurisdiction is also supported by collective recognition (including Palestinian membership of UNESCO) by the international community, and the resultant capacity to engage with international legal instruments through the Vienna Formula.249 Resolution 377 reveals the latent potential of the General Assembly that resides within the United Nations and assembles a procedural framework for this power to be exercised by the General Assembly in situations where the Security Council fails to execute its responsibilities to maintain international peace and security. The application of Resolution 377 within the General Assembly may provide a final avenue for self-determination for the Palestinian people, noting it applies in response to threats to peace, breaches of peace, or acts of aggression, and when other mechanisms (including the Security Council) have failed.

The brief discussion on the role of the United States utilising its Security Council veto vote raises concerns regarding the geopolitical motivations of its decisions on resolutions concerning Palestine. Whilst claims of genocide, war crimes, ethnic

243 Zimmermann (n 193); Ronen (n 21).
244 Palestine v. United States of America (n 30).
245 See for example Switzerland, Nauru, Italy.
246 SC Res 9 (n 209).
247 VCLT (n 22), art 81.
248 Status of Palestine in the United Nations (n 19), para 2
249 VCLT (n 22).
cleansing and crimes against humanity demand a response from the international community that could form a basis for the triggering of Resolution 377, this article has established that key challenges in the realisation of the right to self-determination, as highlighted in the case of the Palestinian people, could also form a basis for action under Resolution 377.

This article has identified two challenges associated with applying the right of self-determination in a way that can promote genuine autonomy for the Palestinian people: occupation and statehood. It has also outlined a way forward through international fora. In a world where self-determination remains a fundamental principle in international law, the international community has an opportunity to support the realisation of self-determination in the case of Palestine. Whilst the application and enforcement of self-determination is not without challenge or limitation, the words of David Ben-Gurion, the First Prime Minister of Israel, in 1931 ring true today:

> The Arab in Palestine has the right to self-determination. This right is not limited, and cannot be qualified by our own interests... It is possible that the realization of the aspirations (of the Palestinian Arabs) will create serious difficulties for us... but this is not a reason to deny their rights.

---

250 Kolb (n 238).
Does Australia Have The Laws It Needs In The #MeToo Era?

Vanisha Babani*

This article explores the adequacy of Australian laws for tackling complaints of sexual assault and harassment in relation to defamation. It discusses the positive and negative effects of #MeToo in Australia, arguing that although the Sex Discrimination Act (Cth) is able to deal with sexual harassment complaints and compensate victims, it does not encourage change in the behaviour of perpetrators. The current legal framework is insufficient for adequate justice, particularly in relation to Australia’s defamation regime. This has resulted to victims being cautious about sharing their stories on digital platforms. In order to provide victims with the justice they deserve, further changes to defamation law and a uniform approach is needed.

In recent years, the #MeToo movement has made a global impact that has allowed many more voices to be raised. This study explored whether Australian laws are adequate in tackling complaints of sexual assault and harassment, especially given the protection of defamation laws. The positive and negative effects of the movement in Australia are discussed to understand the continuing problem and the adequacy of defamation laws in comparison to sexual harassment laws. Although, the Commonwealth Sex Discrimination Act is able to deal with sexual harassment complaints and compensate victims, it does not encourage change in the behaviours of perpetrators. The current legal framework is insufficient in providing victims with adequate justice whereas, the approach adopted by the stringent defamation laws of Australia is far stronger. This has resulted to victims being more cautious about sharing their stories on public platforms and being further discouraged to seek relief. In order to provide victims with the justice they deserve, defamation laws need to be eased when dealing with sensitive matters and sexual harassment laws need to be reformed to align with the #MeToo era.

I #METoo MOVEMENT

The #MeToo movement was founded by Tarana Burke in 2006 to recognise experiences of sexual assault and harassment suffered by women especially of colour in low-income communities.1 The movement encourages survivors of sexual violence to voice out their experiences to hold perpetrators accountable for their abuse2 and allows these women to heal through empathy by coming together and sharing their experiences. The movement gained publicity after film producer, Harvey Weinstein was publicly exposed for sexual assault carrying the hashtag #MeToo, which led other women to share their stories.3 The #MeToo movement has had a global impact by reaching to nearly every region of the world4 through the effect on those in the

---

2 Ibid.
entertainment industry. Although, there have been many successful stories, Australia has a long way to go to achieve the full benefit from this movement due to its federal sex discrimination and defamation laws.

II POSITIVE IMPACTS OF THE MOVEMENT

The issue of sexual harassment and abuse has been prevalent within workplaces for many decades regardless of the illegality. A survey conducted by the Australian Human Rights Commission (AHRC) in 2018 confirmed that one in three people have experienced sexual harassment at work in the last five years. Although the statistics of people experiencing sexual harassment has been increasing rapidly through the #MeToo movement, a Harvard study showed that 74% of women were more willing to speak out against harassment while 77% of men anticipated being more careful about potential inappropriate behaviour. This global movement has had an extraordinary revelation that men are experiencing consequences for the first time ever. The main issue concerning sexual harassment remains to be the incomprehensibility of what constitutes sexual misconduct because a lot of victims once normalised and regarded the respective behaviour as ‘boys being boys’ and ‘men being men’, which are now less tolerated.

For many years, perpetrators have been excused for their sexual misbehaviour but with victims sharing their stories on a public platform with #MeToo, at least 200 prominent men in America have lost their jobs. Additionally, nearly half of the men (43%) who have been replaced were succeeded by women. This portrays women’s advancement and power within organisations. Through the change in an organisation’s hierarchy, women are able to create societal changes by reducing discrimination against women especially in aspects of their maternity leave and family responsibilities. Moreover, this has given employers the opportunity to redefine the boundaries of acceptable workplace conduct and to expand the channels of communication with their employees with the potential to an increased job satisfaction. American workplaces are encouraged to implement policies and trainings for anti-harassment and anti-discrimination, govern employee conduct in and out of the office, expand reporting procedures for inappropriate behaviour and review protocols for responding to complaints of inappropriate conduct.

In Australia, the movement has led the Government to ensure Australian workplaces are safe and free from sexual harassment by improving support and advocacy systems

---

8 Skye Saunders and Patricia Easteal, “Fit in or F#$@ off!”: The (non) disclosure of sexual harassment in rural workplaces” (2012) International Journal of Rural Law and Policy 1, 12.
9 Ibid.
11 Ibid.
13 Ibid.
for victims as well as, clarifying existing laws for more consistency between jurisdictions.¹⁴

III NEGATIVE IMPACTS OF THE MOVEMENT

The #MeToo movement has stimulated a wide range of changes within workplaces in America. However, a blind eye cannot be turned to the challenges that have sparked since the movement took effect. Terry Crews shared his thoughts after the first report about Harvey Weinstein reached the media using #MeToo, where men responded to the shared tales with scepticism and suggested that women were only speaking up because they wanted to be famous.¹⁵ His response to that was ‘That’s not what this is about at all! This is not how it works!’.

This has shed light on a bigger problem. The motive of the #MeToo movement was to encourage men to stand up and support women but the reality was rather contradictory. However, the allegations against Harvey Weinstein encouraged Terry Crews to speak up about his encounter with sexual assault, which also resulted negatively with celebrities mocking him. The reality of Terry Crews’ story is how toxic masculinity permeates culture.¹⁶ It is important to take into account that men are also survivors of sexual harassment with one in four men (26%) experiencing sexual harassment at work in the last five years.¹⁷

Given the gendered nature of the harm, the Australian literature tends to focus on ‘men as perpetrators’, but there are a lot of men that are victims as well who are discouraged to speak up because their experiences are not taken seriously. This depicts a different expectation between men and women in regards to tackling sexual harassment incidents and the need to de-gender violence. Tarana Burke stated that her vision of this global movement is to see a world free of sexual violence and we are the ones that can build that world by supporting and standing up for the victims.

IV DEFAMATION LAW

The positive impact of the #MeToo movement in the United States has not been mirrored in Australia due to its strong defamation laws, leading to people or publications making allegations and facing threats of legal action.²⁰ The movement has

---


¹⁸ Neil Lyndon, ‘My #metoo story shows that men are the victims as well as the culprits’ The Telegraph (online, 23 October 2017) <https://www.telegraph.co.uk/men/thinking-man/metoo-story-shows-men-victims-culprits/>.

¹⁹ Patrick Greenfield, ‘#MeToo has been misrepresented as plot against men, says founder’ The Guardian (online, 30 November 2018) <https://www.theguardian.com/world/2018/nov/30/metoo-has-been-misrepresented-as-plot-against-men-says-founder>.

encouraged victims to speak up, portraying their freedom of speech. However, it is vital to take into account the lack of constitutional protection for freedom of speech in Australia. Thus, the pervasive application of defamation law to all communication creates real risks of liability and poses threats for publishers, which includes the victims using #MeToo to share their stories of sexual harassment. Defamation law in Australia protect a person against published statements contributing to harm in their personal or professional life through the lowering of their reputation, in essence how they are regarded by right minded people. An allegedly victim of defamation has the onus of proving that the communication that clearly identifies the victim and that the speech was impossibly disparaging of that person’s reputation. Defamation is significant for #MeToo because it might be used to silence someone who had been harassed or assaulted, in other words prevent the exposure of wrongdoing. Defamation might however be a mechanism for exposure, given that it requires a lower standard of proof than in criminal law and that wrongdoing might be ventilated when someone who has been wronged defends claims when sued for defamation by a perpetrator.

The high-profile case of Rush v Nationwide News was the first legal determination of a case associated with #MeToo in Australia. Geoffrey Rush, an Australian actor, was accused of his inappropriate behaviour by a fellow actor, Eryn Jean Norvill who informally complained to the Sydney Theatre Company. She was required to become a witness in his defamation case against Nationwide’s newspaper. The court decided the case in favour of Rush, as the Nationwide News was incapable of proving the truth of the defamatory meaning that they sought to be justified. This depicts the difficulty victims face in providing evidence to support the truth within the occurred incident whereas, it is easier for the defamed person to provide evidence through the use of #MeToo. Therefore, the sensitive matters including, sexual assault and harassment cannot be dealt with in the same way other defamation claims occurring in everyday business are tackled with.

Similarly, actress Yael Stone alleged Rush misbehaved with her during a theatre production previously but feared to speak up about it because she could face legal consequences under the defamation laws. The defamation laws in Australia are the core reason to why the #MeToo movement has not been successful in comparison to other cities such as, America. There have been many other high-profile cases involving perpetrators from the entertainment industry that have faded from public view. The reality of this is that, neither have the victims achieved the justice they sought from the perpetrators from the entertainment industry that have faded from public view.

---

23 Ibid.
24 (No 7) [2019] FCA 496.
27 Ibid.
28 Rush v Nationwide News (No 7) [2019] FCA 496.
29 Mao (n 19).
30 O’Connell (n 24).
31 Ibid.
heard under defamation laws not sexual harassment laws,\textsuperscript{32} as no prominent cases of sexual harassment have been brought to attention. The most difficult challenge within a defamation claim is, the onus is upon the person who made the statement to defend their actions usually by proving the truth of the statement while, in the United States, the onus is on the defamed person to prove that the statement is false and was published with malice.\textsuperscript{33} Since, the decision of Rush, silence around sexual harassment has increased.

Following the \textit{Rush} case, in \textit{Johnson v Ramsden}\textsuperscript{34} the issue was whether pinching a woman’s buttock constituted an indecent assault.\textsuperscript{35} The Magistrate found that in the modern era of twerking and grinding, simulated sex and easy access to pornography, the thought of a pinch on the bottom is almost a reference to a more genteel time thus, the act that had capability of being indecent was not inherently indecent.\textsuperscript{36} This portrays a backlash in the little momentum victims in Australia had gained through the #MeToo movement.

Although, through this movement, employees in organisations have a better understanding of what constitutes sexual harassment,\textsuperscript{37} community standards remain unchanged. The decision of both the cases illustrate the ineffectiveness of the #MeToo movement. Additionally, it leads the victims of sexual harassment to believe that these perpetrators can continue acts of sexual assault and harassment because their reputation as dominant authorities within organisations may be protected under the defamation laws. While, there are no adequate protections available to victims under the sexual harassment laws.

\section{V \text{SEXUAL HARASSMENT LAWS}}

After the implementation of the \textit{Sex Discrimination Act (SDA)}\textsuperscript{38} in 1984, sexual harassment in the workplace is prohibited.\textsuperscript{39} Sexual harassment remains prevalent because people are unaware of their rights under the \textit{SDA} and because victims are afraid of further victimisation once cases are reported.\textsuperscript{40} The #MeToo movement has reflected silencing of Australian victims, as only 17\% of women have lodged a formal SDA complaint in the past five years.\textsuperscript{41}

One reason to remain silent is due to the fear of being labelled as a troublemaker or a liar, dismissal or promotion opportunities and psychological distress.\textsuperscript{42} Another reason for a low rate in reporting incidents of sexual harassments is due to the cost and risks involved in pursuing the claims.\textsuperscript{43} However, in the instance that the complaint is reported to the AHRC, it is mandatory for the victim and the perpetrator to attend a

\begin{thebibliography}{99}
\bibitem{32} Ibid.
\bibitem{34} [2019] WASC 84.
\bibitem{35} \textit{Johnson v Ramsden} [2019] WASC 84.
\bibitem{36} Ibid.
\bibitem{37} Bower (n 6).
\bibitem{38} 1984 (Cth).
\bibitem{39} Catherine Van Der Winden, ‘Combating Sexual Harassment in the Workplace: Policy vs Legislative Reform’ (2014) 12(1) \textit{Canberra Law Review} 204, 204.
\bibitem{40} Ibid 205.
\bibitem{43} Shi (n 40) 159.
\end{thebibliography}
conciliation conference, which has an impact on the complainant’s mental health\(^{44}\) by being forced to live through the trauma again. Thus, victims prefer remaining silent, which results in many perpetrators not having to face consequences of their acts.\(^{45}\)

The first case of sexual harassment that was decided concurrently with the SDA was O’Callaghan v Loder\(^{46}\) where Ms O’Callaghan brought a claim against Mr Loder under the Anti-Discrimination Act\(^{47}\) containing sex discrimination provisions.\(^{48}\) The Court held that the requirement for Ms O’Callaghan to prove that Mr Loder was aware that his behaviour was unwelcome was not fulfilled.\(^{49}\) However, this case determined the need to redraft the definition of sexual harassment, which was completed in 1992.\(^{50}\) A problem that arises is some jurisdictions in Australia have a different definition of what constitutes sexual harassment. The statutes equivalent to the SDA in the Australian Capital Territory,\(^{51}\) New South Wales,\(^{52}\) South Australia,\(^{53}\) Victoria\(^{54}\) and Tasmania\(^{55}\) include the same definition of sexual harassment but the statutes of Western Australia\(^{56}\) and the Northern Territory\(^{57}\) have a different meaning.\(^{58}\)

The current approach to sexual harassment regulation reflects a conceptual framing of sexual harassment as a private, individual issue rather than as a result of systemic causes or problems.\(^{59}\) The focus lies on the aberrant behaviour of the individual rather than the structural and systemic manifestations of discrimination.\(^{60}\) Division 3 of the SDA consisting of sexual harassment is inconsistent with the object to eliminate, so far as is possible, discrimination involving sexual harassment in the workplace, in educational institutions and in other areas of public activity\(^{61}\) because it embodies the principle of corrective justice.\(^{62}\)

By comparing the corrective justice approach of the SDA mentioned above and the defamation claims sought through the Civil Law (Wrongs) Act,\(^{63}\) it is evident that defamation law aims to correct wrongs by depriving the wrongdoer of any gain made through the wrong and restoring the wronged party to his or her initial position.\(^{64}\) Therefore, the approach adopted by the defamation laws is far stronger than the SDA, which further discourages victims to seek relief. The SDA has not been able to alter the behaviour of individuals who commit sexual harassment\(^{65}\) due to the failure in recognising or responding to important harms such as, undermining of individual autonomy and the entrenchment of some aspects of gender inequality caused by sexual

---

\(^{44}\) Australian Human Rights Commission (n 5).
\(^{45}\) Shi (n 40) 159.
\(^{46}\) (1983) NSWLR 89.
\(^{47}\) 1977 (NSW).
\(^{48}\) Winden (n 38) 213.
\(^{49}\) Ibid.
\(^{51}\) Discrimination Act 1991 (ACT) s 58(1).
\(^{52}\) Anti-Discrimination Act 1977 (NSW) s 22A.
\(^{53}\) Equal Opportunity Act 1984 (SA) s 87(9).
\(^{54}\) Equal Opportunity Act 2010 (Vic) s 92(1).
\(^{55}\) Anti-Discrimination Act 1998 (Tas) s 17(3).
\(^{56}\) Equal Opportunity Act 1984 (WA) s 24(3)(a), (b).
\(^{57}\) Anti-Discrimination Act 1992 (NT) s 22(2)(e).
\(^{58}\) Winden (n 38) 208.
\(^{59}\) Shi (n 40) 156.
\(^{61}\) Sex Discrimination Act 1984 (Cth) s 3(c).
\(^{62}\) Shi (n 40) 160.
\(^{63}\) 2002 (ACT).
\(^{64}\) Shi (n 40) 160.
\(^{65}\) Ibid 162.
harassment. The undermining of individual autonomy is serious when the victims feel pressure to tolerate the perpetrator's conduct hence, making it difficult to prove the occurrence of the act due to the unwelcomeness element of sexual harassment as depicted in *O'Callaghan v Loder*. In the present, the element of unwelcomeness is established through the surrounding circumstances such as, if the sexual conduct was unwelcome or unwanted by the complainant.

However, sexual harassment and assault are still not eliminated because the complainant’s conduct will be scrutinised by courts to determine the act of the complainant and if pressure is indeed involved, the conclusion leads to the conduct being classified as not unwelcomed. Furthermore, there are problems around gender inequality caused by sexual harassment, as women experience unwanted physical touching, rude jokes, sexual banter and exposure to various types of pornography within male-dominated workplaces because of the excuse that, that is just how men are. Thus, such behaviour undermines a woman’s image and confidence as a capable worker thereby contributing to gender inequality.

