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FOREWORD

Welcome to this first volume of the Canberra Law Review for 2012.

This edition deals with a number of issues of international, national and local significance. Afroza Begum writes about the important issue of equal opportunity for women in the workplace. This is a harder goal to achieve where there are cultural issues that impact on the status of women. Devdeep Ghosh provides an interesting discussion of the scope of the fiduciary relationship – a legal concept that is relevant as a standard for behaviour in many facets of society. It highlights the developing nature of the relationship and its capacity to respond to changes in society. Sophie Riley writes on an important but relatively unexplored area of environmental law – that of the regulation of invasive alien species. This is essential for the health of our water management systems, a very topical issue. Finally, Anita Mackay writes about an issue of particular significance to the Canberra region – that of the stated role of the Alexander Maconochie Centre in achieving therapeutic outcomes for prisoners. It analyses the potentially conflicting nature of a sentence of imprisonment and the aim of rehabilitation and looks, in particular, at the approach taken in establishing the Alexander Maconochie Centre in Canberra.

We have also included one non-refereed piece – a case note by Gregor Urbas on the recent decision of the High Court of Australia in *Aytugrul v The Queen* dealing with the admissibility of DNA evidence.

As always, the production of this volume is a team effort. Particular thanks are due to Skye Masters for her editing work. I hope you enjoy the volume.

Dr Maree Sainsbury

Chief Editor, Canberra Law Review

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IMPLEMENTING WOMEN'S EQUAL RIGHT TO EMPLOYMENT IN BANGLADESH: A COMPARATIVE JUDICIAL APPROACH WITH SPECIAL REFERENCE TO INDIA, CANADA AND AUSTRALIA

AFROZA BEGUM*

ABSTRACT

Women's equal right to employment is a constitutionally entrenched fundamental right and is repeatedly affirmed in several pieces of labour legislation in Bangladesh. However, any legal initiative to advance women sounds hollow as long as it fails to redress the deeply embedded specific phenomena of a traditional culture such as that of Bangladesh, that has eventually made the exercise of 'equality' quite difficult and, on some occasions, impracticable for them. The situation is further exacerbated by the absence of any progressive judicial approach to combat women's unique concerns in employment. Experiences, however, in foreign jurisdictions demonstrate a global judicial consensus on equality that has led to a substantial transformation from the traditional standard of 'equality' and forced activist legal reforms to accommodate those concerns in employment.¹ This article investigates the judicial approach to women's employment in the public life in Bangladesh as compared to that of a number of countries, including India, and recommends the reconceptualisation of the ways in which the judiciary should handle discrimination issues in the workplace to meet women's contemporary values and concerns.

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¹ Refers to substantial equality, 'meaning equality of opportunity and of result', encompasses a broad "remedial component" to mitigate the effects of women's past incapacities by obligating the government to develop strategies appropriate to their particular experiences. See for details C. L'Heureux-Dube, 'Feminist Justice, at Home and Abroad: It Takes a Vision: The Constitutionalization of Equality in Canada' (2002) 14 *Yale Journal and Law Feminism* 363, 368.

I INTRODUCTION

Women's equal right to employment is a constitutionally entrenched fundamental right and is repeatedly affirmed in a series of laws in Bangladesh. In addition, a quota system has been endorsed in existing legislation to compensate for women's underprivileged status in the public service. This has helped women in Bangladesh gain increased access to positions in employment more than ever before. Despite this, the percentage of women in high-ranking positions in the public sector is still below 9%, and the existing provisions of 'equality of employment' fail to respond to this practical situation. The *de jure* (legal, 'formal' as I call it) equality as enshrined in the *Constitution of Bangladesh*, while it aims to ensure equality for the equals in the public service, overlooks women's traditional disadvantages in socio-economic opportunities that virtually incapacitate them in regard to competing on an equal footing with men to attain jobs. As the Supreme Court of India maintained, '[equality] of opportunity for unequals can only mean aggravation of inequality'.² Neither does this formal approach³ to 'equality' recognise the need for redressing those disadvantages to produce women's factual equality.

Precedents across many nations illustrate how legislative and judicial efforts have made a significant departure from the traditional concept of 'equality' and developed a substantive approach⁴ to accommodate women's particular experiences in the workplace.⁵ A substantive approach seeks to improve women's position in employment by removing their socio-economic disabilities, by restructuring workplaces and by obligating employers to eliminate all forms of discrimination in employment.⁶ It also requires the court to move forward the law (from its

² *Kerala v Thomas* (1976) 1 SCR 906, 933.

³ It presupposes an equal ability of men and women and claims for their identical treatment in enjoying all rights. This approach, however, does not recognise the same rights for all individuals but only for equals, 'similarly situated individuals', eg, same ranking employees in a particular job that is very unlikely to promote the already disadvantaged groups in society. See M. J. Frug, 'A Symposium on Feminist Critical Legal Studies and Postmodernism: Part One: A Diversity of Influence' (1992) 26 *New England Law Review* 665, 667; R. Kapur and B. Cossman, *Subversive Sites: Feminist Engagements with Law in India* (1996 SAGE Publications: London) 177.

⁴ L'Heureux-Dube, above n 1, 368.

⁵ See, eg, Canadian Charter of Rights and Freedoms 1982, s 15; Constitution of the Republic of South Africa 1996, s 44.

⁶ J. Hucker, 'Antidiscrimination Laws in Canada: Human Rights Commissions and the Search for Equality' (1997) 19 *Human Rights Quarterly* 547, 560; *Alberta Human Rights Commission v Central Alberta Dairy Pool* (Canada) [1990] SCR 489, 495; S. A. Law, 'Rethinking Sex and the Constitution' (1984) 132 *University of Pennsylvania Law*

cognitive meaning) as far as possible to provide favourable remedies to the disadvantaged groups.⁷ I argued elsewhere⁸ how formal equality proved ineffective in dealing with women's practical needs and perspectives and how law's continued tolerance of some traditional perceptions about women's roles reinforces their subordination in employment in Bangladesh. This article, therefore, predominantly focuses on the judicial approach to women's employment rights in the public life, arguing that despite a few attempts at progressive transformation in recent years,⁹ Bangladesh's judiciary still adheres to the literal approach to interpreting laws and has failed to deliver any dynamic precedent in the last 40 years to address women's contemporary concerns in the workplace. The paper claims that the judiciary owes an affirmative obligation to pursue a dynamic-cum-broad approach to eradicate stereotypical prejudices against women through an analysis of a leading judgement on women's equal opportunity in employment in Bangladesh as compared to that in a number of foreign jurisdictions, especially of India, given its similar constitutional and legal context and socio-cultural commonalities. Although it is not the purpose of this article to portray a comprehensive picture of those foreign experiences, such references may provide a strong basis for changes in Bangladesh.

This research has drawn on my personal investigations that I carried out among NGOs and in different courts in the capital and a regional city of Bangladesh where I collected cases on women's employment and relevant materials from both primary and secondary legal resources. The following discussion begins by briefly outlining the socio-cultural and legal context of

Review 955, 955; A. York, 'The Inequality of Emerging Charter Jurisprudence: Supreme Court Interpretations of Section 15(1), (1996) 54 *University of Toronto Faculty of Law Review* 327, 328; L'Heureux-Dube, above n 1, 368.

⁷ A. Begum, 'Judicial Activism v Judicial Restraint: Bangladesh's Experience with Women's Rights with Reference to the Indian Supreme Court' (2005) 14 *Journal of Judicial Administration* (Australia) 220, 220-221.

⁸ See, generally, A. Begum, 'Equality of Employment in Bangladesh: A Search for the Substantive Approach to Meet the Exceptional Experience of Women in the Contemporary Workplace' (2005) 47 *Journal of the Indian Law Institute* 326, 326-50; A. Begum, 'Politics in Bangladesh: Need for a Reconceptualisation of the Politico-Legal Approach to Mitigate Women's Disadvantaged Positions in the Parliament' (2009) 44 *Journal of Asian and African Studies* (UK) 171, 171-198; A. Begum, 'Women's Participation in Union Parishad: A Quest for a Compassionate Legal Approach in Bangladesh from an International Perspective' (accepted for publication in *South Asia: Journal of South Asian Studies* (Australia)).

⁹ The Supreme Court (High Court Division) of Bangladesh has marked an important advancement for individual rights by addressing sexual harassment in the workplace and environmental issues through public interest litigation. See, for example, *Bangladesh National Women Lawyers Association v Government of Bangladesh and Others*, Writ Petition No. 5916 of 2008; *M Farooque v Bangladesh* (1996) 48 DLR438; *M Farooque v Bangladesh* (1997) BLD 1, 33 where the Supreme Court has expounded the right to life as enshrined in Articles 31 and 33 of the *Constitution* to encompass the right to live, inter alia, free from pollution of air and water. See also, *Nazma Ferdous v National Laboratories Ltd* (1999) PW (*Payment of Wages Act 1936*) Case No 102/99.

Bangladesh to provide a background to the problem. Section III focuses on the judicial approach to dealing with a number of cases on women's employment in Bangladesh. Section IV examines ways the judiciary of other jurisdictions has endeavoured to interpret laws and provide remedies in favour of women, while section V presents a conclusion.

II SOCIO-CULTURAL AND LEGAL CONTEXT IN BANGLADESH

Bangladesh is a parliamentary democracy of 150 million citizens of whom 50% are women.¹⁰ Traditionally, the country has been run along the lines of a patriarchal,¹¹ patrilineal and patrilocal¹² social system which, as elsewhere in the world, has promoted an unequal power relation between men and women, a rigid division of labour, and separate roles for the women. Society's excessive allegiance to those values, combined with poverty, ignorance and the lack of education have engendered women's subordination over the decades.¹³

Despite these social institutions and values, however, some important initiatives have been undertaken since independence in 1971 to improve the status of women. These include: a series of constitutional provisions guaranteeing equal opportunity in the public life; the right to freedom from discrimination and equal protection of law;¹⁴ and special privileges under an affirmative action plan to enhance their participation in the public life.¹⁵ A number of special

¹⁰ 'Bangladesh' <<http://www.infoplease.com>>; US Department of State, *Country Reports 2007* <<http://www.state.gov>>.

¹¹ Patriarchy is a concept, a socially established process through which men in general gain control over women – see A. E. Taslitz, 'Patriarchal Stories 1: Cultural Rape Narratives in the Court Room' (1996) *Southern California Review of Law and Women's Studies* 5, 393–5.

¹² These consider the son the potential supporter of the parents in old age and their successor and a symbol of the family prestige and heredity: see Begum (2009), above n 8, 175–6.

¹³ A. Begum, 'Rape: A Deprivation of Women's Rights in Bangladesh' (2004) *Asia-Pacific Journal on Human Rights and the Law* (Netherlands) 5, 29–40.

¹⁴ See, for details, *Constitution of the People's Republic of Bangladesh 1972*, Articles 27–8, Articles 9–10, Articles 28(2)–(4).

¹⁵ These are framed as enforceable fundamental rights under Chapter III of the *Constitution*. Article 29(3), for example, provides that '[nothing] in this article shall prevent the State from:

(a) making special provision in favour of any backward section of citizens for the purpose of securing their adequate representation in the service of the Republic;

(b) giving effect to any law which makes provision for reserving appointments ... for members of one sex any class of employment or office on the ground that it is considered by its nature to be unsuited to members of the opposite sex.'

Consequently, these provisions have been used to, inter alia, waiving tuition fees for female students up to the 12th grade, providing reserved seats in the parliament and local Council and introducing non-formal institutions

laws such the *Dowry Prohibition Act 1980*, the *Cruelty to Women (Deterrent Punishment) Ordinance 1983* and the *Women and Children Repression (Special Provisions) Act 2000* have also been enacted to address with cases of repression and violence against women.

Despite these laws, the overall record of women's rights in Bangladesh is very disappointing and often reflects disrespect for the rule of law. Patriarchal tradition remains a powerful force; discrimination based on gender is deeply rooted and a striking inequality in accessing employment opportunities is the leading factor depriving women of enjoyment of their de jure equality.¹⁶

Given the situation, judicial progressive intervention is not only desirable but also must be seen as inevitable in order to dismantle discrimination against underprivileged women. The following section examines the role of the judiciary in dealing with employment rights of women in Bangladesh as compared to other jurisdictions.

III JUDICIAL ENFORCEMENT OF WOMEN'S EMPLOYMENT RIGHTS IN BANGLADESH

The High Court Division (HCD) of the Supreme Court (SC), under its writ jurisdiction, is empowered to enforce equal rights to employment in the public life guaranteed by the Constitution.¹⁷ The HCD also grants remedies to different employment grievances by allowing public interest litigation.¹⁸ The Civil Courts are primarily responsible for dealing with industrial disputes and employment rights in the public life. The Labour Court (LC)¹⁹ also has limited

exclusively for women. See Bangladesh Statement (54th session of the Commission on the Status of Women, New York, 5 March 2010) <<http://www.un.org/womenwatch/daw/>>.

¹⁶ See generally Begum, above n 13, 1–48; Begum 2005, above n 7, 227.

¹⁷ Article 102(1), of the *Constitution*, for example, provides that '[the] High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any the fundamental rights conferred by Part III of this Constitution.' The fundamental rights provisions include equal employment opportunity and special affirmative measures to improve women status. See above n 14; above n 15.

¹⁸ Above n 9.

¹⁹ The Labour Court (a tribunal in practice) is empowered to adjudicate and determine an industrial dispute of the private organisation under *Bangladesh Labour Act 2006* (the 2006 Act). The 2006 Act provides that 'Labour court shall for the purpose of adjudicating and determining any matter or issue or dispute under this Act be deemed to be a civil court and shall have the same powers as are vested in such court under the code of civil procedure.' While in

jurisdiction over public service.²⁰ This section, however, only highlights a number of decisions of the Labour Court (LC) and the SC for the two fundamental reasons: there has been a dearth of reported cases on women's employment in Bangladesh; and the decisions of the civil courts are not reported.

Access to the decisions of the LC has been a problem in undertaking an in-depth study of the issue. After conducting a three-month personal investigation to collect the decisions of the LC in Rajshahi (a Division of Bangladesh), only two cases involving women employed in the public sphere were found. A slightly improved situation prevails in Dhaka, the capital city of Bangladesh, where a number of NGOs began to lodge public interest litigation in favour of women workers of the public and private sphere. For example, the Bangladesh Legal Aid and Services Trust (BLAST), a leading NGO in Bangladesh, filed a total of 71 cases with regard to women's illegal dismissal, payment of wages and maternity benefits,²¹ yet only two decided cases of a similar nature on women employees in the public sphere were collected from the LC of Dhaka.

The *Rouhson Case* in Rajshahi LC involved challenges to the illegal and discriminatory official order of the Bangladesh Sericulture Research and Training Institute that forced her to resign

dealing with offences, it can exercise the same power as of the court of a Magistrate of the First Class ... and of the Court of Session (highest criminal court in the District) for the purpose of imposing penalty. An appeal against the decision of the Labour Court lies directly with the Labour Appellate Tribunal. See *Bangladesh Labour Act 2006*, ss 215-218.

²⁰ Section 1 of Bangladesh Labour Court 2006 states:

(3) [this] Act shall not apply to-

(a) Offices of or under the Government;

...

(d) ... except, for the purposes of chapters XII, (Workers Compensation for Injury by Accident) XIII (Trade Union and Industrial Relations) and XIV (Disputes, Labour Court, Labour Appellate Tribunal, Legal Proceedings, etc) workers employed by the-

(i) Railway Department

...

(iv) Public works Department

...

(k) Workers employed in an establishment mentioned in clauses (b), (c) (d), (e), (f), (g) ...'

²¹ This information was collected by telephonic communication with Ms R. Sultana, the Legal Director of the BLAST: see A. Begum, *Protection of Women's Rights in Bangladesh: A Legal Study in an International and Comparative Perspective* (PhD thesis, University of Wollongong, 2005) 160.

from her former job and be re-employed in a lower post.²² In the second case, Ms Maloti received similar treatment from the Electricity Development Board for whom she had been working as a cleaner.²³ In both cases, the LC of Rajshahi was concerned with the issue of whether such acts violated women's right to employment as guaranteed by the law and upon examination of the issue it granted a favourable remedy to the two women by reinstating them in their former positions.²⁴ These decisions certainly reflect the LC's sincere commitment to remedy unfair practices in the workplace and send a positive message to women's current movement for freedom from discrimination in employment.

Nevertheless, the LC failed to condemn such discriminatory actions of the two public establishments and to take into account their hostile attitudes towards those underprivileged women which essentially help sustain stereotypical prejudices in the workplace. Neither did the LC address broader issues such as the dynamics of discrimination and its adverse impact on women, nor did it redress their emotional injuries so that future discrimination against women could be eliminated from or at least be reduced in the workplace.

In particular, the decisions in two other LC cases at Dhaka — in which two women were illegally retrenched without notice and without any reason being given for their dismissal — display the court's restrictive approach to resolving employment claims. In both cases, the LC of Dhaka granted partial compensation in regards to their payment of wages but did not grant any order for restoring their employment.²⁵ By failing to reinstate those women in their positions, the LC not only unduly 'extinguished' their legitimate rights, but also undermined a range of domestic and international human rights laws designed to eliminate all forms of unjust treatment

²² See *Mrs Rouhson Akhtar v Director, Bangladesh Sericulture Research and Training Institute, Rajshahi* (1991) IRO No 74/91 Labour Court, Rajshahi (unreported).

²³ *Ms Maloti Khatun v Electricity Development Board* (1999) ELA No 12/99, Labour Court, Rajshahi (unreported).

²⁴ *Ibid*; *Mrs Rouhson Akhtar v Director, Bangladesh Sericulture Research and Training Institute, Rajshahi* p(1991) IRO No 74/91 Labour Court, Rajshahi (unreported).

²⁵ See *Nazma Ferdous v National Laboratories Ltd* (1999) Case No-102/99 PW (*Payment of Wages Act 1936*), 2nd Labour Court, Dhaka; *Ms Ruba v National Laboratories Ltd* (1999) PW Case No-101/99, 2nd Labour Court, Dhaka (unreported cases).

in employment.²⁶ Inevitably, the consequences of this reinforce discriminatory practices against women in workplace by encouraging employers' unreceptive attitudes and unlawful actions.

One of the few cases on employment rights of women before the Supreme Court (SC) of Bangladesh was *Parveen v Bangladesh Biman Corporation* (the Corporation).²⁷ The case concerned the constitutional legality of the *Biman Corporation Employees (Service) Regulation 1979* that reduced the age of retirement of women from the Corporation. The formal approach to equality excessively dominated the SC's decision in this case.²⁸ According to the facts of the case, Parveen joined the Corporation as a stewardess in 1981. In 1995, a new Regulation 11 was promulgated, the *Biman Corporation Employees (Service) Regulation 1979*, which reduced the age of retirement of the flight stewardess to 35 from 57 but for stewards the retirement age was fixed at 45 years. The Corporation contended that the business of the Biman (Airbus) is competitive and 'the stewardesses are appointed to obtain maximum service for the Biman which has to be obtained from young and smart stewardesses ... with the growing of age of the stewardesses [women attendants] are not as efficient ... as their smartness with growing in age is lost.'²⁹ The Corporation, however, did not provide any evidence in support of its claims that only women's inefficiency and 'lack of smartness' increased with age, nor that their 'non-youngness' and 'lack of smartness' (as compared to that of men) with the increased age have adversely affected its profitability and other gains such as reputation. The underlying concern of the Corporation, therefore, reflects that the job is *barred* to the 'non-young' women, that is, those generally assumed to have children and domestic responsibilities.

Arguably, in Bangladesh as elsewhere in the world, in terms of appointment to various public and private positions of employment, there has been a common attitude among employers that considers 'working mothers' as 'less cost effective' compared to men and other women

²⁶ J. Mertus, et al, *Local Action Global Change* (1999, UNIFEM and the Center for Women's Global Leadership) 42.

²⁷ *Parveen v Bangladesh Biman Corporation* (1996) 48 DLR, 132–36.

²⁸ *Ibid*, 133–36.

²⁹ *Ibid*, 134.

candidates because of fear of extra costs (such as maternity leave) associated with them.³⁰ Unfortunately, none of these issues were dealt with by the SC.

The SC's approach was limited to only two issues: (i) whether Regulation 11 that reduced the age limit from 57 to 35 years had been made without lawful authority; and (ii) whether it violated Article 28 of the Constitution, which is about the right to freedom from discrimination on the grounds of, inter alia, gender. Drawing upon these issues, the SC chose to adhere to the 'similarly situated test' by placing exclusive emphasis on 'fixing an equal age' for Parveen and her male colleagues of similar ranks in the Corporation for retirement. It held that the Regulation 11 'has made a sharp discrimination between the persons rendering the similar service in violation of Article 28 [and deprived the petitioner from remaining] in service until expiry of age of 57 years'.³¹ Such an emphasis, while demonstrating the Court's credible approach to equality in employment, fails to resolve some obvious tenets that have damaging and exclusive consequences for women. First, whether 'losing smartness' with the age is unique to women? Are the physical attributes of male stewards above that assumption? Even if this were true, should it be morally and legally justified to exclude women (as a group, regardless of individual capacity) from employment at an earlier age on that basis, or whether there is any effective but less discriminatory way of ensuring Corporation's profitability and other gains?

In particular, the SC obscured the necessity to determine and remedy more fundamental issues: whether the Corporation's inaccurate assumptions (since no evidence has been put forward by the Corporation) about women's ability to work originated from their biological 'specialness' or from the cultural arrangements in which they stand; and whether such an assumption is compatible with the objectives of 'equality' or the affirmative measure as guaranteed by the Constitution. Every effort to eliminate discrimination, however, should take into account hidden

³⁰ See, eg, L. M. Finley, 'Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate' (1986) 86 *Columbia Law Review* 1118, 1120; J. Mertus, 'Human Rights of Women in Central and Eastern Europe' (1998) 6 *American University Journal of Gender, Social Policy and the Law* 369, 372; J. C. Williams, 'Deconstructing Gender' (1989) 87 *Michigan Law Review* 797, 797-811; C. J. Ogletree and R. de Silva-de Alwis, 'When Gender Differences Become a Trap: The Impact of China's Labor Law on Women' (2002) 14 *Yale Journal of Law and Feminism* 69, 69-96. See also 'Court Orders Air India To Reinstate Air Hostess', *Thaindian News* (online). 19 September 2010 <http://www.thaindian.com/newsportal/business/court-orders-air-india-to-reinstate-air-hostess_100430846.html>.

³¹ *Parveen v Bangladesh Biman Corporation* (1996) 48 DLR, 136.

factors which are not readily apparent but have a powerful influence on maintaining this negative assumption with its devastating consequences for women. There has been general agreement among legal academics and feminist scholars that such an assumption has originated from culture rather than from nature. Freedman, for example, argued that ‘particular human characteristics have no inherent social significance, and no social arrangements concerning sex differences are “natural” rather than culturally determined.’³² And the validity of this classification needs to be judged through reasoned analysis instead of through the ‘traditional, often inaccurate, assumptions about the proper roles of men and women’.³³

If that assumption is the result of culture, the question then becomes one of whether and how the Court should respond to it. In Bangladesh, there has been a social acceptance of treating women as a group subordinate to men,³⁴ a strongly embedded phenomenon which is also evident from the Corporation’s behaviour towards women but there is no indication in the judgment that the Court addressed or even recognised the issue. More fundamentally, the Court failed to evaluate the fact that Corporation’s degrading belief that only *women’s* ageing and their resulting ‘lack of smartness’ caused ‘an early decline in their ability to work’ demonstrated the influence of the existing dominant discriminatory assumptions about women’s work. Neither did it feel an obligation to foster a culture which condemns all forms of discrimination and provides due respect for female employees essential for the enjoyment of all related rights.

Thus, by failing to examine the ways in which the negative ideas are deeply embedded in the Corporation’s policies, the SC seemed to support the maintenance of such a social pattern that creates and perpetuates women’s subordination in employment. Second, and more importantly, when the Corporation placed special emphasis on women’s physical characteristics and assumingly their commensurate social roles as a justification for adopting such a discriminatory policy, the SC failed to properly deal with the issue. The cultural perception that the ‘mother is the exclusive child carer’ has a unique and damaging impact on women’s access to and ability to

³² A. E. Freedman, ‘Sex Equality, Sex Differences, and the Supreme Court’ (1983) 92 *Yale Law Journal* 913, 945.

³³ *Ibid*, 950.

³⁴ For example, see generally Begum (2004), above n 13, 1–48; Begum, ‘Dower Under Muslim Law: Principles and Practices in Bangladesh’ (1996) 1 *Chittagong University Studies* at 114–24; A Begum, ‘Rights of Women under Muslim Law: Principles and Practice in Bangladesh’ (1999) 1 *Islamic University Studies*, 19–37.

remain in employment. This particular perception not only restricts women's employability by placing almost exclusive child care responsibility on them but also enhances 'men only prospects' in employment by relieving them of this responsibility.³⁵ The SC ignored the need to rectify this attitude and, by failing to do so, it also undermined women's dual and significant contributions to society, which deserve to be valued and accommodated in the workplace.³⁶ At one level, women are to bear the primary responsibility for child care and maintenance of the home (domestic chores), on account of which they are able to afford less time, compared to men, for their career development, a situation which ultimately affects their pay scales, promotions and the like. At another level, they suffer different forms of discrimination on account of those same responsibilities. The SC failed both to recognise these special phenomena attendant upon women and to uphold any strong stand by referring to international precedents (except for one case from India) in favour of women.

Nevertheless, the 'biological and societal uniqueness' of women in itself should no longer rationalise discriminatory practices against women, especially when they are burdened with such an important role as child rearing and caring for the family and at the same time are penalised for that. Rather, there are compelling academic arguments³⁷ that the traditional standard of social values needs to be reviewed to accommodate their specific experiences in employment. Here, the core issue is not with the responsibility of 'motherhood' in itself but rather how the culture works as a powerful means to disproportionately affect women and how it reduces a woman's employability by increasing employers' eagerness for males due to women carrying out that responsibility.

Thus, rather than analysing the broad spectrum of the socio-cultural particularities that shape and give significance to women's work, the SC adopted a very narrow approach and compensated the possibility of eliminating discriminatory elements in employment. The decision did not incorporate either the idea of combining family and work, now a quite old concept worldwide in the workplace regulation.

³⁵ Mertus, above n 30, 372.

³⁶ How the Supreme Court of Canada recognised women's contribution to both worlds (public and private) and provided favourable remedies to a woman: see, eg, *Brooks v Canada Safeway Ltd* [1989] 1 SCR 1219.

³⁷ See Finley, above n 30; Mertus, above n 30; Williams, above n 30; Ogletree, above n 30.

Certainly, all of these omissions appear to demonstrate the Court's poor understanding of the contemporary approach to trial which promotes the way the judiciary should handle discriminatory cases against women, this is addressed shortly.

