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CONTENTS

ENSURING THE RIGHT TO A FAIR CRIMINAL TRIAL USING COMMUNICATION ASSISTANCE

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Given the emphasis on verbal testimony in Australian criminal trials, witnesses and accused experiencing communication barriers due to vulnerabilities such as age (i.e., child witnesses), cultural or language background (in particular, Indigenous Australians), physical disabilities, and mental impairment or cognitive disabilities may require support to provide evidence. Around Australia, such support is increasingly being provided by communication assistants or intermediaries. This paper argues that such assistance is a precursor to a fair trial, which is an international human rights law obligation stemming from Article 14 of the International Covenant on Civil and Political Rights ('ICCPR'), *as well as a common law right. There are gaps in coverage of communication assistance/intermediary schemes, including the complete absence of specific legislation and assistance in the Northern Territory, the limited eligibility criteria in jurisdictions that have introduced schemes, the lack of provision for Indigenous Australian people and people from Culturally and Linguistically Diverse ('CALD') backgrounds, and lack of provision for vulnerable accused (only two jurisdictions provide assistance to accused). These gaps should be addressed to ensure the right to a fair trial.*

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CONTENTS

I INTRODUCTION

The right to a fair trial is a long-standing common law right, with the High Court describing this as 'a central pillar of our criminal justice system'.[1] Australia has an international obligation to provide fair criminal trials under Article 14 of the *International Covenant on Civil and Political Rights*.[2] This right has been incorporated into domestic law in the three jurisdictions that have specific human rights legislation (the Australian Capital Territory ('ACT'), Victoria, and Queensland).[3]

Communication barriers present a major obstacle to a fair trial, given that the adversarial system is heavily reliant on verbal testimony. Communication barriers may prevent a witness from giving evidence, or from providing their 'best evidence', which refers to 'the most complete and accurate evidence a witness is able to give'.[4] These barriers may also

[1] *Dietrich v The Queen* (1992) 177 CLR 292, 298. At common law the right is more accurately described as a right 'not to be tried "unfairly"': at [7]. For a discussion of the history of the common law right see Australian Law Reform Commission ('ALRC'), *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (Interim Report No 127, August 2015) 221-26. For a discussion about fair trial and the inherent jurisdiction of courts see: Rebecca Ananian-Welsh, 'The Inherent Jurisdiction of Courts and the Fair Trial' (2019) 41(4) *Sydney Law Review* 423.

[2] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*'). Australia ratified the *ICCPR* on 23 November 1980.

[3] Although there are some variations in wording from Article 14 of the *ICCPR* (This is explicitly acknowledged in the Explanatory Memorandum to the Victorian Human Rights and Responsibilities Bill 2006, which notes that 'intentional modifications have been made to the minimum guarantees' p18). See *Charter of Human Rights and Responsibilities Act 2006* (Vic), ss 24-25, *Human Rights Act 2004* (ACT), ss 21-22, and *Human Rights Act 2019* (Qld) ss 31-32.

[4] *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, December 2017) pts VII–X and apps, 5.

prevent an accused from participating in their own defence and from giving their 'best evidence' should they choose to do so (an accused is not required to give evidence due to the privilege against self-incrimination; otherwise known as the 'right to silence'[5]). At the extreme end of the spectrum, communication barriers can lead to wrongful convictions.[6]

Part 2 of this article gives an overview of the types of vulnerabilities that may lead to communication barriers for both witnesses and accused. Part 3 provides a summary of a new form of communication assistance in Australia: intermediaries. Part 3 commences with a comparison of the legislation and practice in the states/territories that have introduced schemes to date. Part 3 then provides an overview of how such schemes lead to better quality evidence upon which to base verdicts in criminal trials. Part 4 provides the human-rights based justifications for provision of intermediary assistance, with a focus on the fair trial rights for accused that are protected in the *ICCPR*. The specific human rights protections afforded people with disabilities by the *Convention on the Rights of Persons with Disabilities* ('*CRPD*')[7] are also considered. In Part 5, the gaps at the national level are discussed with a view to demonstrating that Australia is not complying with its international human rights law obligations.

This article builds on the authors' earlier examination of this topic. In 2020 we focused on where states and territories were up to in introducing witness intermediary schemes and ground rules hearings in response to recommendations made by the 2017 Royal Commission into Institutional Responses to Child Sexual Abuse ('CSARC'); arguing that legislative uniformity would be desirable in this area before too much further

[5] In *Smith v Director of Serious Fraud Office* [1992] 3 All ER 456 [463]-[464] Lord Mustill identified six disparate immunities that are encompassed by 'the right to silence', two of which are most relevant to trials: (4) a specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in the dock; (6) a specific immunity (at least in certain circumstances, which it is unnecessary to explore), possessed by accused persons undergoing trial, from having adverse comment made on any failure (a) to answer questions before the trial, or (b) to give evidence at the trial. This right is also protected by Article 14(3)(g) of the *ICCPR*. This article uses the terms 'defendant' and 'accused' interchangeably because both terms are used across the jurisdictions considered by this article.

[6] Joseph MacFarlane and Greg Stratton 'Marginalisation, Managerialism and Wrongful Conviction in Australia' (2016) 27(3) *Current Issues in Criminal Justice* 303; see also the examples of Australian wrongful convictions that involved communication barriers discussed in Jacqueline Giuffrida and Anita Mackay 'Extending witness intermediary schemes to vulnerable adult defendants' (2021) 33(4) *Current Issues in Criminal Justice* 498, 506 ('Extending witness intermediary schemes').

[7] *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 2 May 2008) ('*CRPD*'). Australia ratified the *CRPD* on 17 July 2008.

divergence.[8] In 2021 we considered the justifications for extending witness intermediary schemes to vulnerable adult defendants, drawing on the experience of other countries that provide such assistance including the United Kingdom, Northern Ireland and New Zealand.[9] This article provides both up-to-date analysis and comparison of the state and territory schemes, and the human-rights based justifications for provision of assistance to both witnesses and defendants.

II VULNERABILITIES OF PARTICIPANTS IN CRIMINAL TRIALS

There are a range of vulnerabilities that impact on a person's participation in a criminal trial whether as a defendant or a witness. These vulnerabilities include age, education, cultural or language background, physical disabilities, and mental or intellectual/cognitive disabilities.[10] In some cases, a person may be considered vulnerable due to the nature of the offence that has taken place; for example, witnesses in domestic violence or sexual offence proceedings.[11] A person may also be considered vulnerable if they have received threats of violence or fear retribution for giving evidence in a proceeding.[12]

Mental illness and cognitive impairment are distinguishable disorders but are often grouped together. This is because the conditions they cause can impact upon a person's ability to participate in a trial, and more importantly for an accused person to participate in their own defence.[13]

It is difficult to establish the exact number of people who have been accused of crimes who would be considered 'vulnerable'. There are two methods of determining the prevalence of vulnerability among accused persons: (i) examining how frequently mental

[8] Anita Mackay and Jacqueline Giuffrida, 'Implications of the Royal Commission into Institutional Responses to Child Abuse for the Protection of Vulnerable Witnesses: Royal Commission Procedures and Introduction of Intermediaries and Ground Rules Hearings around Australia' (2020) 29(3) *Journal of Judicial Administration* 136 ('Implications of the Royal Commission into Institutional Responses to Child Abuse').
[9] Giuffrida and Mackay, 'Extending witness intermediary schemes' (n 6).
[10] See, *Evidence Act 1995* (Cth) s 41(2)(a)-(b); *Evidence Act 1939* (NT) s 21A(1); *Criminal Procedure Act 2009* (Vic) s 389A(3); *Evidence Act 1929* (SA) s 4(1)-(3); *Evidence Act 1906* (WA) s 106R(3); *Criminal Procedure Act 1986* (NSW) s 306M; *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 7F; *Evidence Act 1939* (NT) s 21AB.
[11] See, e.g., *Evidence Act 1939* (NT) s 21A(1).
[12] See, e.g., *Evidence Act 1929* (SA) s 4 (definition of 'vulnerable witness' (d) (i)-(ii)).
[13] Ruth McCausland and Eileen Baldry, '"I feel like I failed him by ringing the police": Criminalising disability in Australia' (2017) 19(3) *Punishment & Society* 290, 297.

impairment is identified by police when dealing with the public (the entry point of the criminal justice system) and, (ii) identifying the number of people in prison who suffer from a mental impairment or cognitive disability (the population that has progressed through the criminal justice system to conviction, and been sentenced to imprisonment).[14] Studies have shown that in both cases the number of people identified as having a mental illness or cognitive impairment is significantly higher than in the general population.[15] For example, in Victoria police reported that '47% of critical response callouts involved a mentally ill person',[16] while the Australian Institute of Health and Welfare noted that '40% of people entering prison reported being told they had a mental health condition'.[17]

It has been reported that Indigenous Australians 'are five times more likely to experience a mental health condition than other Australians',[18] Indigenous people in the criminal justice system are also more likely than non-Indigenous people to be suffering from a mental illness or cognitive disability.[19] Some Indigenous accused may also face intercultural communication barriers.[20]

There is an over-representation of Indigenous Australians in the criminal justice system. While Indigenous Australians make up 2% of the Australian population, they make up

[14] Giuffrida and Mackay, 'Extending witness intermediary schemes' (n 6) 503-504.
[15] See, e.g., Helen Punter and Simon Bronitt, 'New paradigms of policing mental illness in Australia: The future of mental health street sweeping' in John McDaniel, Kate Moss and Ken Pease (eds), *Policing and mental health: Theory, policy and practice* (Taylor & Francis, 2020) 59, 66; Australian Institute of Health and Welfare, *The health of Australia's prisoners 2018* (Report, 2019) 61; Ruthie Jeanneret et al, 'Enhancing early detection of cognitive impairment in the criminal justice system: Feasibility of a proposed method' (2019) 31(1) *Current Issues in Criminal Justice* 60, 62; Gaye Lansdell et al, 'I am not drunk, I have an ABI: Findings from a qualitative study into systemic challenges in responding to people with acquired brain injuries in the justice system' (2018) 25(5) *Psychiatry, Psychology and Law* 737-738. See also Anna Eriksson, Bernadette Saunders and Gaye Lansdell, 'Neurodisability and the 'revolving' prison door: an international problem viewed through an Australian lens' in Gaye Lansdell, Bernadette Saunders and Anna Eriksson (eds), *Neurodisability and the Criminal Justice System: Comparative and Therapeutic Responses* (Edward Elgar Publishing Limited, 2021) 196.
[16] Colin Rogers and Emma Wintle, 'Accessing justice for mentally ill people: A comparison of UK and Australian developments' in John McDaniel, et al (eds), *Policing and Mental Health: Theory Policy and Practice* (Routledge, 2020) 38, 44.
[17] Australian Institute of Health and Welfare (n 15) 28. Note that because this is only those who have 'been told' they have a condition, it is likely to be an under-estimate.
[18] South Australian Law Reform Institute, *Providing a Voice to the Vulnerable: A Study of Communication Assistance in South Australia* (Report No 16, September 2021) 148 [6.2.1] ('SALRI') citing Law Council of Australia, *The Justice Project: People with Disability* (Final Report, August 2018) 9.
[19] Giuffrida and Mackay, 'Extending witness intermediary schemes' (n 6) 505.
[20] MacFarlane and Stratton (n 6) 311-13.

29% of Australia's prison population.[21] Indigenous Australians are more likely to be charged with an offence, face court for that offence, and receive a prison sentence (as opposed to a community-based order).[22] They are also over-represented in both the remand and prison populations. The average daily imprisonment rate (number of people in prison) of the general adult population in Australia is 212 per 100,000 adults.[23] However, amongst the Indigenous population this rate is 2,394 per 100,000 adult Indigenous peoples, with males imprisoned at a rate of 4,380 per 100,000 Indigenous adults, and females at a rate of 449 per 100,000 Indigenous adults.[24]

Mental illness and cognitive impairment are not the only factors that may impact a person's ability to give their best evidence at trial. Oral language difficulties may also adversely affect an accused or witness's ability to give accurate testimony. Young people with oral language difficulties have been identified as being over-represented in the criminal justice system. In their study, Snow and Powell found that 'nearly half of the sample group (46%) of incarcerated young offenders, had been identified as language impaired'.[25]

III COMMUNICATION ASSISTANCE/INTERMEDIARY SCHEMES IN AUSTRALIA

To achieve 'best evidence',[26] there have been many changes made to the way vulnerable people can give evidence. These include, but are not limited to, the use of screens or partitions in courtrooms and giving evidence by video-link from a remote witness

[21] Australian Bureau of Statistics, *Prisoners in Australia 2020* (Web page, 3 December 2020) ('ABS') <https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release#aboriginal-and-torres-strait-islander-prisoners>; For further discussion see Anita Mackay, *Towards Human Rights Compliance in Australian Prisons* (ANU Press, 2020) ch 1.
[22] Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Indigenous and Torres Strait Islander Peoples* (Report No 133, December 2017) 90-91.
[23] Australian Bureau of Statistics ('ABS'), *Corrective Services, Australia, September Quarter 2021* (25 November 2021) <https://www.abs.gov.au/statistics/people/crime-and-justice/corrective-services-australia/latest-release>.
[24] Ibid.
[25] Pamela Snow and Martine Powell, 'Oral language competence in incarcerated young offenders: Links with offending severity' (2011) 13(6) *International Journal of Speech-Language Pathology* 480, 485.
[26] There has been some criticism of this term because vulnerable people may need assistance with matters in addition to giving evidence, but 'best evidence' is the term that has been accepted by multiple law reform bodies, including the Royal Commission into Institutional Responses to Child Sexual Abuse: SALRI (n 18) vii.

room,[27] the use of support dogs,[28] and more recently the use of witness intermediaries/communication assistants.

The intermediary schemes operating in Australia are based on the scheme that has been operating in the England and Wales since first piloted in 2004. An intermediary scheme for child witnesses in sexual assault proceedings was introduced in New South Whales (NSW) in 2016 following an investigation by the then NSW Attorney-General (the Honourable Brad Hazzard MP), into the scheme operating in the United Kingdom.[29] Other states and territories introduced schemes in response to Recommendation 59 of the CSARC made in 2017,[30] and reports by the Victorian and Tasmanian Law Reform Commission/Institute in 2016 and 2018, respectively.[31]

Intermediaries play an important role in assisting vulnerable witnesses in trials and, in some jurisdictions, assisting vulnerable defendants. To cater for diverse communication needs, intermediaries are generally professionals from various allied health disciplines such as speech pathology, social work, psychology, and occupational therapy, all with a range of different capabilities. They are not advocates putting forward a particular position or argument, they do not act as a 'support person' for the accused or witness, nor are they expert witnesses offering an opinion. Rather, intermediaries are impartial officers of the court whose role it is to ensure that a witness gives their best evidence,[32] and where available to an accused, to ensure the accused is able to properly participate in their own trial and give their best evidence should they choose to take the stand. Intermediaries assist the person giving evidence to understand the questions that are being put to them, and to respond accurately. The following definition from the *Youth Justice and Criminal Evidence Act 1999* (UK) is a concise summary of the role:

[27] *Royal Commission into Institutional Responses to Child Sexual Abuse('*CSARC*'): Criminal Justice Report* (Report, 2017) pts VII-X and apps, 19-20.
[28] See, e.g., Judicial College of Victoria, *Victorian Criminal Charge Book* (at April 2021) [2.3.4].
[29] Penny Cooper, 'A Double First in Child Sexual Assault Cases in NSW: Notes from the First Intermediary and Pre-recorded Cross-examination Cases' (2016) 41(3) *Alternative Law Journal* 191, 191.
[30] CSARC (n 27) pts VII-X and apps, 101. This recommendation states that all state and territory governments establish an intermediary scheme like the United Kingdom scheme.
[31] Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (August 2016); Tasmanian Law Reform Institute, *Facilitating equal access to justice: An intermediary/communication assistance scheme for Tasmania?* (Report No 23, January 2018) ('TLRI').
[32] Law Council of Australia, 'The Criminal Justice System – Issues Paper' submission to Royal Commission into Violence, Abuse, Neglect and Exploitation of People with a Disability (17 August 2020) 38-39.

> *The function of an intermediary is to communicate (a) to the witness, questions put to the witness, and (b) to any person asking such questions, the answers given by the witness in reply to them, and to explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question.*[33]

Where intermediaries are used, pre-trial or 'ground rules' hearings generally also take place prior to a witness or accused giving evidence.[34] These hearings are very important because they provide the intermediary with an opportunity to explain to the judge and others involved in the case (including the lawyers), what difficulties the witness or accused may be experiencing and what measures may be helpful.[35]

All Australian jurisdictions, except for the Northern Territory ('NT'), currently operate some form of intermediary scheme. However, it is worth noting that while Western Australia ('WA') has some legislative provisions,[36] a formal intermediary scheme similar to those operating in other states and territories is not in operation. As a result, in practice, intermediaries are rarely used.[37] WA is also currently only using ground rules hearings in very limited circumstances.[38]

When the legislation and schemes are compared, significant variation in eligibility, operation and terminology may be observed. Even the definition of a 'child' is not consistent. The following is an overview of the current situation in a table format (Table 1) (in chronological order), followed by a more detailed comparison.

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[33] *Youth Justice and Criminal Evidence Act 1999* (UK) s 29.
[34] This is also in response to the Royal Commission into Institutional Responses to Child Sexual Abuse, Recommendation 60 (except for NSW, which was operating a scheme prior to the Royal Commission's report).
[35] Penny Cooper and Michelle Mattison, 'Intermediaries, vulnerable people and the quality of evidence: An international comparison of three versions of the English intermediary mode' (2017) 21(4) *International Journal of Evidence and Proof* 351, 363.
[36] See *Evidence Act 1906* (WA) ss 106F and 106R.
[37] Jonathan Doak et al, *Cross-Examination in Criminal Trials Towards a Revolution in Best Practice?* (Report, 2021) 93.
[38] District Court of Western Australia, *Consolidated Practice Directions and Circulars to Practitioners – Criminal Jurisdiction* (26 March 2019) [19.1.2]. See also Mackay and Giuffrida, 'Implications of the Royal Commission into Institutional Responses to Child Abuse' (n 8) 149. There is also some information to suggest intermediaries have been used in Western Australia in the past: TLRI (n 31) 61-63.

Table 1: Australian communication assistance schemes (December 2021)

						Eligibility		
Jurisdiction	**Commencement of scheme**	**Terminology**	**Legislation**	**Scheme management**	**Ground rules hearings**	**Children[39]**	**Grounds for adult witnesses**	**Accused**
New South Wales	2016 (pilot) April 2019 (program)	Children's champions (who may also be called a witness intermediary)	*Criminal Procedure Act 1986* (NSW)	Victims Services NSW	Yes	Up to 16; or 16-18 if have difficulty communicating	N/A	No
Victoria	July 2018	Intermediary	*Criminal Procedure Act 2009* (Vic)	Department of Justice and Regulation[40]	Yes	Up to 18	Cognitive impairment	No
South Australia	Relaunched March 2020 (replacing earlier scheme that commenced in 2016)	Communication partners	*Evidence Act 1929* (SA)	User pays; privately sourced	Yes	Up to 16	Vulnerable or cognitive impairment	Yes
Australian Capital Territory	January 2020	Intermediary	*Evidence (Miscellaneous Provisions) Act 1991* (ACT)	Human Rights Commission (ACT) Intermediary Program Team	Yes	Up to 18	Communication difficulties	Yes

[39] Guidance for judicial officers dealing with children giving evidence is provided in the Australasian Institute of Judicial Administration, *Bench Book for Children Giving Evidence in Australian Courts* (2020).
[40] *Criminal Procedure Act 2009* (Vic) s 389H. See also Natalia Antolak-Saper and Hannah MacPherson 'Vulnerable witnesses and Victoria's intermediary pilot program' (2019) 43 *Criminal Law Journal* 325.

Tasmania	March 2021 (pilot)	Intermediary	*Evidence (Children and Special Witnesses) Act 2001* (Tas)	Department of Justice (Tasmania)	Yes	Up to 18	Communication need	No
Queensland	July 2021 (pilot)	Intermediary	*Evidence Act 1977* (Qld)	Department of Justice (Queensland).	Yes	Up to 16	Communication difficulty	No
Western Australia	No formal scheme/guidelines	Communicator	*Evidence Act 1906* (WA)	N/A	Extremely limited use	Under 18	Special witness	No
Northern Territory	No scheme							

As shown in Table 1, NSW, Victoria, and South Australia ('SA') have been operating schemes in some form (such as a pilot) for the past five years, with the ACT, Tasmania and Queensland schemes established very recently i.e., in the past two years.

The NSW scheme commenced as a pilot in March 2016 and transitioned to a program in April 2019 (following evaluation).[41] The Victorian program commenced as a pilot scheme on 1 July 2018 and has since been extended with the support of the Victorian courts.[42] The intermediary scheme operating in SA began in 2016 but was relaunched in a different format in March 2020.[43]

The ACT intermediary program commenced in January 2020, the Tasmanian Witness Intermediary Pilot Scheme began on 1 March 2021 and will be evaluated after three years of operation, and the Queensland intermediary pilot program began in Brisbane and Cairns in July 2021.