VI CONCLUSION

The #MeToo movement has gained momentum across the globe with prominent changes within organisations in the United States. However, there have been obstacles for the Australian legal system to mirror these positive changes. Due to the stringent defamation laws, victims are more cautious about sharing their stories on a public platform thus, many incidents go unheard. Australia has laws to deal with sexual harassment under the *Sex Discrimination Act* but its current design is fit for the purpose of compensating victims of sexual harassment rather than changing the behaviours of perpetrators to prevent sexual harassment from occurring. Therefore, in the #MeToo era, the current legal framework surrounding the SDA is insufficient in providing victims with adequate justice.

The laws of Australia are in need of reform in order to align with the #MeToo era. There is a heavy burden on victims to make complaints, which depicts the need of the onus of proof for sexual harassment to be lessened. Through the reform, victims will be encouraged to seek appropriate relief. Additionally, defamation laws need to be eased when dealing with such sensitive matters, to provide victims with some immunity when they publish their stories on a public platform. In order to effect a cultural paradigm shift, it is of utmost importance that members of all people unite and ensure that their voices against any inappropriate sexual behaviours are heard.

***

66 Ibid 163.  
67 Ibid 165.  
68 Ibid 166.  
69 Ibid 167.  
70 Ibid.  
71 Saunders (n 8) 11.  
73 Shi (n 40) 169.  
75 1984 (Cth).  
76 Shi (n 40) 156.  
77 Dalzell (n 14).
Standing Down Athletes Facing Criminal Charges: An Examination of the NRL’s ‘No-Fault Stand Down’ Policy

Ryan Waters*

This article considers the introduction of a policy to the NRL in 2019 that made it mandatory for players charged with certain criminal offences to be stood down from their sport. The article compares and contrasts this policy with the principles that are found in general employment law, examining why athletes may be subject to higher behavioural standards. It examines in detail the test case for this policy heard in 2019, looking at the impacts of that judgment, and how the motivations for the policy were justified in court. The article compares the approach adopted by the NRL to other sports, both domestically and internationally, looking at how those sports deal with the issue of the off-field conduct of athletes. It concludes with recommendations for sporting organisations seeking to write similar policies, and how these can be constructed to best balance a range of competing interests.

1 INTRODUCTION

A Context

In early 2019, the National Rugby League (‘NRL’),¹ one of the most popular sporting leagues in Australia, faced public backlash following repeated incidents of criminal behaviour, with many involving allegations of sexual assault or physical violence against women. In response, the NRL amended its rules to include a new ‘no-fault stand down’ policy.² Under the policy, players charged with serious criminal offences are automatically prohibited from playing until their charge is determined by a court.³ If a player is charged with a crime not classified as a serious criminal offence, the NRL vests discretionary power in the Chief Executive Officer (‘CEO’) or Chief Operating Officer (‘COO’) to decide whether they should be permitted to play.⁴ Thus far, five players have been stood down under the policy, with three players currently stood down, one ultimately found not guilty of the charges and subsequently reinstated to the game,⁵ and one sentenced to community service and subsequently reinstated to the game.⁶ While the policy has been held to be legally valid,⁷ there has been significant debate as to its fairness on the players.

Balancing interests between employers and employees has long attracted legal debate.⁸ The traditional view is that there should be a separation between the ‘public sphere’ and the ‘private sphere’, with actions outside the workplace remaining distinct from

---

* Ryan Waters undertook his LLB (Hons) at University of Canberra.
1 In this article, ‘rugby league’ refers to the sport, and ‘NRL’ refers to the governing body.
2 NRL Rules, National Rugby League (at 11 March 2019) r 22A (‘NRL Rules’).
3 Ibid r 22A(3).
4 Ibid r 22A(7).
5 R v Walker (District Court of New South Wales, Magistrate Goodwin, 10 May 2019) (‘Walker’).
6 R v May (Parramatta Local Court; Magistrate Denes, 31 January 2020) (‘May’).
7 De Belin v Australian Rugby League Commission Limited [2019] FCA 688 (‘De Belin’).
actions inside the workplace. While this view is still seen as ideal to some, the existence of these spheres has slowly dissipated over time as society becomes increasingly interconnected. The advent of social media and similar online tools have reduced the ability for an employee to have a ‘private life’ without consequences on their employment. For athletes, the distinction between public life and private life is even smaller. In countries including Australia, athletes are thrust into the public spotlight, attracting a plethora of media attention. This has led to the lives of athletes being considered in the public interest, resulting in a requirement to act as role models in both their professional and personal lives. Although there are arguments against this, courts have been willing to accept that the lives of athletes and other celebrities are in the public interest, as there is social utility in discussing celebrity morality.

Central to this article is the principle of a reasonable investigation. It is commonly accepted that, in an employment relationship, a criminal charge against an employee will entitle their employer to take disciplinary action. However, before such action can be taken, there is generally an obligation to conduct a reasonable investigation. This obligation does not apply to sporting organisations, who often construct their rules to exempt themselves from the requirement to conduct investigations. The NRL policy expressly excludes the possibility of an investigation, restricting the rights of players to natural justice.

Ultimately, any discussion concerning the merits of the NRL policy is more nuanced than a simple statement about a perceived curtailment of individual rights. The issue is complex, involving an intersection between employment law, privacy concerns, individual legal rights, and sociocultural factors. This article argues that sporting organisations should be able to stand down athletes facing criminal charges due to

---


11 Daniel Goldsworthy, ‘Athletes’ rights under the World Anti-Doping Code: A legitimate public interest?’ (2018) 43(5) *Alternative Law Journal* 197, 199. But see Roger Clarke, ‘Privacy and the Media – A Platform for Change?’ (Research Paper, No 2012-29, University of Western Australia, 20 July 2012) 14, where it is discussed that the ‘likelihood of a public interest factor justifying media attention ... varies depending on such factors as the nature of the behavior or the event’.


13 See, eg, Australian Athletes Alliance, Submission No 7 to Senate Standing Committees on Environment, Communication and the Arts, *Inquiry into the reporting of sports news and the emergence of digital media* (14 May 2009) 1; *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153, 167 (Hunt J) (‘Chappell’).


15 *Terry* (n 4) [104] (Tugendhat J).


17 See especially *FFA Code of Conduct*, Football Federation Australia (at 1 January 2007) cl 2.2(j) (‘FFA Code of Conduct’).

18 *NRL Rules* (n 2) r 22A(16).
social and financial factors. However, the rights and liberties of players should not be made sacrificial to the reputation of the sport. Sporting organisations should seek to draft policies that optimally manage the competing interests between the league and the player, ensuring that both employer and employee obligations best resemble general employment law principles.

**B Question, Aims and Methodology**

The overarching question of this article is whether sporting organisations should be able to stand down athletes facing criminal charges. In answering this question, this article focuses on the NRL policy, as it is the most recent, controversial, and relevant iteration of a sporting policy enabling disciplinary action arising from criminal charges. However, the question requires a deeper understanding of a myriad of factors. The sub-questions in this article include the difference in obligations between athletes and general employees, as well as the difference in obligations between sporting organisations and general employers. This article seeks to explain why these differences exist, as well as discuss the competing interests that are most relevant when implementing disciplinary action.

This article has two distinct aims. The first aim is to provide the first comprehensive discussion of the benefits and disadvantages of the NRL policy. As the policy was implemented recently, the analysis of it has been limited. From a media perspective, there has been brief opinion pieces before and after the policy's implementation, while from a legal perspective, there has only been the decision handed down in De Belin v Australian Rugby League Commission Limited (‘De Belin’). The second aim of this article is to use the research to make recommendations to sporting organisations writing similar policies. This article will use both the doctrinal research paradigm and the reform-oriented research paradigm, looking to provide a ‘systematic exposition of the rules governing a particular legal category’, before recommending changes to ‘any rules found wanting’. These approaches are more appropriate than broad theoretical

---


20 *De Belin* (n 7).


22 Ibid.
research, as this article is aimed at assessing practicalities in law.\textsuperscript{23} The a priori approach will be relied upon, through the evaluation of a range of sources to reach a general conclusion, before identifying any problems that should be resolved.\textsuperscript{24}

\section*{C Structure}

This article is comprised of six Parts. Part One has provided a background of the topic and set out the questions that are to be answered. Part Two examines employment law, looking at the rights of employers to take disciplinary action against an employee’s out of work conduct. This Part provides an explanation of the process employers are obligated to undertake before standing an employee down pending a criminal charge. Part Three identifies the reasons athletes are held to higher behavioural standards than other employees, detailing how and why sporting organisations discipline athletes. Part Four provides an in-depth look at the NRL policy, including the motivations behind the policy, the challenges to the policy, and the decision in \textit{De Belin}. Part Five reviews and evaluates the policy by providing alternative approaches used by other sporting organisations. The Part provides recommendations as to what adjustments could be made. Part Six concludes with a summary of the findings and recommendations made in the previous Parts.

\section*{II THE PUBLIC AND THE PRIVATE}

The power imbalance between employers and employees underpins the uneasiness expressed on this issue. Dissatisfaction concerning athlete discipline is fuelled by fears employers’ powers to discipline employees for conduct outside the workplace are too broad. When the conduct is yet to be proven, these feelings of angst are further exacerbated. Legislatively, employer control for out of work, or off-field conduct, is largely unregulated.\textsuperscript{25} The \textit{Fair Work Act 2009 (Cth)} that regulates unfair dismissal is silent on out of work conduct,\textsuperscript{26} while the \textit{Privacy Act 1988 (Cth)}\textsuperscript{27} is more concerned with information privacy.\textsuperscript{28} Therefore, the current status of the law in Australia is governed by cases, particularly those heard before the Fair Work Commission (‘FWC’). This Part seeks to determine the law concerning discipline for pending criminal charges as it applies to the general population. It looks at principles of employer control relating to out of work conduct, before examining what happens if the conduct is yet to be proven in court. The distinction between suspensions and terminations is then reviewed. This Part looks beyond the sporting landscape as it seeks to provide a broad framework for athletes to be compared in future Parts.

\section*{A Out of Work Conduct}

\subsection*{1 Evolution of Cases}

First, it is necessary to examine the evolution of employer control in Australian law. The clearest explanation of the duties employees have to comply with regarding out of work conduct is found in \textit{Rose v Telstra Corporation Ltd} (‘Rose’).\textsuperscript{29} In \textit{Rose}, it was held there are three scenarios in which employee behaviour can impact employment.\textsuperscript{30} The three scenarios are: (i) if the behaviour is likely to cause serious damage to the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{23} Ibid.
\item \textsuperscript{24} Zina O’Leary, \textit{The Social Science Jargon Buster} (SAGE Publications Ltd, 2007) 13-14.
\item \textsuperscript{25} In this article, out of work conduct and off-field conduct refers to conduct that occurs outside the workplace and would not usually be considered relevant to one’s employment duties.
\item \textsuperscript{26} \textit{Fair Work Act 2009 (Cth)} (‘\textit{Fair Work Act}’).
\item \textsuperscript{27} \textit{Privacy Act 1988 (Cth)}.
\item \textsuperscript{28} Thornthwaite (n 10) 8.
\item \textsuperscript{29} Rose (n 10).
\item \textsuperscript{30} Ibid [30] (Ross V-P).
\end{itemize}
\end{footnotesize}
employment relationship, (ii) if the behaviour interferes with the interests of the employer, or (iii) if the behaviour is incompatible with an employee’s duties or roles. Although the Australian Industrial Relations Commission (‘AIRC’) stressed in Rose that employees are ‘entitled to a private life’, these parameters concerning employer control have been largely adopted and continually refined. A simpler test applied in Hussein v Westpac Banking Corporation (‘Hussein’) of employee behaviour having a ‘relevant connection’ to their employment has also been widely used. Behaviours held to have a relevant connection include accessing pornography through a work computer, and non-compliance with lawful directions concerning sexual harassment outside of work.

While the tests from Rose and Hussein are still referenced in employment cases, their validity has been called into doubt after the AIRC found that out of work behaviour only needs to cause ‘difficulties at work’ for dismissal to be justified. Additionally, there has been an increased focus on protecting the reputation of the employer. This principle is particularly relevant when disciplining athletes as they are in the public eye, however has been held to apply generally if there is significant media coverage of the proceedings.

2 Social Media Influence

Although there is still uncertainty surrounding appropriate levels of employer control due to the lack of legislative authority, undoubtedly a driving force of change has been the emergence of social media. Social media has led to increased interconnectedness, further blurring the lines between public and private conduct. Over the past decade, Australian courts and tribunals have gradually accepted that employers have a ‘legitimate interest’ in their employees’ social media postings. Termination has been held to be justified following negative comments on social media about their employer, although complicating this is that employees do still have the ‘right to

---

31 Ibid.
32 Ibid.
33 Hussein v Westpac Banking Corporation (1995) 59 IR 103 (‘Hussein’).
34 Ibid 107 (Staindl JR). See also HEF of Australia v Western Hospital (1991) 4 VIR 310, 324; Smith v The Christchurch Press Co Ltd [2001] 1 NZLR 407, 413; Wickham v Commissioner of Police (Unreported, Supreme Court of South Australia Full Court, Matheson, Prior and Debele JJ, 6 and 11 May 1998) 18-19; EI Sykes and HJ Glasbeek, Labour Law in Australia (Butterworths, 1972) 71; RC McCallum, Marilyn Pittard and Graham Smith, Australian labour law: cases and materials (Butterworths, 2nd ed, 1990) 140.
35 Griffiths v Rose (2011) 192 FCR 130.
36 McManus v Scott-Charlton (1996) 70 FCR 16 (‘McManus’). See also Colwell v Sydney International Container Terminals Pty Limited [2018] FWC 174, where an employee was terminated for messaging explicit material to colleagues outside of work.
38 Telstra Corporation Limited v Streeter [2008] AIRCFB 15 [15] (Senior Deputy Presidents Acton and Cartwright). Here, the difficulties at work were that other colleagues were crying, hysterical, distressed, and disgusted: at [11].
40 Wakim (n 39).
41 Thornthwaite (n 10). The tests in Rose (n 10) and Hussein (n 33) were formulated prior to the advent of social media.
42 Ibid.
43 Glen Bartlett and Regan Sterry, ‘Regulating the private conduct of employees’ (2012) 7(1) Australian and New Zealand Sports Law Journal 91, 94.
complain about their employment rights and their treatment at work. Courts have also considered the public interest to be an appropriate rationale for taking disciplinary action against an employee for social media activity.

This was recently confirmed in *Comcare v Banerji*, where a public servant’s termination for negative social media comments was justified, notwithstanding the use of an anonymous moniker. This case confirmed the relevance of the public interest in disciplinary determinations, as well as the importance of compliance with employment policies. However, the decision was criticised for ‘significantly degrading public discourse’ and blurring the lines between acceptable and unacceptable expression of opinions.

Regarding athletes, the rising influence of social media is best demonstrated by the furore and subsequent termination of rugby union player Israel Folau in 2019. Folau was criticised following a series of social media postings that included homophobic views. Despite the postings being personal views with no connection to his duties as an athlete, his contract was terminated. These matters demonstrate the effect that social media has on the employment relationship despite being out of work, or off-field. Furthermore, they show the permissible levels of employer control are constantly evolving, in part reflecting the rise of social media.

**B Undetermined Criminal Charges – The Reasonable Investigation**

The diminishing boundaries between the public and the private are evident in situations where the relevant conduct is proven, or indisputable. The concerns surrounding the NRL policy, however, relate to situations where the conduct is alleged and yet to be proven in a court of law. When this occurs in general employment law,
the common law position is that the employee is entitled to procedural fairness, as demonstrated by a number of cases.\textsuperscript{55}

In \textit{Pinawin T/A Rose Vi.Hair.Face.Body v Domingo} (\textit{Pinawin}), a two-limbed test was developed for assessing whether an employer could summarily dismiss an employee.\textsuperscript{56} First, the employer must hold a belief that the employee’s conduct was sufficiently serious to justify immediate dismissal. Second, the belief must be based on reasonable grounds with the assistance of a reasonable investigation. The \textit{Pinawin} test follows earlier cases holding that employers can dismiss an employee for alleged misconduct, providing there was a full and proper investigation conducted, including an opportunity for the employee to respond to the allegations.\textsuperscript{57} If this procedure is followed, employers are protected against an unfair dismissal claim if it eventuates that the employee did not commit the offence they were charged with.\textsuperscript{58}

The principles from \textit{Pinawin} and other cases were tested recently in the FWC case of \textit{Deeth v Milly Hill Pty Ltd} (\textit{Deeth}).\textsuperscript{59} \textit{Deeth} concerned an apprentice butcher who was charged with being an accessory after the fact to murder.\textsuperscript{60} Following this charge, the butcher was terminated, as his employer believed it would drive away customers and cause friction amongst staff.\textsuperscript{61} Applying the \textit{Pinawin} test, it was concluded that the employer had a ‘knee-jerk reaction to the news that Mr Deeth had been charged … and proceeded to terminate his employment on that basis’.\textsuperscript{62} Although customers and other employees had expressed their concern, this did not constitute a reasonable investigation, and the employer had not satisfied the second limb of the \textit{Pinawin} test.\textsuperscript{63}

The deputy president of the FWC encapsulated the state of the law, stating that ‘there is no presumption that a criminal conviction alone is a valid reason for termination of employment’.\textsuperscript{64}

### C Suspension vs Termination

While \textit{Deeth} provides a reasonably clear explanation of the general law of employment where undetermined criminal charges are involved, there is a distinction with the NRL policy in that the athlete is suspended, as opposed to terminated. Regarding suspensions, it is accepted that employees are required to comply with lawful and reasonable directions,\textsuperscript{65} which includes the direction to skip work for a day or two while an investigation occurs.\textsuperscript{66} However, if the suspension is indefinite, courts have held that employers are contravening their duties.\textsuperscript{67} In \textit{Downe v Sydney West Area Health Service (No 2)} (\textit{Downe}), an employee was indefinitely suspended while her employer investigated allegations of bullying.\textsuperscript{68} The NSW Supreme Court held the suspension was improper, as it breached an implied contractual term of mutual trust and

\begin{itemize}
  \item \textsuperscript{55} See, eg, \textit{Bi-Lo Pty Ltd v Hooper} (1994) 53 IR 224 (‘Bi-Lo’); \textit{Howell v John Bennell’s Discount Fuel} (2001) 167 QGIG 202 (‘Howell’).
  \item \textsuperscript{56} \textit{Pinawin} (n 16) [29] (Watson V-P, Senior Deputy President Richards and Commissioner Cloghan). Summary dismissal refers to conduct justifying immediate dismissal without notice: \textit{Fair Work Act} (n 26) s 388(1). The employee must be ‘guilty of gross misconduct’: Simon Gardiner et al, \textit{Sports Law} (Routledge, 4th ed, 2012) 418.
  \item \textsuperscript{57} Bi-Lo (n 55).
  \item \textsuperscript{58} Howell (n 55).
  \item \textsuperscript{59} Deeth (n 16).
  \item \textsuperscript{60} Ibid.
  \item \textsuperscript{61} Ibid.
  \item \textsuperscript{62} Ibid [25] (Senior Deputy President Hamberger).
  \item \textsuperscript{63} Ibid.
  \item \textsuperscript{64} Ibid [29] (Senior Deputy President Hamberger).
  \item \textsuperscript{65} \textit{R v Darling Island Stevedoring and Lighterage Company Limited} (1938) 60 CLR 601.
  \item \textsuperscript{66} \textit{Downe v Sydney West Area Health Service (No 2)} (2008) 71 NSWLR 633 (‘Downe’).
  \item \textsuperscript{67} Ibid; \textit{Moshirian v University of New South Wales} [2002] FCA 179 [64] (Moore J); \textit{Director-General of Education v Sutling} (1987) 162 CLR 427, 445 (Brennan J).
  \item \textsuperscript{68} Downe (n 66).
\end{itemize}
confidence. While this appears to provide clarity, the mutual trust and confidence term was rejected six years after Downe, in the case of Commonwealth Bank v Barker (‘Barker’). In Barker, the High Court of Australia (‘HCA’) held that ‘the implied term of mutual trust and confidence ... imposes mutual obligations wider than those which are necessary’. This has led to uncertainty as to whether the decision in Downe remains relevant and correct.