With globalisation and technological advances, the core pursuit of individual rights as well as national and international expectations has entrusted the judiciary with an affirmative obligation to deliver justice that accommodates the needs of different groups, and especially the target group (if any) for whom the particular law has been made.³⁸ The realisation of these objectives may require the court to develop a new approach through judicial activism even by going beyond formal provisions to suit the particular situation.³⁹ There are, however, strong arguments that such an action tends to insert an extra-legal element into their (judges) decisions and it 'may become a threat if it is not comprised of judges of the highest integrity'.⁴⁰ While such a contention needs to be valued by ensuring a cautious application of this activist approach, an analysis of the source of power of the Court and the role assigned to it by the Constitution suggests that the Court is entrusted with an obligation to balance the conflicting interests of different groups.⁴¹ This obligation also warrants that the court should remain alive to the needs and challenges of contemporary society while it preserves fundamental values of the rule of law.⁴²

The SC of Bangladesh marked an important advancement towards women protection from sexual harassment in 2009. In a leading judgment, the SC issued a set of guidelines to address sexual harassment in the workplace in which, inter alia, the authorities concerned were directed

³⁸ In interpreting and applying laws, the judiciary should have two basic objectives: (i) to interpret the law in a way that reflects its object and to be cautious about the adverse impact of the law on a particular group; and (ii) to deliver justice to accommodate the needs of different groups, and especially the target group for whom the particular law has been made. See, Begum, above n 7, 220; *Andrew v Law Society of British Columbia* [1989] 1 SCR 143 at 166-170.

³⁹ *R v Turpin* [1989] 1 SCR 1296, 13330-34.

⁴⁰ Aung Htoo, 'Seeking Judicial Power: With a Special Focus on Burma's Judiciary' (Occasional Paper No. 20, University of Hong Kong, 2011) 18. For details also see Begum, above n 7, 221-229.

⁴¹ Anand AS, 'Justice ND Krishna Rao Memorial Lecture Protection of Human Rights – Judicial Obligation or Judicial Activism' (1997) 7 *Supreme Court Cases Journal* 11, [9].

⁴² A. Byrnes, et al (ed), *Advancing the Human Rights of Women: Using International Human Rights Standards in Domestic Litigation* (1997, Commonwealth Secretariat: London) 26. In *Iyer v Justice AM Bhattacharjee* [1995] 5 SCC 457, the Court observed that 'the role of the judge is not merely to interpret the law but also to lay new norms of law and to mould the law to suit the changing social and economic scenario'. See also M. N. Rao, 'Judicial Activism' (1997) 8 *Supreme Court Cases Journal* 1, 6; *Unnikrishnan v State of A P* [1993] 1 SCC 645.

to form a five-member harassment complaint committee headed by a woman at every workplace and institution to investigate allegations of harassment of women and to take action against the accused persons.⁴³ This judgment apart, the SC neither developed any concept of a substantive approach to redress the dilemmas of the ‘equality provision’ of the Constitution nor imposed any compensatory obligation on the government⁴⁴ in the last 40 years to overcome women’s meagre status and different forms of exploitation in workplace. The constitutional affirmative measure and the women’s quota for the public service (10% of the first grade positions and 15% for other grades of employment) hint substantive equality but in practice its application is far too remote and has been a subject of intense controversy.⁴⁵ In addition, most of the discriminatory incidents have gone legally unchallenged for a number of reasons, including different socio-cultural setbacks as mentioned.

Nonetheless, these issues have not yet attracted judicial attention; there is no precedent in Bangladesh to suggest that the Court has issued any *suo moto* directives for the government or the employer to adopt measures in conformity with laws to eliminate discriminatory practices against women in employment. Yet, an application of this approach becomes imperative when the State acknowledges an obligation through its provision of special legislative or administrative initiatives to deal with women’s rights.⁴⁶

The following discussion shows how the equality jurisprudence has evolved and been reconstructed in judicial interpretation across nations to eliminate systematic discrimination and

⁴³ See, for details, *Bangladesh National Women Lawyers Association v Government of Bangladesh and Others*, Writ Petition No. 5916 of 2008.

⁴⁴ It has become a common practice in India to hold the government liable for compensating the victims of discrimination and other allegations. See for example, above n 2; *Saheli v Commissioner of Police, Delhi* (1990) AIR SC 513.

⁴⁵ For example, the quota remains unfilled and educated women fail to obtain jobs as per quota. M. K. Akter, ‘Bangladesh Has Offered Higher Education For Women But Not For Jobs’, *The Daily Star* (22 December 2002); Begum, above n 21, 143.

⁴⁶ A number of laws and provisions and government policies in Bangladesh are designed to promote women’s participation in public life which include, *The Constitution*, above n 14, Articles 28-29, *Labour Court Act 2006*, s 50; *Local Government Act 2009*, which provides reserved seats for women members of the Union Parishad (administrative unit in the local government) Committee and its different sub-committees; several government notifications on the role of women members that offer one-third of positions of chairperson of different Standing and Project Implementation Committees to women members and entitle them to participate in development activities. See for example, Begum (2010), above n 8; ‘Government Orders’ <<http://www.dwatch-bd.org>>; ‘Developments in the Law – Legal Responses to Domestic Violence: IV. New State and Federal Responses to Domestic Violence (1993) 106 *Harvard Law Review* 1528, 1557–8.

to enhance women's participation in employment. As part of that process, protective legislation⁴⁷ that effectively works to limit women's employability by 'giving way' to men's prospects for employment, has been struck down by the judiciary.⁴⁸ This new jurisprudence facilitates understanding about how the formal approach to 'equality' works to the disadvantage of women by limiting their job opportunities and how employers' stereotypical presumption about women's work should be resolved. These initiatives could be an important reference for addressing discrimination in employment against women in Bangladesh.

IV COMPARATIVE JUDICIAL DECISIONS REFLECTING SUBSTANTIVE APPROACH

Before advancing with this discussion, it is, however, important to acknowledge that despite progressive attempts by the judiciary discrimination against women in employment still persists worldwide. Nevertheless, it is evident that awareness of discrimination and for the need for legal sanctions to dismantle discrimination has been raised higher than ever before and judicial activism does have a significant contribution to achieve this end. This activist task has not only been limited to implementing the stated and inherent objectives of laws to eliminate discrimination in employment, but also extends to remedy the dynamics of discrimination. Pursuant thereto, the judiciary has provided very authoritative and expansive application of the substantive equality to the detection and remedy of discriminatory practices in the workplace.

Bangladesh and India share a similar socio-economic and cultural heritage, based largely on the British legal and judicial systems. Nevertheless, a noticeable gap exists between the general

⁴⁷ Protective legislation refers to those laws which regulate the terms and conditions of labour for women. These laws aim to, inter alia, facilitate women's parental responsibilities and protect their motherhood capacity. See, for detail, Mertus, above n 26, 8; J. L. Southard, 'Protection of Women's Human Rights under the *Convention on the Elimination of All Forms of Discrimination Against Women*' (1996) 8 *Pace International Law Review* 1, 55-6; see also B. A. Babcock, et al, *Sex Discrimination and The Law – Causes and Remedies* (1975, Little, Brown and Company: Boston) 19.

⁴⁸ Protective legislation, aims to, inter alia, facilitate women's parental responsibilities and protect their motherhood capacities, restricts women's work at some specific sectors, eg, women are not allowed to work at mining factories and hilly areas. Several studies claimed that maternity benefits reduce women's employability by increasing employers' eagerness for males because of extra cost associated with the benefit. See, eg, Williams, above n 30, 797-811, 805-11; R. J. Franklin, 'Jefferson's Daughters: America's Ambiguity Towards Equal Pay for Women' (2001) 11 *Southern California Review of Law and Women's Studies* 233, 247; Finley, above n 30, 1120; Ogletree, above n 30, 69-96.

approaches of the Bangladeshi and Indian courts to interpreting and applying laws that grant remedies to underprivileged groups. The Supreme Court (SC) of India has been renowned for its authoritative guidelines and liberal approach to preserving and developing rights.⁴⁹ More than six decades have passed, since then the SC of India recognised an obligation to facilitate remedies for women in exceptional circumstances by recommending modification to the existing legal and trial systems,⁵⁰ and in a number of cases, it made a significant move away from the traditional formal approach to equality. In the 1950s, for example, a decision considered formal equality out-dated and ineffective in ensuring women's factual equality where the Court observed that equal guarantees, subject to the rational relation to the object of law, may invoke different standards for different classes of peoples.⁵¹

A leading case on women's employment was *Nargeesh*, in which the Court declared a service regulation of Air India that made pregnancy a bar to the continuance in service as an airhostess unconstitutional.⁵² The Court held that such a bar is tantamount to obstructing the ordinary course of human nature and was 'not only a callous and cruel act but an open insult to Indian womanhood, the most sacrosanct and cherished institution.'⁵³ In *Labour Union*, a similar case in terms of the nature of claims, the Court noted that 'it is too late in the day now to stress the absolute freedom of an employer to impose any condition which he likes on labour.'⁵⁴ That time

⁴⁹ The Supreme Court, for example, has granted remedies to victims of sexual harassment in the absence of domestic law and forced the government to enact a law on sexual harassment; accepted and expounded public interest litigation to compensate the victim; holding the government liable for breach of public trust; invoked and enforced fundamental principles of state policies for long to grant socio-economic rights which are not enforceable under the *Constitution of India*. See *Vishaka v Rajasthan* (1997) AIR SC 3011-3017. In *Saheli v Commissioner of Police, Delhi* (1990) AIR SC 513, 516, the Court held that it is well settled now that the State is responsible for the torturous acts of its employees and ordered the State to pay RS75,000 (US\$1,647) to the mother of deceased victim Naresh within a period of four weeks from the date of judgment. See also *Rudul Sha v Bihar* (1983) AIR SC 1086, 1089. According to Rwezaura, 'India's public interest litigation has achieved an identity of its own in the jurisprudence of the subcontinent. This new jurisprudence provides a meaningful escape from the procedural strictures of the common law': see Byrnes, above n 42, 135; *Unnikrishnan v Andhra Pradesh* [1993] 1 SCC 645; *Iyer v Justice AM Bhattacharjee* [1995] 5 SCC 457; Grandle maintains that 'the expansive meaning of fundamental rights in India [is] due to the comprehensive approach of the Indian Supreme Court': See Grandle BB, 'Choosing to Help or to Advance Their Agenda: A Comparative Look at How the Supreme Courts of India and the United States Approach Violence Against Women' (2003) 24 Women's Rights Law Reporter 83, 83. See also Begum, above n 7, 229-230.

⁵⁰ See for detail, Begum, above n 7, 234.

⁵¹ *Budhan Choudhry v State of Bihar* (1955) AIR SC 191, cited in M. C. Nussbaum, 'International Human Rights Law in Practice: India: Implementing Sex Equality Through Law' (2001) 2 *Chicago Journal of International Law* 35, 47.

⁵² See generally *Air India v Nargeesh Mirza* (1981) AIR SC 1829, 1829-1840.

⁵³ *Ibid*, 1831; *Mackinnon Macenzie v Audrey D' Costa* (India) (1987) SC 1281, 1281-1289.

⁵⁴ *Bombay Labour Union v International Franchies Pvt* (1966) AIR SC 942, 944.

had clearly passed, and employers are subject to the law and the courts. In a recent judgment, the Bombay High Court directed Air India to reinstate (with complete back wages) an air hostess, who was dismissed twenty years ago.⁵⁵

In *Indra Sawhney*, the Court compensated a woman by mandating the State to undertake a practical measure such as developing educational institutions to overcome the unequal position of the handicapped women in employment.⁵⁶ The Court's recognition of women's socio-economic disadvantages demonstrates its strong commitment to the achievement of their factual equality by removing traditional discriminatory barriers to employment. In another decision, the Court urged the government to resort to compensatory State action aiming to make people equal in real life, people who are 'unequal in their wealth, education or social environment'.⁵⁷ At a time when the women's movement for 'equality' is gaining momentum, perhaps the most compelling impetus is the acknowledgement by the higher judiciary of the need for the State to develop appropriate measures to achieve the result.

Consistent with the Indian approach, it has been an established judicial practice across nations to invoke different practical methods to remedy women's unique concerns in employment. The SC of Canada, for example, developed a different mode for measuring the impact of a neutral requirement of Canadian National Railway (CNA) on women. The Court, in *Canadian National Railway*, placed emphasis on the issue of whether undertaking a compulsory 'strength-test', a factually neutral precondition to attain a job in the CNA, had discriminatory effect on women because of their inherent physical characteristics. By unveiling an unequal and disparate link between CNA's 'legal equal' requirement and women's practical-biological characteristics, the Court declared that the employment policy to be discriminatory and mandated the CNA to

⁵⁵ Air hostess Jatav had been working with the Air India since 1983. She had applied for paid leave from 1 June 1988 to 1 July 1988 which she extended up to October 1990, and she delivered two children during the period. 'She was dismissed from service in December 1992, on the grounds that she had remained absent without leave for over 10 days.' See for details, 'Court Orders Air India To Reinstate Air Hostess', above n 30.

⁵⁶ *Indra Sawhney v Union of India*, [36], [39], cited in R. Kapur and B. Cossman, *Subversive Sites: Feminist Engagements with Law in India* (1996, SAGE Publications: London) 180.

⁵⁷ *Kerala v Thomas* (1976) 1 SCR 906, 514.

introduce a special employment program to enhance women's positions in blue-collar jobs until their representation reaches the target level.⁵⁸

In attempts to restrict an inappropriate application of 'equality' in employment in the public and private life, the SC of Canada advanced the two-fold standard and bona fide occupational requirement (BFOR) under the Charter and a range of Human Rights Codes.⁵⁹ The two-fold standard requires the court, in applying legislation in the workplace, 'to decide at the outset into which of two categories the case falls: (i) 'direct discrimination', where the standard is discriminatory on its face; or (ii) 'adverse effect discrimination', where the facially neutral stand discriminates in effect' and accordingly grant remedies.⁶⁰ The BFOR places the burden of proof of discrimination in employment on the employer. The three-step test of BFOR requires an employer to prove his/her prima facie non-discriminatory practice by showing that: (i) the adopted measure is rationally connected with the purpose of the job; (ii) the particular measure was taken with honest and good faith and was necessary for the fulfilment of the legitimate purpose of the work; (iii) without such measure it was impossible to accommodate individual employees, and to avoid undue hardship to the employer.⁶¹

Even though organisations' liabilities and government's special/affirmative measures are qualified by certain strict restrictions,⁶² and have been intensely debated and contested since their introduction, they have made a significant contribution to reducing discrimination and intolerant attitudes in the workplace.⁶³

To enhance women's participation in employment, the Court also developed an employment equity program which is designed to work in three ways.⁶⁴ The first test/action imposes

⁵⁸ *Action Travail des Femmes v Canadian National Railway (CNR)* [1987] 1 SCR 1114, 1124-26, 1143-46.

⁵⁹ See generally Hucker, above n 6, 547-70.

⁶⁰ *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] SCCDJ LEXIS 67, 16; see also Hucker, above n 6, 553.

⁶¹ *Ibid.*

⁶² Employers' liabilities and government's affirmative measures are subject to, for example, bona fide occupational qualification (BFOQ) as mentioned and 'compelling needs and specific intended outcomes' respectively. BFOQ signifies that the employers may escape their liabilities in disparate impact cases if they prove that their employment practices that result in discrimination is 'job related' and 'consistent with business necessity'.

⁶³ See, for example, *Adarand Constructor v Pena* (1995) 515 U.S. 200.

⁶⁴ *Action Travail des Femmes v Canadian National Railway (CNR)* [1987] 1 SCR 1114.

mandatory employment equity on the employer to recruit women and minimise the possibility of future discrimination. The second test aims to change the negative attitudes of employers regarding women's ability to work and to consider that women are capable of performing modern jobs beyond their traditional roles. The third test suggests creating a 'critical mass' through recruiting more women. The last mode 'will eliminate the problems of "tokenism"; it is no longer the case that one or two women, for example, will be seen to "represent" all women'.⁶⁵

Similarly, the substantive approach has been a dominant model in numerous judicial decisions of the European Court of Justice (ECJ) for redressing women's disadvantaged experiences in employment.⁶⁶ The ECJ, for example, in *Badeck*, was concerned with issues of whether regional rules giving priority to female candidates in areas of public service where they are underrepresented derogate from the principle of equal treatment.⁶⁷ The respondent contended that there was no hard and fast rule to give priority to female candidates; rather the law put emphasis on the 'best-qualified and most suitable candidate ... [which] does not prevent priority being given to a male candidate if he is the most suitable for the post to be filled.'⁶⁸ Rejecting that contention, the ECJ maintained:

... it is an obligation on the authorities to adopt a women's advancement plan to correct a situation of underrepresentation in particular sectors and grades in a career group and which imposes a requirement to encourage the recruitment and promote the careers of female employees.⁶⁹

More importantly, the ECJ, in *Kalanke*, developed three core concepts of affirmative action to combat women's insignificant positions in public life. The first model aims to provide career guidance and to improve vocational training. The second model seeks to combine and create a favourable balance between the family and professional life and a better distribution of those

⁶⁵ Ibid, 1143–44.

⁶⁶ See, eg, *Enderby v Frenchay Health Authority and Another* [1993] IRLR 591; *Commission of the European Communities v Kingdom of Denmark* (EU) (1985) ECJ CELEX LEXIS 6633; *Commission of the European Communities v French Republic* (EU) (1988) ECJ CELEX LEXIS 6958. The ECJ, in *Enderby*, invoked this mode in considering the difference in pay between two jobs of equal value, one was performed mostly by women and another predominantly by men. The Court favoured women, observing that '... the pay negotiations had not been conducted with the deliberate intention of treating women less favourably, but ... the employer's pay policy indirectly discriminated against women in that the outcome to pay negotiations had an adverse effect upon women and was not justifiable': *Enderby v Frenchay Health Authority and Another* [1993] IRLR 591, [5].

⁶⁷ *Badeck and Others* [2000] All ER (EC) 289, [1].

⁶⁸ Ibid, [37].

⁶⁹ Ibid, [38].

responsibilities. The third action takes on a compensatory nature by providing preferential treatment to the disadvantaged group.⁷⁰ An affirmative action was also well explained in *Marscall*, where a female teacher was given preference in being employed over a male teacher of equal qualification. The Court made an objective assessment of women's specific phenomenon and observed:

[I]t appears that even where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life and the fear, for example, that women will interrupt the careers more frequently, that owing to household and family duties they will be less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breastfeeding. For these reasons, the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chances.⁷¹

Australia may be another leading example in adopting this approach to equality in employment, receiving authoritative recognition and long being given expression in numerous judicial decisions. In *Australian Postal Commission* (APC), the Court of Appeal, for example, examined the adverse impact of APC's neutral policies on two women where they were denied permanent appointments due to their lack of medical fitness — a specified bodyweight measured by height and sex being specified in APC's policy.⁷² The Court favoured them by observing that the requirements may fairly measure the skills of all candidates but operate to disqualify women because of their inherent physical characteristics.⁷³ In *Municipal Officers' Association of Australia & Anor*, the Equal Opportunity Commission maintained that '[formal] equality before the law is an engine of oppression destructive of human dignity if the law entrenches inequalities in the political, economic, social, cultural or any other field of public life'.⁷⁴

Although some of the above judicial findings are largely the consequence of recently enacted legislation, the courts of many nations have developed new ideas and tests to combat

⁷⁰ *Kalanke v Bremen* [1996] All ER (EC) 66, [9].

⁷¹ *Marscall v Land Nordrhein-Westfalen* [1997] All ER (EC) 865, [29]-[30].

⁷² *Dao v Australian Postal Commission* [1987] 162 CLR 317, 318.

⁷³ *Ibid.* See also *Australian Iron and Steel Pty Ltd v Banovic* [1989] 168 CLR 165, 166, 205–208.

⁷⁴ *Municipal Officers' Association of Australia & Anor* (1991) EOC (92-344) 78,399. See also, *Australian Journalists Association* (1988) EOC (92-224) 77,124. The Commission observed that the under-representation of women in the AJA itself suggests that something more than the mere equal opportunity is required to attain the equal result of participation in its affairs: *Australian Journalists Association* (1988) EOC (92-224), 77, 126.

discrimination in employment. For example, the United States Supreme Court, in a series of decisions, treated pregnancy as any other disability or condition that can result in a loss for the employer and granted women qualified rights to reinstatement following childbirth,⁷⁵ even though there are arguments on issues as to whether and how far pregnancy could be equated with disability since the ability of women to get pregnant is an ability additional to those of men, rather than a loss of ability.⁷⁶

Most importantly, ‘rude behaviour’ in workplaces in numerous jurisdictions has become acknowledged as actionable and compensable discrimination,⁷⁷ and there are convincing arguments for treating it with similar legal weight to incidents of sexual harassment since such conduct is frequently directed at an individual based on the basis of gender.⁷⁸ Based on these developments, productive and sophisticated approaches have also been employed by the courts to evaluate gender-specific claims and offer proper remedies. Many United States courts, for example, used the ‘reasonable woman’ standard instead of ‘reasonable person’ in dealing with gender specific claims such as sexual harassment.⁷⁹

In addition, it has become a common judicial culture worldwide to invoke international provisions to remedy women’s exceptional experiences, including sexual harassment in the workplace.⁸⁰ For example, in a leading judgment in 1997, the SC of India, in the absence of domestic legislation, relied on the provisions of the *Convention on the Elimination of All Forms*

⁷⁵ See, eg, *California Federal Savings et al v Guerra* 479 US 272 (1987); *International Union, United Automobile et al v Johnson Controls, INC* 499 US 187 (1991).

⁷⁶ C A Littleton, ‘Reconstructing Sexual Equality’ (1987) 75 *California Law Review* 1279, 1306. ‘... pregnancy is not an illness. It is a normal often planned, part of people’s lives. Giving women maternity leave should not be linked to whether or not employers have good policies for sick employees. The workplace must acknowledge that women have children rather than suggest that they are to forego childbearing or just cope with the difficulties during non-working hours.’ See, for detail, S. J. Kenney, ‘Pregnancy Discrimination: Toward Substantive Equality’ (1995) 10 *Wisconsin Women’s Law Journal* 351, 362.

⁷⁷ Canada, for example, provides remedies for psychological harassment in workplace. Psychological harassment includes, inter alia, ‘... hostile or unwanted conduct, verbal comments, actions or gestures, that [affect] an employee’s dignity ... and results in a harmful work environment for the employee.’ See *An Act to Amend the Act Respecting Labour Standards and Other Legislative Provisions 2002*, Ch 80, s 81.18.

⁷⁸ M Thornton, ‘Sexual Harassment Losing Sight of Sex Discrimination’ (2002) 26 *Melbourne University Law Review*, 113–4.

⁷⁹ See, eg, *Ellison v Brady* (1991) 924 F 2d 872, even though *Ellison’s* endorsement caused controversy and was rejected in many cases such as in *Harris v Forklift Systems* 510 U.S. 17; *Oncale v Sundowner* (1998) 523 US 75.

⁸⁰ See, eg, *Aldridge v Booth* (1988) (Australia) 80 ALR 1; *Southern v Dept of Education Employment & Training* (1993) (Australia) EOC (92-491) 79,534, 79534–36.

of *Discrimination Against Women* (CEDAW) in remedying sexual harassment in the workplace.⁸¹ It provided a set of guidelines emphasising employers' duties to eliminate harassment, including the ruling regarding the creation of a workplace-based Complainants Committee to be headed by a woman. To avoid any undue influence of employers, the Court also recommended involving a third party, an NGO or other body that is familiar with the issue, on the Committee.⁸²

Inevitably, the above judicial decisions in other jurisdictions reflect the impression that the efficiency of the judiciary is imperative to realise women's rights. The dearth of employment cases on women in Bangladesh, despite the violation of laws, therefore warrants strong judicial intervention to develop an anti-discrimination culture in employment. However, given a gulf of inconsistency between developed and developing countries in regard to socio-economic realities, one may doubt whether the standard of the former should be applied to the latter. Yet this argument may not be relevant to the liberal interpretation of laws which inherently aim to protect a vulnerable group in the community.⁸³ Moreover, this argument can logically be blurred by reference to numerous judicial decisions of their neighbouring country, India, where a largely similar situation prevails. The SC of India, in a range of decisions, directed the central government to take immediate steps to provide the benefits and advantages of law in favour of employees.⁸⁴ Most significantly, the SC, on many occasions, even granted socio-economic rights which are not enforceable under the *Constitution of India* by elaborating the *Directive of State Principles*.⁸⁵

⁸¹ *Vishaka v Rajasthan* (1997) AIR SC 3011-3017. See also *Longwe v International Hotel* [1993], decision of the High Court of Zambia, 4 *Law Reports of the Commonwealth* 221. In this case, the Zambian High Court, relying on CEDAW declared the policy of the International Hotel discriminatory against women. The hotel policy had been denying women's entry to the hotel unless males accompanied them, which was not applicable to men. See also *Ephrohim v Pastory* [1990], decision of the High Court of Tanzania, *Law Reports of the Commonwealth (Const)* 757.

⁸² *Vishaka v Rajasthan* (1997) AIR SC 3011-3017.

⁸³ *Andrew v Law Society of British Columbia* [1989] 1 SCR 143, 178.

⁸⁴ For example, in *Labourers Working on Salal Hydro Projec v State of Jammu and Kashmir*, the Court went on to conclude that, '[we] would therefore direct the Central Government to tight up its enforcement machinery and to ensure that thorough and careful inspections are carried out by fairly senior officers at short intervals with a view to investigating whether the labour laws are being properly observed, particularly in relation to workmen employed ...': *Labourers Working on Salal Hydro Projec v State of Jammu and Kashmir* [1983] Writ Petition (Criminal) No-1179.

⁸⁵ See, eg, *Unnikrishnan v State of A P* [1993] 1 SCC 645; *Iyer v Justice AM Bhattacharjee* [1995] 5 SCC 457 (observing that '... the role of the judge is not merely to interpret the law but also to lay new norms of law and to mould the law to suit the changing social and economic scenario ...').

Thus it seems realistic to suggest that in applying and interpreting laws and employment policies, the judiciary of Bangladesh should consider the stated and inherent objectives of laws as well as their impact on women and take into account contemporary approaches to trial. In pursuance of constitutional mandates for special measures for women, the Court should issue proper directives which must possess the qualities of inspiring and binding the government to assume positive responsibility for the underprivileged. And this responsibility should require the government to develop special educational and other relevant institutions exclusively for women, as in India,⁸⁶ to promote their legal capacity to gain, maintain employment and utilise opportunities that employment should offer (for example, advancement). For a similar objective, *suo moto* judicial guidelines for employers can also help eliminate, or at least reduce, discrimination and all unwelcome sexual advances against women in the workplace. While the SC's recent directive on sexual harassment is a significant development in the history of judiciary for protecting women from disgrace and humiliation at work, and is the beginning of an era, it is hoped that the courts will be more and more inclined to redress the dynamics of discrimination and grant compensation 'as a matter of right and as a necessary consequence of the mental injury' to women.

V CONCLUSION

Obviously, any effort, either legislative or administrative, to advance women sounds hollow as long as it ignores the need to recognise the unique phenomena in a traditional culture (as in Bangladesh) that attend women and which has eventually made the 'equality' quite difficult and even sometimes impracticable for them. The situation is further exacerbated by the absence of any progressive judicial approach searching for an accommodation of women's specific perspectives in the public sphere. Experiences, however, in foreign jurisdictions demonstrate a global judicial consensus on the recognition and accommodation of those perspectives in employment. As part of the process, the traditional standard of measuring 'equality' was

⁸⁶ In India, there are 18,000 exclusive colleges for women, '189 Women's ITIs [Indian Technical Institute] and 211 Women's Wings in general ITIs ...' and 45 women's Polytechnics. For detail, see *Education in India* (2012) Wikipedia <http://en.wikipedia.org/wiki/Education_in_India>; Initial Reports of State Parties, India, (CEDAW/C/IND/1, 10 March 1999) [173]-[174]. Bangladesh has also introduced some technical institutions exclusively for women but these are insignificant compared to the current need and the number of women.

modified in the 1950s and a new approach has been incorporated in the judicial culture worldwide to combat women's disadvantaged experiences in employment. Quite in contrast, Bangladesh's judiciary still adheres to the literal approach to interpreting laws and has failed to deliver any dynamic precedent in the last 40 years that could cope with women's contemporary needs and values in the workplace. Yet, the repeated prohibition of sex discrimination in numerous international treaties, national legislation and court practices implies that 'there is a strong [necessity] to end discrimination on the basis of gender.'⁸⁷ Recognising this necessity, this paper recommends the reconceptualisation of the way in which the judiciary in Bangladesh deals with women's employment claims. This reconceptualisation must reflect contemporary judicial practices of foreign jurisdictions and the substantive approach which upholds the concern for equality of result and suggests that the extensive accommodation of women's exceptional phenomena into the workplace is the only way to achieve equality.