Who is considered a 'vulnerable witness' for the purpose of criminal trials varies across jurisdictions.[44] Some allow for a very broad definition, while others list specific examples of vulnerability. For example, in Tasmania any person with a 'communication need' is considered vulnerable, and a communication need is defined as any situation where 'the quality or clarity of evidence given by the witness may be significantly diminished by the witness's ability to understand, process or express information'.[45] Conversely, the NSW legislation lists the conditions that would render a person vulnerable.[46] The age at which a child witness is considered vulnerable can also vary. In Victoria, for instance, a 'child' is considered vulnerable if they are under 18 years of age,[47] while in SA it is under 16 years of age.[48]

[41] Judy Cashmore and Rita Shackel, *Evaluation of the child sexual offences evidence pilot* (Final Outcome Evaluation Report, UNSW August 2018).
[42] As detailed by the SALRI (n 18) 327-28.
[43] In August 2021 the Statutes Amendment (Child Sexual Abuse) Bill 2021 was introduced in the SA parliament. This Bill proposes some changes to s 12AB of the *Evidence Act 1929* (SA) regarding special pre-trial procedures/grounds rules hearings. For further detail see SALRI (n 18) [9.1.5]-[9.1.7].
[44] For a discussion of 'vulnerability labelling' see Florencia Luna, 'Elucidating the concept of vulnerability: Layers not labels' (2009) 2(1) *International Journal of Feminist Approaches to Bioethics* 121.
[45] *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 7F.
[46] *Criminal Procedure Act 1986* (NSW) s 306M.
[47] *Criminal Procedure Act 2009* (Vic) s 389A(3).
[48] *Evidence Act 1929* (SA) s 4(1) (definition of 'vulnerable witness').

The terminology used also varies. In NSW, witness intermediaries are referred to as 'children's champions (who may also be called a witness intermediary)', emphasising the focus of this scheme on provision of assistance to child witnesses. [49] In SA, they are referred to as 'communication partners'.[50] WA uses the term 'communicator', [51] and the remaining jurisdictions' operating schemes use the term 'intermediary'. [52]

The eligibility criteria also vary, and NSW has one of the most limited schemes. The relevant legislation provides that the court *must* appoint a children's champion if the witness in under 16 years of age, and *may* appoint a children's champion for a witness aged 16 or older if the court is satisfied that the witness has difficulty communicating.[53] However, the term *witness* in this context refers to 'a child who is a complainant or prosecution witness'.[54] Therefore, the scheme is only available to witnesses up to 18 years of age, and excludes the accused. The scheme is also limited to proceedings related to prescribed sexual offences.[55]

The Victorian legislation provides that intermediaries are available in most criminal proceedings and at any stage of the proceeding, to a witness *other than the accused* who is under the age of 18 or has a cognitive impairment, provided the proceeding is being held in a participating venue of a court.[56] However, in practice the scheme is currently 'operating more narrowly than the scheme set out in the Act and is only available to vulnerable complainants in sexual offences matters, and vulnerable witnesses, apart from the accused, in homicide matters'.[57]

The Queensland scheme is limited to witnesses for the prosecution who are under 16 years of age, have an impairment of the mind or have difficulty communicating.[58]

[49] *Criminal Procedure Act 1986* (NSW) sch 2 div 3 cl 88 (emphasis omitted).
[50] *Evidence Act 1929* (SA) s 13A(e)(ii).
[51] *Evidence Act 1906* (WA) s 106R(4)(b).
[52] See, e.g., *Criminal Procedure Act 2009* (Vic) div 2.
[53] *Criminal Procedure Act 1986* (NSW) s 89(3).
[54] Ibid s 82.
[55] Ibid s 83(1).
[56] *Criminal Procedure Act 2009* (Vic) s 389F.
[57] County Court Victoria, 'Multi-jurisdictional court guide for the Intermediary Pilot Program: intermediaries and ground rules hearings' (Version 2.0, 22 March 2021) [3.3].
[58] *Evidence Act 1977* (Qld) s 21AZL(1).

Intermediaries are not available to an accused. The scheme is also limited in its application as it is only available in child sexual offence proceedings.[59]

The ACT has broad eligibility criteria 'on paper', with the program available to a witness in a criminal proceeding with a communication difficulty[60] and 'witness' is defined to include the defendant.[61] However, as with other programs that are still in their early stages, the focus is currently on children in sexual assault and homicide cases, but other matters will be considered.[62]

This leaves the SA and Tasmanian schemes that both refer to people with communication needs. The Tasmanian scheme makes a witness intermediary available to both children and adults, *other than a defendant*, with a 'communication need' (definition above).[63] Witness intermediaries are available in a 'prescribed proceeding', which is defined very broadly.[64]

SA 'communication partners' can assist any witness, including the accused, who is considered vulnerable or has communication difficulties. Vulnerable witnesses include children under the age of 16 as well as a witness who is cognitively impaired.[65] Complex communication needs exist where 'the witness's ability to give the evidence is significantly affected by a difficulty to communicate effectively with the court, whether the communication difficulty is temporary or permanent and whether caused by disability, illness, injury, or some other cause'.[66]

The final point of divergence is who appoints and manages intermediaries/communication assistants. Apart from SA, intermediaries are provided by the State and managed by the organisations listed in Table 1. By contrast, in SA

[59] Ibid s 21AZJ.
[60] *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 4AJ(1).
[61] Ibid s 4AG(2).
[62] ACT Human Rights Commission, 'ACT Intermediary Program Information for Service Providers', *ACT Intermediary Program* (Fact Sheet: Information for Service Providers) < https://hrc.act.gov.au/wp-content/uploads/2020/05/4.-ACT-Intermediary-Program-Fact-Sheet-for-Service-Providers.pdf>.
[63] *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 7I(1). This is despite the fact that the Tasmanian Law Reform Institute recommended that Tasmania introduce a scheme that extends to defendants: TLRI (n 31) 75-76 (recommendation 3).
[64] See *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 3 (definition of 'prescribed proceeding').
[65] *Evidence Act 1929* (SA) s 4(1).
[66] Ibid s 4(2).

communication partners are engaged by the parties from privately run organisations and at the engaging parties' expense.[67] This means there is less quality control and oversight than in other jurisdictions.

In summary, there has been significant law reform in this area since the CSARC recommended the introduction of intermediaries in 2017. It is encouraging that the pilots in both NSW and Victoria have transitioned to ongoing schemes, and that two further pilots commenced in 2021 (ACT and Tasmania). The reforms have diverged significantly in application, both in terms of legislation and practice.[68] The gaps in coverage that result from this divergence will be analysed in Part 5.

The schemes will need to be in operation longer before the impact of the reforms, including any benefits for vulnerable witnesses and accused, may be evaluated in practice.

IV HUMAN RIGHTS BASED JUSTIFICATIONS FOR PROVISION OF COMMUNICATION ASSISTANCE/INTERMEDIARIES

Australia's international human rights law obligations support the provision of communication assistance/intermediaries. The focus of international human rights law is equality. In the context of criminal trials, the aim is to put an accused facing communication barriers in the same position as a person who does not have such difficulties i.e., remove the barriers to the extent possible.[69] The reverse of this is that not providing assistance to an accused who needs it will violate that person's rights, including the right to be 'equal before the courts'.[70] There is also a need to gather the 'best evidence' from witnesses as a way of protecting the right of the accused to be tried fairly. In other

[67] Government of South Australia, *A Guide for Communication Partners* (June 2020) 7.
[68] It has been argued that the provisions should be uniform and be incorporated in the Uniform Evidence Scheme, see Mackay and Giuffrida, 'Implications of the Royal Commission into Institutional Responses to Child Abuse' (n 8) 136.
[69] National Disability Authority, *NDA Independent Advice Paper on the use of intermediaries in the Irish justice system* (2020) 27.
[70] *ICCPR* (n 2) Art 14(1).

words, the provision of intermediary assistance to both witnesses *and* accused who need assistance is necessary to protect the right of the accused person to a fair trial.[71]

The *ICCPR* protects the rights of those charged with criminal offences to be tried in person and choose their own legal assistance,[72] 'adequate time and facilities for the preparation of his [sic] defence'[73] and to have an interpreter if they 'cannot understand or speak the language used in court'.[74] They also have the right to 'examine, or have examined, the witnesses against him [sic] and to obtain the attendance and examination of witnesses on his [sic) behalf under the same conditions as witnesses against him [sic)'.[75] In other words, the right to a fair criminal trial under the *ICCPR* is comprised of multiple component rights that need to be afforded to those accused of criminal offences, rather than existing as a stand-alone right.[76]

There is no specific right to communication assistance contained in the *ICCPR*, but this could arguably be considered a 'facility' for preparing a defence, as well as being analogous to the role of an interpreter because both aid communication.[77] In this way communication assistance arguably helps to protect a component right that supports the overarching right to a fair criminal trial under the *ICCPR*.

The three Australian jurisdictions that have specific human rights legislation have incorporated these protections for accused in criminal trials to varying degrees. Victoria and Queensland have gone further than the *ICCPR* in providing a right 'to have the free assistance of assistants and specialised communication tools and technology if he or she

[71] This reflects a broader conception of a fair trial (ie. broader than the rights of the accused) that has been referred to as involving a 'triangulation of interests'; namely the interests of 'the accused, the victim and his or her family, and the public': *Attorney-General's Reference (No 3 of 1999)* [2001] 2 AC 91, 188 per Lord Steyn. The concept of 'triangulation' has also been cited in Australian cases. For discussion of the concept see SALRI (n 18) 195-97.
[72] *ICCPR* (n 2) Art 14(3)(d).
[73] Ibid Art 14(3)(b).
[74] Ibid Art 14(3)(f).
[75] Ibid Art 14(3)(e).
[76] Art 14 of the *ICCPR* is commonly referred to as the right to a 'fair trial'; UN Human Rights Committee, *General Comment no. 32, Article 14, Right to equality before courts and tribunals and to a fair trial,* CCPR/C/GC/32, 23 (23 August 2007). See also, Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights, Cases, Materials and Commentary* (Oxford University Press, 3rd ed, 2013) pt 3 chp 14.
[77] Giuffrida and Mackay, 'Extending witness intermediary schemes' (n 6) 505.

has communication or speech difficulties that require such assistance'.[78] The explanatory memorandum for the *Victorian Charter of Human Rights and Responsibilities Bill 2006* makes it clear that the purpose of these 'communication tools' is for the accused to properly 'understand the nature and the reason for the criminal charge and to participate in the judicial process'.[79] On the face of it, this provides a right to communication assistance, for any accused with communication 'difficulties'. However, as noted above, neither the Victorian scheme, nor the Queensland pilot extend to defendants.

While the *Human Rights Act 2004* (ACT) does not contain the same provision about specialised communication tools that Victoria and Queensland have introduced, as noted in Part 3, the ACT is one of two jurisdictions (along with SA) that provides intermediary assistance to defendants. The explanatory memorandum for the 2019 amendments that introduced an intermediary scheme in the ACT refers to the promotion of a fair trial in two ways: the provision of the best evidence by witnesses and the provision of support to defendants who have communication difficulties.[80]

When SA introduced amendments to the *Evidence Act 1929* (SA) to make provision for communication assistance in 2015, they also emphasised the importance of a fair trial, with the Minister noting in the second reading speech that '[t]he Bill preserves an accused person's right to a fair trial'.[81] The speech goes on to describe communication assistance as analogous to the provision of an interpreter:

> *It is only right that persons, be it witnesses, victims, suspects, or defendants, with complex communication needs have the same entitlement of support to communicate effectively and/or understand the relevant proceedings as someone who is unable to speak or understand English*.[82]

Courts in New Zealand ('NZ') have held that the failure to provide communication assistance may have the same impact on an accused's right to a fair trial as the failure to provide an interpreter. This argument has been based on the right to prepare a defence,

[78] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(2)(j); *Human Rights Act 2019* (Qld) s 32(2)(j).
[79] Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 19.
[80] Explanatory Memorandum, Evidence (Miscellaneous Provisions) Amendment Bill 2019 (ACT) 7.
[81] South Australia, *Parliamentary Debates*, Legislative Council, 4 June 2015, 897 (G E Gago).
[82] Ibid 898.

which is protected by s 25(e) of the *Bill of Rights Act 1990* (NZ).[83] In 2019, in *Mathews v The Queen,* the Court of Appeal of NZ referred to the earlier Supreme Court decision in *Abdula v R* that found:

> *Inadequate interpretation could result in an unfair trial if, as a result of its poor quality, an accused is unable sufficiently to understand the trial process or any part of the trial that affects the accused's interests, to the extent that there was a real risk of an impediment to the conduct of the defence.*[84]

Additionally, it went on to hold that '[t]he same principles can be applied when considering whether Mr Mathews received a fair trial in the absence of a communication assistant'.[85]

It is clear that the NZ courts are considering the substantive position of the accused when assessing the right to a fair trial,[86] as opposed to focusing on types of vulnerabilities or types of cases to determine eligibility, which is the overarching approach under the Australian legislative schemes. The gaps generated by this approach will be considered in more detail in Part 5.

Article 1 of the *CRPD* provides that persons with disabilities includes 'those who have long-term physical, mental, intellectual, or sensory impairments which in interaction with various barriers may hinder their full effective participation in society on an equal basis with others'.[87] As outlined in Part 2, people with mental illness and cognitive

[83] This section provides 'the right to be present at the trial and to present a defence'.
[84] *Mathews v The Queen* [2019] NZCA 131, [25], citing *Abdula v R* [2011] NZSC 130, [43].
[85] Ibid. The role of intermediaries in protecting the right to a fair trial has also been recognised in other jurisdictions. See, e.g., Lord Chief Justice's Office, *Case management in the crown court including protocols for vulnerable witnesses and defendants, Practice direction no. 2/2019* (12 November 2019) (Northern Ireland) and *R v Rashid* [2017] EWCA Crim 2 [73] (Lord Thomas CJ).
[86] It is important to note that the New Zealand scheme extends to defendants, as detailed in Giuffrida and Mackay, 'Extending witness intermediary schemes' (n 6) 511-12. For further discussion of provision of communication assistance in New Zealand see Kelly Howard et al, 'Two Legal Concepts Collide: The Intersection of Unfitness to Stand Trial and Communication Assistance' (2019) 28(3) *New Zealand Universities Law Review* 459-473.
[87] This definition focuses on the barriers people with disabilities face, which was 'meant to help move away from emphasising diagnostic and deficit-based categorisation which pathologises disabled people': Piers Gooding and Charles O'Mahony, 'Laws on unfitness to stand trial and the UN convention on the rights of persons with disabilities: Comparing reform in England, Wales, Northern Ireland and Australia' (2016) 44 *International Journal of Law, Crime and Justice* 122, 130.

impairment are over-represented among accused people, and in Part 3 it was explained that witnesses with mental or cognitive disabilities are included in most Australian communication assistance schemes.[88] Therefore the *CRPD* provides additional protections for any witnesses and accused who fall within this broad ambit.

Article 5 of the *CRPD* affirms that 'all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law' and Article 13(1) protects access to justice as follows.

> States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the *provision of procedural and age-appropriate accommodations*, in order to *facilitate their effective role* as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.[89]

The intersection between these two Articles for the purposes of criminal trials is helpfully clarified by Gooding and O'Mahony, as follows: 'in requesting accommodations defendants can argue that a failure to provide accommodations amounts to a form of discrimination under Article 5, as well as a failure of the more specific right to access to justice'.[90]

The interpretation of these Articles of the *CRPD* is aided by the 2020 *International Principles and Guidelines on Access to Justice for Persons with Disabilities*, prepared by the Special Rapporteur on the Rights of Persons with Disabilities. The guidelines emphasise the importance of people with disabilities being provided with 'individualized procedural accommodations' in legal proceedings, with specific reference to 'intermediaries or facilitators'. The principles go on to require state parties to fund and implement an

[88] The Victorian and South Australian legislation provides assistance to adults with cognitive impairment and the ACT, Tasmanian and Queensland legislation supports people with communication needs/difficulty that may be caused by disabilities. For a detailed discussion of the legislative provisions see Giuffrida and Mackay, 'Extending witness intermediary schemes' (n 6) 501-3.
[89] *CRPD* (n 7) art 13(1) (emphasis added).
[90] Gooding and O'Mahony (n 87) 132. For a more detailed discussion about the application of Article 5 and 13 in Australia see Penny Weller, 'Access to Justice and the Convention on the Rights of Persons with Disabilities – an Australian Perspective' in Lansdell, Gaye, Bernadette Saunders and Anna Eriksson (eds) *Neurodisability and the Criminal Justice System: Comparative and Therapeutic Responses* (Edward Elgar Publishing Limited, 2021).

intermediary program where the intermediaries are independent and trained 'to assist with communication throughout the course of the proceedings'.[91]

Therefore, provision of communication assistance to vulnerable witnesses and accused is supported by the provisions of the *CRPD*. While no Australian State or Territory has specifically incorporated provisions of the *CRPD* into domestic law in the way that three jurisdictions have incorporated provisions of the *ICCPR*, the ratification of the *CRPD* by Australia requires compliance.[92]

Ensuring an accused's right to equality and a fair trial justifies provision of intermediaries to both witnesses and accused who face communication barriers in criminal trials. For the accused it is the right to have adequate facilities to prepare a defence that underpins the right to an intermediary in most jurisdictions, and in Queensland and Victoria it is the specific right to 'assistants and communication tools'.

For witnesses and accused who fall within the broad ambit of Article 1 of the *CRPD*, there are additional requirements in the *CRPD* to provide communication assistance as an individually tailored 'procedural accommodation' that is required to support the right to equality and access to justice.

V A HUMAN RIGHTS ASSESSMENT OF INTERMEDIARIES/COMMUNICATION ASSISTANCE SCHEMES

There are a plethora of ways in which the current provision of intermediary/communication assistance in Australia does not meet these obligations when the national picture is considered. In Part 4 it was demonstrated that Australia's international law obligation to provide fair criminal trials, as well as the obligation to provide equal protection and access to justice for people with disabilities, both support the provision of intermediary/communication assistance to vulnerable witnesses and defendants.[93] The approach of the NZ courts reveals that an assessment should be made

[91] United Nations Human Rights Special Procedures, *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (Geneva, August 2020) 15 (Principle 3). For a more detailed discussion of how these Principles may be used to support an intermediary scheme see SALRI (n 18) [7.7].
[92] The *CRPD* has, however, informed relevant policies, such as the SA *Disability Justice Plan 2014-2017*, which was the framework underpinning the introduction of the initial communication partner scheme in SA in 2016: SALRI (n 18) [7.1.1], [7.2.1], [7.6.1], [8.2.6].
[93] See Part 3 above.

of the needs of the individual accused vis-à-vis the charges they are facing. A commitment to achieving substantive equality would mean prioritising people in the categories of vulnerability outlined in Part 2, with particular emphasis on:

- the needs of Indigenous Australians and others facing cultural communication barriers (people from CALD backgrounds), and
- people with mental illness and cognitive impairment who are over-represented in the criminal justice system and entitled to additional human rights protections under the *CRPD*.

The first is that two of the jurisdictions with the highest imprisonment rates of Indigenous peoples (NT and WA) are not providing any, or adequate, assistance. The NT is the only jurisdiction that makes no legislative provision for, does not currently operate, nor is it considering introducing an intermediary scheme. Yet the NT has a significant Indigenous population (25.5% of the total population),[94] its daily imprisonment rate is almost 3-5 times that of any other state or territory,[95] and the NT Indigenous imprisonment rate is 2909 per 100,000 compared to the national Indigenous imprisonment rate of 2397 per 100,000.[96] WA has also not established an intermediary scheme and is using ground rules hearings in limited circumstances. In WA, Indigenous people are imprisoned at a rate of 3727 per 100,000,[97] which is even higher than both the national and NT Indigenous imprisonment rates.

Even in the jurisdictions that do provide intermediary assistance, the needs of Indigenous Australians and those from CALD backgrounds have been largely overlooked. Some Indigenous witnesses and defendants may need intermediary assistance that is tailored to their communication requirements, but there are currently no schemes that specifically provide for these individuals.

[94] Australian Bureau of Statistics, *Census of Population and Housing - Counts of Aboriginal and Torres Strait Islander Australians* (Web page, 31 August 2017) <https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/census-population-and-housing-counts-aboriginal-and-torres-strait-islander-australians/latest-release#counts-by-state-territory-and-capital-city-rest-of-state>.
[95] Sentencing Advisory Council, *Australia's Imprisonment Rates* (Web Page, 15 April 2021) <https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/australias-imprisonment-rates>.
[96] ABS (n 23).
[97] Ibid.