Attempting to resolve the uncertainty, commentators have suggested that an indefinite suspension may still breach the implied duty of good faith that exists in the employment relationship. The 2019 case of Milam v University of Melbourne (‘Milam’) indicates this suggestion is accurate. In Milam, a university professor was indefinitely suspended while allegations of academic misconduct were pursued. The Federal Court of Australia (‘FCA’) held that the ongoing suspension would cause the professor harm, and thus the suspension was overturned. Although both Downe and Milam concern conduct at work, they provide authority for the proposition that an indefinite suspension is improper. While the NRL policy results in suspension until a court verdict, there is an argument that the suspension could be regarded as indefinite due to the length and variability of criminal proceedings.

D Conclusion

With a lack of legislative authority, a thorough examination of cases is required. When employers sanction an employee for out of work conduct, the test in Rose appears to be the most accepted authority despite recent perplexity. Above all, there is an emphasis on due process and a reasonable investigation. This includes matters involving social media, and importantly matters where there has been a criminal charge yet to be adjudicated on. Indefinite suspensions while matters are investigated are likely to be overturned by courts, despite the confusion arising from the Barker decision.

III Sporting Heroes And The Cost Of Stardom

This Part examines the ways in which athletes are subject to higher standards, following on from the previous Part which examined principles as they apply to most employees. It looks at the disrepute clauses that are incorporated into the contracts of professional athletes to protect the reputation of the game. This Part examines two key reasons that athletes are held to a higher standard. First, the belief that athletes are role models for younger generations is used as a justification for the imposition of higher behavioural standards. This is despite inconsistent literature as to what a role model’s obligations are, and whether athletes fit the definition of a role model. Second, the money invested by corporate sponsors controls how athletes are disciplined.

---

69 Ibid 682 [411] (Rothman J).
70 [2014] HCA 32.
71 Ibid [37] (French CJ, Bell and Keane JJ).
73 Milam v University of Melbourne [2019] FCA 171 (‘Milam’).
74 Ibid.
77 See, eg, Pinawin (n 16); Deeth (n 16); Bi-Lo (n 55); Howell (n 55).
Considering sports and athletes are matters of public interest, sponsors have a vested interest in ensuring they are not seen to endorse misbehaviour.

**A Sport in Disrepute**

Incorporated into the majority of sporting rules and regulations are clauses that one must not 'bring the game into disrepute'. These clauses operate to prioritise the 'good of the game', and in doing so, extend the duties and responsibilities of athletes beyond the duties of the average employee. The clauses are deliberately vague so as to be broad as possible, thus encapsulating a breadth of activity far wider than general employment contracts, including a focus on off-field conduct. For example, the NRL rules state:

> Should the Chief Operating Officer or the Chief Executive Officer form the opinion, in their absolute discretion, that a person registered under this Part ... has engaged in conduct, whether before or after that person was registered, which, in the opinion of the Chief Operating Officer or the Chief Executive Officer, brought into disrepute, or was detrimental to, the interests, welfare or image of the NRL, a Club, the NRL Competition the Related Competitions, the Representative Competitions or the Game, or might have such an effect if the registration of the person is not cancelled or suspended ... [then they have the power to cancel or suspend the player’s registration].

To increase the difficulty for athletes, courts are reluctant to interfere with the decision making of sporting organisations, resulting in athletes having fewer opportunities to appeal disciplinary decisions than the general public.

### 1 Defining Disrepute

The main issue with disrepute clauses is the lack of clarity of the extent of a professional athlete’s obligations. Generally, it is accepted that the meaning of disrepute relates to a loss of trust or respect, however it is not always apparent whose trust or respect must

---


79 Jonson, Lynch and Adair (n 78) 60.

80 Andrew Podbury, ‘AFL players as role models: the off-field expectations placed on AFL players as role-models and how this has affected the traditional employment contract’ (Honours Thesis, La Trobe University, 2011).

81 NRL Rules (n 2) r 22(1).

82 Ibid r 22(1)(b).

83 Ibid r 22(2).


86 See Cambridge Dictionary (online at 21 October 2020), ‘disrepute’.
be lost. Professional sport involves many stakeholders, with a wide range of voices and opinions, that may have varying attitudes towards a given behaviour. The decision handed down by the Court of Arbitration for Sport (‘CAS’) in D’Arcy v Australian Olympic Committee (‘D’Arcy’) attempts to provide some guidance. Although this matter concerned selection on a team as opposed to an employment contract, the discussion surrounding disrepute has been relied on by authors since. In D’Arcy, it was said that ‘disrepute is to lower the reputation of the person in the eyes of the ... public to a significant extent’. While this provides some clarity, the definition is still vague and unquantifiable. Additionally, the definition in D’Arcy is concerned with the individual being in disrepute, as opposed to the sport. An alternative definition is that the behaviour must cause reputational injury to the game. This definition emphasises brand and corporate protection, with a sport’s reputation intrinsically linked to its ability to generate funding. Under this definition, sporting organisations have a duty to impose strict disrepute clauses due to the high financial stakes. However, this definition is arguably just as unquantifiable, as the wide array of stakeholders in sport may have contrasting views.

Although the disrepute clauses are vague, one thing that is certain is that they take the responsibilities of professional athletes beyond what is expected of the general public. The tests in Rose and Hussein discussed above dictate that out of work conduct must have a sufficient connection to the workplace to permit disciplinary action. Through the operation of the disrepute clauses, athletes have been disciplined for a wide range

---

87 George (n 78) 24.
88 D’Arcy v Australian Olympic Committee (Court of Arbitration for Sport, Case No 2008/A/1574, 7 July 2008) (‘D’Arcy’).
89 For further discussion on off-field conduct impacting Olympic selection, see Michael Burke, ‘Character and behaviour off the field should not be selection criteria for the Olympics’, The Conversation (online, 9 June 2016) <https://theconversation.com/character-and-behaviour-off-the-field-should-not-be-selection-criteria-for-the-olympics-60520>.
91 D’Arcy (n 88) [46] (Panel Members Holmes, Grace and Sullivan). See also Zubkov v Federation Internationale de Natation (FINA) (Court of Arbitration for Sport, Case No 2007/A/1291, 21 December 2007).
92 George (n 78) 35.
93 Ibid.
94 See, eg, Daniel Auerbach, ‘Morals Clauses as Corporate Protection in Athlete Endorsement Contracts’ (2005) 3(1) DePaul Journal of Sports Law 1, 2; Suzanne Dyson and Julienne Corboz, ‘Prevention of Violence Against Women in the Australian sports entertainment industry: disentangling tensions between culture change and brand protection in the AFL’ in Murray Drummond and Shane Pill (eds), Advances in Australian Football: a sociological and applied science exploration of the game (Australian Council for Health, Physical Education and Recreation Inc, 2016) 67, 68.
95 Ibid; George (n 78) 26.
97 Chappell (n 13) 166 (Hunt J).
98 Rose (n 10); Hussein (n 33).
of behaviours, including intoxication, extramarital affairs, and stealing an Olympic flag. While behaviours such as these may be considered unethical and can reflect character flaws, it is unlikely they would pass the aforementioned tests enabling employers to take disciplinary action.

This may seem unfair prima facie, however the vast media coverage that sport attracts is a major factor for determining disreputable conduct. Considering significant media coverage of out of work conduct may justify dismissal, it is evident the sporting media play a large role in determining the scope and severity of an athlete’s punishment. In D’Arcy, it was held that ‘the voluminous media reports that have accompanied his misconduct’ justified the removal of an athlete from a team. Therefore, professional athletes have the unfortunate problem of their private lives being public interest. This was demonstrated in England, when association footballer John Terry failed to get an injunction against media outlets reporting on his extramarital affairs, as it was considered to be in the public interest. While those examples involve significant coverage, athletes may nevertheless find themselves in trouble even where the reporting is not extensive.

2 Returning to the Reasonable Investigation

The reasonable investigation requirements discussed above are not as rigorous due to the disrepute clauses. For most employers, any form of discipline including those based on social media posts or criminal allegations requires a thorough investigation to obtain a reasonable belief that there was misconduct. If employers fail to conduct a reasonable investigation, it is likely that a decision to terminate an employee will not be upheld. However, in the context of professional sport, the disrepute clauses may forgo any need for an investigation. This is demonstrated by organisations such as the

100 Chappell (n 13). This has also resulted in the dismissal of senior executives. See, eg, Konrad Marshall, ‘AFL boss Gillon McLachlan: “Cultural leadership is one of the most difficult parts of the job”, The Age (online, 21 September 2019) <https://www.theage.com.au/sport/afl/afl-boss-gillon-mclachlan-cultural-leadership-is-one-of-the-most-difficult-parts-of-the-job-20190916-p5zgph6.html>. Cf Shane Warne, who was ‘never penalised for the widely publicised infidelity to his wife’; George (n 78) 33.
103 Rose (n 10); Hussein (n 33).
104 Wakim (n 39).
105 D’Arcy (n 88) [51] (Panel Members Holmes, Grace and Sullivan).
106 Some authors have justified this based on the salaries of athletes, as well as the cultural benefits of exposing athlete misbehavior. See Bill Birnbauer, ‘Umpire, Where’s the line? Reporting the Private Lives of Footballers’ in Andrew Dodd and Helen Sykes (eds), Media Innovation & Disruption (Future Leaders, 2016) 114, 115.
107 Davies (n 90) 56; Terry (n 14). Cf Australian Football League v The Age Company [2006] VSC 308, where an injunction was granted against releasing players names who had taken illicit drugs, after it was held that the names had not yet entered the public domain. In this article, ‘association football’ refers to the sport sometimes commonly known as soccer/football.
108 Kosla (n 85) 667.
109 Pinawin (n 16); Deeth (n 16).
110 Ibid.
Football Federation of Australia (‘FFA’).\textsuperscript{111} The FFA’s code of conduct states that the charge of a criminal offence against an athlete is enough to bring the sport into disrepute,\textsuperscript{112} creating an avenue for the athlete to be disciplined without any of the requirements for a reasonable investigation that are usually applicable.\textsuperscript{113} The NRL policy operates similarly, with a criminal charge either resulting in an automatic suspension, or a discretionary decision with no formal process or rights of reply.

If a Player is charged with a Serious Criminal Offence, he will be automatically subject to a No-Fault Stand Down Condition ...\textsuperscript{114} where a Player has been charged with a criminal offence (other than a Serious Criminal Offence) and the Chief Executive Officer or the Chief Operating Officer forms the opinion, in their absolute discretion [that the player is bringing the game into disrepute, then they shall be stood down] ...\textsuperscript{115} to remove any doubt, the Player has no entitlement to make submissions or lead evidence in respect of the exercise of the discretion ...\textsuperscript{116} nothing in this Rule requires the Chief Executive Officer or the Chief Operating Officer to provide reasons for their opinion.\textsuperscript{117}

There may be a requirement for a more diligent investigation if inconsistent or disputed facts emerge,\textsuperscript{118} however it is apparent that sporting organisations are not subject to the same standards as most employers.

**B Role Model Status**

The above section demonstrates that athletes are held to a higher behavioural standard than most employees, but the question remains as to why. The primary rationale is the idea that athletes are role models to the broader community.\textsuperscript{119} This sentiment appears to be largely accepted, however there are valid queries regarding what a role model is, and whether it is fair that athletes have the responsibility thrust upon them. A commonly accepted definition of a role model is one who is ‘perceived as exemplary, or worthy of imitation’,\textsuperscript{120} or more simply, one who ‘can be emulated by others’.\textsuperscript{121} Athletes being seen to encompass this definition reflects a social shift towards athletes recognised as entertainers and celebrities, as opposed to simply players of sport.\textsuperscript{122} While some athletes are comfortable to accept and promote this view, it is largely perpetuated by the media, and can be burdensome.\textsuperscript{123}

**1 Athletes as Role Models – Fact or Fiction?**

It is often presumed that athletes automatically have a role model status attached to them, however there is haphazard evidence as to whether this is the case. In the opinions of athletes themselves, it is generally believed they have high expectations thrust upon them. Research conducted with Australian Football League (‘AFL’) players

\begin{itemize}
\item \textsuperscript{111} The FFA governs association football in Australia.
\item \textsuperscript{112} *FFA Code of Conduct* (n 17) cl 2.2(j).
\item \textsuperscript{113} See Jonson, Lynch and Adair (n 78).
\item \textsuperscript{114} *NRL Rules* (n 2) r 22A(3).
\item \textsuperscript{115} Ibid r 22A(7).
\item \textsuperscript{116} Ibid r 22A(11)(a).
\item \textsuperscript{117} Ibid r 22A(11)(b).
\item \textsuperscript{118} Jonson, Lynch and Adair (n 78) 72.
\item \textsuperscript{119} Kosla (n 85).
\item \textsuperscript{120} Antronette K Yancey, ‘Building Positive Self Image in Adolescents in Foster Care: The Use of Role Models in an Interactive Group Approach’ (1998) 33 *Adolescence* 253, 256.
\item \textsuperscript{121} Bartlett and Sterry (n 43) 105.
\item \textsuperscript{122} Peter Kelly and Christopher Hickey, ‘Professional Identity in the Global Sports Entertainment Industry: Regulating the Body, Mind and Soul of Australian Football League Footballers’ (2010) 46 *Journal of Sociology* 27.
\item \textsuperscript{123} Podbury (n 80).
\end{itemize}
found they felt higher expectations than the average person.\textsuperscript{124} Former track and field athlete, Jackie Joyner-Kersee, echoed these beliefs, stating that ‘for professional athletes, whether we like it or not ... we have a way of impacting lives’.\textsuperscript{125} She stated that athletes must take these responsibilities seriously, particularly with increased levels of media coverage exposing athlete behaviour to the general public.\textsuperscript{126} This reflects research finding that media projections of athletes can influence the behaviour of those viewing them, particularly when the viewers are young and impressionable.\textsuperscript{127} Therefore, athletes can be highly influential without any direct interactions,\textsuperscript{128} especially given the rise of social media.\textsuperscript{129}

Despite this, there is a range of research suggesting the influence of athletes is overstated, with young people less likely to see them as role models than most assume.\textsuperscript{130} A California study found most young people named parents as role models, with only 15% naming athletes.\textsuperscript{131} A similar study in Europe found that participants valued the qualities of family members and friends more than athletes,\textsuperscript{132} while another study found similar results.\textsuperscript{133} While there is a strong admiration felt by young people to athletes and other celebrities, they are significantly less likely to be influenced by them than family and friends.\textsuperscript{134} These studies were conducted prior to the introduction of social media, however the limited empirical research since has indicated that athletes are still not considered role models to the level expressed in the media.\textsuperscript{135} One exception is the role models of youth athletes, although a study examining this cohort found parents and other family members were still held as role models almost as commonly as professional athletes.\textsuperscript{136} In any case, it has been suggested that athletes are ‘idols’ and ‘centres of interest’, as opposed to individuals who are actually emulated.\textsuperscript{137}

Although there is inconsistent literature as to the actual influence that athletes have, it is still commonly presumed they are role models, which leads to higher behavioural expectations than the general public. Therefore, it is necessary to evaluate the benefits and disadvantages of this presumption when looking at sporting policies such as the NRL’s.

\textsuperscript{124} Ibid. In this article, ‘Australian football’ refers to the sport, while ‘AFL’ refers to the professional league and governing body.

\textsuperscript{125} Jackie Joyner–Kersee, ‘Entertainers Be Role Models? Yes. They are whether they want to be or not’ (2007) 63(2) Ebony 164, 165.

\textsuperscript{126} Ibid.

\textsuperscript{127} Podbury (n 80) 62.


\textsuperscript{129} David Sutera, Sports Fans 2.0: How Fans Are Using Social Media to Get Closer to the Game (Scarecrow Press, 2013) 104.


\textsuperscript{134} Jonson, Lynch and Adair (n 78).

\textsuperscript{135} See, eg, Kaytlin LeMier, ‘Relationship between Athletes and Role Models’ (2008) 8(7) Journal of Undergraduate Research at Minnesota State University, Mankato 2, 6; Adair (n 12); Professional Footballers Australia, Culture Amplifies Talent: Building a Framework for Golden Generations (Report, 22 October 2019) 6.

\textsuperscript{136} Noora J Ronkainen, Tatiana V Ryba and Harri Selanne, ‘She is where I’d want to be in my career: Youth athletes’ role models and their implications for career and identity construction’ (2019) 45 Psychology of Sport & Exercise 1, 4–7.