⁸⁷ Mertus, above n 26, 42.

FIXING THE FIDUCIARY OBLIGATION: THE PRESCRIPTION-PROSCRIPTION DICHOTOMY

DEVDEEP GHOSH

ABSTRACT

The nebulous nature of the field of equity has been highlighted by Owen J's laborious exposition on the fiduciary obligation in the case of *Bell Group Limited (in liq) v Westpac Banking Corporation* where he effectively questions the traditional model of labelling the fiduciary obligation as strictly proscriptive. This article seeks to analyse the progressive development in this field of equitable jurisprudence, compare and contrast it with similar debates in other Commonwealth jurisdictions and finally, arrive at a conclusion as to the viability of Owen J's principle in the context of Australian fiduciary law.

I INTRODUCTION

A fiduciary relationship is one that is based on trust and confidence.¹ Such a relationship subsists between two persons when one (the fiduciary) has ‘undertaken to act in the interest of the other’ (the beneficiary).² The fiduciary obligation is essentially a tool implemented by the courts to protect those relationships where one has the discretion to control or manage the asset of another to his detriment. The ‘basic model’³ of the fiduciary obligation has traditionally been twofold:⁴ the duty to ensure that his/her private interests do not conflict with his or her role as a fiduciary;⁵ and the duty to not obtain any advantage by virtue of his or her position as a fiduciary.⁶

¹ Butterworths, *Halsbury's Laws of Australia*, vol 10 (at 20 May 2008) 185 Equity, ‘4 Fiduciaries’ [185 - 665].

² *Bell Group Limited (in liq) v Westpac Banking Corporation (No 9)* (2009) 70 ACSR 1, [4552] (Owen J).

³ *Ibid* as quoted in R Langford, “‘The Fiduciary Nature of the Bona Fide and Proper Purposes Duties of Company Directors’”: *Bell Group Ltd (in liq) v Westpac Banking Corp' (No 9)*’ (2009) 31 *Australian Bar Review* 236, 244.

⁴ P. Finn, ‘The Fiduciary Principle’, in T. Youdan (ed), *Equity, Fiduciaries and Trusts* (1989, Carswell: Toronto) 1. See also *Breen v Williams* (1996) 186 CLR 71, 113 (Gaudron and McHugh JJ).

⁵ *Phipps v Boardman* [1967] 2 AC 46. Hereinafter referred to as the ‘no conflict rule’.

⁶ *Chan v Zacharia* (1984) 154 CLR 178; *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41. Hereinafter referred to as the ‘no profit rule’.

As is evident, fiduciary duties have traditionally been explicitly proscriptive – they tell the fiduciary what not to do.⁷ Over judicial discourse, the only exception to this rule has been the relationship between a trustee and a beneficiary where prescriptive obligations are imposed upon the trustee.⁸ However, as shall be elaborated upon later in this paper, in *Bell Group Limited (in liq) v Westpac Banking Corporation (No 9) (Bell Group case)*,⁹ Owen J stipulated that in special circumstances, additional fiduciary duties may be imposed which may be prescriptive in nature.¹⁰

First, the researcher intends to look at the traditional conception of the fiduciary duty which was exclusively proscriptive in contradistinction to judgments in Commonwealth jurisdictions in favour of prescriptive duties which necessitate positive action.¹¹ The latter is part of a series of judicial decisions in Commonwealth jurisdictions such as Canada's which seek to impart a greater degree of flexibility to the fiduciary obligation. Courts in Canada have donned the activist hat and endeavoured to include prescriptive duties within the spectrum of fiduciary duties.¹² Similar arguments have been made by legal scholars.¹³ The High Court of Australia has, however, rejected the activist approach and adhered to the traditional conception of fiduciary duties being exclusively proscriptive. This paper seeks to examine the 'strictly proscriptive' path taken by the High Court of Australia in light of the judgment in the *Bell Group case*.¹⁴

II EXPLAINING THE PRESCRIPTIVE-PROSCRIPTIVE DICHOTOMY

The underlying objective of the fiduciary concept is to protect the beneficiary by holding the fiduciary to certain standards of loyalty. Should the fiduciary undertake a venture in the pursuit of private profit which is in conflict with his role as a fiduciary, it might be near impossible for

⁷ R. Nolan, 'The Proper Purposes Doctrine and Company Directors', in B Rider (ed), *The Realm of Company Law* (1998, Kluwer Law International: London) 12. See also C. Harpum, 'Fiduciary Obligations and Fiduciary Powers: Where Are We Going?' in P. Birks (ed), *Privacy and Loyalty* (1997, Clarendon Press: Oxford) 145.

⁸ Samantha Hepburn, *Principles of Equity and Trusts* (2nd ed, 1997) 289.

⁹ *Bell Group Limited (in liq) v Westpac Banking Corporation (No 9)* (2009) 70 ACSR 1. Hereinafter referred to as 'Bell Group case'.

¹⁰ *Ibid*, [4569] (Owen J).

¹¹ H. Ford and W. Lee, *Principles of the Law of Trusts* (3rd ed, 2001) [9000].

¹² J. Brebner, "'Breen v Williams': A Lost Opportunity or Welcome Conservatism?' (1996) 3 *Deakin Law Review* 237.

¹³ R. Lee, 'Rethinking the Content of the Fiduciary Obligation' [2009] *Conveyancer and Property Lawyer* 236.

¹⁴ *Bell Group Limited (in liq) v Westpac Banking Corporation (No 9)* (2009) 70 ACSR 1.

the courts to adjudge whether such action of the fiduciary has detrimentally affected the beneficiary. That is why the Courts have prohibited fiduciaries from entering into any situation that even remotely envisages a conflict of duty or potential private gain at the expense of the beneficiary.¹⁵ Matthew Conaglen captured the essence of the fiduciary obligation when he described it as a system of insulation to prevent the fiduciary's digression from his 'non-fiduciary duties'.¹⁶ Thus the role played by the fiduciary obligation is to 'prophylactically deter fiduciaries from being tempted to consider self-interest over loyalty'.¹⁷ It seeks to supplement the performance of the fiduciary's non fiduciary duties.¹⁸

This being said, it is wrong to assume that a fiduciary owes no other duty to the beneficiary. These non-fiduciary duties stem from contract, tort or other legal mechanisms and may be prescriptive in nature. However, these duties are not explicitly based on the relationship of trust, loyalty and confidence and therefore cannot be classified as fiduciary in nature.¹⁹

A Oh Canada!

In the opinion of the Supreme Court of Canada in *McIrney v. MacDonald*,²⁰ a fiduciary is encumbered with the prescriptive duty of acting with 'the utmost good faith and loyalty'²¹ towards the beneficiary. In this case, a doctor refused to give a patient access to medical records that were prepared by the patient's previous physicians. The Court first ruled that the relationship between a doctor and patient was fiduciary in nature as it was based on trust and confidence.²² Furthermore, it was held that providing access to medical records was incidental to the fiduciary duty imposed upon the doctor.²³

¹⁵ D. Jensen, 'Prescription and Proscription in Fiduciary Obligations' (2010) 21 *King's Law Journal* 333, 334.

¹⁶ M. Conaglen, 'The Nature and Function of Fiduciary Loyalty' (2005) 121 *Law Quarterly Review* 452, 453.

¹⁷ *Maguire v Markonis* (1997) 188 CLR 449, 495 (Kirby J) as quoted in G. Dempsey and A. Geinke, 'Proscriptive Fiduciary Duties in Australia' (2004) 25 *Australian Bar Review* 1, 2.

¹⁸ Conaglen, above n 16.

¹⁹ Finn, above n 4, 1, 25, 28.

²⁰ *McIrney v. MacDonald* (1992) 93 DLR (4th) 415.

²¹ *Ibid*, 423 (La Forest J).

²² *Ibid*.

²³ *Ibid*.

This pronouncement is not without criticism in Canadian legal circles with legal scholars having termed the approach as ‘a conceptual muddle’.²⁴ It has been lambasted within judicial circles as well. In *A(C) v. Critchley*,²⁵ the Crown placed orphans in the care of certain foster parents who sexually abused them. The Trial Court held the Crown liable for breach of their fiduciary duty by inferring a positive fiduciary obligation on the Crown to look after the children. The British Columbia Court of Appeal reversed the Trial Court judgment. It was held that there was no breach of fiduciary duty as the Crown and its employees were found to have acted honestly.²⁶ Notably, it was held that the Supreme Court had not adopted a principled approach in extending the ambit of the fiduciary obligation and that the inclusion of prescriptive duties was not doctrinally sound.²⁷

B ‘The Law in this Country’

*1 Breen v Williams*²⁸

The outright rejection of importing prescriptive duties into the ambit of Australian fiduciary law was stressed upon in *Breen*.²⁹ In this case, a lady was unhappy with her breast implants and sued the manufacturers of the implants in the United States. To substantiate her claim, she was required to attach her medical records but was denied access to them by her doctor. The matter reached the High Court where she argued that a fiduciary relationship existed between doctors and patients and that part of the fiduciary obligation imposed upon a doctor was the positive duty to grant the patient right to his or her medical records. The Canadian authority of *McIrney*³⁰ was cited in support of this claim. The High Court of Australia, however, dismissed the suit. While the Honourable Court acceded to inferring a fiduciary relationship between doctors and

²⁴ J. Berryman, “‘Equitable Compensation for Breach by Fact-Based Fiduciaries’”: Tentative Thoughts on Clarifying Remedial Goals’ (1999) 37 *Alberta L Rev* 95 as quoted in G. Dempsey and A. Geinke, ‘Proscriptive Fiduciary Duties in Australia’ (2004) 25 *Australian Bar Review* 1, 4.

²⁵ *A(C) v. Critchley* (1998) 166 DLR (4th) 475.

²⁶ *Ibid*, 500 (McEachren CJBC).

²⁷ *Ibid*, 496.

²⁸ *Breen v Williams* (1996) 186 CLR 71.

²⁹ *Ibid*.

³⁰ *McIrney v. MacDonald* (1992) 93 DLR (4th) 415.

patients,³¹ it refused to acknowledge a prescriptive duty as part of the fiduciary obligation.³² Brennan CJ rejected the Canadian ruling saying that it did not ‘accord with the law of fiduciary duty as understood in this country’.³³ Gummow J expressed his disagreement in even stronger words, saying that ‘it would be to stand established principle on its head’ to say that a doctor, as a fiduciary, was burdened with the positive obligation to act in the patient’s best interest.³⁴ Meagher JA was of the opinion that the Canadian decision lacked any concrete doctrinal foundation.³⁵ It was remarked that Canadian and American courts sought to develop the fiduciary concept on an ad hoc basis with the objective of reaching a preferred result in the matter at hand and that their conception of fiduciary obligation could not be applied in Australia.³⁶ Importing positive obligation into the fiduciary concept was seen as embarking on a slippery slope since it would affect all other categories of fiduciary obligations.³⁷

2 *Pilmer v Duke Group Ltd (in liq)*³⁸

Another landmark decision on this point of law was that of the High Court of Australia in *Pilmer*.³⁹ In this case, the plaintiff invested in a company on the advice of a financial advisor. Soon after this investment, the share price plummeted and the plaintiff suffered a sizeable loss. He went on to sue the advisor with the claim that he had breached his fiduciary duty by not exercising due care in preparing the valuation report on which the plaintiff had relied. The Honourable Court adopted the principle of law laid down in *Breen*⁴⁰ in the following words:

[f]iduciary obligations are proscriptive rather than prescriptive in nature; there is not imposed upon fiduciaries a quasi tortious duty to act solely in the best interests of their principals.⁴¹

³¹ *Breen v Williams* (1996) 186 CLR 71, 83.

³² *Ibid*, 113 (Gaudron and McHugh JJ).

³³ *Ibid*, 83 (Brennan CJ).

³⁴ *Ibid*, 137 (Gummow J).

³⁵ *Ibid*, 570 (Meagher JA).

³⁶ *Ibid*, 95 (Dawson and Toohey JJ).

³⁷ *Ibid*, 112 (Gaudron and McHugh JJ).

³⁸ *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165.

³⁹ *Ibid*.

⁴⁰ *Breen v Williams* (1996) 186 CLR 71, 83.

⁴¹ *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 197 (McHugh, Gummow, Hayne and Callinan JJ).

3 *The Bell Group case*⁴²

Just when it seemed rather cut and dry that fiduciary duties can only be proscriptive in nature, Owen J, in the *Bell Group* case,⁴³ raised the question of prescription within the fiduciary obligation yet again.⁴⁴ The central focus of this matter was the fiduciary relationship that subsisted between a director of a company and the company. Historically, equity has imposed on the director of a company the duty to act bona fide in the company's interests⁴⁵ and the duty to exercise powers for purposes for which they were expressly or impliedly conferred⁴⁶ in addition to the no conflict rule and no profit rule.⁴⁷ The former duties are classified as fiduciary in nature despite being prescriptive as they stem from the relationship of trust and loyalty that exists between a director and company. In light of the decisions in *Breen*⁴⁸ and *Pilmer*,⁴⁹ the fiduciary character of the abovementioned duties was thrown into doubt. Owen J attempted to reconcile this apparent contradiction in his judgment in the *Bell Group* case.⁵⁰ The Bell Group was a group of companies out of which some companies had borrowed from a bank with assets of the group as security for the transaction. The directors therefore 'acted in the overall interests of the corporate group but not in the interest of the individual companies'.⁵¹ On liquidation, the banks realised their securities. However shareholders and creditors of some individual companies within the group believed that they had been prejudiced by the alleged breach of the directors' fiduciary duties to act bona fide in the interest of the company and for proper purposes. It was argued before the Supreme Court of Western Australia that in light of the decisions in *Breen*⁵² and *Pilmer*,⁵³ the bona fide rule and the proper purposes rule could no longer be characterised as fiduciary as they were prescriptive in nature. However Owen J dismissed this argument and found that these duties were indeed fiduciary in nature. In doing so, he qualified the rulings of

⁴² *Bell Group Limited (in liq) v Westpac Banking Corporation (No 9)* (2009) 70 ACSR 1.

⁴³ *Ibid.*

⁴⁴ *Ibid.*, [4539].

⁴⁵ *Re Smith and Fawcett Ltd* [1942] Ch 304, 306 (Lord Greene MR). Hereinafter referred to as the 'bona fide rule'.

⁴⁶ Hereinafter referred to as the 'proper purposes rule'.

⁴⁷ Langford, above n 3.

⁴⁸ *Breen v Williams* (1996) 186 CLR 71

⁴⁹ *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165.

⁵⁰ *Bell Group Limited (in liq) v Westpac Banking Corporation (No 9)* (2009) 70 ACSR 1.

⁵¹ P. Radan and C. Stewart, *Principles of Australian Equity and Trusts* (2010) 182.

⁵² *Breen v Williams* (1996) 186 CLR 71.

⁵³ *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165.

the High Court of Australia by suggesting that the conception of the fiduciary duty as merely twofold, ie only the no conflict rule and the no profit rule was a fundamental or ‘core’ understanding of the fiduciary concept and that in certain circumstances, additional fiduciary obligations may be imposed.⁵⁴ On this point, Owen J said the following:

[t]he fact that a relationship is categorised as fiduciary does not mean that all of the obligations arising from it are themselves fiduciary. Unless there are some special circumstances in the relationship, the duties that equity demands from the fiduciary will be limited to what I have described as the core obligations: not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict.⁵⁵ (emphasis supplied)

In spite of the abovementioned remarks, Owen J went on to demonstrate how both the bona fide rule and the proper purposes rule could be phrased in a manner that was proscriptive in nature.⁵⁶ However, his formulation of the practical requirements of the rules was markedly prescriptive in character. While essaying out the requirements of the bona fide rule, he said:

The directors must give real and actual consideration to the interests of the company. The degree of consideration that must be given will depend on the individual circumstances. But the consideration must be more than a mere token: it must actually occur.⁵⁷

While commenting on the fiduciary duties of directors of a soon-to-be-insolvent company to the company’s creditors, Owen J held:

In the circumstances that I have outlined it was not reasonable for [the director] to commit the companies to the grant of securities without:

- (a) identifying the creditors each company in the group might have and considering what effect the proposed securities might have on the creditors and shareholders of that company; and
- (b) having a plan worked out, not in absolute detail but with sufficient precision to make sense, to deal with the longer term problems of the companies and, in particular, with the consequences for each individual company of the proposed course of action.⁵⁸

⁵⁴ Langford, above n 3, 244.

⁵⁵ *Bell Group Limited (in liq) v Westpac Banking Corporation (No 9)* (2009) 70 ACSR 1, [4552], [4569] (Owen J).

⁵⁶ *Ibid*, [4580], [4581].

⁵⁷ *Ibid*, [4619].

⁵⁸ *Ibid*, [6088].

These seemingly prescriptive obligations on directors give true meaning to Owen J's justified clarification of the 'exclusively proscriptive' rule in *Breen*⁵⁹ and *Pilmer*.⁶⁰ What we can take away from Owen J's exposition of fiduciary law is that in certain extra-ordinary circumstances, fiduciary obligations may be prescriptive though the burden of proof required to elevate an ordinary fiduciary obligation to one that incorporates prescriptive duties ought to be high.

III CONCLUSION

In conclusion, the researcher believes that fiduciary law in Australia requires a nuanced approach specifically tailored to the requirements of the relationship being considered. The rulings in *Breen*⁶¹ and *Pilmer*,⁶² while contextually justified, cannot be applied in a blanket manner to all fiduciary relationships. At the same time, the Canadian ruling in *McIrney* that all fiduciary obligations may be prescriptive in nature is also untenable owing to its generic character. Certain fiduciary relationships are not suited to have the broad-ranging obligations that prescriptive duties imply.⁶³ Yet, Owen J's voluminous judgment in the *Bell Group* case makes it clear that age old fiduciary obligations have implied prescriptive duties.

While it may appear to an opinionated reader that the researcher has chosen to sit on the fence in this issue, it must not be forgotten that fiduciary law is but a strata of equity and equity sees as done what ought to be done. The driving force of the law of equity has been to temper the rigours of the common law, yet from the above discussion it seems that equity has assumed an even more rigid posture. Owen J has belled the proverbial cat in the *Bell Group* case⁶⁴ by seeking to carve a niche for those fiduciary obligations that cannot be satisfied by proscriptive requirements. Though he attempts to tread the line of the High Court of Australia, he reverts back to prescriptive formulations to satisfy his proscriptive duties. A nuanced and problematised approach is the sole solution to the proscriptive-prescriptive dichotomy.

⁵⁹ *Breen v Williams* (1996) 186 CLR 71.

⁶⁰ *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165.

⁶¹ *Breen v Williams* (1996) 186 CLR 71.

⁶² *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165.

⁶³ For example, journalists, accountants, bank officers etc: *Breen v Williams* (1996) 186 CLR 71, 112 (Gaudron and McHugh JJ).

⁶⁴ *Bell Group Limited (in liq) v Westpac Banking Corporation (No 9)* (2009) 70 ACSR 1.

It is not the researcher's opinion that the law in *Breen*⁶⁵ and *Pilmer*⁶⁶ ought to be discarded. The fundamental two fold obligation of the fiduciary concept and their proscriptive nature is doctrinally sound and must be retained. A high burden of proof must be imposed on he or she who seeks to import prescriptive duties into a fiduciary relationship. Furthermore, strict regard should be had to the common law and statutory law before any such step. As was held in *Breen*,⁶⁷ the fiduciary relationship cannot 'distort' a subsisting contractual one or any duty imposed by the common law. The ruling in *Breen* was factually justified since common law duties were inherent in a doctor-patient relationship. Yet, there ought to be scope for clarification where needed. The fiduciary relationship between a trustee and a beneficiary is acknowledged to be an exception to the 'strictly proscriptive' rule and courts should be flexible enough to consider more exceptions. The litanies of those wronged by those they trusted may be better remedied by such guided and principled open mindedness. Kirby J acknowledged the state of flux in this field in *Breen*⁶⁸ when he said that the fiduciary principle is 'in a state of development whose impetus has not been spent to the present day'. Deane J once commented that fiduciary law will not accommodate 'idiosyncratic notions of what is fair and just'.⁶⁹ While that may be justified, if what is fair and just is deemed to be idiosyncratic solely on the basis of mere semantics, 'the law in this country' will soon stagnate.

⁶⁵ *Breen v Williams* (1996) 186 CLR 71.

⁶⁶ *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165.

⁶⁷ *Breen v Williams* (1994) 35 NSWLR 527, 552 (Kirby J).

⁶⁸ *Ibid*, 543.

⁶⁹ *Pavey & Matthews Pty Ltd. v Paul* (1986-1987) 162 CLR 221, 256 (Deane J) as quoted in J Brebner, above n 12, 249.

THE ROAD TO THE ACT'S FIRST PRISON (THE ALEXANDER MACONOCHIE CENTRE) WAS PAVED WITH REHABILITATIVE INTENTIONS

ANITA MACKAY*

ABSTRACT

The role of prisons in rehabilitating offenders is highly contested. The two main opposing arguments – that prison should be a ‘last resort’, on the one hand, and that a prison offering a range of programs could rehabilitate offenders, on the other – emerged during the debates about whether the Australian Capital Territory (ACT) should build a prison. An analysis of these arguments from a criminological perspective will assist the ACT to develop future correctional policies, given that rehabilitation has been enshrined in legislation as a primary goal of the Alexander Maconochie Centre. This analysis also reveals that the ACT is somewhat exceptional in consistently maintaining an ideological commitment to rehabilitation whilst other jurisdictions have shifted towards emphasising the more punitive aspects of imprisonment.

I INTRODUCTION

‘It is the duty, and even still more the interest of society, in dealing with its criminals, to try earnestly while they are in custody, to reform them’

– Captain Alexander Maconochie 1853.¹

The Australian Capital Territory’s (ACT) Alexander Maconochie Centre (AMC) has been operational since 30 March 2009. Prior to that, ACT prisoners were held in NSW prisons. The ACT government has elected to emphasise the role of the AMC in rehabilitating offenders. The media release issued about the official opening of the AMC stated that ‘[t]his is the first real

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¹ Cited in John Barry, *Alexander Maconochie of Norfolk Island. A Study of a Pioneer in Penal Reform* (Oxford University Press, 1958) 214.

opportunity that the ACT has had to directly influence rehabilitative and therapeutic outcomes for our sentenced prisoners'.²

An independent consultant's review of the first year of operation made a total of 128 recommendations about how the AMC's operation can be improved.³ As the ACT government considers their response to these recommendations, this article argues that it is worthwhile reflecting on the history that led to this point, which is outlined in Part II. Of particular interest are the two contradictory themes that emerged during the debates, both of which surround the ability of prisons to rehabilitate offenders. One of the themes was an argument used against the ACT establishing a prison; namely, that prison should be a 'last resort' because prisons are often filled to capacity, and community-based sanctions are more likely to rehabilitate offenders. The other theme was an argument in favour of the ACT establishing a prison; namely, that this was an opportunity to build a prison that could run programs to rehabilitate offenders. These themes are discussed and critiqued in Parts III and IV of the article.

The discussion about these themes is not entirely historical, however. The current state of play is assessed for both themes. That is, consideration is given to whether the AMC is actually a punishment option of 'last resort', as well as the status of rehabilitation in current legislation. Part V of the article, which provides an overview of the current legislation, also outlines the relevance of rehabilitation to the human rights framework within which the AMC has been established.

It is important to note at the outset that this article does not seek to assess whether the ACT's commitment to rehabilitation is working in practice. This is certainly an essential question for gaining an overall understanding of the relevance of rehabilitation to penal policies. However, it is too early to assess this, given the short period of time the AMC has been operational. Rather, the article seeks to provide a clear picture of the origins of the ACT's rehabilitation intentions such that future correctional policies are informed by a criminological analysis of the historical

² Katy Gallagher, Chief Minister, Australian Capital Territory, 'New Alexander Maconochie Centre officially opened' (Media Release, 11 September 2008).

³ Knowledge Consulting, *Independent Review of Operations at the Alexander Maconochie Centre* (2011).

debates. The ACT's commitment to rehabilitation at an ideological level is also of interest because this is not a commitment that exists in other Australian jurisdictions.

II THE ROAD TO THE ESTABLISHMENT OF A PRISON IN THE ACT

The ACT was established in 1911, but a decision was made that a separate correctional facility would not be built in the ACT largely due to economic reasons (ie the high costs involved).⁴ Instead, an agreement was reached for NSW to be paid to accommodate all prisoners sentenced to imprisonment in the ACT.⁵

The first suggestion that the ACT build a prison was made in 1955 by the Department of the Interior. That suggestion was that a prison be built in the ACT to accommodate both ACT and Northern Territory prisoners.⁶ A proposal was taken to Cabinet in 1970, but this did not result in any action.⁷

In 1974, the then Commonwealth Attorney-General, Senator Murphy, raised the need for consideration to be given to building a prison facility in the ACT in the Senate.⁸ In the 1970s a survey of judges and magistrates was carried out to ascertain the type of sentences they would impose if they had the option of imposing a sentence of imprisonment that could be served in the

⁴ Australian Law Reform Commission, *Sentencing Reform Options*, Discussion Paper No 10 (1979) 20.

⁵ The legislative provisions for this arrangement were found in the *Removal of Prisoners (Australian Capital Territory) Act 1968* (Cth) and Part IX of the *Prisons Act 1952* (NSW). The Australian Law Reform Commission outlined in their 1979 Discussion Paper on sentencing reform that '[t]he prisoner's transfer to N.S.W. is authorised by a warrant. Under an inter-governmental agreement, the Commonwealth pays to N.S.W. the cost of imprisoning offenders from the Territory': Australian Law Reform Commission, above n 4, 17. In 1972-73 this was costing the ACT \$9.91 per inmate per day: Australian Law Reform Commission, above n 4, 20. By 2006 the daily rate had reached \$203 per inmate: Australian Capital Territory Department of Justice and Community Safety, Communication Plan. Alexander Maconochie Centre Project (April 2007) 5.

⁶ This suggestion is mentioned in a 1979 Australian Law Reform Commission Discussion Paper, but there is no detail provided as to why the proposal was made – Australian Law Reform Commission, above n 4, 26.

⁷ Ibid.

⁸ Andrew Hopkins, Anne Schick and Stephen White, 'A Prison for the Australian Capital Territory?' (1977) 10 *Australian and New Zealand Journal of Criminology* 205, 205. A public seminar titled 'The Future of Corrective Services in the Australian Capital Territory' was held on 2-3 May 1975 – for more information see: 'The Future of Corrective Services in the ACT. Discussion Paper prepared at the Direction of the Minister for the Capital Territory' (Public Seminar, 2-3 May, 1975).