For example, a recent report by the South Australian Law Reform Institute ('SALRI') which examined the provision of communication assistance in SA, highlighted that 'Indigenous peoples continue to experience systemic and attitudinal barriers to justice that extend to language and culture'.[98] The report identified that the 'communication partner' model currently operating in SA 'largely overlooks' the needs of Indigenous communities.[99] The SALRI endorsed the communication partner model,[100] but made several recommendations regarding a 'hybrid model' for Indigenous peoples that provided for greater trust and cultural awareness.[101] This includes a recommendation that this model be co-designed with SA Aboriginal communities and organisations.[102]

The risk of wrongful conviction is heightened when there is a lack of intercultural communication training. This was evident in the wrongful conviction for murder of Indigenous woman Ms Robyn Kina, where 'lawyer-client *mis*communication' was a central cause.[103]

In a report which evaluated the Child Sexual Offence Evidence Pilot program in NSW, the authors noted that it was important to recruit both Indigenous and CALD intermediaries by expanding the appointment criteria.[104] The ACT Intermediary Program appears to be showing some commitment in this area. In the *Application Pack* for prospective intermediaries, it states:

> *It is highly desirable that applicants also have experience engaging responsively with people who are disproportionately impacted by crime and trauma - particularly Aboriginal and Torres Strait Islander people and/or people from*

[98] SALRI (n 18) 146 [6.1.1].
[99] Ibid 146 [6.1.3].
[100] Ibid 191 [6.8.2].
[101] Ibid 194 [6.8.13].
[102] Ibid 194 [6.8.13] (Recommendation 23).
[103] Diana Eades, '"I don't think the lawyers were communicating with me": Misunderstanding Cultural Differences in Communicative Style' (2003) 52 *Emory Law Journal* 1109, 1109 (emphasis added). See further 1119-21.
[104] Cashmore and Shackel (n 41) 8.

> *Culturally and Linguistically Diverse backgrounds. Applicants able to demonstrate their contribution(s) in these regards will be viewed favourably.*[105]

These are welcome steps but a more needs to be done nationally.

Secondly, it is problematic that the SA scheme requires users to pay for the services of a communication partner because the right to a fair trial should not be denied to those without the resources to pay for assistance. The fact that Ms Kina was unable to afford to pay for legal representation played a role in her wrongful conviction.[106] The SALRI's inquiry into the SA scheme found that '[i]t was universally' agreed that this aspect of the scheme's operation 'is undesirable and undermines effective access'.[107] The SALRI has recommended that the scheme be replaced with a government-funded scheme,[108] and that the scheme continue to be available to accused.[109]

Finally, the eligibility criteria for the schemes do not align with the vulnerabilities international human rights law seeks to protect e.g., the ACT is focusing on child witnesses in sexual assault and homicide cases, and the Victorian scheme is also not making provision for all the witnesses eligible in the legislation. Furthermore, as previously noted, only two jurisdictions make any provision for vulnerable accused.

While there is scope to be somewhat optimistic about the reforms that have taken place around Australia, when the vulnerabilities outlined in Part 2 are compared with the coverage of the schemes currently in operation, there are significant gaps and areas for improvement that need to be addressed to achieve compliance with human rights law

VI CONCLUSION

There has been a flurry of law reform around Australia since 2016 designed to respond to the needs of people with communication barriers involved in criminal trials, as discussed in Part 3. While there are significant variations in the eligibility for intermediaries (and in some jurisdictions the assistance is given a different label), at their

[105] ACT Human Rights Commission, 'Panel Intermediary Application Pack' (May 2021) <https://hrc.act.gov.au/wp-content/uploads/2021/05/ACT-Intermediary-Program-Panel-Intermediary-Application-Pack_updated.pdf>.
[106] Eades (n 103) 1113-14.
[107] SALRI (n 18) 26 [1.5.21].
[108] Ibid 27 [1.5.28] (Recommendation 3).
[109] Ibid 27 [1.5.28] (Recommendation 1).

core these reforms will improve the likelihood of fair trials by maximising the provision of best evidence. This accords with Australia's international law obligations under the *ICCPR* and *CRPD*. The *ICCPR* provisions have been incorporated domestically in three jurisdictions, with Victorian and Queensland human rights legislation going further than the *ICCPR* in providing a specific right to 'assistants and communication tools'.

However, some jurisdictions are not yet providing intermediary assistance, and others are operating pilots with limited eligibility. Furthermore, there are two glaring omissions from the current schemes that are in operation that jeopardise the likelihood of the schemes facilitating a fair trial in all trials involving vulnerable witnesses or accused. The first is assistance for vulnerable accused; only SA and the ACT make any provision for vulnerable accused in their intermediary schemes, and in SA this is user-pays, which is a significant limitation. The second is provision for Indigenous Australians and CALD users. No jurisdiction has given these groups adequate attention.[110]

There is an over-representation of vulnerability amongst accused — particularly those with mental impairment or cognitive disability and Indigenous people. To properly protect the right to a fair trial and access to justice, and avoid potential for wrongful conviction(s), all Australian intermediary schemes need to be expanded to include vulnerable accused, and specifically cater to the needs of Indigenous and CALD witnesses and accused requiring assistance.

Without amendments to legislation and adjustments to practice to address the current gaps in coverage, best evidence upon which sound criminal convictions can be made, will not be before the courts, risking unfair trials and potential wrongful conviction(s).

[110] The work of the South Australian Law Reform Institute in highlighting this major oversight is welcome; See, SALRI (n 18) pt 6.

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STATE COMPLICITY IN THE EXTRALEGAL KILLING OF AHMADI MUSLIMS IN PAKISTAN: A CASE FOR BRUTALISATION

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Since 1984, at least 274 Ahmadi Muslims have been extralegally killed in Pakistan on account of their faith. Despite these killings being committed almost exclusively by non-state actors, this paper probes the extent to which such violence can be traced back to the state. We employ the brutalisation thesis to demonstrate how two landmark shifts in the law — the formal declaration of Ahmadis as 'non-Muslim' and the introduction of the death penalty for blasphemy — have, in conjunction with discriminatory policy and inflammatory rhetoric, shaped the sociocultural landscape so profoundly as to inspire anti-Ahmadi violence. By mapping data on the extralegal killing of Ahmadi Muslims against these pivotal events, we argue that the state's curation of an environment in which anti-Ahmadi violence is both enabled and condoned renders the extralegal killing of Ahmadi Muslims by non-state actors so indivisible from the state as to be deemed state sanctioned.

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CONTENTS

I INTRODUCTION

Since 1984, at least 274 Ahmadi Muslims have been extralegally[1] killed in Pakistan on account of their faith.[2] Such violence may, in large part at least, be attributed to the fact that many Muslims view Ahmadi Muslims as heretics. Indeed, this is a position shared with and endorsed by the Pakistani state, legitimised by its designation of Ahmadis as 'non-Muslim' in the country's Constitution and by its criminalisation of Ahmadi religious practices. Under Pakistani law, blasphemy carries the mandatory death penalty. While the state has never judicially executed on this basis, its legislative and rhetorical endorsement of the notion that blasphemers are deserving of death appears to have inspired widespread killing of accused blasphemers at the community level. Against this backdrop, by formalising the heretical status of the Ahmadiyya community, the state has implicitly designated Ahmadi Muslims as deathworthy.

A lack of direct state involvement in extralegal homicides should not be construed as diminishing the state's responsibility for such violence. Indeed, alongside judicial executions and extrajudicial killings by state actors, extralegal killings committed by non-state actors may be deemed 'state sanctioned' where the state 'endorses or condones

[1] The term 'extralegal killings' refers to all homicidal acts committed outside the parameters of the law (i.e., all killings other than the death penalty). Whereas extrajudicial killings are those committed by *state* actors in the absence of lawful authority, 'extralegal killings' is a broader category, including both extra-judicial killings and killings committed by *non-state* actors.

[2] Mahmood Iftikhar, *List of Ahmadis Killed for their Faith Since Promulgation of Ordinance XX 1984* (unpublished, 2021).

homicidal violence, or manifestly fails to prevent violence, protect victims, or bring killers to justice'.[3] Adopting this definition, this paper employs the brutalisation thesis to examine how the Pakistani state may — through law, policy, and rhetoric — have shaped the sociocultural landscape so profoundly as to inspire the extralegal killing of Ahmadi Muslims.

II THE BRUTALISATION THESIS

While the plight of Ahmadi Muslims in Pakistan has been the subject of widespread commentary, extant scholarship predominantly examines the ways in which the state has marginalised the Ahmadiyya community in law and politics.[4] However, academic attention is yet to be paid to the role of the state in facilitating the extralegal violence to which the Ahmadiyya community is endemically subjected. This paper employs the concept of brutalisation to argue that the civilian killing of Ahmadi Muslims should be considered state sanctioned.

The concept of 'brutalisation' was popularised by Mosse to explain the normalisation, or 'domestication', of war:

> *The first world war was an unprecedented experience in men's lives, one which had to be confronted and dealt with — on a personal, political, and cultural level. These levels of experience were closely related through the manner in which men and women confronted the war by building it into their lives — domesticating the war experience, as it were, making it an integral part of their environment, their cultural aspirations, and political dreams*.[5]

[3] Christopher Alexander, Mai Sato, Nadirsyah Hosen, and James McLaren (with Muzafar Ali and Mohammad Mahmodi), *Killing in the Name of God: State-Sanctioned Violations of Religious Freedom* (Eleos Justice: Report, October 2021) 12.

[4] See, e.g., Tahir Kamran, 'The Making of a Minority: Ahmadi exclusion through Constitutional Amendments, 1974' (2019) 4(1) *Pakistan Journal of Historical Studies* 55; Sadia Saeed, 'Political Fields and Religious Movements: The Exclusion of the Ahmadiyya Community in Pakistan' (2012) 23(1) *Political Power and Social Theory* 189; Sadia Saeed, 'The Nation-State and Its Heretics' in *Politics of Desecularization: Law and the Minority Question in Pakistan* (Cambridge University Press, 2017) 145; Ali Usman Qasmi, *The Ahmadis and the Politics of Religious Exclusion in Pakistan* (Anthem Press, 2014); M Nadeem Ahmad Siqqid, 'Enforced Apostasy: Zaheeruddin v State and the Official Persecution of the Ahmadiyya Community in Pakistan' (1996) 14(1) *Minnesota Journal of Law and Inequality* 275.

[5] George L Mosse, 'Two World Wars and the Myth of the War Experience' (1986) 21(4) *Journal of Contemporary History* 491, 491–492.

Mosse wrote on the brutalisation of politics in the Weimar Republic, contending that in the aftermath of World War I, the 'war experience' was transferred into the political arena, ensuing in the birth of Nazism.[6] Brutalisation has since been applied in political science literature to examine violence in various other contexts, such as the rise of the Bolsheviks and the 'uncontrolled violence' of Russia's Civil War (1918–21);[7] the 'systematic annihilation of the Spanish Left' during the Civil Guard repressions of the 1930s;[8] and the birth of 'new terrorism'.[9]

Whereas the political sciences are concerned with the brutalisation of politics and of warfare, criminologists have adopted the brutalisation thesis to make sense of the impacts (intended or otherwise) of law and policy on violence in the community. In death penalty literature, the brutalisation thesis has been used to hypothesise a link between judicial executions and increased murder rates on the basis that the death penalty, as a lawful form of killing by the state, inspires violence at the community level by legitimising and normalising homicide.[10]

In this paper, we do not set out to demonstrate the brutalising impact of Pakistan's death penalty law and practice on the general community. Rather, we use the brutalisation thesis to understand the extralegal killing of Ahmadi Muslims as state sanctioned. We model our approach on that taken by Kil, Menjívar, and Doty (2009), who use the concept of brutalisation to understand the relationship between militarised border policy and vigilante violence against immigrants in the United States:

> *We do not seek to prove that vigilantes react to border policies directly, but to point to how a militarized border policy might shape an environment in which violence becomes an acceptable and appropriate response to undocumented migration. The framing of immigrants as 'legitimate' targets based on moral*

[6] George L Mosse, *Fallen Soldiers: Reshaping the Memory of the World Wars* (Oxford University Press, 1990).
[7] Dietrich Beyrau, 'Brutalization Revisited: The Case of Russia' (2015) 50(1) *Journal of Contemporary History* 15.
[8] Foster Chamberlin, 'Policing Practices as a Vehicle for Brutalization: The Case of Spain's Civil Guard, 1934–1936' (2020) 50(4) *European History Quarterly* 650.
[9] Sebastian Jäckle and Marcel Baumann, '"New Terrorism" = Higher Brutality? An Empirical Test of the "Brutalization Thesis"' (2017) 29(5) *Terrorism and Political Violence* 875.
[10] William J Bowers and Glenn Pierce, 'Deterrence or Brutalisation: What Is the Effect of Executions?' (1980) 26 *Crime and Delinquency* 453, 456.

> *imperatives to 'defend the nation' is not isolated from the state's own practices for dealing with immigration. Thus, our use of brutalization theory helps show a militarized border paradigm as a framework for the possible appearance of vigilantes as well as for public sentiments that treat immigrants as the 'enemy'*.[11]

Adopting this approach, we use brutalisation as a lens through which to understand the influence of the Pakistani state, through its designation of Ahmadi identity as blasphemous and of blasphemy as a capital offence, on the Pakistani conscience, and argue that this may have opened space for, or inspired, or even invited, the extralegal killing of Ahmadi Muslims.

We acknowledge that it would be an overstatement to conclude that the state alone is responsible for inspiring the extralegal killing of Ahmadi Muslims. Indeed, Braithwaite and D'Costa's notion of 'cascades of violence' contends that violence is multidirectional and multifactorial,[12] capable of cascading 'down from commanding heights of power (as in waterfalls), up from powerless peripheries and undulate to spread horizontally (flowing from one space to another)'.[13] This theory accounts for the proliferation of crime through intergenerational cascades (e.g., from parent to child) and cascades of differential association (e.g., from friend to friend), through cascades of anomie (an absence of norms and of the authorities to (re)establish them) and hopelessness, and through cascades of war, civil unrest, and pro-violence politics — all of which may well be applicable in the Pakistan context.[14]

While it would be remiss not to acknowledge that factors extraneous to the state may contribute to anti-Ahmadi violence, it would be problematic to underplay the role of the state. We believe that a focussed examination of the relationship between the state and the extralegal killing of Ahmadi Muslims is crucial, as an understanding of the state's role in facilitating such violence may inform efforts to mitigate it.

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[11] Sang H Kil, Cecilia Menjívar, and Roxanne L Doty, 'Securing Borders: Patriotism, Vigilantism and the Brutalization of the US American Public' (2009) 13(1) *Sociology of Crime, Law and Deviance* 297, 301.
[12] John Braithwaite and Bina D'Costa, *Cascades of Violence: War, Crime and Peacebuilding Across South Asia* (ANU Press, 2018).
[13] Ibid 3.
[14] John Braithwaite, 'Tempered cascades of crime', in *Macrocriminology and Freedom* (Australian National University Press, 2022) 569.

III STATE-PERPETRATED MARGINALISATION OF THE AHMADIYYA COMMUNITY

Founded in 1889 by Mirza Ghulam Ahmad, the Ahmadiyya community is a revivalist movement within Islam.[15] According to the 2017 census, Pakistan's Ahmadiyya community represents 0.22 per cent of the total population, with 191,737 adherents.[16][17] By way of comparison, 96 per cent of the population is either Sunni or Shi'a Muslim,[18] with Sunnis constituting the overwhelming majority.[19] Many Ahmadi beliefs diverge from those of Sunnis and Shi'as, primary among them the reverence by Ahmadi Muslims of Mirza Ghulam Ahmad as a prophet. As Ahmad came after Muhammad, recognition of his prophethood is incompatible with the fundamental belief of Sunnis and Shi'as that Muhammad is the final prophet. This has resulted in Ahmadis being viewed by other Muslims as heretics and non-Muslims;[20] indeed, a 2011 Pew Research Center survey found that only 7 per cent of Pakistani Muslim respondents accepted Ahmadis as fellow Muslims.[21]

Historically, such excommunication of Ahmadi Muslims from the folds of Islam was not a position formally adopted by the Pakistani state in its laws or policy; on the contrary, it resisted calls to do so. Since at least 1934 — more than a decade before the Partition of India and creation of independent Pakistan in 1947 — right-wing religious group *Majlis-i-Ahrar-i-Islam* waged an anti-Ahmadi campaign, portraying the Ahmadiyya community

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[15] Ahmadiyya Muslim Community, *Al Islam* (Web Page) <https://www.alislam.org/ahmadiyya-muslim-community/>.
[16] Population by religion, *Pakistan Bureau of Statistics* (Web Page, 2017) <https://www.pbs.gov.pk/sites/default/files//tables/POPULATION%20BY%20RELIGION.pdf>.
[17] The Ahmadi boycott of the 2017 census means there are no reliable statistics on the true size of the community. An estimated figure of 500,000–600,000 adherents has been cited — this would raise the Ahmadiyya community to 0.29 per cent of the total population: United Kingdom Home Office, *Country Policy and Information Note — Pakistan: Ahmadis* (Report, September 2021) 32; United States Department of State, *International Religious Freedom Report 2020: Pakistan* (Report, 2021) 4.
[18] Population by religion, *Pakistan Bureau of Statistics* (Web Page, 2017) <https://www.pbs.gov.pk/sites/default/files//tables/POPULATION%20BY%20RELIGION.pdf>.
[19] Alongside Ahmadi Muslims, the remaining 4 per cent of Pakistan's population is comprised of religious minorities including Baha'is, Buddhists, Christians, Hindus, Kalash, Kihals, Jains, Sikhs, and Zoroastrians: United States Department of State, *International Religious Freedom Report 2020: Pakistan* (Report, 2021) 4.
[20] Fatima Z Rahman, 'Pakistan: A Conducive Setting for Islamist Violence Against Ahmadis', in Jawad Syed, Edwina Pio, Tahir Kamran and Abbas Zaidi (eds), *Faith-Based Violence and Deobandi Militancy in Pakistan* (Palgrave Macmillan, 2016) 209, 211.
[21] Neha Sahgal, 'In Pakistan, most say Ahmadis are not Muslim', *Pew Research Center* (Web Page, 10 September 2013) < https://www.pewresearch.org/fact-tank/2013/09/10/in-pakistan-most-say-ahmadis-are-not-muslim/>.

as heretical.[22] In 1953, with the support of Punjab's[23] ruling party and the Islamist political party *Jamaat-e-Islami*, the group delivered an ultimatum to the Prime Minister, threatening direct action against the Government should the state fail to declare Ahmadis 'non-Muslim' and remove them from positions of authority.[24] The state rejected the ultimatum, arrested prominent members of *Ahrar* and affiliated groups, and declared martial law over the city of Lahore to quell the anti-Ahmadiyya riots and violence that had erupted.[25] A judicial inquiry concluded that there was no consensus among religious scholars as to the definition of 'Muslim', and cautioned the state against undermining democratic values for political gain or to appease radical forces.[26]

In 1973, Pakistan adopted a new Constitution,[27] declaring Islam the state religion.[28] The following year, state policy toward the Ahmadiyya community shifted dramatically. In the wake of reports of Ahmadi students attacking non-Ahmadi students at a train station in Rabwah ('the Rabwah incident'), anti-Ahmadi looting, arson, assaults, and homicides erupted throughout Pakistan.[29] In response to mounting pressure, Prime Minister Zulfiqar Ali Bhutto announced that the National Assembly would assess the Muslim citizenship of Ahmadis. On 7 September 1974, the National Assembly unanimously resolved to amend[30] the Constitution to declare Ahmadis 'non-Muslims'.[31]

In 1977, a military coup saw Prime Minister Bhutto deposed, with General Muhammad Zia-ul-Haq assuming office as Chief Martial Law Administrator and in 1978 as President.[32] Zia-ul-Haq fronted a regime of Islamisation, characterised by reforms such as the

[22] Sadia Saeed, 'Pakistani Nationalism and the State Marginalisation of the Ahmadiyya Community in Pakistan' (2007) 7(3) *Studies in Ethnicity and Nationalism: 2007 ASED Conference Special* 132, 136, 147.
[23] Punjab province is the home to many of Pakistan's Ahmadis, split between the cities of Rabwah and Lahore: Rahman (n 20) 211.
[24] Saeed (n 22) 136–137.
[25] Ibid 137.
[26] Bilal Hayee, 'Blasphemy Laws and Pakistan's Human Rights Obligations' (2012) 14 *University of Notre Dame Australia Law Review* 25, 28–29.
[27] *Constitution of the Islamic Republic of Pakistan 1973* (Pakistan).
[28] Ibid art 2.
[29] Tahir Kamran, 'The Making of a Minority: Ahmadi Exclusion through Constitutional Amendments, 1974' (2019) 4(1) *Pakistan Journal of Historical Studies* 55, 59–61.
[30] *Constitution (Second Amendment) Act 1974* (Pakistan) Act No. XLIX of 1974, ss 2, 3.
[31] For further context, refer to Ali Usman Qasmi, 'Understanding the Events of 1974', in Ali Usman Qasmi (ed) *The Ahmadis and the Politics of Religious Exclusion in Pakistan* (Anthem Press, 2014) 167; and Sadia Saeed, 'Political Fields and Religious Movements: The Exclusion of the Ahmadiyya Community in Pakistan' (2012) 23 *Political Power and Social Theory* 189.
[32] Kamran (n 29) 76.

introduction of *shari'a* law and religious appellate courts.[33] The 1984 promulgation of the *Anti-Islamic Activities Ordinance* ('Anti-Ahmadi Ordinance')[34] had the effect of introducing two new anti-Ahmadi sections to the *Pakistan Penal Code*[35] ('the Penal Code'). The first prohibits the 'misuse [by Ahmadis] of epithets, descriptions, and titles, etc., reserved for certain holy personages of places',[36] while the second bars Ahmadis from calling themselves 'Muslim', preaching, propagating, or proselytising their faith, or 'in any matter whatsoever outrag[ing] the religious feelings of Muslims'.[37] The Government rationalised the Ordinance by terming the Ahmadiyya community a 'heretical order':

> *The Qadiani [Ahmadiyya] movement is all the more pernicious since it seeks to operate surreptitiously from within the fold of Islam despite its clear status to the contrary, by virtue both of the law that prevails in Pakistan and the Qadiani community's own dissociation from the Muslim Ummah [community]. Muslims the world over need to be fully aware of the origin, the goals, and the activities of this heretical order. The government and the people of Pakistan continue their efforts to decisively isolate them from the Community of Islam to which they do not belong*.[38]

In 1993, the Supreme Court in *Zaheeruddin*[39] upheld the constitutionality of the Anti-Ahmadi Ordinance and,[40] by extension, the legality of the 1974 constitutional amendment.[41] The Ordinance, which remains in force to this day, has been condemned as 'a form of state-sanctioned, institutionalized discrimination and exclusion of Ahmadis'.[42]

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[33] Moeen H Cheema, 'Beyond Beliefs: Deconstructing the Dominant Narratives of the Islamization of Pakistan's Law' (2012) 60 *The American Journal of Comparative Law* 875, 879-80.
[34] *Anti-Islamic Activities of the Quadiani Group, Lahori Group and Ahmadis (Prohibition and Punishment) Ordinance 1984* (Pakistan) Ordinance No. XX of 1984.
[35] *Pakistan Penal Code 1860* (Pakistan) Act No. XLV of 1860.
[36] Ibid s 298B.
[37] Ibid s 298C.
[38] Government of Pakistan, 'Qadianis: Threat to Islamic Solidarity… Measures to Prohibit Anti-Islamic Activities' (1984), 5 (cited in Sadia Saeed, *Politics of Desecularization: Law and the Minority Question in Pakistan* (Cambridge University Press, 2017) 165).
[39] *Zaheeruddin v the State* (1993) SCMR 1718 (Supreme Court of Pakistan).
[40] Ibid 1779 (cited in M Nadeem Ahmad Siddiq, 'Enforced Apostasy: *Zaheeruddin v State* and the Official Persecution of the Ahmadiyya Community in Pakistan' (1996) 14(1) *Minnesota Journal of Law & Inequality* 275, 291).
[41] M Nadeem Ahmad Siddiq, 'Enforced Apostasy: *Zaheeruddin v State* and the Official Persecution of the Ahmadiyya Community in Pakistan' (1996) 14(1) *Minnesota Journal of Law & Inequality* 275, 292–295.
[42] Roswitha Badry, 'The Dilemma of "Blasphemy Laws" in Pakistan – Symptomatic of Unresolved Problems in the Post-Colonial Period?' (2019) 2(59) *Politeja* 91, 98.