\textsuperscript{137} Bartlett and Sterry (n 43) 105.
2 The Social Benefits

There are benefits to athletes being held out as role models. In regards to on-field behaviour, athletes are associated with positive traits such as determination, strength and ability.138 A study of young males supported this, finding that sporting heroes were identified as role models because of traits such as aggression and strength that are considered masculine.139 This can lead to young men feeling more connected and comfortable within themselves.140 Recently, there has been a significant increase in the visibility of women’s sport, which has similar positive impacts for women.141 When targeting athletes to promote their brands, corporations target those with positive traits as well as personal attractiveness.142

This process of identification and connection with role models has clear social benefits for young people. A cross-sectional survey found the majority of participants that identified a specific role model had higher self-esteem and school results, as well as a stronger personal or ethnic identity.143 A recent Australian study looked at the impact that athletic role models can have on amateur sport participation.144 The study found clear benefits on participation, as well as on other prosocial behaviours such as safety and quitting smoking.145 There can also be benefits for athletes that embrace their role model status. The aforementioned research of AFL players discovered that the majority embrace and accept the role model status, taking the opportunity to become involved in community work and improve the lives of others.146 Many athletes take part in activities including charity work, mentorships, and motivational speaking.147

3 Unfair Expectations

Despite these social benefits, the expectations on athletes based on their role model status are overbearing and unnecessary.148 While the traits associated with on-field performance are beneficial, the increased media coverage of off-field behaviour has led to these traits being expected at all times. The notion of a role model is also quite vague and it is argued it has become an easy way for sporting organisations to discipline...

---

138 Joyner-Kersee (n 125).
139 Claudia Biskup and Gertrud Pfister, ‘I would like to be her/him: Are athletes role models for boys and girls?’ (1999) 5 European Physical Education Review 199. See also Ruschelle Leone and Dominic Parrott, ‘Hegemonic masculinity and aggression’ in Jane Ireland, Philip Birch and Carol Ireland (eds), The Routledge International Handbook of Human Aggression: Current Issues and Perspectives (Routledge, 2018) 31, 35.
140 Gary Fine, With the boys: Little league baseball and preadolescent culture (University of Chicago Press, 1987).
145 Ibid 23.
146 Ibid (n 80) 180.
athletes and manage their private conduct. Although some athletes do embrace being a role model, many have expressed concern that the behavioural requirements are not part of their defined job, and that the title of role model does not sit well with them. However, as there is often a lack of alternative employment options, athletes are forced to try and meet these high behavioural standards.

In *Chappell v TCN Channel Nine Pty Ltd* (‘*Chappell*’), it was stated that ‘you cannot set up a person as having a reputation for possessing a character which he does not himself publicly claim to possess, then show that he does not in fact possess that character’. In *Chappell*, the court made clear it was necessary a person professes they are of a high moral character before they can be held to that standard. This is a preferable interpretation of role models, in that one should accept a role such as a brand ambassador or a leadership position before the expectations of a role model are cast upon them. This would suit the scope of their employment better, as currently the expectations on athletes are unreasonable, although they may simply be unavoidable.

### 4 Sport vs the Law

Interestingly, athletes are often treated harsher than other professions requiring high moral character. The case of *Ziems v Prothonotary of the Supreme Court of New South Wales* concerned a barrister who was disbarred after being involved in a car accident while intoxicated which resulted in a conviction of manslaughter. The disbarment was appealed and overturned in the HCA, with the court finding the incident had no connection with his professional duties, reminiscent of the tests currently used in employment law. This is despite the fact that lawyers are entrusted with special ‘privileges, duties and responsibilities’, including that confidence and trust must be maintained in them by the court and the public. Similarly, there has been instances involving members of the judiciary holding their positions following drink-driving offences. Despite the fact that these professions are considered to be of high moral character and would thus require exemplary behavioural standards, there has been a

---

149 Jonson, Lynch and Adair (n 78) 58.
150 Podbury (n 80) 24.
151 Bartlett and Sterry (n 43) 105.
153 *Chappell* (n 13).
155 Ibid 168.
157 Jonson, Lynch and Adair (n 78) 79.
158 *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279 (‘*Ziems*’).
159 Ibid.
160 *Rose* (n 10); *Hussein* (n 33).
161 *Ziems* (n 158) 286 (Dixon CJ).
willingness by courts to separate their actions from their professions, a luxury that is rarely afforded to professional athletes.

C Sponsor Pressure

Another factor distinguishing the responsibilities and pressures of athletes from the general public is the amount of money invested into sporting individuals, teams, and leagues by corporate sponsors. Sponsors are attracted to the public nature of sport, seeking to increase brand recognition or spread a message to the community. However, investment by sponsors can manifest both favourable and unfavourable outcomes, by which ‘unsavoury off-field incidents ... threaten such a positive association for the commercial partners, potentially clouding their message to the community’. Sponsors expect return on financial investments, so must act diligently to ensure they are not seen to ‘take on any negative connotations’ of their associations, as the reputational risk is too great. In doing so, they create pressure on sporting organisations to act against misbehaviour by threatening to remove financial support. Considering sponsors are critical to the financial growth of any sport, it is clear that this pressure may force disciplinary action in a hasty manner that would not occur in other professions. In implementing the NRL policy, the interests of corporate sponsors were heavily considered.

The public can also exert pressure on sponsors to persuade sporting organisations to act on social issues. While distinct from the issue of athlete misbehaviour, community campaigns have called for sponsors to take more action preventing corruption in sporting organisations such as the Federation Internationale de Football Association (‘FIFA’), which was criticised after its decision to award Russia and Qatar the rights to host the association football World Cups in 2018 and 2022. FIFA’s sponsors have been criticised for not doing ‘much more than issue statements in favour

164 Paterson (n 152) 106.
165 Ibid.
166 Bartlett and Sterry (n 43) 104.
168 Davies (n 90).
171 Catherine Ordway and Hayden Opie, ‘Integrity and Corruption in Sport’ in Niko Schulenkorf and Stephen Frawley (eds), Critical Issues in Global Sport Management (Routledge, 2016) 60.
of ethical behaviour', with members of the community feeling they should show more leadership and accountability. This adds an extra layer to the pressure that sporting organisations face. Even if sponsors are at first willing to forgive actions bringing the sport into disrepute, they may be forced into action by other stakeholders such as fans, who can easily spread their opinions via social media channels. Additionally, governments may be determined to ensure that action by sporting organisations positively shapes social values. These external forces driving sporting organisations are unlike those relevant to most industries. As long as sport continues to rely on financial support for growth, athletes and administrators will be held to exemplary moral standards.

D Conclusion

Despite the fact that athletes might only be competing for a few hours a week, the extent of their responsibilities has led to a widespread view that being an athlete is a '24-hour job'. This is a direct result of the media attention that professional sport receives in countries such as Australia. Although this is somewhat unfair, the reality is there is a widespread perception that athletes are role models in the community. Despite haphazard literature as to whether this is actually the case, athletes are ultimately considered to be influential people, and naturally assume extra social responsibility. Furthermore, the financial investment into sport by sponsors and broadcasters creates greater obligations upon athletes.

IV NO-FAULT STAND DOWN

The previous two Parts looked at the rights of employees facing criminal charges, as well as the differences in obligations between general employees and professional athletes. Importantly, the rules of sporting organisations commonly include a clause stating that anyone within their jurisdiction must not bring their sport into disrepute. This Part looks in-depth at the NRL policy, under which players are automatically stood down following a criminal charge, examining the motivations for the policy’s introduction. This Part also explores challenges to the policy, before a discussion on De Belin, the first occasion of an NRL player challenging the policy in court.

A Details of the Policy

The NRL policy came into effect on 11 March 2019, after the rules were amended to insert the policy as r 22A. The ‘no-fault’ element in the title refers to the debated

---

175 Roger Pielke, ‘How can FIFA be held accountable?’ (2013) 16 Sport Management Review 255, 256.
176 Ibid 263.
177 Martin Holzen and Henk Erik Meier, ‘Do Football Consumers Care About Sport Governance? An Analysis of Social Media Responses to the Recent FIFA Scandal’ (2019) 4(1) Journal of Global Sport Management 97, 112-13. Fans can also criticise sponsors through this medium, demonstrated recently after fencing company TFH withdrew sponsorship from the NRL club Gold Coast Titans, citing that a player delivered an ‘embarrassing performance’ in reciting the Welcome to Country speech before the 2019 NRL Grand Final. The decision was condemned by fans, and TFH backflipped on their decision and re-committed to the club: See Elise Kinsella, ‘Gold Coast Titans get sponsor TFH back after they apologise to captain Ryan James’, ABC News (online, 19 October 2019) < https://www.abc.net.au/news/2019-10-18/sponsor-backflips-to-support-titans-ryan-james-again/11618958>.
179 Bartlett and Sterry (n 43) 105.
180 NRL Rules (n 2) r 22A.
contention by the NRL that the policy attributes no blame to individuals, and thus does not prejudice any future proceedings.\textsuperscript{181} The key section of the rule states: ‘if a player is charged with a serious criminal offence, he will be automatically subject to a no-fault stand down condition’.\textsuperscript{182} There is no right for the player to appeal this or to have it reviewed.\textsuperscript{183}

Under the rule, a ‘serious criminal offence’ is one attracting a maximum punishment of 11 years imprisonment or more under the \textit{Crimes Act 1900} (NSW) (‘\textit{Crimes Act}’).\textsuperscript{184} There is no explained rationale for the threshold of 11 years, although an examination of the \textit{Crimes Act} reveals the offences the policy encompasses.\textsuperscript{185} By setting the threshold at 11 years, the policy includes aggravated dangerous driving occasioning grievous bodily harm,\textsuperscript{186} as well as aggravated dangerous navigation.\textsuperscript{187} The more likely explanation is that the threshold excludes certain offences which incur a maximum penalty of 10 years. These offences include sending threatening documents,\textsuperscript{188} aiding suicide,\textsuperscript{189} affray,\textsuperscript{190} possession of an unregistered firearm,\textsuperscript{191} as well as some trespass and sexual offences.\textsuperscript{192} In any case, the threshold covers most of the sexual assault offences that the policy was primarily enacted to respond to.\textsuperscript{193} Preventing sexual assault and domestic violence were some of the key reasons the policy was introduced, and will be discussed further in the next section.

If the maximum punishment for the criminal charge falls below the threshold of 11 years, the CEO or COO of the NRL have discretion to impose a stand down condition if the game has been brought into disrepute.\textsuperscript{194} If the criminal offence involves an allegation that the player has acted violently towards a female or a child, the CEO or COO operate on a presumption that the player should be stood down.\textsuperscript{195} Under this discretionary provision, the player has no right to make submissions or lead evidence,\textsuperscript{196} while the CEO or COO has no obligation to provide a reason for their decision.\textsuperscript{197} The player does have the right to request for the decision to be reviewed,\textsuperscript{198} unlike those charged with serious criminal offences.\textsuperscript{199}

The stand down condition is imposed ‘until such time as the relevant criminal offence has been determined by the court or withdrawn’.\textsuperscript{200} In some instances, this can take years; a significant portion of a playing career. During the period the player is stood
down, they are ineligible to play in any competition, to be considered for representative selection, and to participate in promotional or community activities. They are however permitted to train and to be paid.

B Motivations Behind the Policy

1 Reputation of the Game

As discussed in Part Three, athletes are held to a higher behavioural standard than most employees due to contractual clauses stating they must not bring the game into disrepute. The NRL policy includes this, along with the statement that playing while a charge remains unresolved would be detrimental to the NRL, and bring the game into disrepute. The rules also include a separate provision for cancelling a player's registration if they bring the game into disrepute. When designing the policy, upholding the reputation of the game was a key motivation. The off-season from 2018-19 contained a disproportionately high number of incidents of misbehaviour, becoming known in the media as the 'summer from hell'. The majority of these included physical or sexual violence against women, and were heavily reported in the media, tarnishing the image of the NRL. Journalist Peter Fitzsimons echoed the thoughts of many in writing that players needed to be held accountable for demonstrably damaging the reputation of the NRL, and claiming it was becoming a toxic brand for sponsors to attach to.

The NRL were concerned with the opinions of various stakeholders about the rampant misbehaviour. The success of the NRL depends greatly upon the competition being attractive to sponsors, broadcasters, spectators and television viewers. Sponsors of individual clubs were tiring of the constant incidents and negative associations, and

---

201 Ibid r 22A(13)(a).
202 Ibid r 22A(13)(c).
203 Ibid r 22A(13)(d).
204 Ibid r 22A(13)(e).
205 Ibid r 22A(13)(f).
206 Ibid r 22A(2)(b)(i).
207 Ibid r 22A(2)(b)(ii).
208 Ibid r 22A(2)(b)(iii).
210 Fitzsimons (n 19).
211 De Belin (n 7) 32 [109] (Perry J).
contacted the NRL to request they took stronger action against misbehaviour.\textsuperscript{213} They were concerned their brands were being damaged, and encouraged the stand down policy.\textsuperscript{214} The NRL also received a plethora of negative e-mails and complaints from fans, who were angered with the lack of action being taken.\textsuperscript{215} Almost all fan correspondence supported standing down the players, with many suggesting they would not continue to support the NRL if the players were allowed to continue playing.\textsuperscript{216} Individual NRL clubs also expressed struggles to attract major sponsors,\textsuperscript{217} generate revenue from merchandise,\textsuperscript{218} and attract directors and staff.\textsuperscript{219} The NRL faced the likelihood of serious financial and social damage, and thus implemented the policy to protect the reputation of the game.

2 Deterring Misbehaviour

A more philosophical motivation behind the introduction of the policy was the principle of deterrence. The policy was partly enacted to ensure others would not engage in similar behaviour, with commentary prior to the drafting of the policy stating that any action by the NRL must have a deterrent measure.\textsuperscript{220} The CEO of the NRL echoed this, stating that the purposes of the policy were both to curb player misbehaviour, as well as the effect it was having on the game.\textsuperscript{221} While the NRL policy is too new to assess its effectiveness as a deterrent, parallels can be drawn between the policy and one-punch legislative reform designed to reduce street violence. One-punch violence, also referred to as ‘king hits’ or ‘coward punches’, refer generally to single punch assaults, where ‘a single blow to the head causes a victim to fall to the ground unconscious’.\textsuperscript{222} Generally, these assaults follow heavy amounts of alcohol consumption.\textsuperscript{223} While there are stark differences, both regimes have mandatory

\begin{thebibliography}{99}
\item De Belin (n 7) 49 [157] (Perry J).
\item De Belin (n 7) 46 [150] (Perry J).
\item Ibid 53 [167]. See also Lutton, Nicolussi and Proszenko (n 212)
\item De Belin (n 7) 53 [167] (Perry J).
\item De Belin (n 7) 101 [304.1] (Perry J).
\item Jason Schriber, Angela Williams and David Ranson, ‘Kings to Cowards: One-Punch Assaults’ (2016) 44(2) \textit{The Journal of Law, Medicine and Ethics} 332, 332. One-punch assaults can also occur on the sporting field, increasing the link between the NRL policy and the legislative reform: See Annette Greenhow and Matthew Raj, ‘Regulating unsanctioned violence in Australian sport: time for Vamplew 2.0?’ (2019) 22 \textit{Sport in Society} 1.
\end{thebibliography}
punishments and are targeting the similar audience of young adult males, who are historically prone to physical aggression, particularly when intoxicated.

Similar to the NRL’s ‘summer from hell’, frequent incidents of one-punch violence led to stakeholders demanding reform. In particular, courts demanded that the violence was ‘all too common and needs to be addressed by sentences that carry a very significant degree of general deterrence’. In R v Loveridge, a lenient sentence was successfully appealed by the Crown, on the basis that the first instance judge had not taken into account deterrence as a sentencing factor. The need for stronger deterrence led to changes in public policy and legislation, with the Crimes Act being amended to include a mandatory minimum sentence of eight years imprisonment for individuals convicted of assault causing death when intoxicated. Despite the constructive motivations, these amendments were heavily criticised by civil liberty groups for ignoring subjective factors. This view is supported by research suggesting that mandatory imprisonment is an ineffective deterrent that can lead to disproportionate sentences.

While the NRL is not imposing a mandatory sentence, and there is no prospect of imprisonment, there are similarities to an indefinite suspension without a right of reply. Therefore, assessing the effectiveness of one-punch reform is the best method to examine the likelihood of the policy being effective as a deterrent. Eight months after the reform, the Attorney General of NSW stated there had been a ‘massive reduction in violence’. More recently, a statutory review into amendments to the Crimes Act found there had been limited cases requiring the use of the mandatory sentencing.

---

227 New South Wales, Parliamentary Debates, Legislative Council, 30 January 2014, 2 (Barry O’Farrell). See also Cullen (n 226) 56.
229 Schrieber, Williams and Ranson (n 222) 332; Loveridge (n 228).
230 Schrieber, Williams and Ranson (n 222).
231 Crimes Act (n 185) ss 25A-25B.
234 There is no imprisonment under the NRL policy – there is the prospect of imprisonment when the charges are eventually heard in court.
provisions, \(^{236}\) with the first conviction occurring nearly four years after the amendments.\(^ {237}\) Although almost all submissions to the statutory review supported repealing the provisions, they were retained due to a decrease in street violence.\(^ {238}\) The laws, while they were introduced as part of a broader package, have therefore been beneficial in reducing one-punch violence, thus supporting the proposition that deterrence can be effective, justifying one of the NRL’s motivations.