ACT.⁹ This research found that the judges and magistrates considered that a minimum security prison or work camp was all that was required.¹⁰

In 1984, Professor Tony Vinson chaired a review of the ACT's 'welfare services and policies'.¹¹ The chapter on corrective services recommended '[a] prison system catering for all but maximum security adult prisoners should be created in the ACT'.¹²

The first detailed consideration of whether the ACT needed its own prison was by the Australian Law Reform Commission (ALRC) in their 1979 Discussion Paper and 1988 Report on sentencing.¹³ That Report made the following recommendation: 'An Australian Capital Territory prison system should be established. That system should give proper emphasis to rehabilitation'.¹⁴

The ALRC made their recommendation after considering the arguments for and against an ACT prison. The arguments in favour of establishing a prison in the ACT were:

- the ACT is 'abandoning' its responsibilities by sending sentenced prisoners to NSW;¹⁵
- the ACT has 'virtually no influence over placement, classification, available programs, prison conditions or any other aspect of Australian Capital Territory prisoners' day to day conditions' and the only way to gain such control is to have a prison in the ACT;¹⁶

⁹ Hopkins et al, above n 8, 205-6.

¹⁰ Ibid, 211. This sentiment was echoed in a report released in December 1984 which recommended a prison catering for all except maximum security prisoners: Tony Vinson, Victor Coull and Robyn Walmsley, *Beyond the Image. Review of Welfare Services and Policies in the ACT* (Australian Government Publishing Service, 1985) 251 (see Recommendation 1).

¹¹ Vinson et. al, above n 10. Commonly referred to as the 'Vinson Review'.

¹² Ibid, 251 (Recommendation 1, Chapter VI).

¹³ Australian Law Reform Commission, above n 4; Australian Law Reform Commission, *Sentencing*, Report No 44 (1988).

¹⁴ Australian Law Reform Commission, above n 13, [169]. One member of the Australian Law Reform Commission, Mr Zdenkowski, expressed some reservations about the establishment of a prison in the ACT, noting that if it was to go ahead, the government should be provided with guidelines. He argued that these guidelines include that 'Australian Capital Territory prisoners are not kept in unsatisfactory conditions or subject to inhumane treatment', that correctional legislation 'contain a list of prisoners' rights' and that there be an effective enforcement mechanism for these rights. He also argued that all sentencers have 'first hand knowledge of the conditions which they may sentence offenders' and that they gain this by visiting any prison established in the ACT at least every two years: see Australian Law Reform Commission, above n 13, [263].

¹⁵ Ibid, [251].

¹⁶ Ibid, [252].

- prisoners could maintain better contact with their family and friends if located in the ACT;¹⁷
- conditions in NSW prisons are not ideal and were found not to be rehabilitating ACT prisoners, therefore they were more likely to commit further crimes following their release and return to the ACT;¹⁸ and
- work release programs were not available to ACT prisoners in NSW prisons.¹⁹

The common thread in all of these arguments is that the ACT could rehabilitate offenders if a prison was built in the jurisdiction where the conditions were better than those in Swathes is a theme that is analysed in detail in Part IV of the article.

The arguments against establishing a prison in the ACT were:

- if the ACT had its own prison it may lead to a greater rate of imprisonment (‘the hardships imposed by present transportation arrangements, have arguably deterred sentencers from using imprisonment more often as a sanction’);²⁰
- ‘entrenching prison as a punishment’, whereas if there is no prison it encourages greater use of non-custodial sanctions which are more likely to reduce future re-offending than imprisonment;²¹
- cost – it would be more expensive for the ACT to build a separate prison than to continue to pay NSW, and the small number of prisoners may make it difficult to justify expenditure on programs in an ACT prison;²² and
- the difficulty of separating and catering for diverse groups of prisoners in a small jurisdiction.²³

¹⁷ Ibid, [253].

¹⁸ Ibid, [254].

¹⁹ Ibid, [255].

²⁰ Ibid, [256]. This hypothesis is supported by a presentation by Professor David Biles in March 2008: David Biles ‘How the ACT Compares – Facts and Figures in Australia’ (Paper presented at Christians for an Ethical Society Forum, 19 March 2008).

²¹ Australian Law Reform Commission, above n 13, [257].

²² Ibid, [258].

²³ Ibid, [259].

The first two of these arguments assume the importance of minimising the use of imprisonment (ie keeping prison as a ‘last resort’). This argument is based on two assumptions – that any prison is likely to be filled to capacity, and other sentencing options would be more likely to be relied on if there was not a prison in the jurisdiction. This is a theme that is analysed in detail in Part III of the article.

In 1991, a Discussion Paper entitled *Paying the Price: A Review of Adult Corrective Services and Juvenile Justice in the ACT* made numerous recommendations for alternatives to custodial sentences, such as periodic detention and community supervision orders.²⁴ However, the paper joined the growing chorus against continued transportation of people sentenced in ACT courts to NSW prisons, and of the need to establish a prison in the ACT.²⁵

Discussions became more detailed and precise by the mid-1990s. For example, a 1997 paper recommended that ‘the construction in the ACT of a new 300 bed multi-purpose correctional facility should commence as soon as possible’.²⁶ In 1997, there were also indications of bipartisan support for building a prison (with the siting still contested).²⁷ In October 1998, the government announced a timetable for the building a prison and referred the question about location to the Standing Committee on Justice and Community Safety.²⁸

²⁴ Australian Capital Territory Government, *Paying the Price. A Review of Adult Corrective Services and Juvenile Justice in the A.C.T.* (ACT Chief Minister’s Department, 1991) (see Recommendations 35 and 39 at xxvii-xix). This was followed a year later by a paper by Senator Gary Humphries, Shadow Attorney-General, in which Senator Humphries argued that the ‘Paying the Price’ Report was deficient in its failure to consider the option of a privately owned prison. Senator Humphries visited some privately owned prisons in Queensland and outlined some of his observations in his report – Gary Humphries, *Private Prisons Public Options. A Report on the options available to establish cost effective and humane prison and remand facilities in the ACT* (1992).

²⁵ Australian Capital Territory Government, above n 24, xix (Recommendation 42).

²⁶ Australian Capital Territory Corrective Services, *The Future Correctional Needs of the Australian Capital Territory To The Year 2020, Evaluation of the Current System and Alternatives* (ACT Government, 1997) 25. Another paper was released by the Attorney General’s Department at about the same time – Australian Capital Territory Attorney General’s Department, *The Possible Establishment of a Correctional Facility in the Australian Capital Territory*, Discussion Paper (Australian Capital Territory Government, 1996).

²⁷ Inquiry by the Standing Committee on Legal Affairs on the construction of a prison in the ACT conducted in 1997. As this was an informal inquiry, no formal report was produced; rather they reported to the legislative assembly on 4 September 1997 (see Australian Capital Territory, *Parliamentary Debates, Australian Capital Territory Legislative Assembly*, 4 September 1997, 2903- 9). This Inquiry recommended that the prison also be used to accommodate NSW regional prisoners, as a way of recouping costs (see *Debates*, at 2905).

²⁸ Gary Humphries MLA, Attorney-General, ‘Government Announces Timetable for Prison Project’ (Media Release, 26 October 1998).

That Committee conducted four public inquiries between 1999 and 2001,²⁹ once again considering the arguments in favour of, and against, establishing a prison in the ACT. These were essentially the same as those raised by the ALRC, with two additional arguments in favour of an ACT prison. These were the need to replace the Belconnen Remand Centre which had some serious design faults³⁰ and was overcrowded,³¹ as well as cost savings³² (whereas cost was given as an argument against by the ALRC).

Following the Standing Committee's inquiries the ACT moved into an implementation phase, which included the following:

- A site for the prison in the suburb of Hume being identified in January 2004;³³
- The Chief Minister of the ACT's ministerial statement to the Legislative Assembly detailing the plans for the AMC on 24 August 2004;³⁴
- The commissioning process beginning in mid-2006;³⁵
- Legislation establishing the AMC being introduced into the ACT Legislative Assembly on 14 December 2006 (the Corrections Management Bill 2006 (ACT)), then subsequently being passed on 31 May 2007 (becoming the *Corrections Management Act 2007*(ACT)).³⁶

The AMC was officially opened in September 2008. The first prisoners arrived on 30 March 2009. The ACT government commissioned a review of the AMC's first year of operation. On 12

²⁹ Standing Committee on Justice and Community Safety, ACT Legislative Assembly, *Inquiry into the Establishment of an ACT prison: Justification and Siting* (1999) (hereafter referred to as 'Siting Report'); Standing Committee on Justice and Community Safety, ACT Legislative Assembly, *The Proposed ACT Prison Facility: Philosophy and Principles* (1999) (hereafter referred to as 'Philosophy Report'); Standing Committee on Justice and Community Safety, ACT Legislative Assembly, *Committee Visit to Western Australia, the Northern Territory and South Australia* (2000); Standing Committee on Justice and Community Safety, ACT Legislative Assembly, *The ACT Prison Project: Operational Models, Strategic Planning and Community Involvement* (2001) (hereafter referred to as '2001 Report'). There was also a community reference group report prepared in 2000 (*An ACT Prison – Getting it Right. Report of the ACT Prison Community Panel* (2000)) and a consultant's report prepared for the Department of Justice and Community Safety in 2001 – Rengain Pty Ltd, *ACT Prison Project* (17 April 2001).

³⁰ Australian Capital Territory Government, above n 24, 96.

³¹ Siting Report, above n 29, 8-9.

³² Ibid 10-11.

³³ ACT Department of Justice and Community Safety, ACT Procurement Solutions, Brown Consulting and Purdon Associates, Preliminary Assessment under Part 4 of the Land (Planning and Environment) Act 1991. ACT Prison Project. Part Block 6 Section 24 and Part Block 12 Section 18 Hume (2004) i.

³⁴ Australian Capital Territory, Parliamentary Debates, Australian Capital Territory Legislative Assembly, 24 August 2004, 4046-50.

³⁵ Knowledge Consulting, above n 1, 88.

³⁶ Key provisions contained in the *Corrections Management Act 2007* are discussed in Part V.

March 2011, Knowledge Consulting produced a report entitled *Independent Review of Operations at the Alexander Maconochie Centre. ACT Corrective Services*.³⁷

III PRISON AS A ‘LAST RESORT’

This Part provides the historical backdrop to the discussion in the next two parts of the two major themes that arose during debates about the establishment of a prison in the ACT.

The argument that prison should be kept as a ‘last resort’ appeared consistently throughout the debates about whether the ACT should build a prison. This was the primary reason given against establishing a prison in the ACT. This argument was based on two assumptions. First, that any prison will be filled to capacity, and second, that offenders would be more likely to be rehabilitated if given community-based sentences.

After outlining the attention given to maintaining prison as a ‘last resort’ in the historical debates, this part will consider the debates about the relationship between prison populations and prison capacity, and whether prison has actually been kept as a ‘last resort’ since the AMC opened.

³⁷ The ACT government responded to the review in June 2011. The response states that of the 128 recommendations in the report, the government agrees to 98 and agrees in principle to 31. None of the recommendations have been rejected. The response outlines that a taskforce will be established to oversee the response to the recommendations. The taskforce is expected to operate for about 12 months: Australian Capital Territory, Parliamentary Debates, Australian Capital Territory Legislative Assembly, *Government Response to The Knowledge Consulting Report, Independent Review of Operations of the Alexander Maconochie Centre (Report 1) and The Knowledge Consulting Report, Review ACT Corrective Services Governance including in relation to Drug Testing at the Alexander Maconochie Centre (Report 2)* (2011) 7. The Attorney-General has undertaken to provide a progress report on the implementation of the recommendations to the Legislative Assembly six months after the government response: Australian Capital Territory, Parliamentary Debates, Australian Capital Territory Legislative Assembly, 5 April 2011, 1290.

A Rhetoric During Historical Debates

An emphasis on alternative sentencing options and prison being the ‘last resort’ appeared early on in discussions about establishing a prison in the ACT, ie from the mid-1970s. A discussion paper prepared in 1975 made the point that ‘[a]s many offenders as possible should be rehabilitated within the community and only sent to institutions as a last resort’.³⁸ The reasons given were the cost of keeping people in prison, as well as the detrimental impact prisons have on individuals, their families and the community.³⁹

A 1977 survey of judges and magistrates found that a work release program would be a more desirable option than building a high security prison in the ACT.⁴⁰ One of the magistrates surveyed suggested the following priority order for correctional facilities in the ACT: ‘work release hostel (top priority), weekend detention centre, rural prison, secure prison’.⁴¹

The ALRC’s Report on sentencing in 1988 considered the utility of prisons versus community-based sentences in achieving the goal of rehabilitation. In concluding that the latter is much more successful if recidivism rates are used as a measure of success they observed: ‘[t]hat Australian prisons have failed to reform or rehabilitate offenders is hardly surprising, given the lack of educational, vocational, life skills and drug and alcohol programs in many Australian prisons’.⁴²

That same report gave significant attention to ‘reducing the emphasis on imprisonment’, with Chapter 3 having that as a title. The Report considered both the justifications for reducing the emphasis on imprisonment,⁴³ and some ‘techniques’ for reducing the emphasis.⁴⁴ One technique was to legislate that imprisonment is only to be considered after all other possible sentences have been considered. This type of provision was found in s 17A of the *Crimes Act 1914* (Cth) at the

³⁸ ‘The Future of Corrective Services in the ACT. Discussion Paper prepared at the direction of the Minister for the Capital Territory’ (Public Seminar, 2-3 May, 1975) 4.

³⁹ *Ibid.*

⁴⁰ Hopkins et. al., above n 8, 212.

⁴¹ *Ibid* 212.

⁴² Australian Law Reform Commission, above n 13, [50].

⁴³ *Ibid*, [42].

⁴⁴ *Ibid*, [54].

time of the ALRC's Report,⁴⁵ and is still in place.⁴⁶ This codifies a long standing common law principle,⁴⁷ and there are equivalent provisions in most Australian jurisdictions,⁴⁸ including in the ACT. The *Crimes (Sentencing) Act 2005* (ACT) provides that a prison sentence can only be imposed 'if the court is satisfied, having considered possible alternatives, that no other penalty is appropriate'.⁴⁹ The ACT legislation goes one step further than other jurisdictions by requiring the court to provide written reasons for any sentence of imprisonment.⁵⁰

It appears incongruous that the ALRC focused on ways to reduce the emphasis on imprisonment whilst at the same time recommending that a prison be established in the ACT. In making their recommendation, the ALRC did note, however, that the recommendation should not be considered out of context of the other recommendations they were making. They made the following statement: 'preference in the allocation of financial and other resources should go to improving and establishing community based sanctions. These options should be the punishment of first choice in all but the most serious cases'.⁵¹

The 2001 Report by the Standing Committee on Justice and Community Safety once again considered prison in the context of the spectrum of sentences available for criminal offences, noting concern at the recent decline in the use of community-based sentencing options. The Committee noted that '[t]here are very real dangers that a prison built to any capacity will be

⁴⁵ That particular provision was inserted into the *Crimes Act 1914* (Cth) in 1982.

⁴⁶ Section 17A of the *Crimes Act 1914* (Cth) provides that '[a] court shall not pass a sentence of imprisonment on any person for a federal offence, or for an offence against the law of an external Territory that is prescribed for the purposes of this section, unless the court, after having considered all other available sentences, is satisfied that no other sentence is appropriate in all the circumstances of the case'. The Australian Law Reform Commission confirmed their position that s 17A should remain the guiding principle for federal sentencing law in 2005: Australian Law Reform Commission, *Sentencing of Federal Offenders*, Discussion Paper No 70 (2005) 118.

⁴⁷ Geraldine Mackenzie, Nigel Stobbs and Jodie O'Leary, *Principles of Sentencing*, (The Federation Press, 2010) 186.

⁴⁸ See, eg, Criminal Law (Sentencing) Act 1988 (SA) s 11, Crimes (Sentencing Procedure) Act 1999 (NSW) s 5(1) and Sentencing Act 1991 (Vic) s 5(4).

⁴⁹ *Crimes (Sentencing) Act 2005* (ACT) s 10(2) (this provision was previously found in s 345 of the *Crimes Act 1900* (ACT)). Recent examples of cases involving the interpretation of ss 10(2) include *Ajetovic v Johnston*; *Kahric v Johnston* [2011] ACTSC 201; *Dhol v MacKenzie* [2011] ACTSC 193.

⁵⁰ *Crimes (Sentencing) Act 2005* (ACT) s 10(4).

⁵¹ Australian Law Reform Commission, above n 13, [260].

filled to that capacity. The ACT needs to ensure this does not happen by strengthening other corrections options'.⁵²

B Prison Populations and Prison Capacity

There are two main theories about the relationship between prison population and prison capacity which were put forward by Blumstein et al in 1983. The first is the 'reactive model', which is that prison construction occurs in response to increases in prison populations. The second is the 'capacity model', which suggests that prison construction to increase capacity leads to increases in the prison population to fill the capacity, which in turn prompts more construction.⁵³ It was the 'capacity model' upon which the Standing Committee on Justice and Community Safety based their warnings about the ACT building a prison.

For some time Blumstein argued that the 'reactive model' applied in the United States of America, and prison populations did not exceed the available prison places. However, in 1995 he retracted this argument.⁵⁴ Recent events in California show the unlikelihood of this model continuing to have any traction. Californian prisons recently reached prisoner numbers that were almost double capacity. The consequent lack of availability of medical services for prisoners led the Supreme Court to order that the prison population be reduced.⁵⁵

Freiberg and Ross have analysed the Victorian prison population over time to test the validity of the 'capacity model'.⁵⁶ They conclude from this analysis that prison capacity is not irrelevant, but it is not the deciding factor behind increasing prison populations.⁵⁷ More important factors

⁵² 2001 Report, above n 29, 17.

⁵³ Alfred Blumstein, National Research Council (US) Panel on Sentencing Research, *Research on Sentencing: The Search for Reform, Volume 1* (National Academy Press, 1983) 35.

⁵⁴ Described by Arie Freiberg and Stuart Ross, *Sentencing Reform and Penal Change* (The Federation Press, 1999) 82.

⁵⁵ *Brown, Governor of California, et al v Plata et al* (Appeal No. 09-1233), 23 May 2011. For more information about this decision see Ian Freckelton, 'Cruel and Unusual Punishment of Prisoners with Mental Illnesses: From Oates to Plata. *Brown v Plata*, unreported, Supreme Court of the United States, 23 May 2011' (2011) 18(3) *Psychiatry, Psychology and Law* 329.

⁵⁶ Freiberg and Ross, above n 54, 82-4.

⁵⁷ *Ibid*, 84-5.

are demographic characteristics of the population, crime rates and sentencing regimes (including the type of sentencing options available, and the length of prison sentences imposed).

C Imprisonment Rates Since the AMC Opened

The aspiration of keeping prison as a sentencing option of ‘last resort’ and minimising imprisonment rate is certainly a noble one, but the reality is that no Australian jurisdiction’s commitment to this (including the ACT) goes beyond a small amount of rhetoric in sentencing legislation.⁵⁸

There are two points to emphasise here. The first is about imprisonment as a ‘last resort’ in sentencing practice, and the second is about other factors that have led to the increasing imprisonment rate in the ACT overall. Both will be discussed after an overview of the ACT’s imprisonment rate is provided.

The rate of imprisonment rate in Australia is growing at an average of 3% per year,⁵⁹ despite overall crime rates declining.⁶⁰ The rate of increase varies around the country, with the highest rate being in the Northern Territory, where the imprisonment rate increased by 46% between 2001-2011.⁶¹

The ACT had the lowest rate of imprisonment in Australia before the AMC was built. The year before the AMC opened, in 2008, Professor Biles gave a presentation on the ACT remand and imprisonment rates, compared to the national averages. He observed that the ACT imprisonment rate for *convicted* prisoners was ‘extraordinarily low’ – 38 per 100 000 compared to the national

⁵⁸ In the Western Australian context, Morgan has described legislation aimed at keeping prison as a ‘last resort’ to be a ‘pious aspiration’: Neil Morgan ‘Imprisonment as a Law Resort: Section 19A of the Criminal Code and Non-Pecuniary Alternatives to Imprisonment’ (1993) 23 *Western Australian Law Review* 299, 318.

⁵⁹ Australian Institute of Criminology, *Australian Crime: Facts and Figures 2010* (Canberra, 2011) 110. This statistic is for the years 1984-2009. Between the 2008-09 and 2009-10 financial years there was a 2% increase – Australian Institute of Criminology, *Australian Crime: Facts and Figures 2011* (Canberra, 2012) 116.

⁶⁰ Australian Institute of Criminology, *Australian crime: Facts and figures 2011* (Canberra, 2012) 6-7. There are some exceptions to the general trend of declining crime rates – for a detailed discussion see Rick Sarre ‘The Importance of Political Will in the Imprisonment Debate’ (2009) 21(1) *Current Issues in Criminal Justice* 154, 157-8.

⁶¹ Australian Bureau of Statistics, *Prisoners in Australia 2011*, ABS Catalogue No 4517.0 (2011) 27.

average of 126. The remand rate was not as far below the national average. It was 26 per 100 000 compared to the national rate of 38.⁶²

If this is compared to the statistics since the AMC was built, a startling rise in the rate of imprisonment can be seen to have occurred between 2008-2011. As at December 2011, the ACT's imprisonment rate was 90.1 per 100 000, compared to the national rate of 165.2 per 100 000.⁶³ This rate combines sentenced prisoners and those on remand. When these two population sub-groups are separated, the rate of imprisonment for convicted prisoners in the ACT is 55.4 per 100 000 compared to the national average of 127.8 (in 2008 the rates were 38 and 126 respectively) and the rate of prisoners on remand is 27.2 per 100 000 compared to the national average of 38.6 (in 2008 the rates were 26 and 38 respectively).⁶⁴

The ACT has maintained the lowest overall rate of imprisonment, and the lowest rate of convicted prisoners incarcerated in Australia. However, it should also be emphasised that the ACT's rate of imprisonment of convicted prisoners rose from 38 to 55.4 per 100 000 between 2008-2011, while the national rate increased by a lesser proportion (from 126 to 127.8 per 100 000). The number of prisoners on remand in the ACT (27.2 per 100 000) is higher than both Tasmania (25.8 per 100 000) and Victoria (20.7 per 100 000).⁶⁵

The relationship between sentencing and imprisonment rates is complex, and Freiberg and Ross have noted that it 'is difficult, if not impossible in the absence of complex statistical models to isolate one factor from the other'.⁶⁶ Australian sentencing law is characterised by the provision of a high degree of judicial discretion; therefore it is difficult to accurately assess what emphasis is given by judges to legislation requiring prison to be kept as a 'last resort'. However, it is possible that judges have more scope to abide by this principle when it is left to their discretion to decide whether imprisonment is an appropriate sanction in the particular case. Mackenzie et al have posited that one of the reasons for the high imprisonment rate in Australia may be

⁶² Biles, above n 20.

⁶³ Australian Bureau of Statistics, *Corrective Services Australia, December Quarter 2011*, ABS Catalogue No 4512.0 (2012) 17.

⁶⁴ *Ibid*, 19.

⁶⁵ *Ibid*.

⁶⁶ Freiberg and Ross, above n 54, 95.

prescriptive legislation that limits judicial discretion in determining sentences.⁶⁷ They give the following examples of such limits:

[P]rescribing statutory minimum penalties, requirements for certain classes of offenders to serve minimum terms before being considered for early release, or by mandating imprisonment as the penalty for certain offences.⁶⁸

The emphasis given to intermediate sanctions (ie non-custodial sentences) is clearly pertinent. ACT sentencing laws were overhauled in 2005 by the introduction of the *Crimes (Sentencing) Act 2005* (ACT).⁶⁹ The aim of this Act was to consolidate sentencing laws into one Act, introduce new sentencing options and modernise terminology.⁷⁰ A particular feature of the Act is that it gives judges the option of making a ‘combination sentence’,⁷¹ comprising a number of different sentence types (including imprisonment), which allow a great deal of flexibility.⁷²

The ACT’s use of community-based corrections has increased, while the national average shows a decrease. In 2008, prior to the AMC being built, the ACT’s community-based correction rate was 491.1 per 100 000, compared to a national rate of 337 per 100 000. In June 2011, the ACT rate was 487.2 per 100 000, compared to a national rate of 309.9 per 100 000.⁷³

Whether people are given community-based or custodial sentences does not provide a complete picture, however. There is a complex interplay of factors leading to a jurisdiction’s imprisonment rate. As Baldry et al have observed as part of the Australian Prisons Project:

The phenomenon of punishment is not a singular object of study. There is a variety of often contradictory and competing discourses on punishment including judicial decisions, parliamentary

⁶⁷ Mackenzie et al, above n 47, 185. See also the argument by Nicholson that courts do not adequately use provisions that promote rehabilitation: John Nicholson, ‘When sentencing becomes a walk into the future with the offender: The Griffiths Remand – Compulsion in Rehabilitation’ (2008) 32 *Criminal Law Journal* 142.

⁶⁸ Mackenzie et al, above n 47, 185 (fn 14).

⁶⁹ This followed the release of a discussion paper and extensive community consultation. The process is outlined in the Australian Capital Territory Law Reform Advisory Council’s Report on suspended sentencing report – Australian Capital Territory Law Reform Advisory Council, *A Report on Suspended Sentences in the ACT*, Report No 1 (2010) 12.

⁷⁰ Explanatory Statement, Crimes (Sentencing) Bill 2005 (ACT).

⁷¹ Crimes (Sentencing) Act 2005 (ACT) Part 3.4.

⁷² Richard Edney and Mirko Bagaric, *Australian Sentencing: Principles and Practice* (Cambridge University Press, 2007) 342.

⁷³ Australian Bureau of Statistics, above n 63, 28.

reports, commissions of inquiry, media and popular culture depictions, government policy, academic research and prisoner activist voices.⁷⁴

In summary, whilst it is easy to conclude that the AMC has not been kept as a punishment option of ‘last resort’ in the ACT, the reasons for this are far more complex and difficult to diagnose with any clarity. One of the reasons for this is that arguments about keeping prison as a ‘last resort’ are intermingled with arguments about using prison as a means to rehabilitate offenders. It is these arguments that are considered in the next Part of the article.

IV REHABILITATIVE INTENTIONS

It was argued in the previous part that the AMC has not been kept as a ‘last resort’. This can be partially explained by the strength of the counter argument, which is that a prison was required in order to rehabilitate offenders. This is the argument that ultimately prevailed.

It will be seen in this part that the argument that a prison should be built in the ACT for the purpose of rehabilitating offenders had two impetuses. The first was concern that people serving their sentences in NSW prisons were isolated from their family and friends. The second was that the conditions in NSW prisons were not conducive to their rehabilitation (particularly due to the lack of programs offered in NSW prisons).

It will also be shown in this part that the ACT did not follow broader international trends relating to rehabilitation. This will make it clear that the ACT is somewhat of an anomaly, as it has not followed other jurisdictions in rejecting rehabilitation in favour of more punitive ideologies.

⁷⁴ Eileen Baldry, David Brown, Mark Brown, Chris Cunneen, Melanie Schwartz and Alex Steel, ‘Imprisoning Rationalities’ (2011) 44 *Australian & New Zealand Journal of Criminology* 24, 26. The Australian Prisons Project is investigating the variation in imprisonment rates around Australia as well as national trends since the 1970s.

A The Rise and Fall (and Rise Again) of Rehabilitation: How the ACT Missed the Fall

It is important at the outset to note that every jurisdiction's approach to the goals of imprisonment is complex and nuanced. At any given time the competing goals of rehabilitation, deterrence and retribution, as well as other goals, are likely to be present to varying degrees. The emphasis given to various goals can change quickly, especially with changes to the political party in government. In spite of this, criminologists have made some general observations at the meta-level. This Part of the article provides an over-simplified summary of these observations to give some context to the ACT debates. However, in doing so, it should be remembered that this is meta-level analysis and the picture at the micro-level will always present a more complex interplay of the goals. This is exemplified well by what was happening in the ACT during the relevant period, which was different to the observations made at the meta-level.