State-perpetrated discrimination against the Ahmadiyya community also extends to regulatory fora beyond the criminal law. When applying for national identity cards and passports, applicants must declare their religion. Ahmadi Muslims wishing to be recorded as 'Muslim' are required to swear their belief in the finality of Muhammad's prophethood, reject the prophethood of Mirza Ghulam Ahmad, and declare Ahmadis 'non-Muslim'.[43] In addition to forcing Ahmadis to deny and denounce their faith, this process incites sectarian tensions by requiring non-Ahmadi Muslims submitting such applications to make the same declarations against the Ahmadiyya community. Ahmadi Muslims are similarly disenfranchised in electoral policy: to vote as 'Muslims', they must denounce the Ahmadi faith. Those unwilling to do so must agree to be registered on a separate electoral list as 'non-Muslims' or relinquish their voting rights altogether.[44] These regulations and policies have wide-reaching implications: for instance, Ahmadis without a 'Muslim' designation on their passport are barred from making the *Hajj* pilgrimage to Saudi Arabia,[45] while the publication of electoral lists exposes Ahmadi Muslims to security risks by revealing their residential addresses alongside their faith.[46]

Sectarian division within Pakistan's Muslim community is further exacerbated by inflammatory anti-Ahmadi rhetoric by politicians and other state officials. In justifying the promulgation of the Anti-Ahmadi Ordinance, the Government in 1984 described the Ahmadiyya community as an existential threat to both Pakistan and the Islamic faith:

> *The most sinister conspiracy of the Qadianis [Ahmadis] after the establishment of Pakistan was to turn this newly Islamic state into a Qadiani kingdom subservient to the Qadiani's pay masters. The Qadianis had been planning to carve out a Qadiani State from the territories of Pakistan*.[47]

[43] United States Department of State, *International Religious Freedom Report 2020: Pakistan* (Report, 2021) 9.
[44] Pakistan: Ensure Ahmadi Voting Rights, *Human Rights Watch* (Web Page, 28 June 2018) <https://www.hrw.org/news/2018/06/28/pakistan-ensure-ahmadi-voting-rights#>.
[45] United Kingdom Home Office, *Country Policy and Information Note – Pakistan: Ahmadis* (Report: September 2021) 30–31.
[46] Ibid 26.
[47] 'Qadianis: Threat to Islamic Solidarity… Measures to Prohibit Anti-Islamic Activities' (1984), 24–5 (cited in Sadia Saeed, *Politics of Desecularization: Law and the Minority Question in Pakistan* (Cambridge University Press, 2017) 166).

Sectarian rhetoric continues to this day.[48] During a televised interview in May 2020, Pakistan's Federal Minister for Religious and Inter-faith Harmony Affairs said, 'whoever shows sympathy or compassion towards [Ahmadis] is neither loyal to Islam nor the state of Pakistan'.[49] In July 2021, United Nations Special Procedures mandate holders issued a statement expressing renewed concern as to the ongoing and increasing marginalisation, discrimination, and persecution of the global Ahmadiyya community, including the propagation of disinformation that Ahmadis are 'responsible for the development and spreading of the COVID-19 virus'.[50] State perpetration of sectarian division also extends beyond the rhetorical: police have reportedly destroyed several Ahmadi mosques,[51] and have been implicated in the desecration of Ahmadi graves.[52]

As this brief overview illustrates, the Pakistani state has successfully marginalised the Ahmadiyya community by gradually encroaching on the notion of Muslim citizenship, taking the liberty of defining who is, and who is not, 'Muslim'. By denying Ahmadi identity and criminalising Ahmadi practices, the state has legitimised the popular belief that Ahmadis are heretics. Such institutionalisation of sectarian division has, as the following sections elucidate, had fatal consequences.

IV A FATAL SHIFT: THE DEATH PENALTY FOR BLASPHEMY

Pakistani law criminalises various offences against religion. In 1947, Pakistan inherited the offences of 'injuring or defiling a place of worship',[53] 'disturbing religious assembly',[54] 'trespassing on burial places',[55] and 'uttering words etc., with deliberate intent to wound

[48] For examples, see United Kingdom Home Office (n 45) 49–51.
[49] Niala Mohammad, 'Pakistani Ahmadi Leaders Fear Backlash After New Minority Commission Formation', *Voice of America* (online, 18 May 2020) <https://www.voanews.com/a/extremism-watch_pakistani-ahmadi-leaders-fear-backlash-after-new-minority-commission-formation/6189460.html >.
[50] Ahmed Shaheed, Irene Khan and Fernand de Varennes, 'International Community must pay attention to the persecution of Ahmadi Muslims worldwide', *United Nations Office of the High Commissioner for Human Rights* (Web Page, 13 July 2021) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27305 >.
[51] 'Pakistan police attacks another Ahmadiyya Muslim mosque', *Coordination of the Associations and the People for Freedom of Conscience* (Web Page, 25 June 2021) < https://freedomofconscience.eu/pakistan-police-attacks-another-ahmadiyya-muslim-mosque/>.
[52] 'PAKISTAN: Police accused of desecrating Ahmadi graves', *Human Rights Without Frontiers* (Web Page, 10 February 2022) <https://hrwf.eu/pakistan-police-accused-of-desecrating-ahmadi-graves/>.
[53] *Pakistan Penal Code 1860* (Pakistan) Act No. XLV of 1860, s 295.
[54] Ibid s 296.
[55] Ibid s 297.

religious feelings'[56] from the *Indian Penal Code*.[57] In 1980, Zia-ul-Haq criminalised the 'use of derogatory remarks against holy personages',[58] and in 1982 outlawed the defiling, damaging, or desecrating of a Qur'an.[59] The Anti-Ahmadi Ordinance discussed above was then introduced in 1984. Except for defiling a Qur'an (punishable by life imprisonment), each of these offences carries an imprisonment term of between one and three years and/or a fine.

A major shift occurred in 1986, when Section 295C of the Penal Code was introduced[60] to provide the death penalty for blasphemy:

> *Whoever by words, either spoken or written, or by visible representation, or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad (peace be upon him) shall be punished with death, and shall also be liable to fine.*[61]

The insertion of Section 295C signalled the first time in Pakistan's history that offending religion had been punishable by death. When first introduced, Section 295C provided for life imprisonment as an alternative to the death penalty; however, sentencing discretion was removed in 1991 following a 1990 decision of the Federal Shariat Court, rendering the death penalty mandatory.[62] That same decision also expanded the scope of Section 295C to blasphemous remarks made in relation to *any* prophet.[63]

Prior to the introduction of Section 295C, only seven blasphemy cases were ever filed.[64] Since the 1986 amendment, this number has soared: as of 2020, at least 1,855 blasphemy cases had been registered.[65] A record 200 cases were filed in 2020 — the highest of any year to date, and almost double the previous record of 113 cases in 2009.[66] Moreover,

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[56] Ibid s 298.
[57] *Indian Penal Code 1860* (India) Act No. 45 of 1860.
[58] *Pakistan Penal Code 1860* (Pakistan) Act No. XLV of 1860, s 298A; inserted by *Pakistan Penal Code (Second Amendment) Ordinance* (Pakistan) Ordinance XLIV of 1980, s 2.
[59] *Pakistan Penal Code 1860* (Pakistan) Act No. XLV of 1860, s 295B; inserted by *Pakistan Penal Code (Amendment) Ordinance 1982* (Pakistan) Ordinance 1 of 1982, s 2.
[60] *Criminal Law (Amendment) Act* (Pakistan) Act No. III of 1986, s 2.
[61] *Pakistan Penal Code 1860* (Pakistan) Act No. XLV of 1860, s 295C (Emphasis added).
[62] *Ismail Qureshi v The Government of Pakistan* (1990), PLD 1991 FSC 10 (Federal Shariat Court of Pakistan) [67].
[63] Ibid [68].
[64] Arafat Mazhar, *The Untold Truth of Pakistan's Blasphemy Law: A Reconciliation with the Past and a Way Forward* (Engage Pakistan: Report, 2018) 126.
[65] Centre for Social Justice (2021), *Factsheet on Abuse of Blasphemy Laws* (unpublished, 2021).
[66] Ibid.

blasphemy accusations are disproportionately levelled against religious minorities who, despite constituting less than 5 per cent of Pakistan's population, are implicated in approximately 50 per cent of all cases.[67]

This demographical bias is particularly pronounced vis-à-vis Ahmadi Muslims. Approximately one-third of blasphemy cases have been registered against members of the Ahmadiyya community,[68] despite Ahmadi Muslims comprising only 0.22 per cent of Pakistan's total population.[69] This equates to one in 310 members of the Ahmadiyya community being implicated in a registered blasphemy case.[70] By way of comparison, one in 9,822 Christians have been accused of blasphemy, as have one in 225,380 non-Ahmadi Muslims.[71] Such gross overrepresentation of Ahmadi Muslims amongst those formally accused of blasphemy is likely a by-product of the state-perpetrated marginalisation of the Ahmadiyya community. The designation of Ahmadis as 'non-Muslim' in both the Constitution and in official discourse legitimises — and legally formalises — the popular belief that Ahmadis are heretics. Against this backdrop, the introduction of Section 295C has created a legal avenue by which Ahmadis may be persecuted because their very identity — that is, their claim to be Muslims despite their disbelief in the finality of Muhammad's Prophethood — is deemed blasphemous.[72]

V THE CASE FOR BRUTALISATION

Supporters of Section 295C offer an array of justifications for its retention.[73] One such claim is that it protects those accused of blasphemy by preventing aggrieved civilians

[67] Centre for Social Justice (2021), *Factsheet on Abuse of Blasphemy Laws* (unpublished, 2021); Sana Ashraf, 'Honour, purity and transgression: understanding blasphemy accusations and consequent violent action in Punjab, Pakistan' (2018) 26(1) *Contemporary South Asia* 51, 68.
[68] Centre for Social Justice (n 65).
[69] Population by religion, *Pakistan Bureau of Statistics* (Web Page, 2017) <https://www.pbs.gov.pk/sites/default/files//tables/POPULATION%20BY%20RELIGION.pdf>.
[70] 'Table 9 – Population by sex, religion and rural/urban', *Pakistan Bureau of Statistics* (Web Page, 2017). <https://www.pbs.gov.pk/sites/default/files//population_census/census_2017_tables/pakistan/Table09n.pdf>.
[71] Centre for Social Justice (2021), *Factsheet on Abuse of Blasphemy Laws* (unpublished, 2021); 'Table 9 – Population by sex, religion and rural/urban', *Pakistan Bureau of Statistics* (Web Page, 2017). <https://www.pbs.gov.pk/sites/default/files//population_census/census_2017_tables/pakistan/Table09n.pdf>.
[72] Siddiq (n 41) 289.
[73] For a discussion of such justifications, refer to Qaiser Julius, 'The Experience of Minorities Under Pakistan's Blasphemy Laws' (2016) 27(1) *Islam and Christian-Muslim Relations* 95.

from taking the law into their own hands. In 1994, former President of Pakistan and Supreme Court Justice Muhammad Rafiq Tarar declared:

> *If this law [Section 295C] is not there the doors to courts will be closed on the culprits and the petitioners provoked by them, and then everyone will take the law in his own hands and exact revenge from the criminals. As a result anarchy will prevail in the country.*[74]

Recently ousted Prime Minister Imran Khan echoed this sentiment, claiming that without Section 295C, lynchings and anarchy would erupt across the country.[75]

The evidence disagrees with these claims — indeed, the opposite appears to be true. Between 1987 and 2020, at least 78 people were extralegally killed after being accused of blasphemy.[76] By way of comparison, prior to the introduction of Section 295C, only two such killings were recorded.[77] This increase in extralegal violence appears to be a direct corollary of blasphemy becoming a capital offence, forming the cornerstone of our brutalisation argument. In short, we contend that as an 'official declaration by the state that blasphemers deserve to die',[78] Section 295C legitimises the killing of alleged blasphemers, thus opening space wherein such violence may transpire extralegally.

The courts have not refrained from imposing death sentences for blasphemy: in 2018, between 17 and 29 people convicted under Section 295C were on death row.[79] By 2020, this number rose to between 35 and 40.[80] While this increasing number of death sentences may be deemed an indicator of the state's strict anti-blasphemy stance, no execution has ever been carried out on this basis.[81] It has been postulated that this

[74] 'Blasphemy law revisited' *DAWN* (online, 29 July 2010) <https://www.dawn.com/news/833067/blasphemy-law-revisited>.
[75] Aakar Patel, 'Pakistan's blasphemy law', *The Express Tribune* (online, 26 August 2012) <https://tribune.com.pk/story/426498/pakistans-blasphemy-law>.
[76] Centre for Social Justice (n 65).
[77] Mazhar (n 64) 127.
[78] Christopher Alexander, Mai Sato, Nadirsyah Hosen, and James McLaren (with Muzafar Ali and Mohammad Mahmodi) (n 3) 74.
[79] 'Pakistan: Events of 2018', *Human Rights Watch* (Web Page) <https://www.hrw.org/world-report/2019/country-chapters/pakistan#>; United States Department of State, *International Religious Freedom Report 2020: Pakistan* (Report, 2021) 10.
[80] United States Department of State (n 43) 11.
[81] Ibid.

fundamental contradiction between policy and practice has inspired civilian vigilantes and mobs to 'take matters in their own hands'.[82]

This hypothesis is corroborated by empirical findings. A 2011 survey found that a resounding 84 per cent of the 1,450 Pakistani Muslims interviewed endorsed 'making *shari'a* the official law' of Pakistan,[83] while 76 per cent supported the death penalty for apostasy.[84] 45 per cent of the respondents were of the belief that the country's current laws did not adhere closely enough to the *shari'a*, and 91 per cent of those said that this was unacceptable.[85] These figures give credence to the proposition that civilians might carry out extralegal violence in response to the perceived failure of the state to hold 'offenders' accountable. Such a claim is bolstered by the fact that the notion of committing violence 'to protect or perform a religious obligation' is widely endorsed in Pakistani society.[86]

Ahmadi Muslims account for nine of the 78 persons extralegally killed following a formal accusation of blasphemy.[87] This equates to one in 21,304 Ahmadi Muslims in Pakistan having been killed on this basis.[88] By way of comparison, 23 victims were Christians,[89] representing one in 114,872 of Pakistan's Christian community,[90] while 42 victims — or one in 4,770,541 — were non-Ahmadi Muslims.[91] Such significant overrepresentation of Ahmadi Muslims among the victims of such violence may be attributable to the state's marginalisation of the Ahmadiyya community. By formally declaring Ahmadis 'non-Muslim' and constantly reinforcing this through regulations and rhetoric, the state may

[82] Kunwar Khuldune Shahid, 'How Pakistan's Constitution Facilitates Blasphemy Lynching and Forced Conversions', *The Diplomat* (online, 27 March 2019) <https://thediplomat.com/2019/03/how-pakistans-constitution-facilitates-blasphemy-lynching-and-forced-conversions/>.
[83] Pew Research Center, *The World's Muslims: Religion, Politics and Society* (Report, 30 April 2013) 15.
[84] Ibid 55.
[85] Ibid 57–58.
[86] Raza Rumi, 'Unpacking the Blasphemy Laws of Pakistan' (2018) 49(2) *Asian Affairs* 319, 322.
[87] Centre for Social Justice (n 65).
[88] 'Table 9 — Population by sex, religion and rural/urban', *Pakistan Bureau of Statistics* (Web Page, 2017) <https://www.pbs.gov.pk/sites/default/files//population_census/census_2017_tables/pakistan/Table09n.pdf>.
[89] Centre for Social Justice (n 65).
[90] 'Table 9 — Population by sex, religion and rural/urban', *Pakistan Bureau of Statistics* (Web Page, 2017) <https://www.pbs.gov.pk/sites/default/files//population_census/census_2017_tables/pakistan/Table09n.pdf>.
[91] Centre for Social Justice (2021), *Factsheet on Abuse of Blasphemy Laws* (unpublished, 2021); 'Table 9 — Population by sex, religion and rural/urban', *Pakistan Bureau of Statistics* (Web Page, 2017) <https://www.pbs.gov.pk/sites/default/files//population_census/census_2017_tables/pakistan/Table09n.pdf>.

have inflamed the already brutalising potential of Section 295C by validating popular belief in the heretical status of the Ahmadiyya community.

Just as supporters of Section 295C have advocated that it protects accused blasphemers from the wrath of the masses, similar justifications have been offered for the Anti-Ahmadi Ordinance. In *Zaheeruddin*, the Court rationalised the stifling of Ahmadi religious practices in the name of maintaining public order:

> *It is the cardinal faith of every Muslim to believe in every Prophet and praise him. Therefore, if anything is said against the Prophet, it will injure the feelings of a Muslim and may even incite him to the breach of peace, depending on the intensity of the attack. […] Can then anyone blame a Muslim if he loses control of himself on hearing, reading, or seeing such blasphemous material as has been produced by Mirza [Ghulam Ahmad]?*[92]

Again, the evidence disagrees. The nine Ahmadi Muslims killed following a formal accusation of blasphemy represent only a fraction of the victims of anti-Ahmadi violence. Like all Pakistani citizens, Ahmadi Muslims may be accused of blasphemy on grounds of offensive words or conduct on which criminal charges may be laid. However, due to the state's manufacturing of an environment wherein Ahmadi identity itself is construed as blasphemous (predominantly by operation of the Anti-Ahmadi Ordinance), Ahmadi Muslims may also be viewed as heretical despite an absence of any act capable of being the subject of any criminal charges. In practice, this means that killings are often carried out in instances altogether divorced from any formal blasphemy accusation. When such violence is accounted for, the number of fatalities climbs drastically: between the promulgation of the Anti-Ahmadi Ordinance in May 1984 and September 2021, at least 274 Ahmadi Muslims were killed on account of their faith.[93] By way of comparison, in the 35 years prior to the enactment of the Ordinance, 55 Ahmadi Muslims were killed, with more than half these homicides being committed in the mere months following the Rabwah incident.[94]

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[92] *Zaheeruddin v the State* (1993) SCMR 1718 (Supreme Court of Pakistan) [83]–[84] (cited in International Commission of Jurists, *On Trial: The Implementation of Pakistan's Blasphemy Laws* (Report, November 2015) 35).
[93] Iftikhar (n 2).
[94] Mahmood Iftikhar, *List of Ahmadis Murdered Only For Their Faith From 1947-1984 (Promulgation of Ordinance XX)* (unpublished, 2021).