### 3 The Domestic Violence Issue

Financial concerns aside, the NRL also felt compelled to take a stand against the issue of domestic violence. The policy identifies this by implementing the presumption that a player will be stood down if charged with an offence involving violence towards a female or child.\(^ {239}\) In 2019, the Australian Institute of Health and Welfare reported that one in six Australian women over the age of 15 had been a victim of domestic violence,\(^ {240}\) while research shows that one woman every nine days is killed by an intimate partner.\(^ {241}\) These rates have remained stable over time despite declining rates in overall violence.\(^ {242}\) Furthermore, more women are being hospitalised due to domestic violence than ever before.\(^ {243}\) The issue is one of national importance, and has become a priority for federal and state governments.\(^ {244}\) The NRL has a wide range of viewers, hence having the power to influence others and make a meaningful statement. In both Australia and overseas, athletes have had a troubled history with domestic violence.\(^ {245}\) Considering athletes naturally assume a role model status, it is essential that sporting organisations consistently strive to manage the culture and attitudes surrounding domestic violence.\(^ {246}\) Attitudes and beliefs are pivotal to domestic violence,\(^ {247}\) and as such if negative attitudes are held by influential people, these can be

---

237 *Garth v R* [2016] NSWCCA 203.
238 *Crimes Act Statutory Review* (n 236).
239 *NRL Rules* (n 2) r 22A(8).
241 Ibid x.
243 Ibid.
246 Dyson and Corboz (n 94) 68.
adopted by others, especially fanatical supporters.\textsuperscript{248} Studies have discovered that male athletes often hold particularly problematic views regarding violence against women.\textsuperscript{249} These results have been attributed to the fact that being trained to use violence and intimidation on the field may lead to the same attributes being applied in personal relationships.\textsuperscript{250} Sporting organisations have a social duty to resolve this discrepancy, as norms of gender inequality and the acceptance of violence can be easily transferred.\textsuperscript{251}

Sport itself can also impact negatively on rates of domestic violence. An American study demonstrated that days where American football games were nationally televised had a significantly higher amount of arrests for domestic violence.\textsuperscript{252} The study found this true of other sports including basketball, hockey and baseball, but American football was clearly the most significant.\textsuperscript{253} Additionally, research has shown that the FIFA World Cup is associated with an increase in domestic abuse.\textsuperscript{254} Similar research has been done in Australia, with a 40.7\% increase in domestic assaults documented when State of Origin (an NRL showcase event) is on.\textsuperscript{255} This indicates that witnessing violence on field may impact the attitudes of viewers. Research has also discovered that avid fans experience hormonal surges when supporting their teams.\textsuperscript{256} Other factors attributed to this rise in domestic violence include alcohol consumption and advertising, toxic masculinity, and competition.\textsuperscript{257} Sporting organisations, particularly

\textsuperscript{253} Ibid 31.
\textsuperscript{255} Michael Livingston, The association between State of Origin and assaults in two Australian states (Research Report, June 2018) 5.
those governing sports with excessive physical contact such as the NRL, have the power to mitigate this through statements, partnerships and action such as the policy change.\textsuperscript{258}

Regarding the NRL specifically, there are further reasons to take a stand against domestic violence. Throughout the past 20 years, many players have been involved in incidents concerning violence against women.\textsuperscript{259} In 2004, a large number of incidents led to an investigation into the NRL’s culture. The investigation resulted in the implementation of educational programs, but no concrete policy change.\textsuperscript{260} In 2009, major sponsors threatened to terminate their contracts if tougher action was not taken in regards to off-field indiscretions.\textsuperscript{261} In 2015, following more incidents, the NSW Premier criticised the NRL for failing to act, and his statements were supported by organisations including Domestic Violence NSW.\textsuperscript{262} The NRL was criticised for ‘not acting when such serious charges have been laid’, and not taking its opportunity to condemn domestic violence.\textsuperscript{263} Following the ‘summer from hell’, key stakeholders in the NRL met to discuss the cultural problems, which ultimately resulted in the policy change.\textsuperscript{264}

\textbf{C Challenges to the Policy}

\textbf{1 Restraint of Trade}

The imposition of a suspension restraining players from performing under their contract constitutes a restraint of trade under the \textit{Restraints of Trade Act 1976 (NSW)}.\textsuperscript{265} The preclusion of playing alone satisfies the definition, and it is irrelevant that the players still receive payment and are permitted to continue training.\textsuperscript{266} Furthermore, the restraint of trade is indefinite and a player’s career may be significantly hampered prior to a court determination. Criminal trials, particularly those of a serious nature, can take up to 18 months to be heard, constituting a large amount of a playing career.\textsuperscript{267} Considering the competitive nature of sports such as the NRL, clubs may not be willing to hold a suspended player for this long, meaning that for some it may be the end of their career.\textsuperscript{268}

\textbf{2 Restriction of Rights}

Although the NRL has been emphatic in its assertion that the policy infers no judgment as to the player’s guilt or innocence, commentators have alleged that it interferes with

\textsuperscript{258} Ruth Liston et al, \textit{A team effort: Preventing violence against women through sport} (Research Report, 27 August 2018).
\textsuperscript{259} Dyson (n 245).
\textsuperscript{260} Ibid.
\textsuperscript{261} Davies (n 90) 53. It was reported in the media that these sponsors included Telstra and Harvey Norman: Brad Walter, ‘Sponsors have had a gutful of drunks’, \textit{The Sydney Morning Herald} (online, 20 March 2009) <https://www.smh.com.au/sport/nrl/sponsors-have-had-a-gutful-of-drunks-20090320-gdfth2.html>.\textsuperscript{262} NSW Council of Social Service, ‘NRL has failed to act responsibly on domestic violence’ (Media Release, 22 July 2015).
\textsuperscript{263} Ibid.
\textsuperscript{264} De Belin (n 7) 55 [176] (Perry J).
\textsuperscript{265} \textit{Restraints of Trade Act 1976 (NSW)} s 4(1).
\textsuperscript{266} De Belin (n 7) 68 [214] (Perry J).
\textsuperscript{267} Gore (n 19).
a player’s right to the presumption of innocence. The presumption of innocence is not protected in the Australian Constitution (‘Constitution’), however it is entrenched in the common law as part of the right to a fair trial. Although it is not constitutionally protected specifically, sections of the Constitution including the right to a jury trial, and the concept of judicial power, have been taken to indicate the right to a fair trial. On the presumption of innocence, courts have held that ‘the accused does not need to prove his or her innocence’, and ‘the presumption of innocence in criminal proceedings is an important incident of the liberty of the subject’. At an international level, the presumption of innocence is protected.

The protection of an individual’s civil liberties has traditionally been an argument against sporting organisations exercising discretion to suspend or terminate an athlete’s contract. Commentators have argued that legal standards of proof should be utilised when a determination is made as to whether a disrepute clause should be exercised. These arguments emphasise that an athlete’s civil rights should not be made sacrificial to the reputation of sporting organisations. When an AFL player was suspended in 2013 following a criminal charge, the president of the AFL Players Association stated that ‘we remind the industry and wider community that in our society all members have the right to the presumption of innocence’. It is important for sporting organisations to recognise this principle, and ensure the rights of athletes are considered when drafting policies or making disciplinary determinations.

The NRL policy has been criticised by some for prejudicing the right to a fair trial. Despite the vehement assertions that it is a ‘no-fault rule’, it has been argued there is a presumption of guilt before the player has the opportunity to provide evidence. By standing the player down, it may interfere with future proceedings by projecting to the public that the player is guilty. Following the announcement of the policy, the Rugby League Players Association (‘RLPA’) stated that despite the title of the policy, ‘the reality is that standing down a player indefinitely can impact on the fundamental principle of the presumption of innocence and may prejudice the legal process’. The RLPA stated that the policy was not the fairest approach to what is understandably a

---

269 Gore (n 19); Rhodes (n 19).
273 Australian Constitution s 80.
274 Ibid ch III.
275 Traditional Rights and Freedoms (n 270) 220; Dietrich v the Queen (1992) 177 CLR 292, 298 (Mason CJ and McHugh J); Carr v Western Australia (2007) 232 CLR 138 (‘Carr’).
276 Carr (n 275) [103] (Kirby J).
277 Momcilovic v the Queen (2011) 245 CLR 1, [44] (French CJ).
279 Jonson, Lynch and Adair (n 78) 75.
280 Jonson (n 163).
283 Beattie Interview (n 181).
284 Rhodes (n 19).
285 RLPA Statement (n 268).
complex issue, and that the policy should better respect the presumption of innocence.286

3 Back to the Reasonable Investigation

As discussed earlier, employers are generally required to conduct a reasonable investigation before suspending or terminating an employee based on alleged criminal conduct.287 One of the criticisms of the NRL policy is that there is no right of reply for the players,288 and no requirement for the CEO or COO to explain their reasons for making a decision.289 For offences falling below the 11-year threshold, this grants the decision makers near unfettered power to decide the immediate future of the player. While the NRL cannot conduct a pseudo-trial as this could prejudice future proceedings, there is an argument that the NRL could be ‘less draconian’ and conduct a deeper investigation or allow submissions on certain matters.290 This would dispel criticisms that subjective circumstances are not being considered.

D Testing the Policy

1 Dylan Walker

Dylan Walker, a player for the NRL club Manly Sea Eagles, was one of the players initially stood down under the policy. Walker was charged with assault occasioning actual bodily harm, which carries a maximum penalty of five years,291 as well as common assault, which carries a maximum penalty of two years.292 Although the charge did not warrant an automatic stand down, he was stood down under the discretionary provision of the policy.293 As the alleged assault was against a woman (Walker’s fiancée), the CEO acted on the presumption that the player should be stood down.294 Walker was found not guilty of the charges on 10 May 2019,295 and accordingly the stand down was lifted. This occurred after his fiancée adjusted her testimony, instead supporting Walker’s version of events.296 Nine days later, Walker resumed playing duties and played every match for the rest of the 2019 season. The result of his situation was nine missed matches, despite ultimately being found not guilty of the criminal charges.297

2 Jack De Belin

Jack De Belin, a player for the NRL club St George Illawarra Dragons, led to the most extensive discussion of the policy when he was stood down after being charged with aggravated sexual assault.298 The alleged offence carries a maximum penalty of 20 years,299 and accordingly he was stood down automatically. Subsequently, he appealed

286 Ibid.
287 Deeth (n 16).
288 NRL Rules (n 2) r 22A(11)(a).
289 Ibid r 22A(11)(b).
290 De Belin (n 7) 100 [302] (Perry J).
291 Crimes Act (n 185) s 59(1).
292 Ibid s 61.
293 NRL Rules (n 2) r 22A(7).
294 Ibid r 22A(8).
295 Cf the cases of Josh Reynolds and Curtis Scott: Proszenko (n 194).
296 Walker (n 5).
298 Players can also be reinstated following a guilty verdict, presuming there is no jail time: May (n 6).
299 Crimes Act (n 185) s 61J.
300 Ibid s 61J(1).
the validity of the policy to the FCA. The decision was handed down on 17 May 2019. In *De Belin*, it was ultimately held the policy was legitimate and valid, and the application was dismissed. The judgment included a lengthy discussion of the policy, including justifying the motivations and a response to the array of challenges previously discussed.

(a) Justification of the Motivations

The decision in *De Belin* ultimately rested on the protection of the interests and reputation of the NRL. The success of the NRL in the long term was said to rely on high levels of participation at junior and amateur levels of rugby league, and this was only tenable if players maintained high behavioural standards. The ‘summer from hell’ had caused sponsors, broadcasters and fans to distance themselves from the game, and the NRL was left with no option but to take action. Furthermore, the criminal charge leading to the applicant’s stand down was very much in the public domain. There was no challenge to the motives of the NRL, with the judge accepting they were ‘genuinely concerned with promoting the best interests of the NRL Competition and the game at all levels’. Regarding the motivation of deterrence, a claim by the applicant that the policy should be invalid as there was no evidence it would curb poor player behaviour was dismissed. Furthermore, the judge was satisfied that society had high expectations of the league’s response to domestic violence, and thus the third motivation outlined was justified.

(b) Response to the Challenges

(i) Restraint of Trade

Although the policy is a restraint of trade, this is permissible depending on the circumstances of a case. In *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Company Ltd*, it was held that a restraint of trade is justified if it is reasonable to protect the interests of the parties or the public. Subsequent cases in Australia have upheld this definition. The relevant test in *De Belin* was whether or not the policy was objectively reasonable to protect the interests of the NRL, without being ‘more than adequate protection to [its] interests’. In making the decision, careful consideration was paid to the extent of the restraint. In *Adamson v New South Wales Rugby League Limited*, it was held that in a sporting context, there was no greater restraint of trade

---

300 *De Belin* (n 7).
301 Ibid 32 [110] (Perry J).
302 Ibid 34 [115].
303 Ibid 35 [119].
304 Ibid 42 [138]. The NRL provided evidence of a media analysis prepared by market intelligence firm Isentia identifying 10,155 mentions online (including social media), 8,522 mentions on television, and 7,213 mentions on radio.
305 Ibid 72 [225].
306 Ibid 101 [304.1].
307 Ibid 60 [193.3].
308 *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Company Ltd* [1894] AC 535.
309 Ibid 565 (Lord MacNaghten).
311 *Adamson* (n 310) 265 (Wilcox J).
than restraining a player from playing altogether.\textsuperscript{312} Therefore, the onus was on the NRL to demonstrate that the policy was reasonably necessary to protect its interests.\textsuperscript{313} The judge in \textit{De Belin} relied on a series of cases identifying valid restraints of trade. In \textit{Queensland Co-operative Milling Association v Pamag Pty Limited}, a case involving an agreement restricting a baker from purchasing flour from other millers, certain interests of corporations were said to be legitimate validations for imposing a restraint of trade.\textsuperscript{314} These included the protection of their trade,\textsuperscript{315} their business,\textsuperscript{316} and their goodwill.\textsuperscript{317} In the case of a rugby league organisation, interests such as competitiveness and membership stability have been held to be legitimate,\textsuperscript{318} as well as maintaining the financial viability of the clubs and league.\textsuperscript{319} As discussed, the judge was sympathetic to the motivations and interests of the NRL. The evidence provided of potential sponsors withdrawing from negotiations due to the ‘summer from hell’ was said to be a legitimate danger to the interests of the league,\textsuperscript{320} as well as the potential decline in female participation and interest.\textsuperscript{321}

While the policy was objectively reasonable to protect the interests of the NRL, it still had to be demonstrated that it was not ‘more than adequate protection’ at the expense of the players.\textsuperscript{322} Here, the fact that players are permitted to train with their clubs and receive their full salary was a relevant consideration.\textsuperscript{323} While the applicant suffered financial loss due to personal sponsor withdrawals as well as removal from an NRL marketing fund, these losses were said to result purely from the association with the criminal charge, as opposed to the imposition of the policy.\textsuperscript{324} Also, players are not restricted from negotiating their contracts, which was said to mitigate concerns that the policy could substantially impair the career of players.\textsuperscript{325}

The applicant used the indefinite nature of the stand down as an argument that the policy went beyond protection of the legitimate interests of the NRL.\textsuperscript{326} Employers are generally not permitted to hand down indefinite suspensions, as they breach an implied duty to act in good faith.\textsuperscript{327} He sought to rely on \textit{Hughes v Western Australian Cricket Association (Inc) (‘Hughes’)}, in which a cricketer’s disqualification was held to be an unlawful restraint of trade, partly because the disqualification was ‘indefinite in its operation’.\textsuperscript{328} An indefinite suspension was said to be beyond adequate protection to

\textsuperscript{312} Ibid 267.
\textsuperscript{313} Ibid 266.
\textsuperscript{314} \textit{Pamag} (n 310) 277-8 (Stephen J).
\textsuperscript{315} \textit{Peters American Delicacy Co Ltd v Patricia’s Chocolates and Candies Pty Ltd} (1947) 77 CLR 574, 581 (Latham CJ).
\textsuperscript{316} Ibid 582 (Rich J).
\textsuperscript{317} Ibid 599 (Williams J).
\textsuperscript{318} \textit{Buckley} (n 310).
\textsuperscript{319} \textit{Adamson} (n 310) 295 (Gummow J).
\textsuperscript{320} \textit{De Belin} (n 7) 82 [255.3] (Perry J).
\textsuperscript{321} This was another motivation behind the policy. See, eg, Zemek (n 215); Mark (n 215); Jeremy Nicholas, ‘Extending our NRL partnership into Women’s Rugby League’, \textit{Telstra} (Web Page, 13 June 2019) <https://exchange.telstra.com.au/extending-our-nrl-partnership-into-womens-rugby-league/>.
\textsuperscript{322} \textit{Adamson} (n 310) 265 (Wilcox J).
\textsuperscript{323} \textit{De Belin} (n 7) 74 [231] (Perry J).
\textsuperscript{324} Ibid 75 [235].
\textsuperscript{326} Ibid 89 [269].
\textsuperscript{327} Downe (n 66); Milam (n 73).
\textsuperscript{328} \textit{Hughes} v \textit{Western Australian Cricket Association (Inc)} (1986) 19 FCR 10, 51 (Toohey J) (‘Hughes’).
his employer’s interests.\textsuperscript{329} Ultimately, \textit{De Belin} was distinguished from \textit{Hughes}, as the operation of the policy is finite, even if the date that the criminal charge will be adjudicated on is unknown.\textsuperscript{330} By having a ‘rational connection’ between the reason for the stand down and the period of the stand down, the NRL protected itself against the concerns outlined in \textit{Hughes}.\textsuperscript{331}

Responding to this, the applicant raised concerns about the length of time that criminal trials often take.\textsuperscript{332} This is of particular concern for athletes, as their careers are limited due to the physical demands of professional sport. The applicant was 29 years old at the time he was stood down, which was relevant as few rugby league players are actively playing beyond their mid-30’s.\textsuperscript{333} In response, the judge referred to recent legislative amendments enacted to shorten delays in finalising criminal charges.\textsuperscript{334} The amendments relieve the burden on magistrates to determine the sufficiency of evidence before trial.\textsuperscript{335} NSW District Courts also expressed that ideally, all sexual assault trials would be commenced within eight months of charges being laid.\textsuperscript{336} These factors were used to ameliorate concerns about the potential indefinite length of the restraint of trade.\textsuperscript{337}

\textbf{(ii) Restriction of Rights}

It was also argued the policy neglects the right to the presumption of innocence. The judge was mindful of the presumption of innocence, however her belief was that an ‘ordinary reasonable member of the public is likely to conclude … that the police have reasonable cause for laying the charge against him’.\textsuperscript{338} This decision was made with reference to \textit{Mirror Newspapers Limited v Harrison}, in which a defamation claim against a newspaper that reported the defendant had been charged with a crime was dismissed, as members of the public would presume that any charge would have been reasonably made.\textsuperscript{339} It was held that any inference as to the players’ guilt arises from the criminal charge, as opposed to the imposition of the policy, which was said to still respect the presumption of innocence.\textsuperscript{340} Furthermore, authority was relied upon stating that ‘preventative action taken by an employer in good faith to protect its reputation … does not jeopardize the presumption of innocence in favour of an employee against whom criminal charges have been laid’.\textsuperscript{341} As it was established that

\begin{footnotesize}
\begin{enumerate}
\setcounter{enumi}{329}
\item Ibid 52.
\item \textit{De Belin} (n 7) 91 [279] (Perry J).
\item Ibid.
\item Ibid 73 [229].
\item Ibid.
\item Ibid 94 [286].
\item \textit{Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017} (NSW); \textit{Criminal Procedure Act 1986} (NSW) s 66(2).
\item The District Court of New South Wales, \textit{Annual Review 2017} (Annual Review, 31 December 2017) 15.
\item Despite this, as at 28 October 2020, \textit{De Belin}’s case is still yet to be heard.
\item \textit{De Belin} (n 7) 83 [258] (Perry J).
\item \textit{Mirror Newspapers Limited v Harrison} (1982) 149 CLR 293, 301-2 (Mason J) (‘\textit{Mirror Newspapers}’).
\item \textit{De Belin} (n 7) 84 [260] (Perry J).
\item \textit{Industrial Alliance Life Insurance Company v Cabiakman} [2004] 3 SCR 195, [68] (LeBel and Fish JJ) (‘Cabiakman’).
\end{enumerate}
\end{footnotesize}
the policy was enacted to prevent further reputational or financial damage to the NRL,\(^{342}\) this argument was dismissed.