From the 1890s until the 1970s, what Garland terms 'penal welfarism' was the dominant operational framework for prisons in countries including the USA, the UK and Australia. The growth in penal welfarism paralleled the growth in the social sciences such as sociology, psychology and psychiatry, which shifted the focus away from the individual based explanations of criminal behaviour to socially based ones.⁷⁵ Garland has described this framework as having rehabilitation as 'the hegemonic, organising principle, the intellectual framework and value system'.⁷⁶

The reports prepared about establishing a prison in the ACT in the 1970s-1980s fit squarely within the penal welfarism paradigm. The ALRC's 1979 Discussion Paper went into some detail about the negative impact of keeping ACT prisoners in NSW prisons on contact with family and friends, including reference to some case study interviews.⁷⁷ This concern was echoed by the Vinson report which also included the results of a more detailed survey of prisoners and their

⁷⁵ Clive Hollin and Charlotte Bilby, 'Addressing Offending Behaviour: "What Works" and Beyond', in Yvonne Jewkes (ed), *Handbook on Prisons* (Willan Publishing, 2007) 609.

⁷⁶ David Garland, *The Culture of Control. Crime and Social Order in Contemporary Society* (Oxford University Press, 2001) 35.

⁷⁷ Australian Law Reform Commission, above n 4, 23-5.

families.⁷⁸ The latter survey found that most prisoners were in favour of a prison being built in the ACT, with 31 of the 34 prisoners interviewed giving improved access to visits and contact with family as the main reason.⁷⁹ The families who were interviewed were also in favour of a prison being built in the ACT as it would reduce the travel time and expense associated with visiting.⁸⁰

The ALRC's 1988 Report raised concern about NSW prisons. They wrote that 'the conditions and lack of programs in New South Wales prisons are more likely to lead to continuing criminality than rehabilitation'.⁸¹ This conclusion was reached following reference to the Royal Commission into NSW prisons, which had produced a damning report about the conditions in NSW prisons in 1978.⁸² The ALRC went on to recommend that a prison be established in the ACT, emphasising that '[t]hat system should give proper emphasis to rehabilitation.'⁸³

By contrast, from about the 1970s onwards, the same countries that had subscribed to penal welfarism experienced what has been termed 'the decline of the rehabilitative ideal'.⁸⁴ Rehabilitation was critiqued on three bases, identified by Hudson in 1987. The first was a 'civil liberties' based critique, which was that rehabilitation allowed unchallenged state intervention in the lives of people who were in most cases fairly powerless.⁸⁵ The second was that sentences that were perceived to be indeterminate were bringing the justice system into disrepute. This critique was based on the fact that it was left to people running rehabilitation programs to determine when prisoners were ready to be released, as opposed to judges at the time of sentencing.⁸⁶ The

⁷⁸ The survey was conducted by the Australian Institute of Criminology. Vinson et al, above n 10, 194.

⁷⁹ Ibid, 198.

⁸⁰ Ibid, 200.

⁸¹ Australian Law Reform Commission, above n 13, [254].

⁸² Australian Law Reform Commission, above n 4, 34-5. Parliament of New South Wales, *Report of the Royal Commission into New South Wales Prisons*, Volume I, II and III (Government Printer, NSW, 1978).

⁸³ Australian Law Reform Commission, above n 13, [169].

⁸⁴ Francis Allen, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose* (Yale University Press, 1981).

⁸⁵ Barbara Hudson, *Justice Through Punishment. A Critique of the 'Justice' Model of Corrections* (Macmillan Education, 1987) 22.

⁸⁶ Ibid, 22-3. Hudson notes that this was more of a problem in the USA than the UK: Ibid, 23. This was also less of a problem in Australia.

third was the right wing argument that the rehabilitative focus made prisons seem ‘soft’ and thereby undermined their legitimacy.⁸⁷

In 1974, Robert Martinson published the famous article entitled ‘What Works? – Questions and Answers About Prison Reform’, to which he responded – there is ‘very little to hope that we have in fact found a sure way of reducing recidivism through rehabilitation’.⁸⁸ There was other research being done along these lines.⁸⁹ At the same time, there were complex societal changes tending towards increased punitiveness (this trend is analysed in detail by Garland⁹⁰ and Pratt et al⁹¹).

The end result was that ‘a range of rehabilitative strategies, ranging from education and vocational training to counselling and therapeutic communities, [were] condemned to failure’.⁹² This was due to the perception that ‘nothing works’ to rehabilitate offenders, which was used as an argument in support of greater emphasis being given to the goal of retribution.⁹³

Interestingly, the discussions in the ACT do not reflect this ‘decline in the rehabilitative ideal’. The discussions following the ALRC’s 1988 Report are more in line with what Ward and Maruna have described as the ‘rehabilitation renaissance’.⁹⁴ From the early 1990s, in response to the ‘nothing works’ argument, there was a movement that became known as the ‘what works movement’. This movement originated in Canada and aimed to conduct research and publicise results showing that offender rehabilitation was possible. Cullen has described the movement as follows:

These scholars rejected the ‘nothing works’ professional ideology and instead used rigorous science to show that popular punitive interventions were ineffective, that offenders were not beyond redemption,

⁸⁷ Ibid, 28.

⁸⁸ Robert Martinson, ‘What Works? – Questions and Answers About Prison Reform’ (1974) 35 *The Public Interest* 22, 49. Hudson identifies Martinson’s work as an example of the critique of rehabilitation that argued it was the ‘soft’ option: Ibid, 29.

⁸⁹ Hollin and Bilby, above n 75, 610.

⁹⁰ Garland, above n 76.

⁹¹ John Pratt, David Brown, Mark Brown, Simon Hallsworth and Wayne Morrison (eds), *The New Punitiveness: Trends, Theories, Perspectives* (Willan Publishing, 2005).

⁹² Hollin and Bilby, above n 75, 610.

⁹³ Ibid.

⁹⁴ Tony Ward and Shadd Maruna, *Rehabilitation: Behind the Risk Paradigm* (Routledge, 2007) 10.

and that treatment programs rooted in criminological knowledge were capable of meaningfully reducing recidivism.⁹⁵

For example, the ACT Committee that prepared the *Paying the Price* Discussion Paper in 1991 provided a list of programs on offer in other jurisdictions (prepared by the Australian Institute of Criminology) and recommended provision of education, employment opportunities, recreational facilities and welfare/personal development programs, all with a focus on rehabilitation.⁹⁶ And more detailed consideration was given to rehabilitation programs considered to be effective in a 1996 Discussion Paper by the ACT Corrective Services,⁹⁷ which also emphasised the need to train staff in rehabilitative strategies.⁹⁸ Both of these papers are in the vein of the ‘what works movement’.

However, the ‘what works movement’ is not the end of the story when analysing rehabilitation as a goal of imprisonment at the meta-level. There have recently been eminent researchers calling for caution about the reliance on rehabilitation, particularly where results of complex criminological studies about recidivism may be misinterpreted by politicians.⁹⁹ Therefore, there is still a level of ambivalence about the acceptability of rehabilitation as a goal of imprisonment.¹⁰⁰ The general position currently is probably most accurately described by Garland when he wrote ‘today, rehabilitation programmes no longer claim to express the overarching ideology of the system, nor to be the leading purpose of any penal measure’.¹⁰¹

In contrast, there is evidence to suggest that the ACT has attempted to make rehabilitation the ‘overarching ideology’ of the AMC. When the ACT Standing Committee on Justice and Community Safety was asked to consider the philosophy of the proposed prison in 1999, following consultation they recommended that ‘the guiding philosophy of the prison facility be directed towards rehabilitation, restorative justice and reintegration into society’.¹⁰² In making

⁹⁵ Cullen, cited in Ward and Maruna, above n 94, 10.

⁹⁶ Australian Capital Territory Government, above n 23, 103-4 (Recommendation 51).

⁹⁷ Australian Capital Territory Attorney General’s Department, above n 26, 83-6.

⁹⁸ *Ibid*, 88.

⁹⁹ Ward and Maruna, above n 94, 10-12.

¹⁰⁰ *Ibid*, 12.

¹⁰¹ Garland, above n 76, 8.

¹⁰² Philosophy Report, above n 29, 31 (Recommendation 2).

this recommendation they referred to the United Nations Standard Minimum Rules for the Treatment of Prisoners.¹⁰³ The Committee noted that there should be numerous activities and programs in the prison promoting rehabilitation,¹⁰⁴ as well as the use of case management plans.¹⁰⁵ They made a specific recommendation about programs.¹⁰⁶ The committee also considered ways to facilitate visits from family (including children) and friends as a way to further the goal of rehabilitation.¹⁰⁷

The existing focus on rehabilitation in the AMC is discussed in the next Part.

V NO LONGER MERELY INTENTIONS – CURRENT APPROACH TO REHABILITATION

It was argued in the last part that the ACT has demonstrated a commitment to rehabilitation that belied the ‘decline of the rehabilitative ideal’ that occurred more generally in Australia, the UK and the USA. Next, an overview of the legislative provisions relevant to the rehabilitation of prisoners in the AMC will be provided to support the argument that rehabilitation continues to be the ‘overarching ideology’ of the AMC.

Before discussing the legislation, it is worth noting that the choice of the name for the ACT’s prison – the Alexander Maconochie Centre – also demonstrates its ‘overarching ideology’ of rehabilitation. Captain Alexander Maconochie was the Superintendent of the Norfolk Island

¹⁰³ Ibid, 29. The rules cited by the Committee were Rule 65, which provides that ‘[t]he treatment of prisoners shall have as its purpose the establishment of the will to lead law abiding and self-supporting lives after release. The treatment shall be such which will encourage prisoners’ self-respect and responsibility’; and Rule 66 which provides that ‘[t]o these ends, all appropriate means shall be used including religious care, education, vocational guidance and training, social casework, employment counselling, physical development and strengthening of moral character, in accordance with the individual needs of each prisoner, taking account of his (sic) social and criminal history, his (sic) physical and mental capacities and aptitudes, his (sic) personal temperament, the length of his sentence and his (sic) prospects after release’. Another relevant rule, not referred to by the Committee, is Rule 61 which provides that ‘[t]he treatment of prisoners should emphasise not their exclusion from the community, but their continuing part in it. Community agencies should, therefore, be enlisted wherever possible to assist the staff of the institution in the task of social rehabilitation of prisoners’.

¹⁰⁴ Ibid, 29, 35.

¹⁰⁵ Ibid, 30.

¹⁰⁶ Recommendation 5 was as follows: ‘the committee recommends that the project brief emphasise that prison programs should be aimed at reducing recidivism rates and contributing significantly to the rehabilitation of prisoners meeting the educational, employment and social skill deficits of prisoners’: Ibid, 36.

¹⁰⁷ Ibid, 50-51.

penal colony from 1840-1844. This penal colony had ‘over 900 doubly and trebly convicted prisoners who were regarded as the dregs of the convict system, irreconcilable and irreclaimable’.¹⁰⁸

Prior to going to Norfolk Island, Maconochie had developed a system of prison discipline, aimed at rehabilitating prisoners, which he was to test during his time on the Island. In writing about his approach, Maconochie stated that:

[t]he object of the New System of Prison Discipline is besides inflicting a suitable punishment on men for their past offences, to train them to return to society, honest, useful and trustworthy members of it, and care must be taken in all its arrangement that this object be strictly kept in view, and that no other be preferred to it.¹⁰⁹

Maconochie implemented his approach by using a system of marks whereby convicts were rewarded for their labour and good behaviour with marks. They used these marks to purchase privileges (such as better food) and, for every ten marks saved, their term of imprisonment was shortened by a day. So the ultimate reward was their freedom. The only punishment was the loss of marks.¹¹⁰

The ACT government has asserted that the AMC has been named after Alexander Maconochie to reflect the ACT’s overall philosophy of rehabilitating, rather than punishing, prisoners.¹¹¹ The AMC has not, however, adopted Maconochie’s system of prison discipline.

A Rehabilitation As A Legislative Requirement

In a review of prison-based rehabilitation programs around Australia conducted for the Criminology Research Council, Heseltine, Day and Sarre emphasised the importance of

¹⁰⁸ John Barry, ‘Alexander Maconochie 1787 – 1860’, in Hermann Mannheim (ed), *Pioneers in Criminology* (Patterson Smith Publishing Corporation, 1972) 92.

¹⁰⁹ *Ibid.*, 91.

¹¹⁰ *Ibid.*, 93. For more information about Maconochie’s mark system see John Moore ‘Alexander Maconochie’s “Mark System”’ (2011) 198 *Prison Service Journal* 38. For more information about Maconochie’s reforms more generally see Barry, above n 1.

¹¹¹ Simon Corbell (Attorney General for the ACT) ‘The New ACT Prison: What is Planned and What will be Achieved’, (Paper presented at Christians for an Ethical Society Forum, 19 March 2008). The Dame Phyllis Frost Centre, a women’s prison in Victoria, was named after a campaigner for the rights of female prisoners.

legislation containing ‘affirmations of rehabilitative purposes’, arguing they are ‘essential’.¹¹² That Report noted that the ACT was the only jurisdiction to have legislation of this sort.¹¹³

The *Corrections Management Act 2007* (ACT) (CMA) was brought in to establish the operating framework for the AMC. However, prior to the ACT legislative assembly passing the CMA, the assembly had passed the *Human Rights Act 2004* (ACT) (HR Act), so the latter Act will be discussed first.

The HR Act incorporates some of the rights contained in the *International Covenant on Civil and Political Rights* (ICCPR)¹¹⁴ into ACT law. Particularly relevant Articles of the ICCPR are Article 7 which provides that ‘[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’, and Article 10 of the ICCPR which provides:

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons [...]
3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.¹¹⁵

The ICCPR was drafted during the period of penal welfarism, which explains the prominence given to rehabilitation by Article 10(3).¹¹⁶ Joseph, Shultz and Castan have written that ‘[t]he

¹¹² Karen Heseltine, Andrew Day and Rick Sarre, *Prison-Based Correctional Offender Rehabilitation Programs: The 2009 National Picture in Australia*, Australian Institute of Criminology Reports Research and Public Policy Series 112 (2011) 4.

¹¹³ Ibid.

¹¹⁴ Ratified by Australia on 23 November 1980, however not expressly part of Australian law except to the extent provided for in Commonwealth anti-discrimination legislation: Martin Flynn, Sam Garkawe and Yvette Holt, *Human Rights: Treaties, Statutes and Cases* (LexisNexis Butterworths, 2011) 73.

¹¹⁵ Only an extract from Article 10 is quoted here.

¹¹⁶ The Standard Minimum Rules for the Treatment of Prisoners, which also prioritise rehabilitation, are from the same era. The Rules were first adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Geneva in 1955. The relevant rules are quoted in fn 103.

“rehabilitation” paradigm was more prevalent, at least in Western criminal justice systems, when the ICCPR was adopted in 1966’.¹¹⁷

Section 10 of the HR Act incorporates Article 7 of the ICCPR into ACT law. However, it should be noted that s 19 of the HR Act only incorporates Articles 10(1) and 10(2)(a) into ACT law (the right to humane treatment when deprived of liberty and the segregation of accused and convicted prisoners). The HR Act does not incorporate Article 10(3) (about rehabilitation of prisoners).¹¹⁸

The decision not to incorporate Article 10(3) is inconsistent with the stated intention that the AMC, the ACT’s only prison, rehabilitate offenders. The omission is not adequately explained in the Explanatory Statement circulated with the Human Rights Bill 2003. The Explanatory Statement glosses over the omission of certain Articles with the following statement: ‘In some instances a right has been omitted because it is not appropriate to the ACT as a territory under the authority of the Commonwealth’.¹¹⁹ However, given the ACT government has responsibility for corrections in the Territory,¹²⁰ this does not provide an adequate explanation as to why Article 10(3) has been omitted from the HR Act.¹²¹

Joseph, Shultz and Castan have noted that Article 10(3) has not attracted as much attention from the Human Rights Committee (HRC) as other paragraphs of Article 10. However, they have observed that this is not critical, as adherence to other paragraphs in Article 10 should achieve the same outcome. They write ‘proper adherence to the other aspects of Article 10, which have

¹¹⁷ Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights. Cases, Materials and Commentary* (Oxford University Press, 2nd ed, 2004) 291. The ICCPR came into force on 23 March 1976.

¹¹⁸ The only mention of ‘rehabilitation’ in the HR Act is in s 22, which concerns rights in criminal proceedings. The provision about rehabilitation concerns children accused of a criminal offence: see subsection 22(3) of the *Human Rights Act 2004* (ACT).

¹¹⁹ Explanatory Statement, Human Rights Bill 2003 (ACT), 3.

¹²⁰ See s 37 and Schedule 4 to the Australian Capital Territory (Self-Government) Act 1988 (Cth).

¹²¹ Article 10(3) of the ICCPR was also omitted from the *Charter of Human Rights and Responsibilities 2006*(Vic). In the Victorian Government’s submission to the review of the Victorian *Charter of Human Rights and Responsibilities Act 2006* by the Victorian Scrutiny of Acts and Regulations Committee it was stated that this was because ‘the prison system may have other aims and that this was a matter for public debate’: Victorian Government, Submission to the Scrutiny of Acts and Regulations Committee’s Review of the Charter of Human Rights and Responsibilities Act 2006, *Review of the Victorian Charter of Human Rights and Responsibilities Act* (2011) <<http://www.parliament.vic.gov.au/sarc/article/1447>> 70.

been vigorously monitored by the HRC, would result in a humane penitentiary system which would aid the reformation and rehabilitation of inmates'.¹²²

The CMA, on the other hand, does explicitly deal with the rehabilitation of offenders. Section 7 of that Act sets out the objects, which are stated to include both 'ensuring that detainees are treated in a decent, humane and just way'¹²³ and 'promoting the rehabilitation of offenders and their reintegration into society'.¹²⁴ Further, s 9 of the CMA, which is about the treatment of detainees generally, provides that:

[f]unctions under this Act in relation to a detainee must be exercised as follows [.....] (f) if the detainee is an offender—to promote, as far as practicable, the detainee's rehabilitation and reintegration into society.

When considering the type of education or vocational training to be included in a detainee's case management plan, rehabilitation and reintegration into society is also a relevant consideration.¹²⁵ It can be seen, therefore, that the ACT has shown a consistent commitment to the rehabilitation of offenders despite the failure to incorporate Article 10(3) of the ICCPR into the HR Act. It is a separate, and important, question as to how effective this commitment is in reality. However, that particular question cannot be answered at this time, as no formal evaluations of the rehabilitation programs being run in the AMC has been carried out to date.¹²⁶

VI CONCLUSION

Contradictory arguments about building a prison to rehabilitate offenders, but keeping the prison as a 'last resort' because community-based sentences are more likely to rehabilitate offenders, arose during the historical debates about whether the ACT should build a prison. It is not surprising that there was some confusion about whether rehabilitation should be the goal of

¹²² Joseph et al, above n 117, 292.

¹²³ Paragraph 7(c).

¹²⁴ Paragraph 7(d).

¹²⁵ Corrections Management Act 2007 (ACT) s 52.

¹²⁶ In noting that no evaluations have been carried out, the ACT Standing Committee on Justice and Community Safety recommended that this be rectified 'at the earliest possible opportunity': Australian Capital Territory Standing Committee on Justice and Community Safety, Australian Capital Territory Legislative Assembly, *Report on Annual and Financial Reports 2009-2010* (2011) 51 (Recommendation 3).

imprisonment or not, as during the period the debates were taking place in the ACT (from 1955-2001), rehabilitation was the dominant organising principle, then viewed as not working ('nothing works'), then the position changed to the view that there are some programs that can work ('what works movement').

Despite the debates which considered arguments in favour of, and against, building a prison; what was consistent was the ACT's commitment to the rehabilitation of offenders. It then became a question of what would be the best way to achieve this goal. The ACT is thereby revealed to be exceptional, as this ideological commitment to rehabilitation as a goal of imprisonment does not exist in other Australian jurisdictions. Other jurisdictions have instead shifted away from rehabilitation towards a more punitive approach to imprisonment.

The ACT's ideological commitment to rehabilitation has been translated into legislative provisions governing the operation of the AMC. Whilst it is too soon to assess whether the rehabilitative initiatives are working in practice, an understanding of the past is useful for informing future correctional policies in the ACT. The analysis of two of the themes that emerged during the historical debates contained in this article should contribute to this understanding.

USING ‘THREATENING PROCESSES’ TO PROTECT FRESHWATER BIODIVERSITY FROM INVASIVE ALIEN SPECIES

DR SOPHIE RILEY*

ABSTRACT

The use of formally listed ‘Key Threatening Processes’ (KTPs) is increasingly seen as a way of incorporating the regulation of invasive alien species into land and water management regimes. Yet, prior to the use of KTPs, regulators were already identifying threatening processes by classifying certain types of invasive alien species as noxious, pests, or feral and listing them on registers of prohibited species. These initiatives have been continuously supplemented by Australian jurisdictions adopting a range of strategies, frameworks and management plans relating to invasive alien species. This paper compares and contrasts the use of KTPs with other types of threatening processes as a means of dealing with invasive alien species (IAS), focusing on freshwater ecosystems. The identification and abatement of KTPs and other threatening processes occupies an important regulatory space in invasive alien species’ regimes. However, the effectiveness of these mechanisms depends as much on the success of the IAS regime as a whole as on the operation of the individual KTPs.

I INTRODUCTION

In 1817, explorer John Oxley enthusiastically described the Lachlan River in the State of New South Wales as ‘rich in the most excellent fish, procurable in the utmost abundance’.¹ Yet less than two centuries later, species located in the lowland catchment region of the Lachlan River were collectively identified as an endangered ecological community, with the introduction of

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¹ John Joseph William Molesworth Oxley, *Journals of Two Expeditions, into the Interior of New South Wales Undertaken by order of the British Government in the Years 1817-18* (1820, John Murray: London) 17 <<http://setis.library.usyd.edu.au/ozlit/pdf/p00066.pdf>>. See also discussion in Fact Sheet: Freshwater Habitats (2011) New South Wales Department of Primary Industries <<http://www.dpi.nsw.gov.au/fisheries/habitat/aquatic-habitats/freshwater>>.

alien species such as carp and plague minnow implicated in the decline.² In response to these types of threats, the New South Wales government listed the introduction of fish to fresh waters outside their natural range as a ‘Key Threatening Process’ (KTP).³

This type of categorisation reflects the trend in a number of Australian jurisdictions of regulating invasive alien species by identifying and listing their impacts as a formalised KTP. Yet, prior to the use of KTPs, Australian jurisdictions had already developed legislative mechanisms for regulating harmful species by declaring them noxious, pests, or feral and placing them on lists of prohibited species. In addition, Australian jurisdictions have also adopted a range of strategies, frameworks and management plans in response to growing awareness of environmental problems attributable to invasive alien species.

The purpose of this paper is to evaluate the regulation of invasive alien species by comparing and contrasting the use of KTPs with other types of threatening processes, focusing on freshwater ecosystems. These ecosystems have been selected for discussion because they are especially vulnerable to the impacts of invasive alien species and have generated a large volume of policy and administrative material. While the discussion emphasises freshwater jurisdictions, many of the comments, conclusions and recommendations can apply equally to KTPs and threatening processes of other systems. The term ‘freshwater’ as used in this paper refers to ecosystems located in a river or creek that are not subject to tidal influence. The references include artificially created waterways such as lakes, lagoons, dams, reservoirs, ponds, canals, channels and waterways;⁴ but do not include other aquatic ecosystems such as estuaries, coastal systems, or the marine environment. The latter have been excluded not only because they raise different regulatory issues, but also to keep the material manageable.⁵

² Fisheries Scientific Committee, *Final Recommendation, Aquatic Ecological Community in the Natural Drainage System of the Lowland Catchment of the Lachlan River* (2005)

<http://www.dpi.nsw.gov.au/__data/assets/pdf_file/0004/208291/FR25-Lachlan-River-EEC.pdf>.

³ New South Wales Department of Primary Industries, *Introduction of Fish to Fresh Waters Within a River Catchment Outside their Natural Range* The State of New South Wales, (2005, Primefacts).

⁴ Taken from the *Fisheries Management Act 1994* (NSW), s 14.

⁵ For example, invasive alien species introduced by discharge of ballast water in coastal areas, engages more directly the role of the Commonwealth government and international treaties such as the International Convention for the Control and Management of Ships’ Ballast Water and Sediment. Copy available by subscription from, www.imo.org, IMO Doc BWMCNF/36. The Convention was adopted under the auspices of the International

The discussion commences with a synopsis of the detrimental impacts of freshwater invasive alien species and then moves to an evaluation of the ways that Australian jurisdictions use techniques such as KTPs and other threatening processes to regulate these species. It is argued that the identification and abatement of KTPs and other threatening processes occupies an important regulatory space in invasive alien species' regimes. However, the effectiveness of these mechanisms depends as much on the success of the invasive alien species regime as a whole as on the operation of the individual KTPs.

II INVASIVE ALIEN SPECIES AND FRESHWATER ECOSYSTEMS

Alien species are species that have been introduced outside their natural past or present distribution.⁶ This definition applies to species introduced from one country to another, as well as native species translocated within the same country. Some introductions of alien species, such as those carried out for conservation purposes, have had positive outcomes. In the State of Victoria, for example, translocations of Macquarie perch and trout cod have successfully restored these species from the brink of extinction.⁷ However, many introductions of alien species are detrimental to native biodiversity.⁸ In such cases, alien species threaten ecosystems, habitats or other species and are therefore classified as 'invasive alien species' (IAS).⁹

Maritime Organization on 13 February 2004. It will come into force 12 months after ratification by 30 States, representing 35% of world merchant shipping tonnage.

⁶ Guiding Principles for the Prevention, Introduction and Mitigation of Impacts of Alien Species that Threaten Ecosystems, Habitats or Species, footnote (57), paragraph (i). Adopted April 2003 as part of Decision VI/23 of the Conference of the Parties. Report of the Sixth Meeting of the Conference of the Parties to the Convention on Biological Diversity, UNEP/CBD/COP/6/20 (23 September 2002).

⁷ Sinclair Knight Merz, *An Overview of the Impacts of Translocated Native Fish Species in Australia* (2008, Department of the Environment, Water, Heritage and the Arts, Commonwealth of Australia) 20.

⁸ Definition of Biodiversity in accordance with Article 2 of the Convention on Biological Diversity: 'the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems'.

⁹ Guiding Principles for the Prevention, Introduction and Mitigation of Impacts of Alien Species that Threaten Ecosystems, Habitats or Species, footnote (57), paragraph (ii).