The brutalising potential of the laws, policies, and rhetoric discussed may be exacerbated by state responses to the extralegal killing of Ahmadi Muslims. In high profile blasphemy cases, the state has taken a strict stance against extralegal violence: for example, following the 2011 assassination of Salman Taseer, then Governor of Punjab and outspoken critic of the blasphemy law, his killer was prosecuted, convicted, and executed.[95] By way of contrast, in instances of anti-Ahmadi violence, police are often hesitant to file charges or pursue killers, ensuing in a 'total absence of justice'.[96] This stark disparity demonstrates how the state has not only designated Ahmadi Muslims as deathworthy, but has tacitly approved of their extralegal execution. Whereas genuine law enforcement efforts may be capable of interrupting the brutalisation process, such gross impunity resulting from state inaction almost certainty contributes to the creation of a culture wherein anti-Ahmadi violence is legitimised, normalised, and thus enabled.

VI CONCLUSION

In this article, data on the extralegal killing of Ahmadi Muslims have been mapped against pivotal shifts in Pakistan's law to ascertain the degree to which the state may be viewed as having facilitated such violence. Despite the overwhelming majority of extralegal killings being carried out by non-state actors, the brutalisation thesis serves as a compelling framework by which these homicides can be traced back to the state as products of its official designation of Ahmadis as heretics and of heretics as deathworthy. The state's introduction of the death penalty for blasphemy is a formal declaration that blasphemers ought to be killed, and the marked increase in the extralegal killing of accused blasphemers following the introduction of Section 295C gives credence to the brutalising tendencies of this law. Against this backdrop, the manifest upswing in extralegal killings of Ahmadi Muslims suggests that the state's marginalisation of the Ahmadiyya community through law, policy, and rhetoric has exacerbated these brutalising tendencies vis-à-vis Ahmadi Muslims. In sum, the state has curated an

[95] 'Pakistan hangs Mumtaz Qadri for murder of Salman Taseer', *Al Jazeera* (online, 29 February 2016) <https://www.aljazeera.com/news/2016/2/29/pakistan-hangs-mumtaz-qadri-for-murder-of-salman-taseer>.

[96] Zohra Yusuf, former Chairperson of the Human Rights Commission of Pakistan, in Asad Hashim, 'Pakistan's Ahmadiyaa: An 'absence of justice'', *Al Jazeera* (online, 7 August 2014) <https://www.aljazeera.com/features/2014/8/7/pakistans-ahmadiyya-an-absence-of-justice.>

environment in which anti-Ahmadi violence is not only enabled but condoned, thereby rendering the extralegal killing of Ahmadi Muslims so indivisible from the state as to be deemed state sanctioned.

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NO WAY OUT?

AUSTRALIA'S OVERSEAS TRAVEL BAN AND 'RIGHTS-BASED' INTERPRETATION

BRUCE CHEN*

Shortly after COVID-19 was recognised as a national threat to Australia, in late March 2020 the Commonwealth Government prohibited Australian citizens and permanent residents from travelling overseas, with severe criminal penalties for non-compliance. The overseas travel ban, made under human biosecurity emergency powers under the Biosecurity Act 2015 *(Cth), caused significant outrage. Australia was seen as an outlier in its approach to interfering with the rights of citizens and permanent residents to exit the country. The ban engaged a citizen's fundamental common law right to depart from Australia, and a person's human right to leave their own country. This article analyses the relevance and limits of two statutory interpretation principles protective of those rights — the principle of legality and presumption of consistency with international law. It examines the treatment of those principles in the Full Court of the Federal Court case of* LibertyWorks Inc v Commonwealth *(2021) 286 FCR 131. The article concludes that the Full Court's decision was underdeveloped with respect to the principle of legality. It deserved greater attention, even during a time of public emergency.*

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CONTENTS

I INTRODUCTION

Australia's approach to border control in response to COVID-19 caused significant consternation. It was characterised in the media as creating a 'prison island'[1] or a 'hermit kingdom'.[2] The making of the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 (Cth) ('Determination') was a central aspect of the Commonwealth Government's border control response. The Determination imposed a general prohibition on Australian citizens and permanent residents from leaving Australia unless

[1] Chris Uhlmann, 'We Need Exit Strategy for Prison Island', *The Age* (Melbourne, 28 April 2021); Latika Bourke, '"I Am On Prison Island": Australia's Travel Ban Tearing Families Apart', *Sydney Morning Herald* (online, 2 August 2020) <https://www.smh.com.au/world/europe/i-am-on-prison-island-australia-s-travel-ban-tearing-families-apart-20200707-p559z4.html>; Alexander Downer, 'Prison Island: Australia's Covid Fortress Has Become A Jail', *The Spectator* (London, 28 August 2021).

[2] Tim Soutphommasane and Marc Stears, 'How Failure on Covid-19 has Exposed the Dangerous Delusion of "Fortress Australia"', *New Statesman* (online, 9 July 2021) <https://www.newstatesman.com/politics/2021/07/how-failure-covid-19-has-exposed-dangerous-delusion-fortress-australia>; Janet Albrechtsen, 'Come to the Party, Santa Claus, and Reopen the Border', *The Australian* (Sydney, 8 September 2021).

an exemption applied. It was accompanied by heavy criminal penalties for non-compliance.[3]

The Determination was described as a 'pretty extraordinary restriction on people's liberty'.[4] It was 'an utterly abnormal chapter in our history';[5] 'one of the strictest coronavirus public health responses in the world'.[6] Australia was 'on par with'[7] and had 'the dubious honour of joining North Korea as one of the very few countries that forced its citizens to seek permission to leave'.[8] The effect of the Determination was 'heartless and impersonal';[9] 'tearing families apart'.[10] Its exceptional nature drew the attention of national and international human rights organisations for potentially breaching human rights.[11] This, together with other strict COVID-19-related border controls, led commentators to ask: what is the point of Australian citizenship?[12]

In *LibertyWorks Inc v Commonwealth* ('*LibertyWorks*'),[13] a judicial review application was heard by the Full Court of the Federal Court, seeking to challenge the making of the Determination by the Health Minister on the basis that it was ultra vires and invalid. This article analyses the reasoning and outcome of the Full Court's decision.

Part two of the article outlines the legislative framework under the *Biosecurity Act 2015* (Cth) ('*Biosecurity Act*'), particularly the power to make a human biosecurity emergency

[3] As to the rights impacts of state and territory border closures within Australia during the COVID-19 pandemic, see, for e.g., Kate Ogg and Olivera Simic, 'Becoming an Internally Displaced Person in Australia: State Border Closures during the COVID-19 Pandemic and the Role of International Law on Internal Displacement' (2022) *Australian Journal of Human Rights* (forthcoming).
[4] Caitlin Fitzsimmons, '"On Par with North Korea": Three Out of Four Requests to Leave Australia Refused', *Sydney Morning Herald* (online, 16 August 2020) <https://www.smh.com.au/lifestyle/life-and-relationships/on-par-with-north-korea-three-out-of-four-requests-to-leave-australia-refused-20200814-p55luj.html>.
[5] Waleed Aly, 'The Nation that Cast Out Its Own', *The Age* (Melbourne, 25 February 2022).
[6] Sophie Meixner, 'Australia's Outbound Travel Ban is One of the Strictest Coronavirus Public Health Responses in the World', *ABC News* (online, 31 August 2020) <https://www.abc.net.au/news/2020-08-31/coronavirus-covid-outbound-international-travel-ban-morrison/12605404>.
[7] Fitzsimmons (n 4).
[8] Tim O'Connor, 'Time for Clarity on Our Rights', *The Age* (Melbourne, 14 August 2021).
[9] Caitlin Fitzsimmons, 'Calling Australia Home', *The Age* (Melbourne, 20 February 2022).
[10] Bourke (n 1).
[11] See *Human Rights Watch, World Report 2021: Events of 2020* (Report, January 2021) 60–1; Human Rights Watch, *World Report 2022: Events of 2021* (Report, January 2022) 52, 54; Australian Lawyers for Human Rights, 'Fortress Australia: Legal Body Calls for Rights of Appeal for Australians Denied Exit Permission under COVID-19 International Travel Restrictions' (Press Release, 6 August 2021) <https://alhr.org.au/locked-fortress-australia-covid-19-restrictions-australian-citizens-permanent-residents-leaving-australia/>.
[12] See, for e.g., Kim Rubenstein, 'No Help for Australians Trapped by Travel Bans', *The Age* (Melbourne, 22 April 2021).
[13] (2021) 286 FCR 131 ('*LibertyWorks*').

declaration, and the Health Minister's human biosecurity emergency powers to determine emergency requirements. Part three outlines the Determination and the context in which it was made. Part four examines the relevance of human rights law, and common law rights and freedoms engaged by the Determination. Part five provides an overview and analysis of the Full Court's decision in *LibertyWorks*. The analysis discusses the Full Court's interpretation of the emergency powers provision of the *Biosecurity Act*, including the Court's treatment of principles of statutory interpretation — particularly the principle of legality, and to an extent, the presumption of consistency with international law. Part six concludes that the Full Court's analysis erroneously overlooked certain aspects of the principle of legality and treated it as if it was converged with the presumption of consistency with international law. The Full Court did not take a principled approach based on precedent, when rejecting its application.

This article does not discuss potential constitutional law issues which were not raised in *LibertyWorks*, such as whether there is an implied constitutional right or freedom to depart from Australia. Those are beyond the scope of the article.[14]

II THE *BIOSECURITY ACT* AND HUMAN BIOSECURITY EMERGENCY DECLARATION

The Determination was made under the *Biosecurity Act*. The objects of that Act include providing for the management of 'human biosecurity emergencies', the 'risk of contagion' of listed human diseases, and their risk in entering, emerging, establishing or spreading in Australia.[15] Relevantly, 'human coronavirus with pandemic potential' was added as a listed human disease in January 2020.[16]

[14] For further discussion, see Helen Irving, 'India Travel Ban Breaches Constitutional Rights', *The Age* (Melbourne, 6 May 2021); Claudia Long, Flint Duxfield and Ange Lavoipierre, 'Australians Trying to Leave Could Have A Constitutional Challenge to COVID-19 Travel Restrictions, Says Legal Expert', *ABC News* (online, 8 July 2021) <https://www.abc.net.au/news/2021-07-08/australians-trying-to-leave-could-make-legal-challenge-covid/100273572>.
[15] *Biosecurity Act 2015* (Cth) s 4(1) ('*Biosecurity Act*').
[16] Biosecurity (Listed Human Diseases) Amendment Determination 2020 (Cth).

A *The Human Biosecurity Emergency Declaration Power*

Part 2 of Chapter 8 deals with 'human biosecurity emergencies'. Section 475 provides that the Governor-General may declare that a human biosecurity emergency exists, if the Health Minister is satisfied that:[17]

> (a) a listed human disease is posing a severe and immediate threat, or is causing harm, to human health on a nationally significant scale; and
>
> (b) the declaration is necessary to prevent or control:
>
> > (i) the entry of the listed human disease into Australian territory or a part of Australian territory; or
> >
> > (ii) the emergence, establishment or spread of the listed human disease in Australian territory or a part of Australian territory.

A human biosecurity emergency was declared by the Governor-General on 18 March 2020.[18] It recognised that COVID-19, as a 'human coronavirus with pandemic potential',[19] had entered Australia, was 'fatal in some cases', had no available vaccine or treatment (at the time), and 'pos[ed] a severe and immediate threat to human health on a nationally significant scale'.[20] The declaration continued to be extended pursuant to s 476 until 17 April 2022.

B *The Human Biosecurity Emergency Powers*

The making of a declaration allows for potential exercise of the Health Minister's broad, discretionary human biosecurity emergency powers. Section 477(1) confers a general power. It provides that during the 'human biosecurity emergency period', the Health Minister 'may determine any requirement that he or she is satisfied is necessary':

> (a) to prevent or control:

[17] *Biosecurity Act* (n 15) s 475(1).
[18] Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020 (Cth).
[19] Ibid cl 5.
[20] Ibid cl 6.

> (i) the entry of the declaration listed human disease into Australian territory or a part of Australian territory; or
>
> (ii) the emergence, establishment or spread of the declaration listed human disease in Australian territory or a part of Australian territory; or
>
> (b) to prevent or control the spread of the declaration listed human disease to another country; or
>
> (c) if a recommendation has been made to the Health Minister by the World Health Organization under Part III of the International Health Regulations in relation to the declaration listed human disease—to give effect to the recommendation.

Section 477(3) relevantly provides that, without limiting s 477(1), the determination may include 'requirements that apply to persons … when entering or leaving specified places' (sub-s (3)(a)) and 'requirements that restrict or prevent the movement of persons … in or between specified places' (sub-s (3)(b)).

Section 477(4) provides that the Health Minister, before determining a requirement under s 477(1), 'must be satisfied of all of the following':

> (a) that the requirement is likely to be effective in, or to contribute to, achieving the purpose for which it is to be determined;
>
> (b) that the requirement is appropriate and adapted to achieve the purpose for which it is to be determined;
>
> (c) that the requirement is no more restrictive or intrusive than is required in the circumstances;
>
> (d) that the manner in which the requirement is to be applied is no more restrictive or intrusive than is required in the circumstances;
>
> (e) that the period during which the requirement is to apply is only as long as is necessary.

The above sets out a number of statutory preconditions which the Health Minister must be satisfied of before making a determination. These are subjective jurisdictional facts.

The Health Minister must hold the subjective belief that these criteria are satisfied. Once made, a person must comply with a Health Minister's determination per s 479(1). Failure to comply gives rise to an offence, with a maximum penalty of five years imprisonment, a $66,600 penalty, or both: s 479(3). These high penalties are said to 'reflect the high level of threat or harm posed … and the potential consequences of non-compliance'.[21]

A determination is exempted from the procedures for disallowance of legislative instruments by Commonwealth Parliament (s 477(2)). A requirement under a determination overrides any other Australian law (s 477(5)). Section 477(7) provides that a determination ceases to have effect at the end of the human biosecurity emergency period, unless earlier revoked.

Finally, s 477(6) provides that a determination 'must not require an individual to be subject to a biosecurity measure of a kind set out in' sub-div 3B of pt 3 of ch 2 of the *Biosecurity Act*. Part 3 of ch 2 provides a scheme for the making of individual 'human biosecurity control orders'. Subdivision 3B confers discretionary powers on biosecurity officers to impose human biosecurity control orders on a certain individual, including someone who has symptoms of or has been exposed to a listed human disease[22] (with accompanying procedural safeguards and review rights including merits review). Relevantly, s 96(1) provides that '[a]n individual may, for a specified period of no more than 28 days, be required by a human biosecurity control order not to leave Australian territory on an outgoing passenger aircraft or vessel'. The relevance of this scheme will be discussed below when examining *LibertyWorks*.

III THE DETERMINATION

Shortly after the human biosecurity emergency declaration, the Prime Minister on 24 March 2020 foreshadowed the making of the Determination, saying that for people who defied advice not to travel overseas: 'when they come home, that's when they put Australians at risk'.[23] The next day, the Health Minister made the Determination pursuant to s 477(1), prohibiting an Australian citizen or permanent resident from leaving

[21] Explanatory Memorandum, Biosecurity Bill 2014 (Cth) 206.
[22] See *Biosecurity Act* (n 15) s 60(2).
[23] Prime Minister of Australia, *Press Conference — Australian Parliament House* (Transcript, 24 March 2020) <https://www.pm.gov.au/media/press-conference-australian-parliament-house-5>.

Australia as a passenger on an 'outgoing aircraft or vessel', unless one of the exemptions applied.[24] For the general population, an exemption would only be granted to an individual where 'exceptional circumstances' were involved, demonstrated by 'a compelling reason for needing to leave' Australia.[25]

The Replacement Explanatory Statement said the Determination was:[26]

> *in response to the COVID-19 pandemic, which continues to represent a severe and immediate threat to human health in Australia and across the globe, and has the ability to cause a high level of morbidity and mortality and to disrupt the Australian community socially and economically. As worldwide case numbers of COVID-19 increase, and the countries reaching the peak of their epidemic curve change, it is impossible to manage the risk of imported cases through targeting specific countries...*

Further, the Health Minister was said to be satisfied, on advice of the Director of Human Biosecurity (the Commonwealth Chief Medical Officer) and the Secretary of the Department, 'that the outbound travel restriction is necessary to prevent or control the entry, emergence, establishment or spread of COVID-19 in Australian territory and abroad'.[27]

IV HUMAN RIGHTS AND THE PRINCIPLE OF LEGALITY

The Determination engaged rights sourced under both human rights law and common law.

International human rights law recognises the significance of liberty of movement as 'an indispensable condition' for human beings.[28] Article 12(1) of the *International Covenant*

[24] Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 (Cth) ('Determination') cl 5.
[25] Ibid cl 7.
[26] Replacement Explanatory Statement (No 2), Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 (Cth) 1.
[27] Ibid.
[28] Human Rights Committee, *General Comment 27: Article 12 (Freedom of Movement)*, 67th sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) [1] ('*General Comment 27*').

on Civil and Political Rights ('*ICCPR*')[29] provides that everyone who is lawfully within a State territory has the right to liberty of movement and freedom to choose their residence. Most relevantly for this article, art 12(2) provides that '[e]veryone shall be free to leave any country, including [their] own', which enshrines the ability to leave to a destination of choice, regardless of the purpose and the period of time spent overseas.[30] Article 12(4) provides that '[n]o one shall be arbitrarily deprived of the right to enter [their] own country'.

Despite the importance of such human rights, Australia is exceptional in that it is 'the only democratic country in the world'[31] without a national bill of human rights. In lieu of this, the Commonwealth Parliament enacted a human rights parliamentary scrutiny process pursuant to the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) ('*HRPS Act*'). Nevertheless, there are two pre-existing rights-based principles of statutory interpretation which can be raised in court proceedings in Australia.

First, there exists the common law presumption of consistency with international law. It is presumed that Parliament intends to give effect to Australia's international law obligations.[32] Accordingly, 'a statute should be interpreted and applied, as far as its language permits',[33] so that it conforms with international human rights treaties. Where the legislation is ambiguous, it must be interpreted consistently with, for example, art 12 of the *ICCPR*. But the presumption may be rebutted by 'clear' language to the contrary.[34]

Second, the common law principle of legality is a presumption that Parliament does not intend to abrogate or curtail fundamental common law rights, freedoms, immunities and principles, or to depart from the general system of law.[35] The presumption may be

[29] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[30] *General Comment 27* (n 28) [8].
[31] George Williams and Daniel Reynolds, *A Charter of Rights for Australia* (University of New South Wales Press, 4th ed, 2017) 17.
[32] *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J).
[33] Ibid 287 (Mason CJ and Deane J). See further *Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 258 CLR 31, 50 [44] (French CJ and Kiefel J).
[34] *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 526–7 [8] (French CJ); *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 ('*Malaysian Declaration Case*') 206 [153] (Heydon J).
[35] See Bruce Chen, 'The Principle of Legality: Issues of Rationale and Application' (2015) 41(2) *Monash University Law Review* 329.

rebutted by 'clear and unambiguous' language;[36] with 'irresistible clearness'.[37] This can be either by express words or necessary implication.[38] The case of *Potter v Minahan* ('*Potter*') is the seminal 1908 High Court case on the principle of legality in Australia.[39] Justice O'Connor said, quoting *Maxwell on the Interpretation of Statutes*:[40]

> *It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.*

Potter is also of direct relevance to the fundamental common law right engaged by the Determination. An Australian-born man of Chinese descent seeking to return to Australia was denied re-entry, having failed the notorious dictation test under the 'White Australia' policy and as required by the *Immigration Restriction Act 1901* (Cth). Justice O'Connor said '[a] person born in Australia, and by reason of that fact a British subject owing allegiance to the Empire' is 'a member of the Australian community' entitled to the fundamental common law 'right to depart from and re-enter Australia as he pleases without let or hindrance'.[41] This right of Australian citizens, particularly in relation to re-entry, continues to be affirmed by the High Court.[42] It attracts the protection of the principle of legality.

Hence, in this context there is an overlap between international human rights law and the presumption of consistency, as well as the fundamental common law right and the

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[36] *Bropho v Western Australia* (1990) 171 CLR 1, 17 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ) ('*Bropho*'); *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393, 439 [86] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
[37] *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J) ('*Potter*'), quoted in *Bropho* (n 36) 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259 [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *R v Independent Broad-based Anti-corruption Commissioner* (2016) 256 CLR 459, 471 [40] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ) ('*R v IBAC*').
[38] *Potter* (n 37) 305 (O'Connor J); *Coco v The Queen* (1994) 179 CLR 427, 436–8 ('*Coco*').
[39] *Potter* (n 37).
[40] Ibid 304 (citation omitted).
[41] Ibid 305. See also at 289 (Griffith CJ), 293–4 (Barton J).
[42] *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462, 469–70 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ); *Love v Commonwealth* (2020) 270 CLR 152, 197–8 [94]–[95] (Gageler J), 254 [273] (Nettle J), 309 [440] (Edelman J).

principle of legality.[43] Although, the latter right is narrower in scope, being couched in terms of citizenship.[44] Both presumptions of statutory interpretation protect the rights holder against infringements on exiting and re-entering Australia, where it is possible to interpret the legislation in that manner (as to how limits on those rights are addressed, this is discussed below).[45] However, they are merely presumptions and can be overridden by clearly drafted legislation, thereby preserving the concept of parliamentary sovereignty or supremacy in Australia.