**(iv) Reasonable Investigation**

The applicant made numerous submissions relating to the fact the policy does not allow for affected players to make submissions, while the CEO or COO can make a discretionary decision without providing any reasons for the decision. First, the applicant referred to Hughes, in which the lack of a right to be heard was a feature of a rule held to be an unlawful restraint of trade.\(^ {343}\) Second, the judge discussed the Canadian Supreme Court case of Industrial Alliance Life Insurance Company v Cabiakman (\textit{Cabiakman}),\(^ {344}\) in which the court held that an employee was entitled to make submissions or explain a situation with their version of facts.\(^ {345}\) This is similar to the Australian cases imposing obligations on employers to conduct a reasonable investigation.\(^ {346}\) Third, the applicant submitted that players should be entitled to a hearing, based on HCA authority that their contract,\(^ {347}\) and their reputation, are affected.\(^ {348}\) Here, De Belin heavily relied on the decision in Ainsworth v Criminal Justice Commission (\textit{Ainsworth}), in which a report damaging the reputation of a group of gaming companies was subject to a declaration that their rights to natural justice had not been observed.\(^ {349}\) Finally, it was submitted that the NRL should not have ‘carte blanche to amend the rules at whim in whatever way it felt appropriate to do’, referencing the lack of a requirement to provide reasons for a discretionary decision.\(^ {350}\)

In \textit{De Belin}, these concerns were ultimately mitigated by the fact that the highly publicised nature of the policy meant there was a risk of hindering the future criminal proceedings,\(^ {351}\) even if there was a finding of innocence.\(^ {352}\) It was believed that a determination by the NRL based on evidence would ultimately prejudice a fair trial.\(^ {353}\) It creates a risk of interference and prejudice if one is questioned on matters directly relevant to the criminal charge.\(^ {354}\) This is especially true where the matter is in the public interest, as ‘there is a danger ... that prospective jurors may be prejudiced, or a party will come under pressure to make admissions’.\(^ {355}\) Additionally, any investigation based on evidence would be incomplete, unreliable, and more prone to error.\(^ {356}\) While this appears contradictory to cases such as Cabiakman and Deeth, it creates the impression that any reasonable investigation requires specific limits, especially in situations where the case has been reported on publicly. The judge in \textit{De Belin} did not comment extensively on whether any investigation would have been possible, instead flatly stating that ‘the applicant’s submission that a player should be entitled to a hearing before being stood down ... must be rejected’.\(^ {357}\) The decision in Ainsworth was

---

\(^{342}\) \textit{De Belin} (n 7) 84 [263] (Perry J).
\(^{343}\) Hughes (n 328). See also Greig (n 265).
\(^{344}\) \textit{De Belin} (n 7) 96 [293] (Perry J).
\(^{345}\) Cabiakman (n 341) [68] (LeBel and Fish JJ).
\(^{346}\) See Pinawin (n 16); Deeth (n 16).
\(^{347}\) Jarratt v Commissioner of Police (2005) 224 CLR 44; Annetts v McCann (1990) 170 CLR 596.
\(^{349}\) Ibid.
\(^{350}\) \textit{De Belin} (n 7) 106 [321] (Perry J).
\(^{351}\) Ibid 96 [295].
\(^{352}\) \textit{Director of Public Prosecutions (Cth)} v Wran (1987) 7 NSWLR 616, 626-7. See also \textit{R v Castro, Onslow’s & Whalley’s Case} (1873) LR 9 QB 219.
\(^{353}\) \textit{De Belin} (n 7) 96 [291] (Perry J).
\(^{354}\) Hammond v Commonwealth (1982) 152 CLR 188, 198 (Gibbs CJ).
\(^{356}\) \textit{De Belin} (n 7) 95 [290] (Perry J).
\(^{357}\) Ibid 96 [292].
distinguished, as the judge held that the laying of criminal charges is the event damaging the player’s reputation, as opposed to the application of the policy.\footnote{Ibid 100 [301].} In regards to the CEO and COO’s broad discretion, it was held that the policy did not subvert any rational limitations,\footnote{Ibid 109 [327]. as this discretion was more or less agreed to when registering as an NRL player.\footnote{Ibid. See also JW Carter, Contract Law in Australia (Lexis Nexis Butterworths, 7\textsuperscript{th} ed, 2018) 2-17. However, the judge did not consider the inequality in bargaining power when agreeing to these contracts/registrations. See, eg, Nick De Marco, ‘Compelled Consent – Pechstein & the Dichotomy and Future of Sports Arbitration’ (Discussion Paper, Blackstone Chambers, 4 July 2016); Tilman Niedermaier, ‘Arbitration Agreements between Parties of Unequal Bargaining Power – Balancing Exercises on Either Side of the Atlantic’ (2014) 39 ZDAR 12, 13.} The next Part looks at alternatives to the NRL policy found in other sports both domestically and internationally, before providing recommendations for sporting organisations moving forward.

\section*{V ALTERNATIVES AND RECOMMENDATIONS}

\subsection*{A Other Sporting Codes}

\section*{1 AFL}

The AFL confers discretion to senior members similar to the NRL, with the Commission and the General Counsel granted power to investigate rule breaches,\footnote{AFL Rules, Australian Football League (at 9 May 2019) r 2.1(a) (‘AFL Rules’).} and take subsequent disciplinary action.\footnote{Ibid r 2.1(a)(iv).} This includes if a player has engaged in conduct likely to ‘bring the game of [Australian] football into disrepute’.\footnote{Ibid r 2.2(a)(i).} However, the rules stipulate that being charged with a crime does not bring the game into disrepute,\footnote{Ibid r 2.3(g).} instead stating that the AFL will wait until either a plea of guilty or a guilty verdict by a court or tribunal.\footnote{Ibid r 2.3(c)(i).} This is consistent with the AFL’s historic emphasis on protecting the presumption of innocence.\footnote{Staff Reporter (n 281); Paterson (n 152) 140.} The AFL’s disciplinary process is also more thorough than the NRL’s. Generally, they will appoint people to conduct an investigation into the matter,\footnote{AFL Rules (n 362) r 3.1.} as well as appointing a disciplinary tribunal to make a final determination.\footnote{Ibid r 41.1(a)(i).} This tribunal is composed of three people, as opposed to vesting discretion in one individual.\footnote{Ibid r 41.2.} The players are given the right to be heard,\footnote{Ibid r 41.4(a).} and the right to appeal an unfavourable decision to a board composed of at least three people.\footnote{Ibid r 43.2.} This process is far more generous to the player involved, although this could be a result
of AFL players being involved in far less scandals than NRL players, particularly in recent years.\(^\text{373}\)

Despite comparatively better behaviour historically, the AFL’s lack of a similar policy to the NRL’s has been criticised in 2020, following an incident involving Sydney Swans player Elijah Taylor.\(^\text{374}\) Taylor was stood down by his club after he was arrested and charged with aggravated assault occasioning bodily harm.\(^\text{375}\) Additionally, Collingwood Magpies player Jordan De Goey was charged with sexual assault in 2020, however was permitted to play the rest of the season as the club and league awaited outcomes of a potential trial.\(^\text{376}\) It has been suggested the AFL may consider implementing a similar policy to the NRL’s prior to the commencement of the 2021 season, however this remains to be seen.\(^\text{377}\)

2 National Football League (‘NFL’)

The NFL\(^\text{378}\) is perhaps the most comparable to the NRL considering its personal conduct policy was designed to deter against incidents of domestic violence, following an incident involving NFL player Ray Rice where footage of an assault on his then fiancée was made public.\(^\text{379}\) However, as with the AFL, the NFL policy allows for a more thorough investigation. When a player is charged with a crime, the NFL undertakes an investigation to determine the appropriate sanction.\(^\text{380}\) The investigation is undertaken concurrently with the police investigation,\(^\text{381}\) and is conducted by a ‘highly-qualified individual with a criminal justice background’.\(^\text{382}\) This appointment is sensible and diminishes concerns expressed by the NRL that an investigation would prejudice the future criminal proceedings. The investigator can engage with experts and independent

---


\(^{378}\) The NFL governs the sport of American football.


\(^{379}\) NFL Personal Conduct Policy, National Football League (at 11 August 2017) 3 (‘NFL Personal Conduct Policy’).

\(^{380}\) Ibid.

\(^{381}\) Ibid 5.
Canberra Law Review (2020) 17(2) 186

advisors with specialised skills including law enforcement and mental health. 383 Throughout the investigation, players are permitted to make submissions or meet with the investigator. 384 They are obviously unable to challenge the criminal charge, 385 but are free to offer facts about the charge in order to mitigate any punishment. 386 The investigator is then obligated to report their findings, before the NFL Commissioner makes a determination. 387 The player has the right to appeal the decision before a board composed of multiple ‘hearing officers’. 388

As the NFL is targeting domestic violence, there are specific provisions regarding these incidents, that are similar to the NRL policy. If a violation of the policy involves domestic violence, there is a baseline suspension of six games without pay. 389 Although there is a financial impact, the penalty is less onerous than the presumption of a stand down that is in the NRL policy. 390 There has been some concern regarding this baseline suspension, as most players have been given a suspension of less than six games, indicating the policy allows for more discretion than is indicated. 391 The NFL also implements education, counselling and treatment to both offenders and victims. 392 While the NRL policy does not preclude someone from seeking education and welfare, 393 the policy is silent on any immediate assistance following the imposition of a stand down.

3 National Basketball Association (‘NBA’)

In contrast to the NRL, the NBA in the United States places huge importance on subjective considerations in its policy on domestic violence, sexual assault and child abuse. 394 Once a player is charged, they are subject to a treatment and accountability plan, with a focus on education and welfare. 395 If a player does not comply with this plan, they are then subject to disciplinary action. 396 The NBA Commissioner has the power to stand players down with pay for a ‘reasonable period of time’, 397 however each case is treated differently, with a range of factors considered. 398 These factors include the nature and severity of the allegations, 399 the evidence of the allegations, 400 the relationship between the player and the accuser, 401 prior history, 402 the player’s reputation within the NBA community, 403 and the risk of reputational damage to the

---

383 Ibid 5-6.
385 Ibid.
386 Ibid.
387 Ibid.
389 NFL Personal Conduct Policy (n 380) 7.
390 NRL Rules (n 2) r 22A(3).
392 NFL Personal Conduct Policy (n 380) 3.
393 De Belin (n 7) 74 [231] (Perry J).
394 NBA Collective Bargaining Agreement, National Basketball Association (at 30 June 2017) app F (‘NBA Domestic Violence Policy’).
395 Ibid 333.
396 Ibid.
397 Ibid 334.
398 Ibid.
399 Ibid.
400 Ibid.
401 Ibid.
402 Ibid.
403 Ibid.
NBA.\textsuperscript{404} While the NRL relies on little subjectivity in making determinations,\textsuperscript{405} the NBA seeks to consider the circumstances of the charge as much as reasonably possible. As with most North American sports, the NBA relies heavily on the authority of a Commissioner, an approach emulated by the NRL policy. The NBA Commissioner has always had extremely broad authority to take disciplinary action.\textsuperscript{406} Courts have seldom intervened with this power, stating that their power can generally only be limited by express constitutional terms.\textsuperscript{407} It has been suggested that the Commissioner’s discretion to impose discipline should be limited, with proper sentencing guidelines.\textsuperscript{408} This would lead to internal consistency and a clearer understanding of obligations.\textsuperscript{409} One set of suggested guidelines has been a ‘three strikes, you’re out’ approach, where a minimum one game suspension is imposed following a third violent transgression.\textsuperscript{410} This demonstrates that concerns about one individual holding too much disciplinary power is not limited to the NRL policy.

\textbf{4 Australian Olympic Committee (‘AOC’)}

The AOC team member agreement stipulates that athletes must not bring the sport or themselves into disrepute,\textsuperscript{411} and that being charged with a crime satisfies the definition of disrepute.\textsuperscript{412} The agreement does not operate in exactly the same context as the other policies, concerning team selection as opposed to employment relationships.\textsuperscript{413} However, cases involving the agreement have helped to provide some clarity as to the meaning of disrepute. Prior to the Beijing Olympics in 2008, two athletes were stood down following criminal charges, and both appealed these decisions to the CAS, who made determinations confirming the validity of the AOC’s policy.\textsuperscript{414} In \textit{D’Arcy}, a swimmer charged with assaulting a fellow member of the swim team appealed the decision on the grounds that it was ‘so unreasonable or perverse that it could be said to be irrational’.\textsuperscript{415} In holding that the stand down was valid, the CAS relied on the overwhelming number of media reports, which ‘could not help but be likely to bring him into disrepute’.\textsuperscript{416} In \textit{Jongewaard v Australian Olympic Committee}, a cyclist was charged with a hit and run incident. In holding that the decision was

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{404}Ibid.
\item \textsuperscript{405}\textit{NRL Rules} (n 2) rr 22A(3), 22A(7).
\item \textsuperscript{409}Ibid.
\item \textsuperscript{410}Ibid 177. Under this approach, a criminal charge (even if later dropped) would be considered a transgression. See also Joel Ugolini, ‘Even a Violent Game Has Its Limits: A Look at the NFL’s Responsibility for the Behaviour of its Players’ (2007) \textit{39(1) University of Toledo Law Review} 41, 56-7.
\item \textsuperscript{411}Team Membership Agreement – Athletes, Australian Olympic Committee (at 21 August 2015) cl 4.1(4).
\item \textsuperscript{412}Ibid cl 4.1(5).
\item \textsuperscript{413}The team selections are for the Summer or Winter Olympics, which occur every four years, meaning that the period of influence the AOC has over athletes is limited.
\item \textsuperscript{414}\textit{D’Arcy} (n 88); \textit{Jongewaard v Australian Olympic Committee} (Court of Arbitration for Sport, Case No 2008/A/1605, 19 September 2008) (‘\textit{Jongewaard}’). Cf the case of Peter Wakefield in 2004, who was charged with a crime prior to the Olympics and permitted to compete due to the presumption of innocence. He was ultimately convicted following the Olympics: \textit{George} (n 78) 46.
\item \textsuperscript{415}D’\textit{Arcy} (n 88) [4 [1] (Panel Members Holmes, Grace and Sullivan). See also \textit{Associated Provincial Picture House Ltd v Wednesbury Corporation} [1948] 1 KB 223, 230 (Lord Greene) (‘\textit{Wednesbury}’): \textit{Minister for Aboriginal Affairs v Peko Wallsend Limited} (1986) 162 CLR 24, 40-2 (Mason J).
\item \textsuperscript{416}D’\textit{Arcy} (n 88) 15 [46] (Panel Members Holmes, Grace and Sullivan).
\end{itemize}
\end{footnotesize}
rational, the AOC stated that the fact there was alcohol in his system automatically invoked the disrepute clause.\textsuperscript{417} Furthermore, the CAS, similar to the judge in \textit{De Belin}, relied on the fact that the charge itself would lead to members of the public reasonably believing that he was ‘guilty of criminal charges arising out of the incident’,\textsuperscript{418} especially considering the volume of media attention.\textsuperscript{419} In justifying this, it was held there is a significant process before charges are officially laid, citing that the Director of Public Prosecutions (‘DPP’) and a magistrate both have to form the view that there are reasonable prospects of conviction.\textsuperscript{420} These cases upheld the validity of the policy, while also confirming that athletes are held to a higher behavioural standard due to the significant media coverage.

\textbf{B Alternative Approach: Educating the Players}

To align with the NFL and the NBA, the NRL could opt to rely on a more educational and therapeutic approach to implement cultural change. While the NRL spend approximately $3.5 million annually on player education and welfare,\textsuperscript{421} the policy does not mention any immediate educational support. A study in the United States looked at how sporting culture often perpetuates negative attitudes regarding domestic violence,\textsuperscript{422} and sought to examine the best methods of education to change attitudes.\textsuperscript{423} Domestic violence advocates, as well as sporting coaches, delivered effective results in changing the athletes’ attitudes to recognising abusive behaviours.\textsuperscript{424} However, the results were most effective when the advocate cultivated relationships with the participants by joining workouts and training.\textsuperscript{425} Furthermore, if the advocate had shared experiences such as being an ex-player, players were more likely to be receptive.\textsuperscript{426} In implementing educational programs, selecting advocates who can integrate into the athletic culture will be most effective.\textsuperscript{427} Other necessary factors for educational programs include that they are comprehensive, intensive, relevant, and offer positive messages.\textsuperscript{428}

While educating players on anti-social behaviours may be the most desirable approach,\textsuperscript{429} this is not always possible. The NRL’s gender advisor, who has invested time into promoting and implementing player education, recently said that some players were simply ‘education-proof’.\textsuperscript{430} Therefore, an alternative approach focusing on education may not be a viable response to concerned sponsors and fans. However, lessons can be learned from international studies at how best to implement player education.

\begin{footnotes}
\item[417] Jongewaard (n 414) 3 (Panel Members Kavanagh, Ellicott and Sullivan). Cf Ziems (n 158), where a distinction was drawn between a barrister’s personal and professional life following a drink-driving accident.
\item[418] Ibid 2.
\item[419] Mirror Newspapers (n 339) 299 (Mason J).
\item[420] Jongewaard (n 414) 6 [14] (Panel Members Kavanagh, Ellicott and Sullivan).
\item[421] De Belin (n 7) 38 [130] (Perry J); Beattie Interview (n 181).
\item[423] Ibid 680.
\item[424] Ibid.
\item[425] Ibid 691.
\item[426] Ibid.
\item[427] Ibid 692.
\item[428] Michael Flood and Suzanne Dyson, ‘Sport, athletes, and violence against women’ (2007) 4(3) NTV Journal 37, 43.
\end{footnotes}
education, and an educational approach should be used concurrently with disciplinary procedures.