The problem of IAS has been described by the International Union for the Conservation of Nature (IUCN) as ‘one of the major threats to biological diversity’.¹⁰ In a similar manner, the *Conference of the Parties to the Convention of Biological Diversity* (CBD) has also pinpointed the IAS dilemma as a cross-cutting issue to be dealt with in each of its thematic work programs.¹¹ In the context of freshwater systems, the CBD has specifically singled out the aquarium industry as a major source of detrimental introductions.¹² This conclusion is reinforced by the work of the IUCN that indicates world-wide almost one-third of the species listed by it as the worst invaders are garden or aquarium escapees.¹³

In Australia, fish are a significant IAS of freshwater systems. In some cases, fish have been deliberately introduced as part of stocking programs for recreational fisheries¹⁴ and also for biocontrol purposes.¹⁵ In other cases, freshwater fish have been ‘accidentally’ introduced by enthusiasts emptying aquariums and releasing unwanted pet fish.¹⁶ One recent study concluded that aquarium fish represent the greatest proportion of recent fish introductions¹⁷ with goldfish now being found in every Australian jurisdiction except the Northern Territory and Western

¹⁰ International Union for the Conservation of Nature, ‘Guidelines For the Prevention of Biodiversity Loss Caused by Alien Invasive Species’, Species Survival Commission of International Union for the Conservation of Nature, Gland, Switzerland (2000) section 1; see also See for example, Carol M. Brown, *Tilapia and the Environment*, (1995) 4(2) *TED Case Studies*, Case No. 208 <<http://www.american.edu/TED/tilapia.htm>>; E. Grossman, *Nile Perch and Lake Victoria Infestation Problem* (1995) 4(2) *TED Case Studies*, Case No. 206 <<http://www.american.edu/TED/perch.htm>>; Dianna Padilla and Susan Williams, ‘Beyond Ballast Water: Aquarium and Ornamental Trades as Sources of Invasive Species in Aquatic Ecosystems’ (2004) 2(3) *Ecological Society of America* 13.

¹¹ *Convention on Biological Diversity 1992*, adopted 5 June 1992, [1993] ATS No 32 (entered into force 29 December 1993). The convention had 193 Parties as of August 2011. The Conference of the Parties to the Convention on Biological Diversity has identified five thematic work programmes: biodiversity of marine and coastal areas; agricultural areas; forest areas; inland waters; and dry and sub-humid lands. Cross-cutting programmes pinpoint issues relevant to all thematic areas.

¹² Secretariat of the Convention on Biological Diversity, ‘Pets, Aquarium and Terrarium Species: Best Practices for Addressing Risks to Biodiversity’ (Technical Series No. 48, Montreal, SCBD, 2010).

¹³ *Ibid*, 11.

¹⁴ Sinclair Knight Merz, above n 7, 2.

¹⁵ New South Wales Department of Primary Industries, *Aquatic Ecological Community in the Natural Drainage System of the Lowland Catchment of the Lachlan River* (2006, Primefacts), 2; New South Wales National Parks and Wildlife Service, *Threat Abatement Plan, Predation by Gambusia Holbrooki – The Plague Minnow* (2003, National Parks and Wildlife Service) i <<http://www.environment.nsw.gov.au/resources/nature/ThreatAbatementPlanPlaqueMinnow.pdf>>.

¹⁶ See generally, Andrew L. Chang, et al, ‘Tackling Aquatic Invasions: Risks and Opportunities for the Aquarium Fish Industry’ (2009) 11 *Biological Invasions* 773; Secretariat of the Convention on Biological Diversity, above n 12.

¹⁷ J. Corfield, B. Diggles, C. Rubb and Ors, Review of the Impacts of Introduced Aquarium Fish Species That Have Established Wild Populations in Australia, (2010, Commonwealth of Australia) 1.

Australia.¹⁸ Fish have also gained entry as an unintended consequence of development works. In Tasmania, for example, the construction of hydroelectricity facilities led to the flooding of Lake Pedder and the introduction of climbing galaxias, which brought the native Pedder galaxias to the point of extinction.¹⁹

If unchecked, the introduction of alien fish has the potential to develop into one of the most ecologically damaging activities undertaken by humans.²⁰ Alien fish species can impact on native fish by direct predation, competition for food and habitat, introduction of diseases²¹ and ‘loss of genetic integrity’ through hybridisation.²² Introduced fish can also impact on species such as native frogs,²³ freshwater vegetation²⁴ and contribute to changes in river bank stability.²⁵ It is telling that overall alien fish species are ‘implicated in the decline of 42% of Australian native fish and several frog species’.²⁶

Plants and amphibians are another source of alien introductions. Several species of native frogs for example are potentially under the threat of extinction from the introduced cane toad.²⁷ Moreover, almost three quarters of Australia’s freshwater weeds initiated as introduced ornamental escapees.²⁸ Plants accidentally wash into waterways from dams and ponds during flooding,²⁹ and as with fish, members of the public carelessly introduce plants when emptying aquariums.³⁰ Yet another cause of plant introductions stems from boating enthusiasts who

¹⁸ Ibid, 36.

¹⁹ This occurred in combination with the prior introduced brown trout. Merz, above n 7, 2.

²⁰ Ibid, 1.

²¹ New South Wales Department of Primary Industries, above n 15, 2; Fisheries Scientific Committee, above n 2.

²² Merz, above n 7, 13-20.

²³ Ibid, 18.

²⁴ Fisheries Scientific Committee, above n 2.

²⁵ Ibid.

²⁶ Andy Moore, Nicholas Marton and Alex McNee, *A Strategic Approach to the Management of Ornamental Fish in Australia* (2010, Bureau of Rural Sciences) iv.

²⁷ These are the green and golden bell frog, wallum froglet and the green-thighed frog. *Cane Toad – Key Threatening Process Listing* (2011) New South Wales Department of Environment and Heritage <<http://www.environment.nsw.gov.au/determinations/BufoMarinusKtp.htm>>.

²⁸ Nursery and Garden Industry Australia, *Fact Sheet: Reducing the Water Weed Risk* (2007) 6 *Nursery Papers* <http://www.ngia.com.au/files/nurserypapers/NP_2007_06.pdf>. See also Fisheries Scientific Committee, *Degradation of Native Riparian Vegetation Along New South Wales Water Courses* (2001) <http://www.dpi.nsw.gov.au/__data/assets/pdf_file/0009/208377/FR19-riparian-vegetation.pdf>.

²⁹ Nursery and Garden Industry Australia, above n 28.

³⁰ The State of Queensland, Department of Environment and Resource Management, *Fact Sheet: Aquatic Weeds*, (2011).

unknowingly transport plant fragments that attach to propellers, anchors, watercraft and trailers.³¹ A more insidious dilemma stems from dishonest retailers who deliberately use public waterways to grow plants for economic advantage.³²

The effects of alien plants on freshwater ecosystems are equally as devastating as alien fish introductions. Non-native plants ‘shade out’ native vegetation and destroy habitat for native species,³³ with willow trees being a particularly sinister problem. Their root systems erode banks as well as choke rivers and streams.³⁴ What is more, in common with other deciduous trees, willows drop large volumes of leaves in a short time, which in freshwater ecosystems break down rapidly leading to a decline in water quality.³⁵

The regulation of freshwater IAS poses special challenges for regulators. To start with, the Australian continent comprises a vast land mass with an array of climatic zones and freshwater habitats. Accordingly, alien species have many opportunities to establish themselves, compared with countries whose geographical areas cover a less diverse range of habitats.³⁶ In addition, the control and eradication of freshwater weeds is a complex process. The weeds may be submerged and difficult to access;³⁷ and at the same time the technology for weed eradication and control has often been developed for terrestrial weeds and does not readily convert to freshwater environments.³⁸ In designing its IAS regimes, Australia is guided by the provisions of the CBD.

³¹ *Weed Definitions and FAQs*, NSW Government (2011) New South Wales Department of Primary Industries <<http://www.dpi.nsw.gov.au/agriculture/pests-weeds/weeds/definition>>.

³² Nursery and Garden Industry Australia, above n 28; The State of Queensland, Department of Environment and Resource Management, above n 30.

³³ The State of Queensland, Department of Environment and Resource Management, above n 30.

³⁴ New South Wales Department of Primary Industries, above n 1.

³⁵ Linda Taman, ‘The Effects and Management of Deciduous Trees on Waterways’ (2002) *WaterNotes* WN25 <<http://www.nynrm.sa.gov.au/Portals/7/pdf/LandAndSoil/50.pdf>>.

³⁶ Corfield, Diggles, Rubb and Ors, above n 17, 16.

³⁷ Nursery and Garden Industry Australia, above n 28.

³⁸ *Ibid.*

III THE REGULATORY REGIME

A The Use of Key Threatening Processes

As already noted, the CBD has recognised the effects of IAS as a cross-cutting issue. The Convention itself obliges the parties to identify processes and activities that have, or are likely to have, a significant adverse impact on biological diversity – in other words to identify and manage threatening processes and activities.³⁹ The use of the phrase ‘likely to’ is worth mentioning because the term refers to the potential for harm, rather than simply the detection of harm once it has occurred. Accordingly, domestic regimes need to be proactive in identifying and preventing threats to biodiversity.

Article 8(h) of the CBD specifically singles out the adverse effects of IAS as a noteworthy threatening process and calls on the parties to ‘prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species.’ The CBD envisages that members will employ a variety of measures to achieve these objectives, including the development of national strategies and programmes, the introduction of legislation and the strengthening of institutions.⁴⁰ The CBD does not specify how members are to structure their regimes. Therefore, members have a relatively free hand to use any combination of legal and policy instruments in order to achieve their objectives. Thus, members may: adopt formal lists of threatening processes; adapt procedures already established that deal with harmful species such as weeds, feral animals and noxious fish;⁴¹ and develop policy instruments including fisheries plans, biodiversity strategies and biosecurity strategies that provide strategic guidance for dealing with IAS.⁴²

³⁹ Convention on Biological Diversity, Article 7(c), Article 8(1).

⁴⁰ Ibid, Article 6(a), Article 8(k); Convention on Biological Diversity Guiding Principles, Guiding Principle 11.1.

⁴¹ Fisheries Management Act 1994 (NSW) s 220FC, s 220C.

⁴² For example: Natural Resource Management Ministerial Council, *Australia’s Biodiversity Conservation Strategy 2010-2030* (2010, Australian Government, Department of Sustainability, Environment, Water, Population and Communities: Canberra) 24-25; Queensland Department of Primary Industries and Fisheries, *Queensland Biosecurity Strategy 2009-14*, (2008, Queensland Government, Department of Primary Industries and Fisheries); Natural Resource Management Ministerial Council, *Australian Pest Animal Strategy – A National Strategy for the Management of Vertebrate Pest Animals in Australia* (2006, Australian Government, Department of the Environment and Water Resources: Canberra) (i); *Flora and Fauna Guarantee Act 1988* (Vic) s 3, s 10, s 11(3); *Threatened Species Conservation Act 1995* (NSW) ss 16-25A; *Land Protection (Pest and Stock Route Management)*

The concept of a threatening process is different from the totality of a country's IAS regime. The latter refers to the combination of measures, mechanisms, objectives and outcomes for dealing with IAS. It includes quarantine and biosecurity regulation, plans, strategies, legislation and other measures. The identification and abatement of threatening processes occupies one part of that regime. The CBD recognises this fact and in addition to the identification and abatement of threatening processes affirms the need for other equally important measures, such as strengthening border controls and fostering risk analysis.⁴³ Furthermore, IAS regimes also only occupy one part of broader initiatives designed to protect biodiversity. Accordingly, the CBD also recommends that members implement plans and strategies to recover threatened species and rehabilitate degraded ecosystems.⁴⁴ Indeed, listed KTPs often engage with these issues,⁴⁵ underscoring the fact that threatening processes do not operate in a regulatory vacuum. Consequently, as noted in the introduction, the effectiveness of KTPs and other threatening processes also depends on the success of the entire IAS regime.

As a preliminary matter, Australian jurisdictions recognise different calibres of threatening processes. For example, both the Commonwealth and New South Wales parliaments differentiate between 'threatening processes' and 'key threatening processes.' Section 188(3) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) defines a threatening process as one that threatens or may threaten the survival of native species or ecological communities. Similarly, s 4 of the *Threatened Species Conservation Act 1995* (NSW) defines a threatening process as one that can threaten the survival of species or ecological communities, although the definition also extends to threats to the evolutionary development of species,

Act 2002 (Qld), ss 39-46; *Agriculture and Related Resources Protection Act 1976* (WA), s 43, s 50, s 51; *Pest Plant and Animals Act 2005* (ACT), s 9, s 18, s 22; *Plant Diseases Act 1924* (NSW); *Plant Diseases Control Act 1979* (NT); *Agriculture and Related Resources Protection Act 1976* (WA); *Catchment and Land Protection Act 1994* (Vic); *Weeds Management Act 2001* (NT); *Land Protection (Pest and Stock Route Management) Act 2002* (Qld).

⁴³ Convention on Biological Diversity Guiding Principles, Principle 7, Principle 10, Principle 11.

⁴⁴ Convention on Biological Diversity, Article 8(f).

⁴⁵ See, for example, *Final Determination Predation by the Plague Minnow (Gambusia Holbrooki) – Key Threatening Process Listing* (2011) New South Wales Department of Environment and Heritage <<http://www.environment.nsw.gov.au/determinations/PlagueMinnowKTPListing.htm>>. The plan notes, at (ii), that 'effective long-term control of gambusia across the landscape will only be achieved in partnership with programs that endeavour to restore aquatic ecosystems.' Proposed 'Action 6' detailed on pages 32-34 links the control of gambusia with habitat restoration programmes designed to recover threatened species.

populations or ecological communities. In both jurisdictions, a *key* threatening process is defined in a more restricted manner as one that has caused actual damage to threatened species or ecological communities, or adversely affects their conservation status.⁴⁶

The importance of these definitions lies in the fact that in accordance with both the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and the *Threatened Species Conservation Act 1995* (NSW), only KTPs are eligible for listing.⁴⁷ This narrower formulation for the listing of KTPs has undoubtedly been designed to limit listings to those processes and activities with a significant adverse impact on biological diversity. It is also a formulation that is at least partly consistent with the definition of threatening processes found in the *Flora and Fauna Guarantee Act 1988* (Vic).

The *Flora and Fauna Guarantee Act 1988* (Vic) specifies a threatening process is eligible for listing if it poses, or has the potential to pose, a significant threat to the evolutionary development of a range of flora or fauna.⁴⁸ The primary difference between this formulation and the one found at the Commonwealth and New South Wales levels is that the Victorian legislation also stresses the potential of threatening processes to impact on biodiversity. This gives the Victorian definition a wider scope than those applying under New South Wales and Commonwealth laws. In the Australian Capital Territory, which is the only other jurisdiction to offer a legislative base for the listing of threatening processes, the *Nature Conservation Act 1980* (ACT) defines these as processes that threaten or may threaten the survival, abundance or evolution of the species or community.⁴⁹ As with the Victorian legislation, this provides a wider definitional ambit than the Commonwealth or New South Wales. However, to date no threatening processes have been listed in the Australian Capital Territory.

The common feature of these jurisdictions is that they provide for the formal listing of particular types of threatening processes, which in two of the jurisdictions are called ‘key threatening

⁴⁶ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 188(4); *Threatened Species Conservation Act 1995* (NSW) s 13.

⁴⁷ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 188(1); *Threatened Species Conservation Act 1995* (NSW) s 13. See also *Fisheries Management Act 1994* (NSW) s 220FC.

⁴⁸ *Flora and Fauna Guarantee Act 1988* (Vic) s 3, s 11(3).

⁴⁹ *Nature Conservation Act 1980* (ACT), definition in the Schedule to the Act.

processes'. As a consequence of this differentiation, in this paper, the term 'key threatening process' (KTP) is used to denote threatening processes that can be formally listed under Commonwealth, New South Wales, Victorian and Australian Capital Territory legislation. The term 'threatening process' is used to describe other means of identifying the deleterious impacts of IAS, such as the development of lists of prohibited species and the myriad references to IAS in strategies and management plans.

B Key Threatening Processes and Invasive Alien Species in Biodiversity Legislation

As just noted, statutes that facilitate the listing of KTPs include: the *Environment Protection and Biodiversity Conservation Act 1999* (Cth);⁵⁰ the *Threatened Species Conservation Act 1995* (NSW);⁵¹ the *Flora and Fauna Guarantee Act 1988* (Vic);⁵² and the *Nature Conservation Act 1980* (ACT).⁵³ In addition, NSW affords separate listing procedures for KTPs of terrestrial and freshwater systems. IAS that impact on terrestrial systems are regulated under the *Threatened Species Conservation Act 1995* (NSW),⁵⁴ while IAS that impact on freshwater systems are dealt with under the *Fisheries Management Act 1994* (NSW).⁵⁵ The two statutes contain mirror provisions for listing of KTPs and abating their threats.⁵⁶

The procedures for nominating and listing KTPs are roughly equivalent. The process commences by a nomination that may be made by any person, including members of the public.⁵⁷ Once the

⁵⁰ *Environment Protection and Biodiversity Conservation Act 1999* (ACT), s 183, s 188, s 528.

⁵¹ *Threatened Species Conservation Act 1995* (NSW) s 8, s 17, s 128A, s 74-85.

⁵² *Flora and Fauna Guarantee Act 1988* (Vic) s 10(2), s 11(3), Schedule 1 s 5.1.

⁵³ *Nature Conservation Act 1980* (ACT) s 38(1).

⁵⁴ *Threatened Species Conservation Act 1995* (NSW), s 5A.

⁵⁵ *Fisheries Management Act 1994* (NSW) s 220FC, s 220FD.

⁵⁶ *Threatened Species Conservation Act 1995* (NSW), ss 16-25A; *Fisheries Management Act 1994* (NSW), s 220C(6) (listing process); *Threatened Species Conservation Act 1995* (NSW), ss 17, 23; *Fisheries Management Act 1994* (NSW) ss 220G, 220L (role of scientific committees).

⁵⁷ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 194E; *Threatened Species Conservation Act 1995* (NSW) s 18; *Fisheries Management Act 1994* (NSW) s 220H; *Flora and Fauna Guarantee Act 1988* (Vic) s 12; *Nature Conservation Act 1980* (ACT) s 39. In addition, although Tasmania does not provide for the listing of KTPs, it does permit the public to nominate threatening processes. See *Threatened Species Protection Act 1995* (Tas) s 16.

nomination is made, it is evaluated by a scientific committee.⁵⁸ For the most part, the committee provides advice on whether to accept a nomination by making recommendations to the relevant Minister.⁵⁹ Less commonly, the committee makes the decision whether to accept or reject a nomination.⁶⁰ If a nomination is accepted it is placed on a list of KTPs awaiting further action. Such action can include the preparation and implementation of a threat abatement plan and the linking of abatement measures with the recovery of threatened species and ecosystems.⁶¹

Table 1 contains a listing of KTPs of freshwater systems attributable to IAS. From this summary, two KTPs stand out – the degradation of riparian systems by introduced plants and the impact of introduced fish on freshwater biodiversity. Given that the purpose of listing KTPs is to identify and abate environmental threats, it would be reasonable to assume that the preparation and implementation of abatement and recovery strategies would automatically follow these listings of KTPs. Yet this is not necessarily the case.

⁵⁸ These committees are established by legislation: *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 502; *Threatened Species Conservation Act 1995* (NSW) s 128; *Fisheries Management Act 1994* (NSW) ss 221ZA-221ZE; *Flora and Fauna Guarantee Act 1988* (Vic) s 8(3); *Nature Conservation Act 1980* (ACT) s 13, s 14 establish the Flora and Fauna Committee.

⁵⁹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 189, s 503; *Flora and Fauna Guarantee Act 1988* (Vic) s 8(2), s 16; *Nature Conservation Act 1980* (ACT) s 13, s 14, s 38(3).

⁶⁰ *Threatened Species Conservation Act 1995* (NSW), s17, s 23; *Fisheries Management Act 1994* (NSW) s 220G.

⁶¹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 267-284; *Threatened Species Conservation Act 1995* (NSW) ss 74-85; *Fisheries Management Act 1994* (NSW) ss 220ZJ-220ZP; *Flora and Fauna Guarantee Act 1988* (Vic) s 21(1); *Nature Conservation Act 1980* (ACT) s 40. With respect to the linking of threat abatement plans to recovery of threatened species and ecosystems see above n 45.

Table 1: Invasive Alien Species Listed as Key Threatening Processes of Freshwater Systems

Jurisdiction	(Key) Threatening Process
Federal	<p>KTPs Accepted for Listing under <i>Environment Protection and Biodiversity Conservation Act 1999</i> (published in the Gazette)</p> <ul style="list-style-type: none"> • Loss and degradation of native plant and animal habitat by invasion of escaped garden plants, including aquatic plants. • Infection of amphibians with chytrid fungus resulting in chytridiomycosis.
New South Wales	<p>KTPs Accepted for Listing under <i>Threatened Species Conservation Act 1995</i> (Schedule 3)</p> <ul style="list-style-type: none"> • Infection of frogs by amphibian chytrid causing the disease chytridiomycosis (22 August 2003). • Invasion and establishment of the cane toad (<i>Bufo marinus</i>) (21 April 2006) • Predation by <i>Gambusia Holbrooki</i> Girard, 1859 (plague minnow or mosquito fish) (29 January 1999). <p>KTPs Accepted for Listing under <i>Fisheries Management Act 1994</i> (Schedule 6)</p> <ul style="list-style-type: none"> • The introduction of fish to fresh waters within a river catchment outside their natural range. • The degradation of native riparian vegetation along New Wales water courses. • (Other KTPs relevant to aquatic systems include the introduction of non-indigenous fish and marine vegetation to the coastal waters of New South Wales).
Victoria	<p><i>Flora and Fauna Guarantee Act 1988</i> (Schedule 3)</p> <ul style="list-style-type: none"> • Degradation of native riparian vegetation along Victorian rivers and streams. • Introduction of live fish into waters outside their natural range within a Victorian river catchment after 1770. • (Other KTPs relevant to aquatic systems include: the input of organotins to Victorian marine and estuarine waters; the introduction and spread of <i>Spartina</i> to Victorian estuarine environments; and the introduction of exotic organisms into Victorian marine waters).
Australian Capital Territory	<ul style="list-style-type: none"> • No threatening processes yet declared.

To start with, Australian legislation with respect to KTPs is often permissive, rather than obligatory. Consequently, the Minister normally retains wide discretion in determining whether to prepare and implement threat abatement plans. In New South Wales, for example, regulators

‘may’ prepare a threat abatement plan which the Minister needs to approve.⁶² In coming to a determination, the Minister must have regard to the likely social and economic consequences of the plan and can refuse consent because of those considerations.⁶³ Accordingly, in exercising his or her discretion, the Minister cannot automatically allow environmental concerns to override other criteria, yet social and economic considerations may override environmental concerns.

In Victoria, the provisions of the *Flora and Fauna Guarantee Act 1988* (Vic) are similarly permissive;⁶⁴ although in determining the list of KTPs the Minister may only have regard to conservation matters.⁶⁵ It is also worth pointing out that in Queensland the Minister ‘may’ issue interim conservation orders for threatening process.⁶⁶ Although this power is permissive, it is nevertheless important, because the *Nature Conservation Act 1992* (Qld) does not otherwise deal with KTPs in a formalised manner.⁶⁷ To date, the power has not been used with respect to IAS, but has been used to impose a 60 day ban on net fishing in the Boyne River region to protect turtles.⁶⁸

Even where legislation uses words of obligation such as ‘must’ or ‘shall’ this does not necessarily diminish the Minister’s discretion. At the Commonwealth level, s 270A of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) stipulates that the Minister ‘must’ prepare a threat abatement plan, but only if he or she believes that the plan is a feasible, effective and efficient way to abate the process. By way of illustration, on 8 January 2010 the Minister accepted that ‘Loss and Degradation of Native Plant and Animal Habitat by

⁶² *Threatened Species Conservation Act 1995* (NSW) s 74 the Director-General may prepare a threat abatement plan; *Fisheries Management Act 1994* (NSW) s220ZJ the Director-General may prepare a threat abatement plan. The preparation of a threat abatement plan was in fact mandatory in New South Wales up until 2004 when the *Threatened Species Legislation Amendment Act 2004* (NSW) amended the word ‘must’ to read that the Minister ‘may’ prepare a threat abatement plan. This change was partly prompted by the backlog of KTPs awaiting preparation of plans. See further discussion on this point in Part V of this paper.

⁶³ *Threatened Species Conservation Act 1995* (NSW) s 83; *Fisheries Management Act 1994* (NSW) s 220ZP.

⁶⁴ *Flora and Fauna Guarantee Act 1988* (Vic) s 21(1). Threat abatement plans are referred to as management plans.

⁶⁵ *Flora and Fauna Guarantee Act 1988* (Vic) s 10(7).

⁶⁶ *Nature Conservation Act 1992* (Qld), s 102.

⁶⁷ Section 82 of the *Nature Conservation Act 1992* (Qld) permits regulators to declare wildlife as ‘prohibited’ if it constitutes a threat to native wildlife. However, as discussed in Part 3, Sub-section C of this paper, this type of declaration differs from the listing process of KTPs.

⁶⁸ The Honourable Kate Jones, Minister for Environment and Resource Management ‘Fishing Industry and Government Act To Protect Turtles in the Boyne River’ (Media Release, 2 May 2011) <<http://www.cabinet.qld.gov.au/MMS/StatementDisplaySingle.aspx?id=74570>>.

Invasion of Escaped Garden Plants, Including Aquatic Plants' should be listed as a KTP.⁶⁹ However, the Minister also decided that a threat abatement plan was not a feasible, effective or efficient way to abate the process. In doing this, the Minister followed advice given by the Threatened Species Scientific Committee that existing institutions established under the auspices of the *Australian Weeds Strategy 2007* were sufficient to deal with escaped garden plants. Yet, gaps and inconsistencies with weed regulation in Australia are notorious and have already been well documented in the literature.⁷⁰

Unlike the provisions of Commonwealth legislation, s 40 of the *Nature Conservation Act 1980* (ACT) provides that the conservator⁷¹ 'shall' prepare a draft action plan to minimise threatening processes. Yet, this provision still needs to be read in conjunction with s 38(3) of the same Act, which initially gives the Minister a wide discretion whether to declare a threatening process.⁷² It is telling that, as already noted, at the time of writing no threatening processes have been declared, despite the fact that the *1997 Nature Conservation Strategy* pointed out that the Australian Capital Territory still had much work to do with respect to species such as willow that were steadily invading riparian ecosystems.⁷³ Ten years later, in 2007, willows were still identified as a significant problem in the Australian Capital Territory.⁷⁴

⁶⁹ Advice to the Minister for the Environment, Heritage and the Arts from the Threatened Species Scientific Committee (the Committee) on Amendments to the List of Key Threatening Processes under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) <<http://www.environment.gov.au/biodiversity/threatened/ktp/pubs/garden-plants-listing-advice.pdf>>.

⁷⁰ Richard Groves, Robert Boden and Mark Lonsdale, *Jumping the Garden Fence Invasive Plants in Australia and their Environmental and Agricultural Impacts* (2005); Paul Martin, Robyn Bartel, Jack Sinden, Neil Gunningham and Ian Hannam, *Developing a Good Regulatory Practice Model for Environmental Regulations Impacting on Farmers – Overview* (2007, Australian Farm Institute: Surry Hills Australia) 2; Jack Sinden, et al, 'The Economic Impact of Weeds in Australia' (Technical Series No. 8, CRC for Australian Weed Management, March 2004) 5; Mark Burgman, Terry Walshe, Lee Godden and Paul Martin, 'Designing Regulation for Conservation and Biosecurity' (2009) 13(1) *Australasian Journal of Natural Resources Law and Policy* 93, 110.

⁷¹ The conservator is appointed under s 7 of the *Nature Conservation Act 1980* (ACT) for the purposes of carrying out functions under the Act.

⁷² *Nature Conservation Act 1980* (ACT), s 38(3). The Flora and Fauna Committee makes a recommendation to the Minister with respect to declaration of a threatening process, which the Minister may accept.

⁷³ ACT Government, Territory and Municipal Services, above n 83, Part 3.1.