In the earlier case of *Newman v Minister for Health and Aged Care* ('*Newman*'),[46] the Federal Court upheld the validity of a determination made under s 477(1) which prohibited travellers, including Australian citizens and permanent residents, who had been in India from re-entering Australia.[47] This article focuses predominantly on the rights protection for exiting Australia, although it must be acknowledged that its operation is interlinked with the rights protection for re-entering Australia. A rights holder, who wishes to continue residing in Australia, is inhibited from exercising their right to exit the country without the knowledge that they are able to freely re-enter it.

[43] As to the origins of the right at international human rights law and common law, see Jane McAdam, 'An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty' (2011) 12(1) *Melbourne Journal of International Law* 27.
[44] See Regina Jefferies, Jane McAdam, and Sangeetha Pillai, 'Can We Still Call Australia Home? The Right to Return and the Legality of Australia's COVID-19 Travel Restrictions' (2022) 27(2) *Australian Journal of Human Rights* 211, 216–9; *Minister for Immigration, Multicultural Affairs and Citizenship v SZRHU* (2013) 215 FCR 35, 58–9 [106]–[107], 60 [113] (Flick J). Cf *General Comment 27* (n 28) on art 12 of the *ICCPR*.
[45] Although the orthodox view is that the presumption of consistency with international law in Australia has a stricter requirement of textual ambiguity before it can be applied: Dan Meagher, 'The Common Law Presumption of Consistency with International Law: Some Observations from Australia (and Comparisons with New Zealand)' [2012] *New Zealand Law Review* 465; and Wendy Lacey, *Implementing Human Rights Norms: Judicial Discretion and Use of Unincorporated Conventions* (Presidian Legal Publications, 2008) 100–1, 147.
[46] [2021] FCA 517 ('*Newman*').
[47] Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements — High Risk Country Travel Pause) Determination 2021 (Cth). See discussion in Bruce Chen, 'The COVID-19 Border Closure to India: Would an Australian Human Rights Act have Made a Difference?' (2021) 46(4) *Alternative Law Journal* 320; Samuel Walpole and William Isdale, 'COVID-19, The Principle of Legality and the "Legislative Bulldozer" of the *Biosecurity Act 2015* (Cth): *Newman v Minister for Health and Aged Care*' (2021) 32(4) *Public Law Review* 267; Jefferies, McAdam and Pillai (n 44); Olivera Simic, 'Australia, COVID-19, and the India Travel Ban' (2022) 9(2) *Griffith Journal of Law and Human Dignity* 35.

V THE *LIBERTYWORKS CASE*

A *Summary of the Proceedings*

In *LibertyWorks*, the applicant was a private, conservative think-tank in Australia. LibertyWorks Inc's activities included organising an annual conference. It sought an exemption under the Determination for an employee to travel to London 'to assess potential … conference venues there on [their] behalf'.[48] While business-related grounds for exemption to travel existed,[49] clearly the above was not, in the words of the Determination, 'exceptional circumstances' and 'a compelling reason for needing to leave'.[50] Unsurprisingly, the request was rejected.[51]

In the judicial review proceeding, Libertyworks Inc claimed that restricting overseas travel was 'a measure "of a kind" that may not be included'.[52] It was ultra vires — 'invalid by reason of inconsistency with, or of lacking authority in, the [*Biosecurity Act*]'.[53]

LibertyWorks made three main arguments. First, while s 477(3)(b) specifies that the Health Minister may under s 477(1) make requirements that restrict or prevent the movement of persons in or between specified places, 'places' meant places within Australia, 'so as to apply only to movement within Australia'.[54] Second, a determination could not be made under s 477(1) to impose a prohibition on a group of individuals from leaving Australia for overseas, as a result of the operation of s 477(6).[55] Provisions such as s 477(6), LibertyWorks Inc argued, 'demonstrate Parliament's concern for the protection of individual rights and freedoms'.[56] It will be recalled that s 477(6) excludes a determination from subjecting an individual to a biosecurity measure 'of a kind' such as that in s 96(1). Third, LibertyWorks Inc raised in support[57] both the principle of legality

[48] *LibertyWorks* (n 13) 134 [8].
[49] Anthea Vogl, 'There's a Ban on Leaving Australia under COVID-19. Who Can Get an Exemption to Go Overseas? And How?', *The Conversation* (online, 31 August 2020) <https://theconversation.com/theres-a-ban-on-leaving-australia-under-covid-19-who-can-get-an-exemption-to-go-overseas-and-how-145089>.
[50] Determination (n 24) cl 7.
[51] *LibertyWorks* (n 13) 134 [8].
[52] Ibid 136 [21].
[53] Ibid 134 [4].
[54] Ibid 144 [59]. LibertyWorks Inc raised the presumption against extra-territorial operation in support.
[55] Ibid 137 [26].
[56] Ibid 137 [27].
[57] Ibid 146 [70].

(presumably in relation to the fundamental common law right to depart),[58] and the presumption of consistency (it seems)[59] with the international human right to freedom of movement.

The matter was heard by the Full Court of the Federal Court, constituted by Katzmann, Wigney and Thawley JJ.[60] The Full Court unanimously found that the Determination was within power and valid. It favoured a purposive,[61] and apparently 'harmonious' approach,[62] having regard to the legislative context of the *Biosecurity Act* and broad scope of the Health Minister's emergency powers in s 477(1).

The Full Court found that to construe 'places' as only referring to places within Australia would be 'contrary to the plain words of' s 477(3)(b),[63] and the 'broad scope' of the general power in s 477(1).[64]

As to the exclusion in s 477(6), sub-s (1) 'takes precedence'.[65] LibertyWorks Inc's approach 'would at least emasculate' (if not 'eviscerate') the Health Minister's emergency powers.[66] That construction 'would frustrate Parliament's clear intention in enacting the emergency powers',[67] which were 'very broad, as might be expected in the case of an emergency power'.[68] The Full Court expressed the view that 'it defies belief' s 477(1) be constrained so that the only way of preventing Australians from returning with and spreading a listed disease would be to make a human biosecurity control order under s 96(1) 'with respect to every single would-be traveller'.[69]

One purpose of the general power in s 477(1) was to prevent or control the spread of the listed human disease to *another country*: sub-s (1)(b). That being so, the Full Court considered that '[t]he principal (or at least the most effective) way of achieving this

[58] The Full Court's judgment did not specifically mention the right.
[59] The Full Court's judgment did not specifically mention this principle of statutory interpretation by name.
[60] Justice Thawley had earlier decided the *Newman* case (n 46), which also raised the principle of legality.
[61] See *LibertyWorks* (n 13) 137–8 [31], 144 [58], 145–6 [67].
[62] See ibid 138 [32], 144 [58].
[63] Ibid 144 [59].
[64] Ibid 144 [60].
[65] Ibid 144 [58].
[66] Ibid 145 [63].
[67] Ibid.
[68] Ibid 144 [58].
[69] Ibid 145 [66].

purpose is by restricting international travel'.[70] This of itself 'tells against LibertyWorks' construction'.[71] The Full Court did not confine its analysis to this purpose (nor did the Determination suggest it was only for this purpose).[72] Even so, everyday Australians might be surprised to hear that such reliance was placed on protecting persons overseas in upholding the Determination — given the Commonwealth Government's emphasis on prioritising those within Australia's 'prison island'[73] or 'hermit kingdom'.[74]

The Full Court accepted that Parliament had drawn a clear distinction — s 96(1) was for a particular individual, whereas s 477(1) was for a group or class of individuals (in this case, the citizenship and permanent residency).[75]The emergency powers were 'additional' to the control orders power.[76]

Finally, in relation to the principle of legality and human right to freedom of movement, the Full Court was dismissive. It said: 'The problem with this submission is that it proceeds from the erroneous premise that the right is absolute. Yet Article 12 expressly allows for restrictions provided by law which are necessary, among other reasons, to protect public health.'[77]

It should be noted here that art 12(3) of the *ICCPR* relevantly provides that a person's freedom to leave a country can be subject to restrictions which are necessary to protect public health. Accordingly, the right can be limited to protect against the COVID-19 pandemic as a public health emergency,[78] provided those limitations are justified and proportionate.[79]

B *Analysis of the Findings*

LibertyWorks is notable for five reasons. First, the Full Court recognised that, under international human rights law, any limitations under the *Biosecurity Act* 'must be necessary and proportionate to protect the purpose for which it is imposed and should

[70] Ibid 145–6 [67].
[71] Ibid 146 [67].
[72] See Part 3 of this article.
[73] See n 1.
[74] See n 2.
[75] *LibertyWorks* (n 13) 146 [68].
[76] Ibid 146 [69].
[77] Ibid 146 [71].
[78] As to art 12(3), see further discussion in Jefferies, McAdam and Pillai (n 44).
[79] *General Comment 27* (n 28) [14].

be as least intrusive as possible to achieve the desired result'.[80] This justification and proportionality testing was explicitly 'addressed' in s 477(4),[81] which sets out the statutory preconditions before the Health Minister can determine a requirement. Therefore, the conferral of emergency powers contained a safeguard against their exercise in breach of art 12 of the *ICCPR*.[82] Presumably then, the Full Court did not consider it necessary to adopt LibertyWorks Inc's narrow construction to ensure consistency with human rights.

However, there is some difficulty with treating the principle of legality with the same broad brush. That is because the predominant position in Australian law is that the principle of legality does not incorporate justification and proportionality considerations, as a matter of statutory interpretation.[83] Although highly contested,[84] this is said to prevent Australian judges trespassing the separation of powers — from interpreting laws to legislating them.[85] Accordingly, the judiciary adopts the following approach:[86]

> *When applying the principle of legality, one takes the right at its highest. It is not appropriate to consider whether any abrogation of a common law fundamental right or freedom is justified. It must be kept in mind the fact that the principle of legality does not require one to look at whether the intended end justifies the proposed means.*

[80] *LibertyWorks* (n 13) 146–7 [71], quoting Human Rights Compatibility Statement, Biosecurity Bill 2014 (Cth) 26.
[81] *LibertyWorks* (n 13) 147 [71].
[82] See further Human Rights Compatibility Statement (n 80) 31, 32.
[83] For clear and notable exceptions, see *DPP v Kaba* (2014) 44 VR 526; *Brett Cattle Company Pty Ltd v Minister for Agriculture* (2020) 274 FCR 337. Cf the United Kingdom position: *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532; *R (UNISON) v Lord Chancellor* [2017] 4 All ER 903. The New Zealand courts are only beginning to fully grapple with this issue: *Four Midwives v Minister for COVID-19 Response* [2022] 2 NZLR 65, 87–88 [63]–[64].
[84] See Dan Meagher, 'The Principle of Legality and Proportionality in Australian Law' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 114. Cf Hanna Wilberg, 'Common Law Rights Have Justified Limits: Refining the "Principle of Legality"' in ibid 139; Chen (n 35).
[85] See Meagher (n 84) 134–5; John Basten, 'The Principle of Legality: An Unhelpful Label?' in Meagher and Groves (n 84) 74, 84. See further Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35(2) *Melbourne University Law Review* 449, 465–6, 469–71 who contrasts this to the position under the presumption of consistency with international law.
[86] *WBM v Chief Commissioner of Police* (2012) 43 VR 446, 465 [80] (Warren CJ). See also Pamela Tate, 'Statutory Interpretive Techniques under the *Charter*: Three Stages of the *Charter* — Has the Original Conception and Early Technique Survived the Twists of the High Court's Reasoning in *Momcilovic*?' (2014) 2 *Judicial College of Victoria Online Journal* 43, 44, 58. See further Basten (n 85) 79–80, 84.

The Full Court's approach in *LibertyWorks* was therefore inconsistent with the present state of the jurisprudence. In dismissing the principle of legality simultaneously with the presumption of consistency with human rights, it erroneously subsumed both under the human rights approach to justification and proportionality.

Second, the approach under the principle of legality requires clear and unambiguous language (or irresistible clearness) through express words or necessary implication to rebut the principle. Here, express words were used to curtail movement generally (as evidenced by s 477(3)(b)), but s 477 did not go so far as to expressly curtail the right to depart from Australia. This can be contrasted to s 96(1) under the human biosecurity control orders scheme, which expressly allows for the curtailing of an individual's right to depart for up to 28 days. Curtailment of the right under s 477 therefore needed to be by necessary implication.

On one established view, the test of necessary implication 'is a very stringent one'.[87] The Full Court did state in the course of its judgment Parliament's awareness that the travel restrictions which may be imposed were 'harsh' and 'intrude[d] upon individual rights', but it 'intended that … such measures could nonetheless be taken'.[88] It is possible, likely probable, that the Full Court would have considered the principle rebutted — even on a strict approach to necessary implication.[89] However, this was not directly addressed. The Full Court should have extended its analysis to do so, rather than a perfunctory dismissal of the principle — given the requisite clarity demanded.[90]

Third, it has recently been reaffirmed that 'the required clarity increase[es] the more that the rights are "fundamental" or "important"'.[91] Arguably, the common law right to depart and re-enter Australia is amongst the most fundamental and important. The right's

[87] *Coco* (n 38) 438; *Bropho* (n 36) 17.
[88] *LibertyWorks* (n 13) 145 [66].
[89] In recent years, there has been a perceived divergence in approach with respect to strictness of the necessary implication test: see Francis Cardell-Oliver, 'Parliament, The Judiciary and Fundamental Rights: The Strength of the Principle of Legality' (2017) 41(1) *Melbourne University Law Review* 30; Bruce Chen, 'The French Court and the Principle of Legality' (2018) 41(2) *University of New South Wales Law Journal* 401; T F Bathurst, 'Address to NSW Legislative Drafters on the Principle of Legality' (Speech, Sydney, 30 October 2018); Dan Meagher, 'On the Wane? The Principle of Legality in the High Court of Australia' (2021) 32(1) *Public Law Review* 61.
[90] This is somewhat surprising, given that Thawley J, one of the judges sitting on the Full Court, had earlier undertaken such an analysis in *Newman* (n 46). See discussion in Walpole and Isdale (n 47).
[91] *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560, 623 [159] (Nettle, Gordon and Edelman JJ) (citations omitted).

origins have been traced to ancient philosophy and natural law,[92] and its existence at common law is 'beyond serious controversy'.[93] While the High Court has yet to go so far, it can be described as an aspect of the right to liberty — considered one of the most cherished of common law rights.[94] There would be a particular high threshold before the principle of legality would be considered rebutted. Again, this was not addressed by the Full Court.

Fourth, *LibertyWorks* illustrates the inherent tension between a purposive approach to statutory emergency powers and rights-based principles of statutory interpretation. The former involves adopting an expansive construction to give effect to broadly drafted provisions, whereas the latter often involves adopting a narrow construction to broadly drafted provisions in order to protect fundamental common law rights and freedoms or human rights. How can the two be reconciled? As the Full Court said, s 477(1) 'is very broad, as might be expected'.[95] It quoted: 'reposing a power of that nature in a Minister reflects the reality that … "[t]he Executive Government is the arm of government capable of and empowered to respond to a crisis"'.[96]

The reasoning process was further explained by Thawley J in *Newman*:[97]

> *The precise nature of future threats could not be known. In this context and appreciating that emergencies may take a wide variety of forms it is hardly surprising that the legislature would want to provide a broad power capable of addressing human biosecurity emergencies of whatever kind. Parliament should be taken to have intended to provide a broad power to facilitate appropriate responses, including novel responses, to future and unknown threats.*

It is therefore apparent the courts will tend to give greater weight to a purposive approach to statutory emergency powers. Yet as Gleeson CJ famously recognised in *Carr*

[92] McAdam (n 43) 32.
[93] *Potter* (n 37) 304 (O'Connor J).
[94] See William Blackstone, *The Oxford Edition of Blackstone's: Commentaries on the Laws of England* (Oxford University Press, 2016) bk 1, ch 1, 91; bk 1, ch 7, 171.
[95] *LibertyWorks* (n 13) 144 [58].
[96] Ibid 144 [61] quoting *Palmer v Western Australia* (2021) 388 ALR 180, 216–7 [155] (Gageler J) where the constitutional validity of Western Australia's COVID-19-related border closures and emergency legislation was challenged.
[97] *Newman* (n 46) [92].

v Western Australia, 'legislation rarely pursues a single purpose at all costs'.[98] Here, the question of 'how far does the legislation go in pursuit of that purpose or object' is primarily answered by the statutory preconditions in s 477(4),[99] enacted by Parliament. Considering the above, it seems unlikely that (any constitutional issues aside) the courts would impose any further limits on the scope of s 477, as a matter of statutory interpretation, that would constrain an emergency response.

This also brings to mind the obiter dicta of Gageler J in *R v IBAC*,[100] where his Honour called it 'inherently problematic' for the principle of legality to examine 'a complex and prescriptive legislative scheme' which is already 'designed to comply with identified substantive human rights norms'.[101] That is especially so given the principle of legality is said not to incorporate justification and proportionality considerations. It might be argued then that the strength of the principle of legality is mitigated with respect to the *Biosecurity Act*. The kind of situation referred to by Gageler J could become increasingly common, with legislation developed in light of statutory bills of human rights currently in three state and territory jurisdictions in Australia,[102] and a national human rights parliamentary scrutiny process under the *HRPS Act*.[103]

Fifth, *LibertyWorks* only examined the outer boundaries of the power in s 477. The Full Court held that a general prohibition on overseas travel fell within the boundaries and so was intra vires. The Full Court had no cause to examine whether the general prohibition *itself* was justified and proportionate in accordance with s 477(4). For example, whether the Determination was 'appropriate and adapted' and 'no more restrictive or intrusive than is required' in the particular circumstances. LibertyWorks Inc 'made it clear that it does not contend that the Health Minister was not in fact satisfied of any of the matters' in s 477(4).[104]

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[98] (2007) 232 CLR 138, 143 [5]. See also *Lee v NSW Crime Commission* (2013) 251 CLR 196, 250 [126] (Crennan J), 292 [262] (Bell J).
[99] Ibid 143 [7].
[100] *R v IBAC* (n 37).
[101] Ibid 480–1 [76].
[102] *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2019* (Qld).
[103] Although the *Biosecurity Act* may be an outlier: see Adam Fletcher, *Australia's Human Rights Scrutiny Regime: Democratic Masterstroke or Mere Window Dressing?* (Melbourne University Publishing, 2018) 149–50.
[104] *LibertyWorks* (n 13) 135 [12]. This can be contrasted to *Newman* (n 46).

This meant that the evidence surrounding the Health Minister's making of the Determination, such as the underlying public health advice (referred to in the Determination's explanatory statement), were not ventilated and interrogated. Given the criteria under s 477(4) are subjective jurisdictional facts, this would nevertheless have presented a relatively high bar for LibertyWorks Inc to overcome. Such criteria are based on the Minister's personal satisfaction, and as the Full Court found, the Minister had not 'misapprehended the law in making the Determination'.[105] It would likely have been difficult to make out the ground that the Health Minister had no power to make the Determination due to the absence of a subjective jurisdictional fact.[106]

VI CONCLUSION

In *LibertyWorks*, the Full Court in upholding the validity of the Determination briefly dismissed the application of rights-based principles of statutory interpretation. The facts of the case presented a poor vehicle to engender the Full Court's sympathy. This was not a vulnerable or marginalised applicant who had arguably compassionate grounds for overseas travel.

Nevertheless, the Determination itself imposed serious limitations on the right to depart from Australia, being amongst the most fundamental rights. The Full Court's analysis of the principle of legality was underdeveloped. It effectively treated the principle of legality as if it converged with the presumption of consistency with international law. This failed to sufficiently engage with whether a fundamental common law right was displaced.

However, the Full Court may very well have reached the same finding — on the basis that the *Biosecurity Act* rebutted the principle of legality as a matter of necessary implication. Indeed, even the potential imposition of less restrictive interferences such as pre-departure quarantine and COVID-19 testing, as complete alternatives to a general prohibition on travel, would have involved some kind of interference with the right to depart from Australia. But the point is that the Full Court's reasoning was neither rigorous nor principled. Rights matter, even (or especially) during times of public emergency, and the principle of legality argument should not have been so readily

[105] *LibertyWorks* (n 13) 135 [12].
[106] Relevantly, LibertyWorks Inc also did not pursue a claim that the Determination was legally unreasonable: ibid [12].

dismissed. *LibertyWorks* forms part of a troubling broader pattern during the COVID-19 pandemic of the minimisation of rights-based interpretive principles by courts, when challenges have been brought against restrictions impacting on rights.[107]

[107] See in the United Kingdom context: Lord Jonathan Sumption, 'COVID-19 and the Courts: Expediency or Law?' (2021) 137 (July) *Law Quarterly Review* 353. In the New Zealand context: Claudia Geiringer and Andrew Geddis, 'Judicial Deference and Emergency Power: A Perspective on *Borrowdale v Director-General*' (2020) 31(4) *Public Law Review* 376.