C Recommendations

The decision in *De Belin* confirms the NRL policy is legally valid. While it is not always fair on athletes, the pressure arising from media attention, their role model status, and sponsor influence means they are held to a higher behavioural standard when it comes to off-field conduct. However, in the interests of balancing the abundance of competing interests, including between the reputation of the sport and the individual rights of the players, sporting policies such as the NRL’s should implement changes to achieve greater fairness.

1 Time for Clarity

The first recommendation is that policies should clarify the obligations of athletes. In particular, terms such as disrepute should be properly defined.431 Previous authors have suggested it should amount to actions which are ‘so outrageous that the sport is subjected to public ridicule’,432 or that demonstrate a lack of trustworthiness or competence.433 The most preferable interpretation is one that mirrors general employment law principles.434 As per the *Rose* test, the behaviour should either cause serious damage to the employment relationship, interfere with the interests of the employer, or be incompatible with their duties or role.435 Creating a clear framework in which the disrepute clauses operate would make it fairer for athletes, while also ensuring consistency in disciplinary action.436

An alternative option is presented in the FFA policy. The FFA policy creates a non-exhaustive list of conduct that brings the sport into disrepute.437 These include actions such as discriminatory behaviour,438 harassment,439 offensive behaviour,440 as well as being charged with a criminal offence.441 Although this policy is inconsistent with other sporting policies,442 it does help to clarify the expected behavioural standards, and is another option for sporting organisations.

The scope of obligations as a role model should also be clearly identified. It is illogical that all players are subject to the same standards as a role model, when some players are more idolised, generally due to accessibility via the media or marketing campaigns. A more reasonable approach is one where athletes must subscribe to a particular standard.443 This would include accepting a certain role such as being in a leadership position,444 or choosing to be involved in a marketing or advertising campaign.445 In *De Belin*, this was discussed, however was dismissed as the NRL own all rights to the individual’s ‘player property’, consisting of their name, photograph, likeness, image,
reputation and identity.\(^{446}\) With players being ‘live advertising space’,\(^{447}\) there limits the opportunities for players to subscribe to a certain standard. The intricacies of this agreement are beyond the scope of this article; however, it would be preferable if players could opt to be included in publicity and promotions, thus subscribing to a particular standard.

### 2 Implementing the Reasonable Investigation

The main issue with the NRL policy is the absence of a reasonable investigation. While the policies of other sporting organisations discussed include provisions for an investigation, the NRL imposes an automatic stand down for offences above the 11-year threshold,\(^{448}\) and a very limited investigation for offences below the threshold.\(^{449}\) This is a denial of procedural fairness which should be rectified.\(^{450}\) Sporting organisations should be subject to the same obligations as general employers, with a reasonable investigation required before taking disciplinary action.\(^{451}\)

The concerns in *De Belin* that an investigation may prejudice a fair trial are well founded, however there are steps that can be taken to ensure the investigation does not interfere with the police process. The NFL model of limiting the scope to an individual with a criminal justice background is optimal, as is engaging with experts possessing specialised skills. Direct questions regarding the criminal charge should be forbidden,\(^{452}\) however there a range of other considerations that could be included in an investigation. In *De Belin*, the suggestion of including an investigation was rejected as the only factors raised by the applicant were regarding the financial and emotional impact upon the player.\(^{453}\) This was an inadequate argument as the players still have access to their salary and welfare support.\(^{454}\) Factors that were not raised by the applicant, but could be considered, include the impact on the wellbeing of the player’s family, the impact on the club and representative matches, the impact of feelings of isolation, as well as the fact the NRL has no evidence by which to base its claim.

The suggestion that the charge itself means that there is a high likelihood of guilt could be disputed by Commonwealth DPP statistics. According to their website, there were 65 defendants convicted after a plea of not guilty in 2017-18, while there were 46 defendants acquitted.\(^{455}\) These statistics could be relied upon to counter the argument that the charge itself brings the game into disrepute, obliging the NRL to conduct a reasonable investigation.

The other reform should be to reduce the power vested in one individual. Commissioners in the United States have been described as ‘more powerful than a chairperson of a board’,\(^{456}\) and possessing ‘all the disciplinary powers of the proverbial

\(^{446}\) *De Belin* (n 7) 18 [53] (Perry J).

\(^{447}\) Ibid 30 [100].

\(^{448}\) NRL Rules (n 2) r 22A(3).

\(^{449}\) Ibid r 22A(7).


\(^{451}\) Pinawin (n 16); *Deeth* (n 16).

\(^{452}\) It would also be inappropriate for sporting organisations to involve the victim in these investigations, as there is the risk of re-traumatising them: See Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) xx.

\(^{453}\) *De Belin* (n 7) 101 [303] (Perry J).

\(^{454}\) Ibid.


paterfamilias’.\(^{457}\) Although their powers have occasionally been limited,\(^{458}\) there is little doubt that they have ‘historically been the most powerful tool’ for controlling player discipline,\(^{459}\) and are essentially only subject to federal law restrictions.\(^{460}\) This model of disciplinary power is emulated by the NRL policy, however a more preferable approach would be a tribunal composed of multiple individuals with specialised skills, with clarity in the constitution, tribunal rules and procedures.\(^{461}\) This would lead to decisions that are reasonable, consistent, and in the best interests of the game.\(^{462}\) It is essential that sporting organisations make reasonable disciplinary decisions, as courts are reluctant to involve themselves.\(^{463}\) Decisions are generally only reviewable in a court if ‘no reasonable man could come to the conclusion that the facts proved amounted to the offence charged under the rules’.\(^{464}\) Given this responsibility, tribunals are optimal as they encompass a broader range of knowledge and opinions. Additionally, the reasons for the decision should be made clear to the players, which is not the case in the current iteration of the NRL policy.\(^{465}\)

VI CONCLUSION AND LIMITATIONS

In the modern social landscape, sporting organisations have a difficult task of balancing a significant number of competing interests when a player is charged with a criminal offence. These interests include the sport’s reputation amongst the public, pressure from sponsors and broadcasters, laws surrounding restraints of trade, a player’s right to the presumption of innocence, managing internal investigations, and affording players natural justice. While these factors create a complex intersection, the mass of media coverage and money invested into sport ultimately mean it is unavoidable that athletes may need to be stood down following a charge of a serious criminal offence. However, sporting organisations still have a duty to properly respect the players when drafting rules and policies.

While the NRL was forced to act due to a myriad of social and financial factors, its policy is overbearing on players and should be amended to closer resemble other sporting organisations. The automatic stand down for offences over 11 years is too rigid, while the discretion for the CEO or COO to make a determination for other offences grants too much power to one individual. The best approach is to conduct a careful investigation, with a disciplinary determination ultimately decided by a tribunal composed of members with specialised skills or knowledge. This approach aligns sporting organisations closer with other industries. This is a fairer method, as currently the obligations imposed on athletes as a result of disrepute clauses and role model factors are unclear. As many other commentators have noted,\(^{466}\) all employees deserve to have a clear understanding of their obligations, both when at work, and for out of work conduct.

It is hoped the recommendations of this article can be used as guidance for sporting organisations when introducing policies that involve standing down players charged with a criminal offence. However, it must be acknowledged there were limitations in writing this article. First, the recency of the NRL policy meant there was limited

\(^{457}\) Atlanta Baseball Club, Inc. v Kuhn, 432 F Supp 1213, 1220 (N.D. Ga, 1977).

\(^{458}\) See, eg, Mackey v National Football League, 435 F.2d 606 (8th Cir., 1976).

\(^{459}\) Holden and Tweedie (n 391) 402-3.


\(^{461}\) Healey (n 450) 125.

\(^{462}\) Paterson (n 152) 139.

\(^{463}\) Kosla (n 85) 654; Shepherd (n 85).

\(^{464}\) Dickason v Edwards (1910) 10 CLR 243, 254 (O’Connor J). See also Wednesbury (n 415).

\(^{465}\) NRL Rules (n 2) r 22A(11)(b).

\(^{466}\) See, eg, Paterson (n 152); Kosla (n 85); Jonson, Lynch and Adair (n 78); Davies (n 90).
literature on it, while the policy itself has only been implemented on five occasions. These concerns were somewhat ameliorated due to the De Belin decision being handed down, which substantively covered some issues relating to the policy. Second, the scope of this article meant there is little discussion about other jurisdictions. While international policies including those of the NBA and the NFL were mentioned, it would be beneficial for organisations such as the NRL to examine individual cases arising from international jurisdictions.

467 Additionally, there has been discretion used to not suspend a player in at least two instances: Proszenko (n 194).
Deepfakes Are Coming: Does Australia Come Prepared?

Federica Celli

The phenomenon of ‘deepfakes’ has increased exponentially since its first appearance in 2017 when several actresses saw their faces featured in adult movies without having given consent. The potential dangers to democracy as well as to individuals’ reputation are significant. The article discusses the adequacy and applicability of Australian laws to deepfakes. It analyses the technology behind deepfakes and ‘cheap fakes’, followed by an examination of the misuse of deepfakes. It then offers a comparative analysis of European personality rights, the US right of publicity, and the US Deep Fakes Accountability Act before evaluating Australian tort, consumer and intellectual property law. It concludes that Europe’s personality rights provides an effective and desirable legal response to deepfaking.

I INTRODUCTION

In his painting ceci n’est pas une pipe, Rene Magritte portrayed a pipe followed by the sentence ‘this is not a pipe’. He demonstrated in a rather unique way that what human eyes see is not necessarily the truth. Although unique, anyone who is admiring Magritte’s painting is ready to accept that what they see is indeed not a pipe, rather a painting depicting a pipe. Such an acceptance is not that automatic when looking at pictures or videos, which appear to resemble reality perfectly, yet they can be deceitful and portray something different from what is real. Technology is making that deception even easier, an example of that being the so-called ‘deepfakes’, which have been described as ‘AI-generated media that depict made-up events ... [with] no agreed-upon technical definition’.¹

Deepfakes can severely harm people’s reputation and erode democracy, considering that ‘[f]alsehood diffuse[s] significantly farther, faster, deeper, and more broadly than the truth in all categories of information’, particularly when it comes to false political news.² Since law tends to march with technology ‘in the rear and limping a little,’³ this article aims at assessing if and how badly Australian laws are currently limping in a potential march against deepfakes.

Such an evaluation appears crucial considering that even Facebook has launched a challenge to find the top-performing detection model for deepfakes,⁴ which ‘have proven to be something of an exaggerated menace for social media’,⁵ raising questions regarding what role such platforms should play in taking down deepfakes, which will not be the focus of this article.

The article firstly discusses deepfakes’ origin and applications in Part II. Part III then examines the notion of personality rights in Europe and America as a possible response to deepfaking.

¹ Federica Celli, MLS student at the University of Canberra.
Deepfakes have their root in academic literature with a paper written in 2016. The authors’ purported goal was to transfer the facial expressions of a source actor to a target actor by using a YouTube video portraying a facial performance of the latter in a way that ‘it [was] virtually impossible to notice the manipulations.’\(^6\) One year later, a Reddit user called ‘deepfakes’ posted several manipulated porn videos featuring celebrities by employing the open-source machine learning tool TensorFlow, and by compiling the celebrities’ faces through ‘Google image search, stock photos, and YouTube videos’,\(^7\) thus roughly applying what had been academically discussed the previous year. Such audio-visual manipulations became colloquially referred to as deepfakes.

Since emerging in 2017, deepfakes have rapidly developed in terms of numbers and perceived authenticity. In July 2019, with a 100% increase from 2018, the total number of deepfakes reached 14,678. 94% were pornographic videos with 134,364,438 views across only four dedicated deepfake pornography websites.\(^8\) As of June 2020, deepfakes have had a 330% increase, reaching a total of 49,081.\(^9\)

The next two paragraphs briefly address the differentiation between deepfakes and the so-called cheap fakes, followed by the possible uses and threats of the technology behind deepfakes.

### A Deepfakes and Cheap fakes

Since 2017, the technology behind deepfakes has spread rapidly. Software such as Faceswap and Zao have allowed everyday-users to potentially create as well as distribute content comparable to more advanced deepfakes, resulting in what is called a democratisation of deepfakes’ technology.\(^10\) A differentiation between deepfakes and what is known as cheap fakes appears now relevant before continuing.

Cheap fakes arguably pre-date the digital age, an example being the fake bellicose telephone conversation between Margaret Thatcher and Ronald Reagan created by the anarcho-punk band Crass in the occasion of the 1983’s UK elections.\(^11\) A more recent example of a cheap fake is the video of Nancy Pelosi, the US House of Representatives Speaker, the speed of which was reduced in a way to make Mrs Pelosi sound drunk.\(^12\)

\(^7\) Samantha Cole, ‘AI-assisted fake porn is here and we’re all fucked’, Vice (online at 12 December 2017) <https://www.vice.com/en_us/article/gxydym/gal-gadot-fake-ai-porn>.
\(^12\) Washington Post, ‘Pelosi Videos Manipulated to Make Her Appear Drunk Are Being Shared on Social Media’ (YouTube, 24 May 2019) <https://www.youtube.com/watch?v=sDOo5nDJwgA&t=46s>.
The cheap fake-deepfakes spectrum helps distinguish those two phenomena. Their differences primarily concern technical sophistication, techniques, and barriers to entry.\(^{13}\) Where deepfakes represent the end of the spectrum characterised by a higher computationally reliance and the least publicly accessibility,\(^{14}\) cheap fakes refer to techniques such as photoshopping, slowing and speeding moving images, recontextualization, and lookalikes.\(^{15}\) More generally, cheap fakes, sometimes also known as ‘shallowfakes’ represent those manipulations that do not rely on AI.\(^{16}\)

Although this article specifically addresses deepfakes, most of the following considerations arguably apply to cheap fakes as well. Indeed, if on the one hand Generative Adversarial Networks (GANs), which is a machine learning (‘ML’) configuration where two MLs systems compete to improve the learning of a task, are contributing to the increased ability to generate even more convincing deepfakes,\(^{17}\) on the other hand cheap fakes also are increasingly becoming more credible with the advancement of technology.

Finally, it is worth mentioning that social media apps are increasingly using AI technologies to engage their users by, for instance, allowing them to manipulate videos with a smartphone. An example of such an app is Reface, which is currently ranked number eight in the top charts for free entertainment apps.\(^{18}\) Setting aside the possible issues in relation to privacy, Reface allows its users to put their faces on popular GIFs by simply using one of their pictures, and it also offers a premium option which allows users to ‘upload their own, choose faces from their gallery’, and providing results without watermarks or adverts.\(^{19}\) Although the final result is arguably still easily recognisable as having been manipulated, the quality of the final GIF can be quite convincing. Furthermore, the ability to simply use one photo to create the manipulated video makes it extremely easy to create a GIF without the consent of the person involved, considering that Facebook is a great and accessible resource when it comes to people’s pictures.

\section*{B Deepfakes’ Applications and the ‘Liars Dividend’}

It has been said that for human beings to survive and improve, they need to constantly acquire knowledge about the world by relying on trustworthy sources of information such as direct visual perception.\(^{20}\) However, because it is impossible to always witness in first person an event occurring, videos represent ‘the next best thing’.\(^{21}\) The same principle applies to hearing, which is another sense that generally leads to trust and believe in what is heard whether that would be in person, over the phone or, again, through a video. Deepfakes are arguably demolishing the trustworthiness of both sight and hearing.

\begin{itemize}
\item\(^{13}\) Britt Paris and Joan Donovan, Data & Society, Deepfakes and Cheap fakes: The Manipulation of Audio and Visual Evidence (Report, 18 September 2019) 10-11.
\item\(^{14}\) Ibid.
\item\(^{15}\) Ibid 24.
\item\(^{16}\) Bateman (n 1) 28.
\item\(^{21}\) Ibid.
\end{itemize}
The technology behind deepfakes has also been employed for noble purposes. For instance, the Scottish company CereProc offers, among other services, Cerewave AI, a neural text-to-speech system powered by the same deepfakes’ machine learning technology, which has also been used to produce a reconstruction of the original voice of a customer, who suffered from a degenerative illness, by fusing the customer’s voice with a relative’s voice. However, the same technology was employed to fraud and steal money. Indeed, an energy company’s CEO transferred a considerable amount of euros to a Hungarian supplier, believing that was at the direction of his parent company’s chief executive, who, unfortunately, had never given that order, the CEO being the victim of a ‘voice-spoofing attack’ made possible by AI. This ‘deepfake vishing (voice phishing)’ is easily employable in identity theft, requiring a small amount of audio data to be created, making it possible to clone someone’s voice by using a social media clip or voicemail greetings.

David Beckham’s manipulated videos are another example of benign employment of deepfakes’ technology, which spread awareness about the Malaria Must Die initiative by manipulating Beckham’s original video where he spoke English, to allow him to speak nine different languages without needing Beckham actually to learn those languages.

In 2018, some researchers at Berkeley had used AI to transfer professional dance moves from a professional dancer to a target person. This innocuous deepfake arguably discloses how the step towards harmful employment of the technology is quick to make. Indeed, as Agnieszka Walorska highlighted, ‘what would, for instance, be the ramifications of a video showing a politician performing a Nazi salute or even just giving the middle finger?’. The answer remands to deepfakes’ ability to compromise democracy and spread misinformation.