⁷⁴ Hugo Bowman, and Vanessa Keyzer, *Molonglo River Rescue Action Plan 2010*, (2010, ACT Government, Natural Resource Management Council) 4, 9, 11, 20, 24. This situation in fact prompted local communities to embark on a restoration program in Yarralumla Creek. See Australian Government Department of the Environment, Water, Heritage and the Arts, *Willows, National Management Guide, Weeds of National Significance, Victorian Department of Primary Industries* (2007) 98.

A further difficulty with formalised KTPs is the fact that not all jurisdictions in Australia use them. As indicated in Table 1, only four of the nine jurisdictions provide for the listing of KTPs. Accordingly, more than half of Australia's State and Territory governments, namely, Western Australia, Northern Territory, South Australia, Tasmania and Queensland, do not accommodate official lists of KTPs.⁷⁵ That fact, however, does not also mean that more than half of Australia's jurisdictions are inactive with respect to IAS. Indeed, as already mentioned, regulators can identify and regulate IAS as a threatening process in a variety of ways including the declaration of lists of prohibited species.

C Threatening Processes and Prohibited Species

All Australian jurisdictions have enacted legislation that enables regulators to declare pest species of plants or fish as noxious,⁷⁶ weed, or feral. This type of declaration essentially creates lists of prohibited species (or prohibited lists) and is often a precursor to offences created for the sale or possession of declared species.⁷⁷ Section 78 of the *Fisheries Management Act 2007* (SA), for example, prohibits a person from being in possession or control of noxious fish or bringing such fish into South Australia without a permit. In a similar manner, ss 104 and 105 of the *Fish Resources Management Act 1994* (WA) also prohibit individuals from keeping noxious fish or bringing them into the state. Legislation can also proscribe the release of live fish,⁷⁸ or the import, possession and release of non-native fish.⁷⁹ Comparable provisions apply to lists of prohibited plant species. In New South Wales, in accordance with the *Noxious Weeds Act 1993* (NSW), the Minister for Primary Industries may declare plants as noxious.⁸⁰ Pursuant to this power, the Minister has declared as noxious a number of notable IAS of freshwater systems,

⁷⁵ Tasmania and Queensland however do refer to, and define threatening processes, see *Threatened Species Protection Act 1995* (Tas), s 3; *Nature Conservation Act 1992* (Qld), s 12.

⁷⁶ For example, Schedule 6C of the *Fisheries Management Act 1994* (NSW) sets out a list of declared noxious fish and vegetation in New South Wales. At the time of writing, the list contained one declared plant and 137 declared fish; *Fisheries Act 2000* (ACT), s 14; *Natural Resources Management Act 2004* (SA) Chapter 8.

⁷⁷ *Fisheries Management Act 1994* (NSW) s 210, s 211; *Fisheries Act 1994* (Qld), s 78, s 89, s 92; *Fisheries Act* (NT) s 15(1)(b); *Fisheries Management Act 2007* (SA) s 78; *Fisheries Act 2000* (ACT), s 78; *Fish Resources Management Act 1994* (WA) s 104, s 105.

⁷⁸ *Fisheries Act* (NT) s 15(1)(a).

⁷⁹ *Fisheries Act 2000* (ACT) s 76; *Fisheries Act 1994* (Qld) s 90; *Fisheries Management Act 1994* (NSW) s 216(1); See also, in Tasmania, the *Living Marine Resources Management Act 1995* (Tas) s127, s 128, s 129.

⁸⁰ *Noxious Weeds Act 1993* (NSW) s 7, s 33.

including Alligator weed, Salvinia and Water Lettuce.⁸¹ The Minister also has concomitant powers under the *Fisheries Management Act 1994* (NSW) and has listed Caluperia in Schedule 6C of the Act as an aquatic weed.

The declaration of pest species and the creation of prohibited lists underpin policy aimed at regulating species already identified as causing damage. For this reason, prohibited lists do not deal with the *potential* of species to become an IAS in the preventative manner emphasised by the CBD. By way of contrast, a number of policy instruments and management plans relevant to freshwater systems do consider this point. These initiatives, however, vary considerably in their design, and the extent to which they engage with IAS.

D Invasive Alien Species as a Threatening Process in Strategies and Management Plans

The types of instruments adopted by Australian jurisdictions that relate to IAS include policy initiatives covering biosecurity, biodiversity, threatened species and invasive species.⁸² These instruments are designed to provide strategic guidance for the problem of IAS. For example, the deleterious impacts of freshwater IAS are noted in six out of the seven biodiversity strategies adopted at the Federal, State and Territory levels in Australia.⁸³ The strategies note the

⁸¹ Department of Primary Industries, above n 31.

⁸² See for example, The Intergovernmental Agreement on Biosecurity: An Agreement Between The Commonwealth of Australia, State and Territory Governments To Strengthen The National Biosecurity System <http://www.coag.gov.au/intergov_agreements/docs/intergovernmental_agreement_biosecurity.pdf>; Department of Environment and Resource Management, Building Nature's Resilience – A Draft Biodiversity Strategy for Queensland, State of Queensland 2010; Tasmanian Department of Primary Industries, Water and Environment - Nature Conservation Branch, Threatened Species Strategy 2000 <[http://www.dpiw.tas.gov.au/inter.nsf/Attachments/RLIG-542642/\\$FILE/threatspstrat.pdf](http://www.dpiw.tas.gov.au/inter.nsf/Attachments/RLIG-542642/$FILE/threatspstrat.pdf)>.

⁸³ State of New South Wales, Industry and Investment NSW and the Department of Environment, Climate Change and Water, *Draft NSW Biodiversity Strategy 2010-2015* (2010) NSW Government DECCW, 87-8, <<http://www.environment.nsw.gov.au/resources/biodiversity/strategy/10821DraftBioStrat.pdf>>; Department of Environment and Resource Management, above n 82, 8; Victorian Department of Sustainability and Environment, *Victoria's Biodiversity Strategy 2010-2015 Consultation Draft, the State of Victoria, Department of Sustainability and Environment* (2010), 19-20; Tasmanian Government, *Tasmania's Nature Conservation Strategy 2002-2006*, 36 <[http://www.dpiw.tas.gov.au/inter.nsf/Attachments/JCOK-5L2664/\\$FILE/NCS%20Final%20Report%202003.pdf](http://www.dpiw.tas.gov.au/inter.nsf/Attachments/JCOK-5L2664/$FILE/NCS%20Final%20Report%202003.pdf)>; Australian Capital Territory Government, Territory and Municipal Services, *The ACT Nature Conservation Strategy* (1997), Part 3.1 <http://www.tams.act.gov.au/__data/assets/pdf_file/0020/13493/natureconservationstrategyword.pdf>; Natural Resource Management Ministerial Council, above n 42, 61; State of Victoria, Department of Primary Industries, *Invasive Plants and Animals, Framework* (2010).

desirability of collaborative efforts⁸⁴ and increasingly emphasise the need to identify and regulate pathways of invasion. Typical of this trend is the *Tasmanian Nature Conservation Strategy 2002-2006* that stresses the need to manage ‘sites and avenues of high-risk new introductions.’⁸⁵

Additionally, the impacts of freshwater IAS feature in numerous instruments that deal with recreational fisheries, ornamental fish and aquatic weeds.⁸⁶ The Commonwealth Government, in particular, has adopted a number of national policies and strategies aimed at providing leadership for the States and Territories to develop their own instruments. Commonwealth initiatives include the *National Policy for the Translocation of Live Aquatic Organisms – Issues, Principles and Guidelines for Implementation (National Translocation Policy)*⁸⁷ and the *National Code of Practice for Recreational and Sport Fishing (RecFish Australia 2001) (Recreational Fishing Code)*.⁸⁸ These documents are designed to reduce the likelihood of translocating species that can become invasive or introduce pests and diseases. Hence, key recommendations include not using high risk alien species as live bait and following uniform guidelines for stocking in private waters to ensure that locally-native fish are used.⁸⁹ The States and Territories have in fact used these instruments to formulate their own frameworks for translocation of aquatic species.⁹⁰

These developments, in a very practical sense, identify the introduction of alien fish as a threatening process and provide guidance for dealing with that process. The instruments, however, neither deal with alien fish already present in a jurisdiction, nor act as recovery or

⁸⁴ State of New South Wales, Industry and Investment NSW and the Department of Environment, above n 83, 88.

⁸⁵ Tasmanian Government, *Tasmania’s Nature Conservation Strategy 2002-2006*, above n 83, 38.

⁸⁶ For example, Queensland Government, Department of Primary Industries, Management Arrangements for Translocation of Live Aquatic Organisms (Transport Between Bioregions) for Aquaculture, Aquaculture Policy FAMOP015 (2006) <http://www.dpi.qld.gov.au/documents/Fisheries_Aquaculture/Translocation-Policy.pdf>; Ministerial Council on Forestry Fisheries and Aquaculture, *National Policy for the Translocation of Live Aquatic Organisms – Issues, Principles and Guidelines for Implementation*, Bureau of Rural Sciences (1999) <http://adl.brs.gov.au/brsShop/data/12105_translocation.pdf>; Moore, Marton and McNee, above n 26; Management Arrangements for Translocation of Live Aquatic Organisms (Transport Between Bioregions) for Aquaculture, above n 86; Phil Moran, Noosa and District Landcare Group, *Mary River Aquatic Weed Strategy, 2010-2014* (2009) Queensland Government <http://www.bmrg.org.au/downloads/Mary_River_Aquatic_Weed_Management_Strategy.pdf>.

⁸⁷ Ministerial Council on Forestry Fisheries and Aquaculture, above n 86.

⁸⁸ *National Code of Practice for Recreational and Sport Fishing (RecFish Australia 2001)* (2001) Department of Agriculture Fisheries and Forestry <http://www.daff.gov.au/_data/assets/pdf_file/0019/6058/nat_code_of_practice_2001.pdf>.

⁸⁹ Ministerial Council on Forestry Fisheries and Aquaculture, above n 86, 14-15; *National Code of Practice for Recreational and Sport Fishing*, above n 88, paragraph 3; Merz, above n 7, 41.

⁹⁰ See discussion in Merz, above n 7, Parts 7.1, Part 7.2, 43-46.

rehabilitation plans for threatened species and degraded ecosystems. This is hardly surprising since both the *National Translocation Policy* and the *Recreational Fishing Code* were largely developed to stop unwarranted introductions of aquatic species in the context of recreational fishing. Indeed, as the *Fish Stocking Plan for the Australian Capital Territory 2009-2014* notes, fish stocking plans rarely consider that the very act of restocking may put threatened species under further stress.⁹¹ For this reason, these types of instruments do not provide a comprehensive regulatory channel between the threatening process they address and the recovery and rehabilitation of threatened species and degraded ecosystems.

Elsewhere, plans and strategies represent a potpourri of regulation. Some consider a limited range of abatement measures such as eradication and control of alien species, while others reach further to consider recovery of threatened species and rehabilitation of degraded ecosystems.

For example, the *Action Plan for South Australian Freshwater Fishes 2007-2012* notes the importance of developing measures to reduce the numbers of alien fish introduced into South Australia. Additionally, the plan outlines the advantages of carrying out targeted control measures in order to ‘improve resilience of native fish populations’.⁹² The plan therefore recognises the need to abate the threats posed by alien fish. However, in similarity with the *National Translocation Policy* and the *Recreational Fishing Code*, the *South Australian Action Plan* does not grapple with recovery of threatened species and rehabilitation of degraded ecosystems. Similar comments can be made about other strategies, such as the *Mary River Aquatic Weed Strategy 2010-2014*.⁹³ This initiative deals with early detection, eradication and containment of aquatic weeds, but is not intended to operate as a recovery or rehabilitation plan beyond recommending measures for abating the threatening processes it identifies.

⁹¹ The Department of Environment, Climate Change, Energy and Water, *Fish Stocking Plan for the Australian Capital Territory 2009-2014* (2009) 7
<http://www.environment.act.gov.au/__data/assets/pdf_file/0004/156820/Fish_stockplan_2009-2014_final.pdf>.

⁹² Michael Hammer, Scott Wedderburn and Jason van Weenen, *Action Plan for South Australian Freshwater Fishes*, (2009, Department for Environment and Heritage, Native Fish Australia (SA) Inc Adelaide) 5, 138-146.

⁹³ Phil Moran, above n 86.

In contrast, plans dedicated to recovery of threatened species by their very nature will consider recovery *and* rehabilitation issues. The *Mary River Cod Research and Recovery Plan*,⁹⁴ for example, concentrates on restoring cod populations in their historic range within the Mary River system and also on rehabilitating cod habitat. One of the objectives of the plan is to reduce the impacts of alien species on the Mary River Cod. Consequently, the plan recommends a range of measures including: disallowing further introductions of non-native fish;⁹⁵ investigating the feasibility of establishing fish hatcheries along the Mary River; and rehabilitating fish habitat.⁹⁶

The examples of KTPs and other threatening processes discussed in this part of the paper are but a selection taken from a voluminous amount of law and policy that authorities have developed for dealing with IAS of freshwater systems.⁹⁷ Each of the legislative initiatives, strategies, plans and policy documents is vital to the IAS regime. Yet the effectiveness of these measures not only depends on their individual utility, but also on how they function as a whole – for gaps and inconsistencies in either area can weaken the entire IAS regime.

IV GAPS AND INCONSISTENCIES

Gaps and inconsistencies attributable to the use of KTPs and other threatening processes stem from at least two sources: first, weaknesses with the operation of the processes themselves; and second, deficiencies with the IAS regime that impede the operation of KTPs and threatening processes. The Secretariat of the CBD has succinctly weighed up Australia's problems with respect to freshwater systems:

Ornamental fish are a significant threat to freshwater ecosystems in Australia ... Each jurisdiction has different regulations and management regimes for the ornamental fish trade. It is uncertain what species are being traded in Australia and in what abundance.⁹⁸

⁹⁴ Robert Simpson and Peter Jackson, *The Mary River Cod Research and Recovery Plan* Queensland Department of Primary Industries – Fisheries Group, Prepared for Endangered Species Program, Environment Australia, Project Number ESP 505 (undated) <<http://www.environment.gov.au/biodiversity/threatened/publications/recovery/mary-river-cod/pubs/mary-river-cod.pdf>>.

⁹⁵ *Ibid*, 22.

⁹⁶ *Ibid*, 26-29, 33-34.

⁹⁷ For discussion of some of these initiatives see generally Merz, above n 7.

⁹⁸ Secretariat of the Convention on Biological Diversity, above n 12, 11.

This pointed critique highlights a crucial problem stemming from inconsistencies in regulation amongst Australia's jurisdictions. Yet, notwithstanding this critique the jurisdictions share a number of seemingly common characteristics, such as the establishment of lists of prohibited species, and the use of plans and strategies that seek to grapple with the deleterious impacts of freshwater IAS.

The use of prohibited lists can provide a degree of certainty for stakeholders and managers and are useful in identifying and dealing with the most pressing IAS.⁹⁹ The lists are also supported by a range of sanctions and penalties designed to enhance their operation further. However, the lists do not necessarily translate well from paper to implementation.

To start with, the content of the lists varies across Australia. The jurisdictions each incorporate different species in their lists, meaning that a species prohibited in one jurisdiction may be permitted in an adjacent one.¹⁰⁰ This jeopardises the capacity of regulators to implement risk management measures to control cross-border movements in declared species.¹⁰¹ Accordingly, in a practical sense, the lists are ineffective to block the internal trade in declared species. At present, the public trades in approximately two thousand species of ornamental fish and many of these are non-native.¹⁰² Thirty of these species are now established in freshwater ecosystems and cause significant harm.¹⁰³

The reasons for the continuing trade in harmful species are only partly attributable to deficiencies in the prohibited lists prepared by the states and territories. Other reasons stem from weaknesses in Australia's border controls in quarantine and biosecurity. Initially, then, harmful species are thought to gain entry from undetected smuggling activities.¹⁰⁴ Enforcement officers can face exceptional difficulties identifying some fish and plant species, particularly those destined for the

⁹⁹ Natural Resource Management Ministerial Council, *A Strategic Approach to the Management of Ornamental Fish in Australia*, Department of Agriculture, Fisheries and Forestry (2006), 8
<http://www.dpi.nsw.gov.au/__data/assets/pdf_file/0011/288425/Management-of-ornamental-fish-in-Australia.pdf>.

¹⁰⁰ *Ibid*, 3.

¹⁰¹ *Ibid*, 8.

¹⁰² Moore, Marton and McNee, above n 26, iv.

¹⁰³ *Ibid*.

¹⁰⁴ Natural Resource Management Ministerial Council, above n 99, 8.

aquarium trade.¹⁰⁵ Fish, for example, are notoriously difficult to identify in their juvenile phase and smugglers who are aware of this fact have been caught mixing juvenile forms of prohibited fish with permitted species.¹⁰⁶ A second reason derives from defective policy that permits harmful fish species to gain entry. At the time of writing, for example, Commonwealth regulation still permits 10 of the 30 harmful species just referred to, to be imported.¹⁰⁷ This signifies a need to re-evaluate import procedures at the Commonwealth level. Prior to 2007, a similar loophole existed with respect to invasive plants until Biosecurity Australia reviewed its import procedures.¹⁰⁸

The third reason for the continuing trade in harmful species flows from the fact that border controls do not deal with species already present in a jurisdiction. Prior to 1998 the *Quarantine Act 1908* (Cth) allowed the importation of numerous animals, plants and their products into Australia, unless there was ‘compelling scientific evidence’ to indicate that these commodities posed a threat.¹⁰⁹ *Quarantine Proclamation 1998* (Cth) reversed this position by prohibiting the entry of animals, plants and their products unless they were already on a permitted list, or they were assessed and a permit granted for their importation.¹¹⁰ The proclamation however, did not deal with species that had already been imported into Australia. It is highly likely, for example, that many fish species being traded within Australia and not currently on the national permitted list were introduced prior to these amendments.¹¹¹

These three points reinforce the importance of Australia’s border controls in quarantine and biosecurity and their repercussions for state and territory regulation. While the internal regulation

¹⁰⁵ Ibid, 14.

¹⁰⁶ Ibid, 9.

¹⁰⁷ Moore, Marton and McNee, above n 26, iv.

¹⁰⁸ For discussion of the problem see Andreas Glanzig, *Closing Australia’s Quarantine Loophole to New Weeds* (2005, WWF-Australia: Sydney), 8-9.

¹⁰⁹ Samantha Gray, ‘Aquatic Imports in Australia: Quarantine, International Trade and Environmental Protection’ (2000) 17 *Environmental and Planning Law Journal* 241, 242.

¹¹⁰ Essentially, only plant seeds listed in Schedule 5 of Quarantine Proclamation are permitted entry. All other importation of plant and animal products must undergo a risk assessment. The proclamations are available from <<http://legislation.gov.au/comlaw/comlaw.nsf/sh/homepage?OpenDocument>>. The 1998 Proclamation is available from: *Quarantine Proclamation 1998* (2011) Australian Government: ComLaw <<http://www.comlaw.gov.au/comlaw/legislation/legislativeinstrumentcompilation1.nsf/current/bytitle/AE38C4F883931ACECA256FC60003F7DB?OpenDocument&mostrecent=1>>.

¹¹¹ Natural Resource Management Ministerial Council, above n 99, 8.

of species that threaten biodiversity is often left to State and Territory jurisdictions, the success of this regulation is also dependant on the effectiveness of Commonwealth procedures.

Compounding these problems are further dilemmas stemming from the relationship between threatening processes and KTPs in the context of the IAS regime. As more species are added to prohibited lists, governments will find it increasingly difficult to enforce regulation and fund eradication and control measures.¹¹² This problem is exacerbated in those jurisdictions that lack a cohesive structure for dealing with KTPs – for these will also be the very jurisdictions that consign threatening processes to other regulatory pathways, such as prohibited lists. Yet, in doing so, regulators are adding further stress to already over-burdened systems without necessarily addressing the cause of the IAS problem. What is more, prohibited lists are normally administered under the control of agricultural or primary industries product sectors, rather than agencies charged with protecting biodiversity.¹¹³ The danger in these cases lies in the tendency of the regimes to develop an emphasis on pests of agriculture and primary production. Arguably, the listing of KTPs provides a counter-balance, because KTPs focus on the protection of biodiversity and squarely place IAS on the environmental agenda. It will be recalled that by their very nature KTPs are designed to identify threats to biodiversity. The definitions and descriptions of KTPs, for example, are based on the impact of the processes on threatened species and ecological communities. In addition, the listing of KTPs can identify a variety of threats to biodiversity including threats created by pathways of invasion.

Prohibited lists on the other hand are a form of command and control regulation that concentrate on a restricted range of individual species known to be causing damage. This not only runs the risk of narrowing the focus of the regime,¹¹⁴ but also highlights a weakness in the capacity of the regime to identify potential IAS. Although one of the criticisms of KTPs is that they largely identify threatening processes after damage has occurred, the ability of KTPs to identify pathways of invasion presents opportunities to identify processes with the *potential* to introduce

¹¹² State of Victoria, Department of Primary Industries, above n 83, 3.

¹¹³ S. T. Garnett, G. Ainsworth and R. Carey, *Analysis of Northern Territory legislation for the Protection of Threatened Species* (2007), 22.

¹¹⁴ Parliament of Tasmania, *Auditor-General Special Report No. 78, Management of Threatened Species* (2009) Parliament of Tasmania, 18
<<http://www.audit.tas.gov.au/publications/reports/specialreport/pdfs/specialreport78.pdf>>.

IAS. Moreover, as pathways of invasion are often responsible for the entry of more than one species, regulating pathways presents an opportunity to target measures that simultaneously prevent the entry and establishment of several IAS.¹¹⁵

Command and control regulation is also weak in engaging stakeholders in a meaningful way. In common with other types of alien species, freshwater IAS are often introduced to fulfil human needs or desires.¹¹⁶ Hence the introduction of mosquito fish was a failed attempt at biocontrol, rainbow and brown trout were deliberately introduced for recreational fishing; and species, such as goldfish and aquarium plants are purchased by enthusiasts who carelessly release them into waterways.¹¹⁷ Although legislation can establish systems for licensing, help create lists of prohibited species and impose a range of penalties and sanctions, it is questionable whether these initiatives are sufficiently responsive to address underlying patterns of behaviour. To deal with this human aspect of the IAS problem regulators need to reconceptualise accepted practices and re-shape behaviour. As a starting point, regulators need to engage more effectively with the public and stakeholders.

The formal identification of KTPs, provides one means of engaging with the community because the public is able to contribute by nominating KTPs for listing.¹¹⁸ Where individuals are able to participate, a significant number of proposals for listing are in fact generated by the public.¹¹⁹ In a similar way, the development of strategies and management plans that identify threatening processes, and call on the public for comments and submissions, can also engage stakeholders and the community. This is not to say that established procedures for public participation are

¹¹⁵ State of Victoria, above n 8, 3; Paul O. Downey, Moira C. Williams, Leonie K. Whiffen and Ors, 'Weeds and Biodiversity Conservation: A Review of Managing Weeds Under the New South Wales Threatened Species Conservation Act 1995' (2009) 10 (S1) *Ecological Management and Restoration* S53, S56.

¹¹⁶ See generally, Jeffrey McNeely, 'An Introduction to Human Dimensions of Invasive Alien Species', in Jeffrey A McNeely (ed), *The Great Reshuffling, Human Dimension of Invasive Alien Species Help Feed the Global Economy* (2001).

¹¹⁷ See for example, Department of Primary Industries, above n 15, 2; NSW Scientific Committee, above n 45.

¹¹⁸ Environment Protection and Biodiversity Conservation Act 1999 (Cth), s 194E; Threatened Species Conservation Act 1995 (NSW), s 18; Fisheries Management Act 1994 (NSW), s 220H; Flora and Fauna Guarantee Act 1988 (Vic), s 12; Nature Conservation Act 1980 (ACT), s 39.

¹¹⁹ Bob Makinson, 'A Directory of Conservation-Status Listing Processes for Threatened Australian Plant Species and Ecological Communities' (2008) 17(2) *Australasian Plant Conservation* 2, 4. An exception to this is the Australian Capital Territory where no threatening processes have been declared in accordance with the *Nature Conservation Act 1980* (ACT).

above criticism. Indeed, a joint submission by WWF Australia, The Australian Council of National Trusts and the Tasmanian Conservation Trust on the operation of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) highlighted important deficiencies in the public participation mechanisms of that Act. More specifically, the criticisms centred on the lack of weight given to submissions made by the public, the costs to members of the public in appealing decisions, and the short time frame available for making comments.¹²⁰

In the context of KTPs, another flaw with public participation mechanisms derives from the listing process – and more specifically, the level of scientific evidence required for a successful nomination juxtaposed against the experience and expertise of community groups and the public. By way of illustration, consider an unsuccessful nomination at the Commonwealth level, relating to freshwater systems that was titled ‘Six Key Threatening Processes of Rivers and Streams’ and consisted of the following proposed KTPs: ‘Alteration to the Natural Flow Regimes of Rivers and Streams’; ‘Alteration to the Natural Temperature of Rivers and Streams’; Increased Sediment Input to Rivers and Streams Due to Human Activities’; ‘Introduction of Live Fish into Waters Outside their Natural Range After 1770’; ‘Removal of Large Woody Debris from Rivers and Streams’; and ‘The Prevention of Passage of Aquatic Biota as a Result of the Presence of Instream Structures’.¹²¹ The nomination failed due to lack of sufficient detail, particularly with respect to the level of impact on specific threatened species and/or ecological communities.

Although the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) envisages that a KTP can be listed if it ‘could’ cause native species or ecological communities to become extinct or endangered,¹²² the Scientific Committee still needs a sufficient level of evidence to make a determination in favour of a listing. This point is reinforced by the fact that in New South Wales, the New South Wales Scientific Committee, accepted for listing the nomination of

¹²⁰ Australian Council of National Trusts, *Submission to the Review of the EPBC Act* (2008) 20-22, 24-33 <<http://www.environment.gov.au/epbc/review/submissions/pubs/039-aust-council-of-national-trust.pdf>>.

¹²¹ Threatened Species Scientific Committee, Advice to the Minister for the Environment and Heritage from the Threatened Species Scientific Committee on public nominations of Key Threatening Processes under the Environment Protection and Biodiversity Conservation Act 1999 <<http://www.environment.gov.au/biodiversity/threatened/ktp/streams.html>>.

¹²² See ss 188(4)(a), 188(4)(b), and 188(4)(c) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

‘Alteration to the Natural Flow Regimes of Rivers, Streams, Floodplains & Wetlands’.¹²³ Although this KTP was similar to one that the Commonwealth had already rejected, the information before the NSW Scientific Committee was considered sufficient to support the listing.¹²⁴ This scenario demonstrates that the public can be successful with their nominations, but the level of evidence needed might still be daunting for some sections of the community.

Notwithstanding these difficulties, the availability of participation mechanisms does at least provide an opportunity to generate public discussion. This differs from the declaration of prohibited lists where the public is largely shut out. In such cases, regulators run the risk that communities will question the level of transparency and accountability in the decision-making process, and become ‘antagonistic and alienated’.¹²⁵ This is an important consideration, given that large numbers of recent freshwater species have been introduced by members of the public as an unintended consequence of gardening and aquarium activities. Indeed, regimes dealing with aquarium species are unlikely to succeed without industry and community support.

Apart from the use of prohibited lists and KTPs, another common trend amongst the jurisdictions is the increasing use of policy instruments such as biodiversity strategies, biosecurity strategies and invasive species plans.¹²⁶ These strategies and plans are broadly-based instruments that can draw together diverse elements of the IAS regime. For example biodiversity strategies can integrate biosecurity policy, invasive species frameworks and protection of the environment. Victoria’s *Biodiversity Strategy 2010-2015 Consultation Draft* links with the *2009 Biosecurity Strategy for Victoria*.¹²⁷ Similarly, the *Draft New South Wales Biodiversity Strategy 2010-2015* acknowledges the deleterious impacts of invasive species and notes the need for a coordinated response with other initiatives, such as the *New South Wales Invasive Species Plan 2008*.¹²⁸

¹²³ Threatened Species Scientific Committee, above n 121.