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RACIST IDEOLOGY AND HASHTAG ACTIVISM: THE COLLISION OF ART, BRAND, AND LAW IN PETER DREW'S AUSSIE FOLK HERO, MONGA KHAN

KATHY BOWREY*

Racist ideology is reproduced in daily communications and in art. Racism is also challenged. In this essay I explore the way ideology is present in Peter Drew's 'Monga Khan' posters — artwork designed to provoke critical reflection about representations of race and Australian identity. Part I discusses the ideological engagement Peter Drew anticipated arising from his art 'hactivism' and critical reception of the work. I compare Drew's oeuvre to 1970–80s protest posters, showing the effects of greater exposure to intellectual property constructs, marketing, and commercial branding on the ambition of art activism. Part II shows how attribution practices in the art world and media connect the politics of hactivist art with commodification. I discuss how 'Blackness', represented by Drew in the form of challenge to racialized ideas of Australian identity, functions as Drew's 'second skin', or brand identity. Subaltern voices also challenge the authority of white artists to speak for the 'Other', but due to the way today we attribute ownership to image and voice, these protests metamorphise into a passing parade of objectified cultural difference. Part III draws out the implications for law, addressing the socio-legal reproduction of ideology, outside of relations normally identified with the lived experience of law.

* With thanks to Peter Drew, Chips Mackinolty and Toni Robertson for their generosity in permitting use of their imagery, and to Lloyd Sharp, Toni Lester, Irene Watson, Marie Hadley, Hyo Yoon Kang, Hai-Yuean Tualima and the anonymous reviewers for their insights.

CONTENTS

I INTRODUCTION

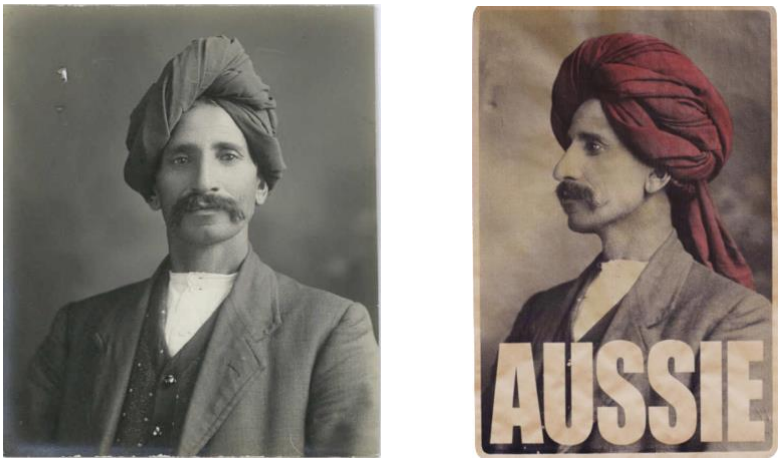


Figure 1 (left): *Monga Khan: Application for Certificate Exemption from Dictation Test*, Photograph, Unknown, 1916: NAA: MT19/4, 1916, Monga Khan.
Figure 2 (right): *Monga Khan: Series 2016,* Poster, Peter Drew 2016. Reproduced by permission of Peter Drew.

In 2015, Australian artist Peter Drew, a self-proclaimed 'poster boy of hashtag activism', selected an image from the National Archive of Australia, dating from the period of the White Australia Policy. The White Australia Policy (1901–1966) sought to protect 'racial purity' by subjecting 'undesirable' people to a dictation test. This test was not necessarily delivered in English; it could be in any prescribed language, thus magnifying the potential for racial discrimination. But it was also possible for persons of good character to apply for an exemption. Drew selected one of two headshots of a man whose application to be exempt from the test was successful.

Australian national identity has long been imagined and debated in terms of 'a triangulated relationship between white Australians, an internal Indigenous Other and an external non-white Other'.[1] Drew chose his image following nationwide 'Reclaim Australia' rallies, which called for further restrictions to Australia's refugee and migration policy and an end to non-white immigration. Rallies had Islamophobic overtones. He says:

> *The moment I found this photo I knew I had my hero image. He just looked so proud and stoic… We can only imagine what it was like to be the man in the image. But that's the difference between history and mythology. Mythology is where my curiosity catches fire.…Through mythology he can become more than an identity, he can become a personality. He can embody a story that modern Australians cherish and desire to emulate. The man's name was Monga Khan*.[2]

Drew was already a highly successful art activist and poster campaigner for social justice and human rights, with a mainstream media presence. He attracted crowd funding to support the reproduction of 1000 posters and to support travel associated with plastering them across major Australian cities.

In this essay, I analyse the production and circulation of the Monga Khan poster series exploring how the relationship between ideology, street art and political activism is impacted by our exposure to marketing and commercial branding. Ideology is discussed in terms of national and personal politics, and as encompassing artistic practices that seek to lay bare values, attitudes and subject positions present in the ideas we hold and observe around us. Drew describes his art practice as a form of propaganda. His art is not site specific. It is designed to be reproduced at large, disseminated far and wide, and recirculated in the form of digital copies made by those who stumble across it in the real world and online, aided by hashtag references ubiquitous to social media. Drew's incorporation of slogans and hashtags into his artistic practice connects his imagery to contemporary political issues. Adoption of the same slogans and hashtags also turns spectators into participants, as they are attracted and repelled by the cultural

[1] Catriona Elder, 'Invaders, Illegals and Aliens: Imagining Exclusion in a "White Australia"' (2003) 7 *Law Text Culture* 221, 223–4 (references omitted).
[2] Peter Drew, *Poster Boy. A Memoir of Art and Politics* (Black Inc, 2019) 98.

connotations suggested by #mongakhan; #peterdrewarts; #aussie; #realaussie; #realaustralians; and #auspol. These posters aim to provoke a conversation about Australian identity and an awareness of self that can be made visible through thinking about others' positive and negative responses.

The interest stimulated by Drew's rephotographing portraits found in government files, discussing the works in the media, reposting on social media and the creation of merchandise featuring the same imagery, allows us to glimpse the everyday process where ideology is the made, remade and reinvented. I move well beyond the scope of the artist and critics' discussion about the ideological dimensions of Australian national identity challenged by and reproduced in the *Monga Khan* posters, to show how, alongside engaging in political discussion about Australian racism, ideologies of authorship, private property, and commercial branding are embedded in the same public discourse about the poster art.

The methodology adopted decentres legal taxonomy and moves beyond neat scholarly approaches to reading the *Monga Khan* posters with reference to pre-constituted themes such as commercialisation and branding, the racism of the immigration act, protest art shaping legal discourses, intellectual property issues in archival work, critical race intellectual property, and more. My investigation moves across and in-between these topics; rather than beginning by locating art within legal taxonomies then commentating on the race implications of these framings for society, my gaze is turned the other way. I want to highlight the social fabrication of legal thinking as expressed in everyday political commitments. I begin with the political ambition of art activists, and the place, role, and impact of law as they understand and engage it. I then trace the broader impact of socio-legal constructs on the production, circulation, and reception of their communications.

This framing does not privilege expert readings of law above those of non-experts. This displacement creates a space to consider how the production and reproduction of socio-legal constructs and ideology ground the authority of law. As we interact in the world, we all navigate a 'lawscape'. How we make sense of it has implications for political action.

The essay is in three parts. Part I discusses the social fabrication of legal thinking as expressed in everyday political commitments. I begin with the political ambition of art

activists, and the place, role, and impact of law as they understand and engage it. I then trace the broader impact of socio-legal constructs on the production, circulation, and reception of their communications and engagement Peter Drew anticipated arising from his Monga Khan campaign, and critical reception of the work. Part II considers the same terrain, showing how attribution practices in the art world and media connect the politics of hactivist art with commodification. This part relies on Drew's own description so far as possible, so as not to distort his motivations.[3] I discuss how a connection to commodification is enabled by intellectual property constructs that attach to any work of art such as authorship, privacy, public domain, and private property rights. Intellectual property constructs engage racialized optics, meaning the central tenet of the White Australia Policy using 'face value' as the criteria of inclusion, is reproduced in everyday engagement with Drew's artistic practice. What drives this engagement is Drew's branding strategy. A brand signifies a connection between the purveyor of a message, the content communicated and the informed reader who comes to identify hallmarks or features that allow for easy identification of the brand identity. I argue that, courtesy of the new reproductions of Monga Khan and the application of hashtags, #Aussie functions as Drew's second skin or brand. This involves the imposition of a mythologised racist representation of 'Blackness', in the space that is supposed to advance critical reflection about the man Monga Khan, Australian race politics, and national identity.

Part III draws out the implications for law, addressing the socio-legal reproduction of ideology, outside of relations normally identified with the lived experience of law. In comparing Drew's hactivist art with activist poster art of the 20th century, I explore the significance of a deeper penetration of intellectual property ideologies into everyday life. The communicative function of the political poster has changed. Our receptivity to branding in public space and in art has implications on the struggle to combat racism. 'Blackness' and other signifiers of cultural difference represented in street imagery designed to challenge racism become the brand of the activist artist, perpetuating the objectification of the 'Other'. This turns recognition of difference into a mechanism that

[3] Peter Drew had the opportunity to read the article prior to publication and did not object to the characterisation offered here. Of course, this does not mean he endorses this analysis in any way.

facilitates commodification, reinscribing the cultural commons with racialised hierarchies of inclusion.

II ART ACTIVISM: MAKING MONGA KHAN FAMOUS

It is usually hard to identify the space where ideology lives and is reproduced as we go about in our days because perception, real and borrowed memories and positionality blur. Activist art, posters with slogans provocatively appropriating public space, can directly engage us in thinking about ideology through the immediate frame of reference, the site of display and through what is said and left unsaid. The Monga Khan poster is an intervention that shouts out to an undifferentiated and anonymous Australian public where those who look are assumed to already be familiar with contentious debates about Australian identity, Islamophobia, and race. For this audience, the poster suggests a juxtaposition between the man in the portrait and the 'Aussie' badge and, at one and the same time, questions the place of visual representation in history and in the present, by playing with black and white.

Drew's recontextualisation of the archival file image omits and adds information to provoke discussion of racism and oppression associated with ascriptions of Australian national identity and belonging. The Monga Khan image was one of six faces turned into posters, selected from a process described as 'strip-mining the archive'.[4] A paradox sits at the heart of the artistic practice. In 'making Monga Khan famous' the subject was picked from obscurity and put on display where his known identity is hidden.[5] The reason the man was a photographic subject, and the bureaucratic reasons for the image's production and retention on file, is not apparent, at least to those who came across the poster without already knowing about it from advance media coverage based upon an accompanying campaign video.[6] Choosing to sepia tint the mass reproduction signals historic distance, whilst the slogan resonates in the present by inviting the viewer to accept or reject the politics implicit in the association. The red colourisation of the turban is designed to help catch the eye and further highlight the dissonance between the subject in the image and

[4] Peter Drew, 'Strip-Mining the Archive' in Drew (n 2) 93-99.
[5] Ibid 115.
[6] The video poses the question, 'Did Australia inherit its identity from the people who created the White Australia policy, or does "Aussie" have more to do with the people who survived it?'. Ibid.

stereotypic projections of white Australia, as well as connect with contemporary debates around signifiers of racial and religious difference and intolerance. It is interesting that Drew selected the shot where the man is looking away, not what would have been a more confrontational one, where Monga Khan holds the gaze of the viewer (Figure 1). While we now know that as an Australian resident Monga Khan was seeking an exemption from a racist dictation test, it is the poster artist who, in adding the slogan, brands this subject as 'Aussie'.

Drew says the intention of propaganda is to provoke, and the purpose of art is to create myths that are open to interpretation. The posters were not necessarily designed to jolt the viewer into scholarly reflection on Australian history, national identity, migration or even refugee policy. On a personal level, it was his way of 'getting his anger out'.[7] In terms of political ambition, Drew is ambivalent about the political value of provoking empathy for the 'other'. Seeking to empower the subject and others that look like them is also not the point of activist poster art:

> *In the game of image virality, the aim is to flatter or empower the viewer, compelling them to share your image with their social network – and they won't do that if they're crying. You want to keep your images fast, shallow, and ironic…Luckily for me, today's culture rewards the fast and shallow.*[8]

The poster provoked media and academic discussion of Australia's South Asian and Islamic history as well as connections with Aboriginal Australia.[9] The fast and shallow engagement practice was also criticised, in particular by South Asian commentators. There is a web page that seeks to dispel Drew's myth making and tell the true story: Monga Khan was a Victorian hawker but not a cameleer. He was not an Afghan but is described as a British Moslem Indian from Punjab who came to Australia in 1895.[10]

[7] Drew (n 2)139.
[8] Ibid 27.
[9] See, e.g., Daniel Browning, 'Behind the portraits of the cult "Aussie" poster series', *The Art Show* Radio National, Australian Broadcasting Corporation 26 May 2021; David Hansen, 'Only connect: Chunder Loo, Monga Khan and Australia's fugitive South Asians' (2018) 61 *Griffith Review* 153.
[10] 'The Legend of MONGA KHAN – No! the true story' (online, 19 March 2016) <http://australianindianhistory.com/monga-khan/>.

The presumed inclusiveness of the address to the Australian public was deconstructed in an interesting insight by Reena Gupta:

> *The posters imbue the white Australian who consumes them with a different mode of inhabiting Australia compared to those who are accepted into it. They empower the former with the fantasy of authority to dictate the terms by which the latter may inhabit it.*

The campaign's attempt to accept the non-white body as Aussie therefore doesn't subvert racist practices of exclusion but in fact, works to reproduce the assumption that 'real' Aussies are white. Paradoxically then, Drew's poster campaign celebrates a form of inclusiveness that reinforces a dichotomy between white Australians and their non-white counterparts. The poster campaign reproduces the racial divisions that it wants to transcend.[11]

Such criticism can help progress an understanding of Australian history and the ongoing ideological foundations to racism. But while critics challenge Drew's right to claim Monga Khan's image and story, these critiques are blunted by the way they intersect with cultural and legal norms applied when we recognise a work of art. Peter Drew's artistic practice was not simply related to public exhibition of an image of a man. He has a sophisticated understanding of media practice and the communication practices of the art world:

> *Today we view history through the lens of the market. As a result, we see only a succession of novelties rather than a battle of ideas. Others have to mimic the academic jargon of the curatorial clergy who run the state-sponsored art institutions and offer refuge to artists who mutter the correct incantations. Increasingly those mutterings favour ideology over aesthetic or spiritual aspirations. My posters are a symptom of this trend.*[12]

[11] Reena Gupta, 'Welcome! (Kind of.) The problem with being declared "Aussie"' (Overland, 23 March 2017) <https://overland.org.au/2017/03/welcome-kind-of-the-problem-with-being-declared-aussie/>.
[12] Drew (n 2) 5.

His posters did not only appear on walls in public spaces— copies of posters entered public gallery collections.[13] The artist talk associated with the 'Ian Potter Centre: NGV Australia 'We Change the World'' exhibition did not include acerbic commentary about curators and their tastes. Rather, it traverses very conventional ground — the artist's biography, art school connections, artistic intention, production process, street art, political art, emotional impact, and public reception of works.[14] Drew also produced a range of merchandise; [15] for example, posters, t-shirts, and a collection of commissioned short stories, poems, and illustrations by 36 artists and writers, inspired by the 'Aussie' recreation of Monga Khan, from excess money raised by crowd funding.[16]

Hashtag activism adopts a different form of public engagement to older, more radical forms of art activism personified in the liberated creativity of the 'Situationists' and their successors.[17] For example, the Sydney's Earthworks Poster Collective (Tin Sheds), produced political posters 1972-1980 in support of land rights, gay and lesbian rights, against racism, domestic violence and in support of the unemployed, workers, education, and nuclear disarmament. The posters communicate overt ideological positions using striking and provocative imagery to advertise events, concerts, and fundraisers.[18] They did not invite introspection but direct action, generating 'social capital' linked to grassroots political campaigns. The design studio is described as a product of:

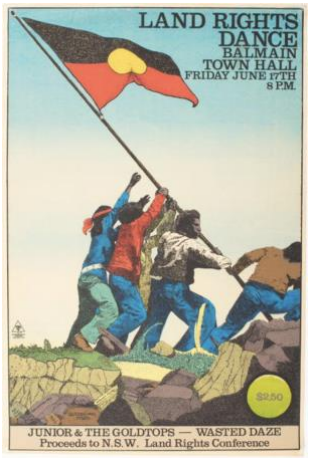
> *The anti-elitist decade of the 1970s which saw an 'anti-commodity' push in the wider art world, where artists produced work such as happenings, performance, installations, video, and silk-screened posters, that were ephemeral by nature. Poster artists also quoted or appropriated other art works in their posters as a strategy to undermine the art world's worship of originality. The aim was to*

[13] *Monga Khan 1916, Series 2016*, Poster, Peter Drew, 1916. Art Gallery of South Australia, Accession Number 20167G103. National Gallery of Victoria, Accession Number 2020.185.
[14] National Gallery of Victoria, 'Peter Drew: In Conversation (with Katharina Prugger)' 17 June 2021.
[15] See Peter Drew, 'Peter Drew Arts' (online) <https://www.peterdrewarts.com>.
[16] Drew (n 2) 117. The title is *The Legend of Monga Khan, An Aussie Folk Hero* (Ibid).
[17] See Tom McDonough, *Guy Debord and the Situationist International: Texts and Documents* (MIT Press, 2002).
[18] Olga Tsara, 'The Art of Revolution. Political Posters in the Red Planet Archive' (2005) 75 *Law Trobe Journal* 94, 95.

> *produce works which were more interesting for their 'making' or effect, than for their collectability.*[19]

These posters were participatory in making and circulation. Works were unsigned, income generated was shared, and the attribution to a collective signified the posters as the creation of community-based art workers. They were designed to involve audiences in politics and cultural activity, alongside any effect they might have on private subjectivities. They were the people's art.

Some of the posters also ended up in gallery collections and featured in curated exhibitions, with artist names researched and credited.[20] But with these posters the artist's voice remains subjugated to that of the community connection signalled by the object of curation. They document past political agency, site specific cultural activity and unfinished business surrounding the ideologies promoted and contested by the groups and campaigns they were a product of.



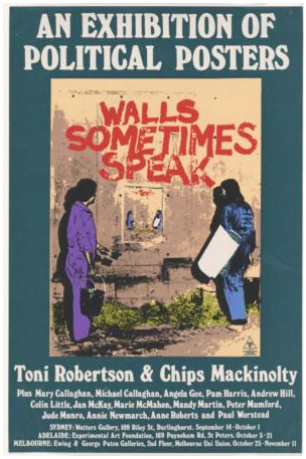


Figure 3 (left): *Land Rights Dance,* Poster, Chips Mackinolty, 1977. Reproduced by permission of Chips Mackinolty and Toni Robertson.

Figure 4 (right): *Walls Sometimes Speak: An Exchibition of Political Posters,* Poster, Chips Mackinolty, 1977. Reproduced by permission of Chips Mackinolty and Toni Robertson.

Drew engages the public and the reproduction of ideology in a different way. Whereas the Earthworks posters point to externally organised political action and community

[19] Ibid 94.

[20] Collection of posters produced by Earthworks Poster Collective and others, ca. 1978-1989; SLNSW: Record Identifier 9PQNK8On; Earthworks Poster Collective, History I - Writing on the fence is better than sitting on the fence, 1977, Museum of Contemporary Art Australia (MCA): Accession Number 2006.32.101.

agency, Drew describes his activism as 'an imaginary battle against the city'.[21] The action he seeks is a journey of self-knowledge, for artist and viewer. His book explains his art in the context of plotting a personal and family life story. He is also aware that most purchasers of the volume would be inclined to look to him for guidance on poster art activism. In this mode he presents like a streetwise impresario, promoting a brand of art advocacy that could lead to competition with the 'Master' for street real estate. This activity could build connections to other individuals and lead to a broader political embrace of historical outsiders to Australian national identity.

Drew's outreach activity is best explained with reference to the commissioned book, which was an extension of the poster campaign attempting to stimulate further debate about race and, in particular, respond to allegations of cultural appropriation implicit in the Monga Khan myth making. In curating a collection of tributes, his idea was 'to launch Monga Khan into collective ownership'.[22] The language used signals letting go of this creation. The front matter of the book says:

> *The Publisher and the Authors acknowledge that the copyright of the fictional character name 'Monga Khan' hereafter belongs in the public domain, meaning that anyone can publish works of fiction featuring a character of that name*.

This information sits in tension below a conventional copyright notice '© Peter Drew Arts 2016'. As the quote itself acknowledges, the name 'Monga Khan' was already public property or part of the commons. It is not possible to copyright a fictional two-word name.[23] And of course, this is not really a fictional name at all. The Monga Khan image is also in the public domain, as Drew had presumed when he selected the image.[24] A

[21] Drew (n 2) 134.
[22] Ibid 130.
[23] Real names and short phrases are too insubstantial to qualify as original literary works under the *Copyright Act 1968* (Cth) s 32. It is only possible to 'own' a name if it is registered as a trademark, that is, where the owner intends to use the sign in trade, and it can be very difficult to prove to the Registrar that a real personal name is distinctive enough to qualify as a trademark, *Trade Marks Act 1995* (Cth) ss 17, 41.
[24] Not all images held in the National Archive are in the public domain. When Drew first reproduced the poster in 2016, copyright duration was for seventy years after the death of the (unknown) author/taker of the photograph. It is not known if the image was still in copyright, although it was often wrongly presumed that copyright expired 50 years after it was first made. As an unpublished image it may have retained copyright, and most likely it was the estate of Monga Khan who owned the right to it, as a commissioned image. However, since Drew made the poster, the law has changed. 2019 reforms changed the status of copyright in unpublished photographs where the author is unknown. For these works

presentation of ostensibly new 'collective ownership' of the fictional Monga Khan — indicated by an emphatic 'hereafter' — simply accords with what was always the legal status quo, where the private property rights of the author arise from labouring on knowledge or ideas that form the public domain or cultural commons. So why bother with it?