Such a threat is perceived now more than ever, when, in the middle of a pandemic, the internet has had an increase in demand, which was up to 80% in April 2020 to the point it caused ‘the worst average internet congestion’ in some cities. With more people spending time over the internet to get entertained as well as informed, the possibility to encounter deepfake videos, and potentially believe in the truthfulness of those videos at least initially, increases exponentially.

With the upcoming US election, the threat deepfakes poses to democracy has prompted corporations such as Sensy, ‘the world’s first visual threat intelligence company’, to provide to its subscribers a ‘special fake video monitor for US2020’ giving daily updates on the incidence of deepfakes detected by Sensy’s Platform, targeting US candidates.

---

24 Bateman (n 1) 9-11.
27 Agnieszka M Walorska, Deepfakes and Disinformation (Friedrich Naumann Foundation for Freedom, May 2020).
to the Presidential elections as well as other people of interest. As of 19 October 2020, Donald Trump is the most targeted candidate with 174 deepfakes and four cheap fakes.\(^{30}\) Although those videos do not appear to truly compromise the political balances unless Trump announcing ‘the Milky Act’ is considered a severe threat to democracy,\(^ {31}\) examples from the past show how deepfakes can create political turbulences. For instance, in June 2019 a sex tape portraying a Malaysian minister engaging in homosexual sexual intercourse compromised the minister’s political career and risked him facing criminal charges, homosexuality being illegal in Malaysia.\(^ {32}\)

The Malaysian minister’s video has not officially been declared to be a deepfake although the minister claimed so.\(^ {33}\) This situation shows the so-called liar’s dividend problem arising from deepfakes. Since the quality of deepfake’s videos is continuously getting better, it is possible that people caught doing something wrong might invoke the deepfake card to get away with that misbehaviour. Moreover, as concisely stated by Professor Citron ‘[r]egrettably and perversely, the Liar’s Dividend grows in strength as people learn more about the dangers of deep fakes’.\(^ {34}\)

To raise awareness, Sensity has created with Microsoft and the University of Washington’s Centre for an Informed Public the project ‘Spot the Deepfake’, a quiz which goal is to educate people about deepfakes,\(^ {35}\) to have ‘informed citizens who critically question what they see and hear, and who are looking for confirmation that the media has been vetted’.\(^ {36}\)

While the threat to democracy represents a real risk, as of June 2020, only 4% of deepfakes targeted people with political backgrounds,\(^ {37}\) pornography accounting for 96% of deepfakes,\(^ {38}\) including pornographic deepfakes featuring celebrities as well as revenge porn content. Revenge porn resulting from image manipulation already existed as ‘sexualised photoshopping’, i.e. the superimposition of a pornographic image onto a person’s head or body.\(^ {39}\) Although the medium has been refined and turned into a proper video rather than a mere photoshopped image, the point is still that ‘the fact that an image [or video] has been altered, or is even composed of images taken of different women, does not diminish the potential harm resulting from its dissemination’.\(^ {40}\)

\(^ {30}\) The data can be found at this link <https://platform.sensity.ai/us2020>, provided you have signed up for Sensity.
\(^ {31}\) Mista Jones, ‘President Trump Announces the Milky Act’ (YouTube, 5 October 2020) <https://www.youtube.com/watch?v=QPWyg8nbe00>.
\(^ {33}\) Ibid.
\(^ {34}\) The National Security Challenge of Artificial Intelligence, Manipulated Media, and “Deep Fakes” Before the H. Permanent Select Comm. on Intelligence, 116th Cong. 7 (2019) (statement of Danielle Keats Citron, Morton & Sophia Macht Professor of Law, University of Maryland Carey School of Law).
\(^ {36}\) Ibid.
\(^ {37}\) Ajder (n 9).
\(^ {38}\) The State of Deepfakes (n 8) 1-2.
\(^ {40}\) Australian Women Against Women Alliance, Submission No 19 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, Inquiry into the Phenomenon Colloquially Referred to as ‘Revenge Porn’ (14 January 2016) 6.
What are legal strategies to combat the unauthorised manipulation of someone’s image, primarily focusing on the civil rather than criminal aspects?

### III Possible Legal Responses Applicable to Deepfakes

As previously stated, deepfakes’ harm involves the manipulation of someone’s likeness, image, and voice without that person’s consent. Consequently, any adequate legal response to deepfakes must consider such a non-consensual element.

The following paragraphs examine the so-called personality rights, which Australia, following the UK, does not specifically recognise, and some US acts and bills on deepfakes, with particular attention on the DEEP FAKES Accountability Act (‘DF Act’).

#### A Personality Rights: the European and United States Approaches Compared

Personality rights are said to be ‘a civil law concept’, seen as a bundle of rights that includes the right to one’s name, image, right to privacy, and in general it relates to the protection of individuals’ integrity and inviolability. German scholars were among the first to use the word Persönlichkeitsrecht during the nineteenth and twentieth centuries. Although the concept subsequently spread also to extra-European countries, in Anglo-American countries the term ‘personality’ does not connotate the protection of people’s bodily and non-bodily aspects. The US has adopted the different concept of ‘right to publicity’, which is more connected to the idea of protecting liberty rather than protecting individuals’ dignity as pursued by the European concept of personality rights. Since the latter is said to have derived from the ‘particular synergy’ between German and French scholars and case law, those countries are here used as representative of the European approach to personality rights.

As mentioned previously, deepfakes’ harm comes from the unconscionable use of an individual’s likeness perpetrated by a third person. French law protects from such harm by recognising that individuals have an exclusive right to their image and its use, which embodies the power to prohibit its dissemination and reproduction when that occurs without express and specific permission. France had recognised the right of a person to their own likeness already in 1858 when the family of the actress Rachel was awarded damages as a result of the unauthorised publication of the actress’ portraits over her deathbed. France’s personality rights are broadly interpreted, they are reflected in the

---

42 DEEP FAKES Accountability Act, HR 3230, 116th Congress (2019) (‘DF Act’).
44 Ibid.
46 See, eg, Código Civil [Civil Code] (Brazil) Ch II Book 1 Title 1; Civil Code of Quebec, CQLR c CCQ-1991 Art 3.
47 Resta (n 43) 222 [2].
49 Resta (n 43) 228 [5].
50 Gert Bruggemeier, Aurelia Colombi Ciacchi and Patrick O’Callaghan (eds), Personality Rights in European Tort Law (Cambridge University Press, 2010) 284.
51 Rachel, Tribunal Civil de la Seine (Paris), DP 1858.3.62, 16 June 1858.
words of article 9 of the Code Civil, which states that everyone has the right to see their private life respected, and empowers courts to issue injunctions to stop or prevent intrusions into the intimacy of one’s private life. The protection is independent of both the notoriety and profession of the person, always requiring a specific authorisation to use the person’s photograph.

Germany impliedly recognises a right of personality in its Constitution, Civil Code and its 1907 Act on the Protection of Works of Art and Photographs. Germany’s right of personality is conceived as a unitary protection of patrimonial and non-patrimonial interests, where the autonomy of self-determination represents the core. A landmark case, which showed that ‘the notion of human dignity is the conceptual and normative backbone of all German constitutional law’, upheld an injunction preventing the printing, distribution, and publication of a novel which character was modelled on the author’s brother-in-law, although named differently and more caricatured. The injunction’s basis was that freedom of art presupposes dignity, which represents the ‘supreme and controlling value of the whole system of basic rights’. Another interesting case, which perfectly shows the applicability of personality rights’ protection to deepfakes, is the one where a German goalie successfully stopped FIFA videogame from using his likeness and name without his explicit consent, the court interestingly stating with regard to the use of the goalie’s name that the damage derived from the player’s infringed right to choose how his name might be used.

Differently from France and Germany, America has adopted the narrower concept of ‘right of publicity’. Born from the right ‘to be left alone’ conceived in 1890 to protect publications of individual’s private matters when publicly irrelevant, the term right of publicity was arguably firstly mentioned when a baseball player successfully won a case against the use of his image on baseball cards, considered as merchandise exploiting his image for profit. Such a right has been described as one ‘inherent to everyone to control the commercial use of identity and persona’, so disclosing its primarily patrimonial focus. Moreover, differently from Germany and the protection

---

53 Bruggemeier, Colombi Ciacchi and O’Callaghan (n 50) 285.
57 Mephisto, Bundesverfassungsgericht [German Constitutional Court], 1 BvR 435/68, 24 February 1971 reported in 30 BVerfGE 173.
58 Ibid.
59 Oliver Kahn v Electronic Art, Oberlandesgericht Hamburg [Hamburg Court of Appeal], 7 U 41/03, 13 January 2004.
60 Greer (n 54) 268.
61 Ibid 265.
given by the broader personality right concept in Europe, the American First Amendment has mostly prevailed over the right of publicity’s protection of people’s likeness and name when claimed against videogames.66 Indeed, videogames in the US have been considered to represent a form of expression similar to books.67

US publicity rights are stated differently in each state with California arguably representing the ‘golden standard’68 by recognising such rights both statutorily and at common law.69 Moreover, differently from the general US trend mentioned above, California had also enforced the protection of publicity rights against videogames.70 Nevertheless, even California’s publicity rights ‘almost always fail to overcome’ the First Amendment’s defence,71 arguably showing that the broader concept of personality rights linked to individuals’ dignity guarantees greater protection and would better tackle deepfakes.

B The US Deepfakes-Targeted Laws

Although several American states had passed deepfakes-targeted laws, those are still affected by the rights of free speech under the First Amendment.72 California has, for instance, passed two bills in 2019 amending various sections of the Civil Code and Code of Civil Procedure to prevent both the improper influence of elections and unauthorised use of people’s likeness in pornography that deepfakes could cause.73 Similarly, Virginia has criminalised maliciously distributed unauthorised pornographic material, while Texas specifically criminalised deepfakes aimed at injuring political candidates or influencing elections’ results, both states providing incarceration for the laws’ violation.74

At the federal level, the DF Act75 is currently before the Congress. Such Act requires anyone sharing a harmful deepfake to disclose it is fake in a way which varies depending on the medium.76 It provides about the establishment of the Deep Fakes Task Force to detect deepfakes and differentiate them from legitimate audio-visual

---

66 CBC Distribution and Marketing v Major League Baseball Advanced Media, 505 F 3d 818 (8th Cir, 2007).
69 The right was firstly established in Eastwood v Superior Court (respondent National Enquirer, Inc., as real party in interest), 149 Cal App 3d 409 (Cal Ct App, 1983) at common law, and it is recognised at a statutory level by §3344 of Cal Civ Code (Deering 2020), which states ‘(a) [a]ny person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person’s prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof ...’.
71 Farish (n 68) 46.
74 Thornton et al (n 72) 3-4.
75 Also before the congress since 2018 is the Malicious Deep Fake Prohibition Act of 2018, S 3805, 115th Congress (2018), which will not be discussed in this article.
76 DF Act (n 42) s 2 §1041.
recordings, and prescribes criminal liability on pornographic deepfakes’ creators as well as an in rem civil action against the content when the author is unknown. Although the bill appears overall thorough, it has been criticised for not truly discouraging malicious deepfakes’ creators, and because the term ‘deepfakes’ is so overbroad that it would be more sensible to let courts apply current laws to address each particular case better rather than using a standardised approach. Additionally, it has been highlighted how criminalisation might not be appropriate, considering the complexity and ubiquity of deepfakes’ technology and their ability also to facilitate free speech, and social and political comment.

IV Australian Legislation

Australia does not specifically recognise personality rights, nor has it created anything similar to the American right of publicity. Thus, in addressing whether current Australian laws can adequately respond to the threat posed by deepfakes, different statutes and case laws must be analysed. Specifically, Australian consumer and intellectual property laws, as well as torts laws such as passing off and defamation, could represent valuable means to fight deepfakes.

The following paragraphs discuss the application of such laws to deepfakes, and whether they provide sufficient protection to individuals who see their images unauthorizedly manipulated.

A Copyright, Trademarks, and Consumer Laws

Especially with regard to celebrities, copyright, trademarks and consumer laws could successfully protect against deepfakes. According to the Copyright Act, celebrities are generally considered the owner of their performance, hence arguably of the image and voice related to that performance, potentially allowing them to sue for any infringement of their copyright caused by a deepfake which unauthorizedly manipulated their image, and seek relief through injunctions, damages or account of profits.

It should be briefly mentioned that also the author of a deepfake could, at least in theory, claim copyright authorship. Indeed, deepfakes could arguably be considered ‘original artistic work’, for instance, and confer to their creators an exclusive right to reproduce, publish and communicate the work, i.e. the deepfake, to the public. The situation could be complicated further when the image used to create the deepfake video is subjected to third-party copyright, for instance, the professional photographer who took the photo, who would then arguably be the one entitled to sue the deepfake creator. In this scenario, if the third-party has authorised to make the deepfake or made it themselves, it might be difficult for the person portrayed in the manipulated image to find protection.

Furthermore, since celebrities’ images can be highly valuable, being able to influence consumer choices if used in products’ advertisements, trademarks are being used as a

---

77 Ibid s 7.  
78 Ibid ss 2, 4.  
81 Copyright Act 1968 (Cth) (‘Copyright Act’).  
83 Copyright Act (n 81) s 32.  
84 Ibid s 31(b).
mean to control celebrities’ personalities. 85 Under the Trade Marks Act, for a successful registration, the trademark must be capable of distinguishing the applicant’s goods or services in respect of which the trademark is sought, 86 an example could be Paul Newman’s sauces which have his face and signature on the label. 87 However, arguably a celebrity could trademark their image even when there is not such a connection with a good, changing the nature of trademark protection and assimilating it to a generalised image or personality protection. 88 Thus, since a trademark infringement occurs when there is a deceptive and almost identical use of the image, 89 deepfakes would easily represent such an infringement.

Additionally, a celebrity’s image could also be protected through consumer laws, specifically when it is used in a misleading and deceptive way, 90 for instance the unauthorised display of a music group on a t-shirt 91 or the photograph of a professional swimmer used in a way as to falsely suggest he sponsored a telephone company. 92 Hence, a deepfake created to advertise a specific service or product without the actual authorisation of a certain celebrity could be stopped under consumer laws.

Nevertheless, copyright, trademarks and consumer laws, while arguably applicable to celebrities due to their notoriety, would hardly apply to ordinary people, since the damage created by the unauthorised use of the celebrity’s image derives from the profit related to that same image because famous, which would not be the case for non-famous people.

B Defamation and Passing off

Defamation is a tort to protect individuals’ reputation from being diminished in the eyes of the public due to someone else’s false assertions, 93 regardless of whether that someone intended to have that effect and had, indeed, reasonable care. 94

For an action in defamation to succeed, there must be three elements. Firstly, provided the victim is alive, 95 the defamatory matter must be published, it must be communicated to someone other than the plaintiff. 96 Deepfakes spread around the internet, on websites and social media, hence this element would easily be present, considering that Facebook posts have already been held capable of representing defamatory matters. 97 Secondly, the defamed must be identifiable, which is satisfied by merely portraying a person on television or in a photograph without needing to name them. 98 Deepfakes are all about images manipulation, thus the second element is connatural in such videos. Finally, the matter must be defamatory in the eyes of a right-

---

86 Trade Marks Act 1995 (Cth) s 41(2) (‘Trade Marks Act’).
87 Weathered (n 85) 167.
88 Ibid 167-168.
89 Trade Marks Act (n 86) s 120.
90 Competition and Consumer Act 2010 (Cth) sch 2 s 18.
91 Hutchence v South Seas Bubble Co Pty Ltd (1986) 64 ALR 330.
93 Peter Nygh and Peter Butt, Butterworths Australian Legal Dictionary (Butterworths, 1997) 333.
95 Civil Law (Wrongs) Act 2002 (ACT) s 122.
97 Reid v Dukic [2016] ACTSC 344.
thinking member of the society. This could at times not be present in deepfakes, defamation requiring some sort of actual damage to the individual’s reputation, and not protecting the mere unauthorised use and distribution of that individual’s image.

Moreover, even when damages have occurred, while Australian differently from the US does not have an equivalent of the freedom of speech, the common law defence of opinion could successfully be used when the deepfake is clearly satirical.100

Another possible protection could be the tort of passing off. Briefly, such tort arises when a person’s reputation is misrepresented by another person so to create a damage to the first person’s business.101

Courts had upheld passing off in cases of unauthorised use of the plaintiff’s photograph or created personality when that gave the public the erroneous impression that the plaintiff consented to such use and profited from it. It was also upheld for the publication of a written work’s parody when there was no sufficient indication that it was simply a satirical copy of the original.104 Indeed, the tort has been also used for ‘authors protection of their goodwill from damage occasioned by false attribution of authorship’.105

Thus, arguably such a tort could be used against deepfakes. For instance, it could be used in the case of a politician’s video manipulated as to create a parody, when its satirical aspect is not that obvious to the public, and could fuel misinformation about that politician’s views or his or her reputation. This could be made possible by loosely interpreting the word ‘authors’ as to include the protagonists of the original video, which was then manipulated.

Nevertheless, once again a commercial aspect must be present, courts having dismissed cases where, although a famous person’s image was used without that person’s consent, the use of that image did not induce the public to think there was a commercial connection between such person and the company or product which exploited that person’s image.106

V CONCLUSION

Deepfakes represent a serious problem which is growing consistently. From the considerations above, the protection afforded by current laws appears primarily commercial-related, Australia evidently lacking in providing a protection to people’s likeness, image and voice in a broader sense.

The analysis of Europe and the US shows that the most desirable approach would be to recognise a type of personality rights similar to the one conceived by France and Germany, the American right of publicity being, similarly to Australia, anchored in commercial considerations. The DF Act also does not represent the best solution, risking to compromise the ‘bad’ as well as the ‘good’ deepfakes. Indeed, as wisely

99 Reader’s Digest Services Pty Ltd v Lamb (1982) 150 CLR 500, 506; Sim v Stretch (1936) 52 TLR 669, 671.
101 R P Balking and J L R Davis, Law of Torts (LexisNexis Butterworths, 5th ed, 2013) 719 [23.7].
104 Clark v Koala Dundee Pty Ltd [1998] 1 All ER 959.
105 Ibid [18].
pointed out by Lawrence Lessig, ‘[law] should regulate culture only where that regulation does good’.107

To conclude, Australian laws are limping in their march against deepfakes. However, personality rights, if specifically recognised, could be Australia’s clutches, at least temporarily.

***