¹²⁴ NSW Scientific Committee, Final Determination – Alteration To The Natural Flow Regimes Of Rivers, Streams, Floodplains & Wetlands – Key Threatening Process Listing (2002) New South Wales Department of Environment and Heritage <<http://www.environment.nsw.gov.au/threatenedspecies/AlterationNaturalFlowKTPListing.htm>>.

¹²⁵ Garnett, Ainsworth and Carey, above n 113, 37.

¹²⁶ Above n 83.

¹²⁷ Department of Sustainability and Environment, above n 83, 19-20.

¹²⁸ Draft NSW Biodiversity Strategy 2010-2015, above n 83, 86.

However, as with the formal listing of KTPs, the uptake of policy instruments is inconsistent. The Northern Territory and Western Australia, for example, are still to settle their biodiversity strategies and neither has adopted an invasive species plan. The fact the jurisdictions do not share similar strategies potentially creates a weak point in the IAS regime. States and Territories may be working towards different objectives, outcomes and targets, making it difficult to deal with KTPs and threatening processes in a consistent way. It also makes it difficult to determine whether regimes are achieving their objectives and targets – something that, ironically, is also the case with jurisdictions that have adopted overarching strategies.

Australia's Biodiversity Conservation Strategy 2010-2030, for example, has set an ambitious target to reduce the impacts of IAS by 10%;¹²⁹ yet other jurisdictions do not provide for such explicit outcomes. Victoria's biodiversity strategy expresses aims and outcomes in very general terms. The strategy highlights the need for a better coordinated response to IAS, especially in problem areas such as freshwater habitats, while also noting that measures to deal with IAS have thus far focussed on agricultural weeds and pest animals.¹³⁰

In a similar manner, the *Draft New South Wales Biodiversity Strategy 2010-2015* sets out general outcomes, encouraging regulators to use strategic approaches to IAS such as the listing of threatening processes and the use of threat abatement plans. However, the New South Wales Strategy also strengthens these general provisions by linking the *Biodiversity Strategy* with the *New South Wales Invasive Species Plan 2008-2015*,¹³¹ noting that regulators should aim to harmonise responses to IAS in accordance with the latter. The *New South Wales Invasive Species Plan* measures achievements by evaluating how the IAS regime reaches 'milestones' such as the development of instruments to manage IAS (including aquatic IAS), and the establishment of 'monitoring and control programs for selected widespread species'.¹³²

¹²⁹ Natural Resource Management Ministerial Council, above n 42, 46, Target 7.

¹³⁰ Department of Sustainability and Environment, above n 83, 19-20.

¹³¹ State of New South Wales, Industry and Investment NSW and the Department of Environment, Climate Change and Water, above n 83, Objective 10, page 15.

¹³² *Ibid*, 24.

A lingering problem that flows from these instruments centres on the different language and criteria the regimes use. This not only makes it difficult to assemble data on the achievements of each regime but also further complicates efforts to compare data that could otherwise be useful in developing consistent strategic targets and outcomes for Australia-wide IAS regulation.

In a practical sense, these shortcomings not only point to a regime in which regulators face difficulty in keeping pace with the magnitude and growth of the IAS problem, but also draw attention to the limitations of KTPs and other types of threatening processes as a regulatory tool. Given the ever-increasing rate of introduction of alien species, and the fact that invasive freshwater species are almost impossible to eradicate once they have established,¹³³ regulators need to reflect more deeply on how to improve the quality of their regimes. This will be challenging because, in addition to the difficulties just discussed, failings often stem from resource constraints that limit the ability of regulators to identify threats to biodiversity as well as to prepare and implement abatement and recovery plans. Irrefutably, the *Tasmanian Biodiversity Strategy 2002-2006* highlighted this very point, noting that while management plans have been developed to deal with a range of IAS, insufficient resources have been provided for implementation of the plans.¹³⁴

V RECOMMENDATIONS

To begin with, governments need to place more emphasis on preventing introductions¹³⁵ and improving capacity. Two suggestions are put forward: first, that the states and territories develop lists of permitted species; and second, that regulators investigate ways of making better use of existing resources.

The first suggestion is based on the approach adopted by the Commonwealth government subsequent to the promulgation of *Quarantine Proclamation 1998* (Cth), and has already been

¹³³ Australian Capital Territory Government, Territory and Municipal Services, above n 83, part 3.1.

¹³⁴ Tasmanian Government, above n 83, 36.

¹³⁵ *Invasive Plant and Animals Policy Framework* (2010) Department of Primary Industries <<http://www.dpi.vic.gov.au/agriculture/pests-diseases-and-weeds/protecting-victoria-pest-animals-weeds/invasive-plants-animal-policy>>.

identified elsewhere as a helpful means of enhancing IAS regulation.¹³⁶ The use of permitted lists means that alien species can only be imported once their safety has been evaluated. Accordingly, these lists operate in a preventative manner by stopping potentially harmful species from gaining entry. This indeed is where the value of permitted lists lies – in their capacity to guide regimes towards identifying potential threats posed by IAS. Another benefit flowing from using these lists is that they can be harmonised nationally, leading to uniformity of regulation. This would discourage stakeholders from trading, transporting and spreading unauthorised species across Australia. However, one drawback of permitted lists is that they do not deal with IAS already present in a jurisdiction. Hence, existing methods for eradication and containment of declared or listed species would need to operate in conjunction with lists of permitted species.

With respect to capacity building, decision-makers should consider ways of making smarter use of available ‘capital’. For example, the diversity of methods by which regulators identify threatening process and abate threatening processes represents a rich storehouse that can be tapped in many ways. Consequently, KTPs and less formal threatening processes may be identified by extrapolating information from instruments such as nominations and recovery plans for threatened or endangered species. In NSW, the nomination for the Booroolong Frog and Macquarie Perch both identify trout predation as a likely factor in the decline of these species.¹³⁷ This fact should act as a trigger for treating the introduction of alien fish species, and particularly trout, as a KTP, or other category of threatening process. The Tasmanian government, in fact, has already acknowledged the usefulness of such techniques.

The Tasmanian *Threatened Species Protection Act 1995*(Tas) accommodates the listing of threatened and endangered species, although it does not provide for the listing of KTPs.¹³⁸ A recent review of the management of threatened species in Tasmania concluded that the focus on individual species was too narrow and recommended that regulators should consider adopting

¹³⁶ Moore, Marton and McNee, above n 26, 1.

¹³⁷ *Booroolong Frog – Endangered Species Listing – NSW Scientific Committee, Final Determination* (2012) New South Wales Department of Environment and Heritage <<http://www.environment.nsw.gov.au/determinations/BooroolongFrogEndSpListing.htm>>; Fisheries Scientific Committee, *Final Determination: Macquaria Australasica – Macquarie Perch* (2008), 3-4 <http://www.dpi.nsw.gov.au/__data/assets/pdf_file/0017/251342/FD37-Macquarie-perch.pdf>.

¹³⁸ See above n 57.

threat abatement strategies, including the development of a state strategy for ‘introduced pest species’.¹³⁹ The government’s response has been to agree to identify KTPs from existing recovery plans.¹⁴⁰ In this way, KTPs extrapolated from recovery plans can provide a means of identifying threatening processes even in those jurisdictions that do not proffer formal listing procedures for them.

The New South Wales government, which does allow for the listing of KTPs, has adopted a somewhat analogous procedure to deal with a backlog in the preparation of threat abatement and recovery plans. It is a matter of some irony that the listing processes established under the *Threatened Species Conservation Act 1995* (NSW) have apparently been too successful and the accumulation of unprepared plans meant that the government needed to find an alternative regulatory path. In 2007, the Department of Environment and Climate Change initiated a system called the *NSW Threatened Species Priority Action Statement* (PAS).¹⁴¹ The PAS is based on 34 of the most functional recovery and threat abatement strategies, a selection of which is adopted for each threatened species and KTP. Accordingly, the PAS identifies commonalities from the 34 strategies and, in similarity to the system endorsed by Tasmania, it can detect KTPs and provide a framework for abatement even though the KTP has not been formally listed.¹⁴²

Regulators can also consider developing new threat abatement plans by using information mined from existing plans. At the time of writing, more than half the KTPs listed under the *Threatened Species Conservation Act 1995* (NSW) were also listed under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and approximately half of these also had threat abatement plans prepared.¹⁴³ Consequently, these instruments provide a wealth of knowledge, information and recommendations that can be adapted for local conditions.¹⁴⁴ Similar techniques

¹³⁹ Parliament of Tasmania, above n 114, Part 4.

¹⁴⁰ Government of Tasmania, Response to the Management of Threatened Species Audit Report (Tasmanian Audit Office Special Report No. 78), Resource Management and Conservation Division, Department of Primary Industries, Parks Water and Environment (2010), 4 <[http://www.dpiw.tas.gov.au/inter.nsf/Attachments/LJEM-8AC3RH/\\$FILE/TS%20Audit%20Response.pdf](http://www.dpiw.tas.gov.au/inter.nsf/Attachments/LJEM-8AC3RH/$FILE/TS%20Audit%20Response.pdf)>.

¹⁴¹ Department of Environment and Climate Change NSW, *NSW Threatened Species Priority Action Statement (PAS)* DECC (2007) <<http://www.environment.nsw.gov.au/resources/threatenedspecies/threatspepcpas07168.pdf>>.

¹⁴² *Ibid*, 1, 19.

¹⁴³ At the Commonwealth level, there are 19 KTPs listed and 13 threat abatement plans approved. For discussion see New South Wales Department of Environment and Climate Change, above n 141.

¹⁴⁴ *Ibid*, 19.

can apply to a range of management plans and strategies that refer to IAS or establish measures for their abatement.

Finally, regulators should not overlook how they can make better use of human resources. Effective engagement with stakeholders is important to the success of regimes. This is especially the case where changes in the law, such as the development of permitted lists, call for prohibitions on the introduction or use of species that hitherto had been legal. If regulators are insensitive in their approaches, regulation will likely be unsuccessful. Indeed, lack of stakeholder engagement is often cited as a reason for regulatory failure in the context of the aquarium industry.¹⁴⁵

VI CONCLUSION

This paper has discussed the variety of ways that regulators use KTPs and other threatening processes to manage freshwater IAS. Each measure is essential to the IAS regime, yet no sole measure can successfully grapple with the problem of IAS. In reality, the effectiveness of KTPs and other threatening processes depends not only on the value of the individual processes, but also on their effectiveness within the entire IAS regime. Moreover, as regulators try to come to grips with gaps and inconsistencies in the IAS regime, they must also address resource constraints that make the design and implementation of measures all the more difficult.

These issues are linked by the need for regimes to become more proactive in identifying and dealing with the potential of species to become IAS. This is especially important in freshwater jurisdictions, where control and eradication of IAS is a complex process. Indeed, by regulating the potential of species to become IAS, regulators can enhance the performance of the IAS regime as well as providing a more cost effective way of dealing with these difficult species.

One suggestion proffered is the development of lists of permitted species. This has the advantage of evaluating species prior to entry, helping to identify and prevent introductions of potential IAS. Yet to be truly effective, the operation of permitted lists needs to be considered in a broader

¹⁴⁵ Natural Resource Management Ministerial Council, above n 99, 1.

cross-jurisdictional context that takes into account additional areas of regulation such as biosecurity, weed regulation and invasive species control.¹⁴⁶ The second proffered suggestion centres on ways of making better use of resources by identifying KTPs and other threatening processes from existing initiatives. One benefit of this system is that it can mimic some of the more useful techniques derived from the listing and abatement of KTPs, such as the identification and abatement of pathways of invasion. In similarity with the development of permitted lists, targeting pathways of invasion can promote measures that deal with the potential of activities to introduce IAS. Moreover, targeting pathways can also engage with the human element of introductions – the ‘how’ and ‘why’ of introductions. In reality, addressing the human element is vital for the effectiveness of any IAS regime. For without this component even the best constructed regimes will fail.

¹⁴⁶ Paul O. Downey and Andrew R. Leys, ‘Weeds as Key Threatening Processes: Implications for Managing Environmental Weeds’, in B. M. Sindel and S. B. Johnson (eds), *14th Australian Weeds Conference Proceedings: Weed Management – Balancing People, Planet, Profit* (2004, Weeds Society of New South Wales) 454, 456.

THE HIGH COURT AND THE ADMISSIBILITY OF DNA EVIDENCE: *AYTUGRUL v THE QUEEN* [2012]

HCA 15 (18 APRIL 2012)[‡]

DR GREGOR URBAS*

ABSTRACT

The High Court of Australia has dealt with the admissibility of DNA evidence in criminal trials in only a few cases. In this most recent decision, the focus of analysis was on whether the manner in which an expert witness for the prosecution had presented information about DNA match probabilities was unfairly prejudicial. The appellant had argued that the expert's presentation of statistical information in the form of an 'exclusion percentage' (99.9%) as opposed to a 'frequency ratio' (1 in 1,600) was unfairly prejudicial due to its likelihood of being given too much weight by a jury, or being misleading or confusing. The High Court unanimously rejected this contention and dismissed the appeal.

I BACKGROUND FACTS AND FIRST APPEAL

The appellant had been convicted of murder in the New South Wales Supreme Court. More than two years before her death by stabbing, the victim had been in a relationship with the appellant. This relationship failed and the victim had formed a relationship with another man. The Crown case was that the appellant was motivated by jealousy and had stalked and harassed her for some months before her death. He also published a poem in the *Turkish Weekly News* declaring his love for her (both the appellant and the victim were of Turkish origin):¹

Even if you don't want to remember my name,
Don't want to hear my voice
Even if you say give up, I cannot give you up
Even if you say forget, I cannot forget the beautiful
Days we lived

[‡]This article is a case note and therefore has not been peer-reviewed.

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¹ As translated from Turkish: see *R v Yusuf Aytugrul* [2009] NSWSC 275 (16 April 2009), [7].

Even if you cry all your hate, say give up,
I cannot give up.

After his conviction, there was an appeal to the Court of Criminal Appeal, on the ground that ‘a miscarriage of justice occurred because of the prejudicial way in which DNA evidence was expressed to the jury’.² The appellant argued that an expert witness called by the prosecution, Ms Gina Pineda, Associate Laboratory Director and Technical Leader of a United States DNA laboratory company, had presented her evidence in an unacceptable way. This evidence concerned the results of mitochondrial DNA testing that had been performed on a hair sample that had been found under the thumbnail of the victim.³ This testing revealed a DNA profile that was not that of the victim or her maternal relatives, but was consistent with the DNA profile obtained from saliva taken from the appellant.⁴

As is generally the case with DNA profile matching, a *negative* result or ‘exclusion’ is definitive – the two profiles come from different biological sources – but a *positive* result or ‘inclusion’ is not definitive – the two matching profiles may have come from the same source, but there is a non-zero probability of a random source other than the first source having the same DNA profile. In presenting this information in court, great care must be taken in correctly stating and explaining the relevant probabilities, how they are calculated, and what they signify.⁵ In the

² *Aytugrul v R* [2010] NSWCCA 272 (3 December 2010); see also Andrew Ligertwood, ‘Can DNA Evidence Alone Convict An Accused?’ (2011) 33(3) *Sydney Law Review* 487, 502-504. As noted in the High Court, the central complaint made in both the Court of Criminal Appeal and the High Court was as to a decision on the admissibility of evidence, and so better cast as a “wrong decision of any question of law” under s 6(1) of the *Criminal Appeal Act 1912* (NSW): see *Aytugrul v The Queen* [2012] HCA 15 (18 April 2012), [18], (French CJ, Hayne, Crennan and Bell JJ). As to the ‘common form’ grounds of appeal, see Gregor Urbas, ‘DNA Evidence in Criminal Appeals and Post-Conviction Inquiries: Are New Forms of Review Required?’ (2002) 2(2) *Macquarie Law Journal* 141.

³ Mitochondrial DNA (mtDNA) is shared among members of a family to a greater extent than nuclear DNA, and can also be used for forensic matching in some circumstances: see Marc Smith and Gregor Urbas, ‘Regulating New Forms of Forensic DNA Profiling under Australian Legislation: Familial Matching and DNA Phenotyping’ (2012) 44(1) *Australian Journal of Forensic Sciences* 63; F. Kaestle, et al, ‘Database Limitations on the Evidentiary Value of Forensic Mitochondrial DNA Evidence’ (2006) 43 *American Criminal Law Review* 53; *DNA Profiling – Recent Developments and Future Directions* (2012) CrimTrac <http://www.crimtrac.gov.au/our_services/DNAProfiling-RecentDevelopmentsandFutureDirections.html>.

⁴ The applicable forensic procedures legislation in New South Wales is the *Crimes (Forensic Procedures) Act 2000* (NSW). This governs the taking of biological material from persons including suspects, and the permissible matching of DNA profiles thereby obtained against others including those obtained from crime scene samples.

⁵ See Jeremy Gans and Gregor Urbas, ‘DNA Evidence in the Criminal Justice System’ (2002) 226 *Trends and Issues in Crime and Criminal Justice*. In Australia, the Profiler Plus system is most widely used, and tests at nine loci or

Aytugrul case, the fact that mitochondrial DNA was involved meant that the frequency of the expected occurrence of that particular profile in the community was far greater than would typically be seen in a case involving nuclear DNA matching, where match probabilities of one in millions or even one in billions are routinely calculated. Nonetheless, the experts in this case, including Ms Pineda, were able to present figures of around one in 1 600 persons in the general community having the DNA profile generated from the hair sample, a profile shared by the appellant. Putting this statistic in a different but mathematically equivalent form, 99.9% of the population would not be expected to have this DNA profile.⁶

It is at this point that the appellant's central argument can be clarified. Defence counsel at the trial had objected to the admission of her expert evidence, unsuccessfully, including on the ground that the use of the 99.9% exclusion percentage was unfairly prejudicial '[b]ecause it has a connotation that is very different to the reality'. This was elaborated in the arguments on appeal to be because a jury was liable to subconsciously 'round up' such a probability to one, and mistakenly infer that there was a mathematical certainty (or close to it) of the appellant's guilt.⁷ In the Court of Criminal Appeal, only McClellan CJ at CL agreed with this contention, referring to published academic work on 'the differing persuasive power of probabilistic formulations'.⁸ By contrast, Simpson and Fullerton JJ, while agreeing that as between equivalent statistical statements, 'some formulations have a greater educative force or persuasive appeal than others; or ... are more colourful, or more easily comprehended, than others', did not regard this as amounting to a basis for exclusion because of a risk of unfair prejudice or the evidence being misleading or confusing.⁹ Thus, the Court of Appeal, by a two to one majority, dismissed the appeal.

genetic markers, whereas in the United States up to 14 loci are tested, allowing for greater discrimination between potential sources.

⁶ *Aytugrul v R* [2010] NSWCCA 272 (3 December 2010), [56] (McClellan CJ at CL).

⁷ *Ibid*, [63] (McClellan CJ at CL).

⁸ *Ibid*, [89]-[95] (McClellan CJ at CL).

⁹ *Ibid*, [164] (McClellan CJ at CL), [198] (McClellan CJ at CL), [238] (Fullerton J).

II THE HIGH COURT'S DECISION

The leading opinion was the joint judgment of French CJ, Hayne, Crennan and Bell JJ. Their Honours stated that '[n]o sufficient foundation was laid, at trial or on appeal (whether to the Court of Criminal Appeal or this Court) for the creation or application of a general rule' to the effect that 'evidence expressing the results of DNA analysis as an exclusion percentage would in every case be inadmissible because its probative value is always outweighed by the danger of unfair prejudice to the defendant'.¹⁰ This was in part because it was an improper exercise of judicial notice to take into account general studies of psychological reactions to statistical information (as had McClellan CJ at CL) without recourse to the requirement that parties be able to make submissions on such material, statutorily embodied in s 144(4) of the *Evidence Act 1995* (NSW).¹¹ Even if such material were considered, however, it did not establish the risk of unfair prejudice referred to in s 135(a) and s 137 or the danger that the evidence might be misleading or confusing under s 135(b) of that Act.¹²

No reason is shown for answering either form of those more particular questions in favour of the appellant. The evidence given was clear. It was evidence adverse to the appellant but it was in no sense *unfairly* prejudicial, or misleading or confusing. The exclusion percentage given was high – 99.9 per cent – but relevant content was given to that figure by the frequency ratios that were stated in evidence. As the trial judge pointed out to the jury, the evidence that was given did not, and was not said to, establish that the mitochondrial DNA profile found in the hair definitely came from the appellant. There was no risk of rounding the figure of 99.9 per cent to the certainty of 100 per cent.

In a separate judgment, though dealing at greater length with some of the other evidentiary aspects of the appellant's arguments, Heydon J agreed as to the main issues of unfair prejudice and discretionary exclusion.¹³

No doubt both the 'frequency estimate' and the 'exclusion percentage' evidence, like many other aspects of the expert evidence, were difficult for the jury to deal with. The field is arcane. But any criminal jury of 12 is likely to contain at least one juror capable of realising, and demonstrating to the

¹⁰ *Aytugrul v The Queen* [2012] HCA 15, [20].

¹¹ *Ibid.*, [21].

¹² *Ibid.*, [24] (emphasis original).

¹³ *Ibid.*, [75]. His Honour also dealt with the question whether an appeal based on s 137 can be entertained if the appellant did not object at trial to the admission of evidence as unfairly prejudicial; with the meaning of 'probative value' in s 135 and s 137; with the 'slicing up' of logically equivalent pieces of evidence; and with the taking of judicial notice under s 144 of the Act.

other jurors, that the frequency estimate was the same as the exclusion percentage. Further, detailed evidence was given about how the ‘exclusion percentage’ evidence was derived from the concededly admissible ‘frequency estimate’ evidence, and how their significance was identical.

The appeal was unanimously dismissed.

III COMMENT

The High Court’s analysis stands in conformity with the few other cases in which it has significantly considered the admissibility of DNA evidence in criminal proceedings. In *Hillier v The Queen*, the High Court unanimously ruled that the Australian Capital Territory (ACT) Court of Appeal had been in error in its treatment of DNA evidence in a successful appeal from a murder conviction.¹⁴ The majority on the Court of Appeal, notably comprising the Chief Justice of the ACT and the President of the Court of Appeal, had erred in assessing the DNA evidence, as well as other elements of the Crown’s circumstantial case, in isolation rather than in the light of the totality of admissible evidence.¹⁵

In the special leave application of *Forbes v The Queen*, also arising in the ACT, but this time involving a sexual assault, DNA evidence provided the central evidentiary link between the applicant and the crime. The appeal against conviction, and the special leave application, relied on the proposition that no conviction should ever be based on ‘DNA alone’. Noting that this was not such a case, there being other evidence including the applicant’s own alibi testimony (which the jury had evidently not believed), the application for special leave was refused. Along the way, Heydon J observed:¹⁶

¹⁴ *Hillier v R* [2005] ACTCA 48 (15 December 2005) (Higgins CJ and Crispin P, with Spender J in dissent). The ACT Director of Public Prosecutions appealed to the High Court against this decision: *R v Hillier* [2007] HCA 13.

¹⁵ *R v Hillier* [2007] HCA 13, [1] (Gleeson CJ), agreeing with the joint judgment of Gummow, Hayne and Crennan JJ, who pointedly ordered the rehearing of the appeal by a ‘differently constituted Court of Appeal’ ([55]). Calinnan J agreed, though would have ordered a retrial. The second appeal (before Madgwick, Weinberg and Dowsett JJ) resulted in orders for a retrial: *Hillier v R* [2008] ACTCA 3 (6 March 2008). At the new trial, held this time before a judge alone rather than a jury, Hillier was acquitted.

¹⁶ *pForbes v The Queen* [2010] HCATrans 45 (12 March 2010); *Forbes v The Queen* [2010] HCATrans 120 (18 May 2010).

It is a very rare proposition, probably non-existent in our law outside statute that evidence is admissible if corroborated but not if it is not. Why does the existence of some other evidence, for example, if your client had been seen nearby 10 minutes earlier apparently innocently engaged, why does that suddenly make all this other evidence fit to go to a jury and be the basis of a conclusion of guilt?

However, the Court dismissed the application without specifically ruling on whether there was a legal principle such as the one contended for by the applicant, to the effect that ‘there is a particular class of evidence, DNA evidence, which regardless of its particular content, should be held legally insufficient to support a conclusion that a disputed proposition of fact is established beyond reasonable doubt’.¹⁷

The general principle to be extracted from the *Hillier*, *Forbes* and *Aytugrul* cases, as enunciated by the High Court, appears to be that DNA evidence attracts no special rules of evidence that would differentiate it from other elements of a circumstantial criminal case. In particular:

- DNA evidence is to be assessed in the context of all the admissible evidence in the proceeding, and not in isolation (*Hillier*);¹⁸
- There is no legal rule to the effect that a person cannot be convicted using a DNA match as the central element connecting him or her to the crime scene (*Forbes*);¹⁹ and
- Logically equivalent presentations of the statistical aspects of DNA match evidence, properly explained, cannot be differentially treated as unfairly prejudicial or as

¹⁷ This characterisation of the applicant’s contention was framed by Hayne J, with counsel for the applicant agreeing with its terms. The application for special leave was decided on the basis that the defence at trial had acquiesced in the presentation of the DNA match probability in qualitative terms (‘strong’ or ‘extremely strong’) rather than quantitative terms (‘greater than 1 in 10 billion’), and that this had not resulted in a miscarriage of justice: *Forbes v The Queen* [2010] HCATrans 120 (18 May 2010). See also Ligertwood, above n 2, 530, which states that the ‘1 in 10 billion’ figure was not advanced at trial or the first appeal, and made its first appearance in the High Court proceeding.

¹⁸ It is worth noting in this regard that the Australian Law Reform Commission (ALRC) considered, in its 2005 Review of the Uniform Evidence Law, whether DNA match evidence was a form of ‘identification evidence’, to which special rules including warning provisions do attach under Part 3.9 of the *Evidence Act 1995* (Cth, NSW). The ALRC concluded that DNA match evidence was not identification evidence as defined in the Act: Australian Law Reform Commission, *Uniform Evidence Law*, ALRC Report No. 102, [13.17]-[13.34].

¹⁹ The shorthand suggestion of a ‘DNA alone’ prosecution case is in reality somewhat fanciful, given that no prosecutor would seriously consider trying a case with literally no evidence besides a DNA inclusion. Rather, what is denoted is that class of cases where the DNA evidence provides the only positive link between the accused and the crime scene. Given the High Court’s comments, it is doubtful that even *Forbes* falls within this special class.

misleading or confusing merely because of a perceived difference in their persuasive force (*Aytugrul*).²⁰

With these considerations established, the Australian justice system can have somewhat greater confidence in the admissibility of DNA evidence in criminal proceedings.

²⁰ Important to note is that all members of the NSW Court of Criminal Appeal and the High Court in *Aytugrul* appeared to accept that the ‘exclusion percentage’ (99.9%) and the ‘frequency ratio’ (1 in 1 600) had equal (non-zero) probative value. Where there was some disagreement was on the question whether, this being so, the two variants could carry different risks of unfair prejudice. The better view is arguably that such a proposition impermissibly involves ‘slicing up’ what is in reality a single piece of evidence into two illusory halves: *Aytugrul v The Queen* [2012] HCA 15, [64] (Heydon J).