It is easy to dismiss Drew's engagement with law here as a technical newbie mistake. However, this view presumes the authority of formal legal understandings of copyright law as the 'correct' way of engaging and ordering social and cultural life. Respecting law is somewhat irrelevant to Drew's practice, as an artist where negotiating an 'outsider' relationship to law is integral to a practice of claiming the street as public space to debate ideology and its effects on Australian society. Further:

> *The role of intellectual property rights in controlling the boundary between private and public spaces has a political significance that tends to be obscured by their legal character as private property rights…the power of the intellectual property system has been harnessed not only to the economic interests of multinational corporate actors, but also to the interests of that community that imagines itself as the Western nation state*.[25]

Drew's fictional legal notice reimagines the public function of Australian copyright. This novel assertion of collective legal entitlement to participate in the creation of Monga Khan mythology opens up discussion about the character of public dialogue.

One subtext of his legal notice is that the realm of creativity is under threat by historians and other truth pedallers who wish to speak for the 'real' Monga Khan, wanting to discourage racially motivated mythmaking by cultural outsiders. Drew explains it this way. In emphasising collective ownership of the Monga Khan of fiction the book is designed to inspire other members of the public to invent their own Monga Khan stories. Nationalist expressions of belonging and solidarity with once alienated subjects can

copyright expires at the end of seventy years after it was first made. This means the copyright term for the Monga Khan photograph is 1916 + 70 = 1987. Thus, the poster may have been an infringing work between 2016-2018 but due to law reform the photograph it was based upon entered the public domain in 1988, *Copyright Act 1968* (Cth) ss 33(2), 35(5).

[25] Fiona Macmillan, *Intellectual and Cultural Property. Between Market and Community* (Routledge, 2021) 33.

undermine attempts to the renew the White Australia politics of history. Drew considers the volume itself was a creative success, but he was disappointed in terms of it serving as a wider political inspiration. On reflection he says, the problem was with the book format. Unlike a poster, the book wasn't 'getting into anyone's face', not 'ruffling enough feathers,' and as self-publisher he also had no major book distribution network to help it find a wider audience. He concludes that his concerns about cultural appropriation and the danger it posed to creativity were all in his head.[26]

However, unauthorised creative re-imaginings of 'Aussie' did emerge. The most famous 'copycat' posters featured two famous Australian outlaws, Victorian ISIS recruit Jake Bilardi and ex pat sex offender and children's entertainer, Rolf Harris. The publicity they generated and uncertainty as to the motivations behind them presented further opportunities for Drew to engage the media and advocate for an inclusive vision for Australia. He described the copycat poster efforts disparagingly as undergraduate expressions of anti-nationalism:

> *The objective of my posters was to celebrate some Australians that historically had been forgotten and to celebrate the history of diversity in this country. [The new posters are] that silly point of view that if something is not 100 per cent good, that you can't enjoy it.*[27]

But there is a political strategy that sits behind the churlish dismissal of works that talk back to his theme. His statement needs to be read in line with his 'Ten Rules for Great Propaganda'. This includes the following advice:

> *Empathise with your enemy.*
>
> *Try to understand the people you oppose because they're not really your enemy. — they're actually you with a different worldview. What is it they are really trying to protect? Maybe you can show them another way to protect it*.[28]

[26] Drew (n 2) 133.
[27] Lucy Battersby, 'Aussie poster campaign hijacked by disturbing images of Rolf Harris and 'Jihadi Jake', *The Age* (online, 2 June 2016) < https://www.theage.com.au/national/victoria/aussie-poster-campaign-hijacked-by-disturbing-images-of-rolf-harris-and-jihadi-jake-20160602-gp9w3b.html>.
[28] Drew (n 2) 243.

In his media appearances, Drew is very consistent in presenting an optimistic view of Australian identity, to engage a broad audience in discussion about local politics of cultural inclusion.

Drew's art activism seeks to raise questions about ideology in the everyday reproduction of national identity and the positive public function of poster art. But the mythmaking that revolves around Monga Khan also reproduces other power dynamics that stem from the attribution of authorship in a work of postmodern art. Alongside building an amorphous political connection with other Australians, Drew is building a brand identity. The section below explores the everyday reproduction of ideologies that support commodification of art and the brand identity of the artist. This amplifies the voice of the artist amongst others that challenge his right to speak for the 'other'.

III CREATIVE ATTRIBUTION AND BRAND DYNAMICS

Modern intellectual property law developed alongside a differentiation of works of mechanical labour from those of mental labour.[29] Well before there were laws protecting brands, there were authors.

In explaining the author function, Foucault suggests:

> *The coming into being of the notion of 'author' constitutes the privileged moment of individualization in the history of ideas, knowledge, literature, philosophy, and the sciences … an author's name is not simply an element in a discourse (capable of being either subject or object, of being replaced by a pronoun, and the like); it performs a certain role with regard to narrative discourse, assuring a classificatory function. Such a name permits one to group together a certain number of texts, define them, differentiate them from and contrast them to others.*[30]

[29] Brad Sherman & Lionel Bently, *The Making of Modern Intellectual Property Law* (Cambridge University Press, 1999).
[30] Michel Foucault, 'What is an author?' in JV Harari (ed) *Textual Strategies: Perspectives in Poststructuralist Criticism* (Cornell University Press, 1979) 141.

Copyright laws afford a special status to original works attributed to an expressive individual. Original works are housed within a taxonomy that groups together literary, dramatic, musical, and artistic works. For reasons discussed below, expansion of the category of fine art to include photography was long and contested.[31] Whilst the inclusion of photography is now accepted, there remains potential for significant confusion about attribution of ownership where a postmodern work includes a repurposed photograph. This is especially so where the reuse is of an historic image.

In the 19th century, the conditions of production of a photographic image challenged identification of an original artist or author. Analogue photography sits uneasily amongst other works of fine art because it is difficult to determine who is the producer of an original work, and who is responsible for the fixation of an original image required for copyright to subsist. The camera operator does not produce an image when they take the shot. An entirely different labourer might be responsible for directing the sitting, staging, and arranging the lighting. A different party again might produce the photograph plate or negative and print copies. These processes occur in the absence of a positive original, to which copyright might affix.[32] The practice of commissioning a photographic portrait adds another layer of complication. The consumer contract between the photographer or studio might accommodate the interests of the commissioner, including the privacy of the sitter. In 1911, British law determined that the owner of the negative, normally the studio, was the first owner of copyright, but in the case of commissioned portraits, the commissioner — most normally the sitter — should own the copyright.[33] This principle was reflected in Australian law when Monga Khan arranged for his studio sitting.[34] But, so far as we know, Monga Khan never published the photograph, which, under the Act, required commercial printing, not simply exhibition. Historically, copyright law allowed the owner of an unpublished image to choose if or when to publish it. [35] The copyright term reflected this, beginning from first publication.

[31] Elena Cooper, *Art and Modern Copyright. The Contested Image* (Cambridge University Press, 2018), 20ff.
[32] Kathy Bowrey, 'Copyright, Photography and Computer Works - the fiction of an original expression' (1995) 18(2) *University of New South Wales Law Journal* 278.
[33] *Copyright Act 1911* (UK) ss 5, 21. See also Cooper (n 31) 49-106.
[34] *Copyright Act 1911* (UK) ss 5, 21 was in force under *Copyright Act 1912* (Cth) s 8.
[35] *Copyright Act 1911* (UK) s 1. See also, EJ MacGillivray, *The Copyright Act 1911 (Annotated)* (Stevens & Sons, 1912), 7–10.

With respect to the Monga Khan archival image, to some degree, the sitter's privacy was already invaded by the requirement to deliver his photographic portrait to the police or a customs officer as part of his application in order to claim an exemption under the White Australia Policy. While this legal requirement led to retention of the photograph in official records, this does not transfer any copyright in the image.[36] However, the archival obligations of the state to release most records after twenty or thirty years[37] ultimately makes unpublished images public and free for others to use without permission. Due to Drew's interest in the Monga Khan photograph, the original file was digitised and is now free for anyone to download.[38]

The white colonial governance project that determined fitness for inclusion as Australian citizens and residents has created a national archive of photographs and related records that disproportionally document black, brown, and Asian peoples. Those passing as white Australians were not only exempt from the historical project, the same racialized 'optics' that led to the inclusion of particular images in the archives in the first place carries forward into the 21st century, with the opening up of the archival record and the delivery of its contents as copyright-free or part of the cultural commons or public domain. Here, the photographic subjects become fodder for reuse, in line with a different governmental project related to the politics of an open archive.[39] Copyright law erases any potential claim by the successors in title to reclaim the original unpublished works. It tributes the photographic subjects to the public domain we all share, where the photographic subjects are once again observed and judged by strangers, including myself. While no longer scrutinised in terms of official discourses of racial identity, racist ideologies are reproduced in the process that open the images for further objectification, and not just in the terms Gupta observed where the imaginary white viewer gets to decide who is, and is not, an Aussie.

[36] This was in accordance with the *Immigration Restriction Act 1901–12* (Cth) and Regulations s 4B.
[37] *Archives Act* 1983 (Cth) ss 3(7) & 31.
[38] Application for Certificate Exemption from Dictation Test. NAA: MT19/4, 1916, Monga Khan.
[39] There are (of course) a raft of other historical and ongoing governance projects using the face value of banks of photographs to predict criminality and receptivity to commercial overtures. The use of data mining and algorithms stimulates legal critique that routinely fails to consider the low-tech history of similar racialized targeting in public and private domains.

Objectification of the subject to support the process of commodification precedes any decision to reproduce the image on a poster, t-shirt, or other merchandise. It occurs in advance of the distribution of the repurposed image. The Monga Khan image was selected for reasons beyond the aesthetic criteria that potentially marked it as a suitable foundation for a new poster to stimulate public debate about national identity. The potency of the 'hero' image of a 'proud and stoic' Muslim man, its capacity to do the political work required to reach out to Drew's ideal audience — those likely confused or disconcerted by the juxtaposition of an 'Aussie' flag — draws from an existing cultural economy that revolves around 'face value'. Here, 'blackness continues to give appearance and visibility to commodity status'.[40] The capacity of the image to reach out to white audiences involves detaching the 'blackness' of Monga Khan from his body or skin, so that it can be observed, contemplated, and reinscribed with reference to the additional signifier, 'Aussie':

> *The fact that blackness can be made "detachable" from black bodies — where it was made to adhere by what had been constructed as its natural, ontological, visuality — can be regarded as an indication of a new phase of development of the commodity form, what I described as blackness as phantasmagoria; that is, the stage in which an increasingly simulacral status of the visual develops its own, independent, social materiality*.[41]

The apparent legal and semiotic openness of the image of the blackness, also inscribed as foreignness with Islamic overtones, affects a corresponding closure to whatever meaning Monga Khan, or his family might ascribe to his representation. This might, as Drew suggests, deliver the racialised image to an unbounded collective ownership. Foucault suggests:

> *An anonymous text posted on a wall probably has a writer — but not an author. The author-function is therefore characteristic of the mode of existence, circulation, and functioning of certain discourses within a society.*[42]

[40] Alessandra Raengo, *On the Sleeve of the Visual. Race as Face Value* (Dartmouth College Press, 2013) 90.
[41] Ibid 128.
[42] Foucault (n 30) 148.

Anonymity attached to the street exhibition of the Monga Khan image potentially also permits reclaiming of him by family and subaltern peoples. However, the new inclusion of a slogan, in conjunction with the media campaign and promotion by hashtag, affects how we read street art.

The unsigned poster glued to a wall on the street, sitting alongside graffiti and other outsider art and advertising, is not really one more anonymous work amongst others when the image is plastered across the country with a mainstream media and a social media campaign designed around it. The poster may not have an author, but the inclusion of the 'Aussie' banner, as designed to challenge the viewer, has a branding function. In the age of the hashtag, it serves as an aid to build a following and to reconnect image and source, art, and artist. In the gallery space, and on the artist webpage, there is no ambiguity at all about Drew's attribution as artist and owner of the image, regardless of the anaemic copyright status of the poster, based as it largely is, on a photograph in the public domain.

Art activism is linked with propaganda techniques, communication logics and eye-catching presentation styles developed by advertising agencies. Propaganda and advertising share an interest in building a following, or a brand identity. A brand is a socio-legal form of intellectual property. It operates at a much higher level of recognition and abstraction to any private property right associated with a registered trademark or copyright ownership.

Throughout the 20th century, brand identities started to be produced in advance of, and sometimes in defiance of, legal determinations about the legal right of the corporation to own a trademark or dress.[43] Brand value is not produced by the designer of the trademark or sign. It is the product of the affective relationships generated from connecting the signifier of the brand to an audience. Through marketing, consumers are educated to understand connotations in a particular way. Brands and marketing are not necessarily limited to the commercial activity of corporations. Today, trademark

[43] See for example, Disney's agency practices that developed in the absence of strong legal rights, in Jose Bellido & Kathy Bowrey, *Adventures in Childhood. Intellectual Property, Imagination and the Business of Play* (Cambridge University Press, 2022) 135–139.

registrations by political parties, civil society actors and non-government organisations are also commonly used to help raise one's voice amongst the throng.

As a branding device, 'Aussie' signifies a connection between the ostensibly anonymous artist and members of the public interested in the political dynamics of inclusion/exclusion in association with Australian national identity. The slogan appeared in the same manner on the other images of Asiatic Australian faces in the same series. However, when deployed as a hashtag, 'Aussie' produces a brand association that helps us find and assign a value to the work of activism art and identify the ostensibly anonymous artist. Drew's faux anonymity creates a puzzle for the interested viewer to follow. Entering into this game dissipates any lingering ambiguity about the right of Drew to re-present the 'fictional' identity, Monga Khan. This brand is a 'second skin':

> *The brand functions instead as a center of corporeal density, a site of stabilization of the frenzy of circulation, but also a form of embodiment that competes with the embodiment of race. As Rosemary Coombe states, the brand is a 'second skin' that products develop in order to interface their consumers. She notes how with the rise of mass consumption, trademarks and logos offered a promise of bodily contact for the unmarked and disembodied bourgeois subject that sought to experience corporeality through consumption. Through its own prosthetic body, the brand could safely offer a little taste of the Other*.[44]

The political poster no longer functions, as it did in the time of Earthworks, to recruit the masses to participate and build community or collective action. A connection with merchandising and fandom is also not incidental to the ambition of raising one's voice about a political issue or cause. This activity signifies more than simply fund raising to make more art. It is a symptom of the penetration of intellectual property dynamics into the everyday, where public and private communicative acts interact to produce the celebrity artist. The public domain is overlaid with privileged attribution of expressions to recognised personalities. Intellectual property norms help amplify the voice of the artist amongst challenges to representations of Blackness and difference. Subaltern voices also circulate in a racialised public sphere, but expressions of resistance to racism

[44] Raengo (n 39) 119–20 (notes omitted).

circulated across media and through social media platforms often metamorphise into a passing parade of objectified cultural difference.

IV LAW AS LIVED EXPERIENCE

Intellectual property laws are frequently deconstructed to expose the ideological dimensions of underlying principles that combine to define the distinctive technicalities of the different rights — copyright, design, patent, and trademark. This can include readings that locate racialised tropes and norms in society and in intellectual property case law that impacts on questions of culture, inclusion, national identity, and citizenship.[45] However, intellectual property concepts and practices associated with the attribution of ownership of ideas are woven into the social fabric of all cultural communication, not just those linked to the assertions of rights to intangible properties.[46] This affects the way the world is perceived, including the significance of personal and inter-personal connections and experiences within it. In other words, what might be described as our everyday lived experience includes the reproduction of legal ideas that support new processes of commodification in ways that cannot be easily observed or closely mapped by taxonomic readings of law or litigation. Street art has emerged as a significant site where this occurs. The panorama of public space supports destination branding, cultural tourism, and new kinds of art curatorship and attempts at legal protection.[47] Ephemeral works such as politically inspired posters are given over to the public on qualified terms that carry along commercial branding dynamics. This has

[45] See, e.g., Toni Lester, '*Blurred Lines - Where Copyright Ends and Cultural Appropriation Begins — The Case of Robin Thicke versus Bridgeport Music and the Estate of Marvin Gaye'* (2014) 36 *Hastings Communications and Entertainment Law Journal* 217; Anjali Vats, *The Colour of Creatorship* (Stanford University Press, 2020).

[46] Ethnographic studies of community and everyday IP are increasingly common, see Rosemary Coombe and Susannah Chapman, 'Ethnographic Explorations of Intellectual Property', in *Oxford Research Encyclopedia of Anthropology*, (Oxford University Press, 2020) <https://doi.org/10.1093/acrefore/9780190854584.013.115>; Cathay YB Smith, 'Street Art: An Analysis Under US Intellectual Property Law and Intellectual Property's "Negative Space" Theory' (2014) 24 *DePaul Journal of Art, Technology & Intellectual Property Law* 259.

[47] See Christie's, 'A guide to collecting Banksy' (online, 6 September 2021), <https://www.christies.com/features/Collecting-Guide-Banksy-street-artist-10016-1.aspx>; Kathy Bowrey 'Why Margaret Atwood, Radiohead and Banksy are not anti-copyright' in Kathy Bowrey, *Copyright, Creativity, Big Media and Cultural Value* (Routledge, 2021) 188–211; Fiona MacMillan, 'Living between Market and Community' in Macmillan (n 25) 177.

implications for the public communicative function of the poster as a call to political action.

The Monga Khan poster was successful in opening discussions about Australian national identity and race, using a slogan that engaged racial hierarchies to question who is and is not Australian. It also reproduced ideologies of 'Blackness' and cultural difference. For this to happen first, Monga Khan's identity was 'fictionalised', expressed as a disembodied concept and surface aesthetic, separated from the historical figure. Second, in applying the 'Aussie' tag to the fictional personality of Monga Khan, the aesthetic becomes a brand — Drew's 'second skin', part of his artistic identity and the oeuvre by which he is best known to the public. Intellectual property logics are implicated at both points; in opening the image of Monga Khan to the public domain in the first place, freeing his skin to be mythologised by strangers and in reassigning ownership of the racialised imaginary to the artist who claimed it. Ideologies of race are reproduced in both these moments.

V THE COLLISION OF ART, BRAND, AND LAW

This essay is not really about Peter Drew and his personal politics or the value of his art. It is also not intended as writing in solidarity with those who have criticised the poster which would involve a ventriloquist act, another illusory voicing of Monga Khan. Rather, what I am trying to draw attention to and create more discussion about, is the socio-legal construction of art, in the form of a poster that circulates on social media intended to create a controversy. An engagement with Australian race politics can be deliberately provoked by works that invite judgement of the face value of the imagery. But usually without even knowing about the law or thinking about it, as we navigate public streets, laneways, advertising, and social media, we also draw upon intellectual property constructs and branding dynamics to make sense of the artistic expressions we encounter. The ability to communicate ideas about race and see a different way of being is impacted by the socio-legal frameworks that connect minds, eyes, and hearts. Australian law penetrates the field of perception and because intellectual property constructs underlay evaluation and reception of these artworks, this forecloses different ways of understanding race and place within the nation.

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OLDER PERSONS, THE SUSTAINABLE DEVELOPMENT GOALS, AND HUMAN RIGHTS

BELINDA BENNETT*

In 2015, the adoption of the Sustainable Development Goals ('SDGs') set new goals and targets for global health and set out the goal to leave no one behind. With populations ageing in many countries, there is a clear need for the interests of older persons to be recognised as a priority in the work towards achieving the SDGs. This article considers the intersection between the SDGs and human rights and how each may contribute to advancing the rights of older persons. It analyses the relevance of the SDGs for older persons, contemporary debates on the rights of older persons, and the importance of data being disaggregated by age.

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CONTENTS

I INTRODUCTION

In 2015, the United Nations General Assembly adopted 17 Sustainable Development Goals ('SDGs') and 169 targets,[1] with the overarching goal that 'no one will be left behind'.[2] Within the SDGs, SDG3 is focused on health, with the goal to 'ensure healthy lives and promote well-being for all at all ages'.[3] While the SDGs set goals and targets for 2030, the COVID-19 pandemic has presented new, immediate challenges and needs,[4] and set back progress towards achieving the SDGs and their targets.[5]

The goal of the SDGs of leaving no-one behind, and the specific goal in SDG3 of meeting the health needs of all at all ages, is ambitious. It requires developing an understanding of, and recognition that, health needs will vary across the life course,[6] and between people of the same age. With the ageing of populations in many countries, ensuring that older persons are not left behind is an issue of emerging importance.

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[1] United Nations General Assembly, *Transforming our World: The 2030 Agenda for Sustainable Development* (A/Res/70/1) (2015) ('*Sustainable Development*').
[2] Ibid para 4. For discussion see Inga T Winkler and Margaret L Satterthwaite, 'Leaving No One Behind? Persistent Inequalities in the SDGs' (2017) 21(8) *The International Journal of Human Rights* 1073.
[3] United Nations General Assembly, *Sustainable Development* (n 1) SDG3.
[4] Kristin Heggen, Tony J Sandset, Eivind Engebretsen, 'COVID-19 and Sustainable Development Goals' (2020) 98 *Bulletin of the World Health Organization* 646; Editorial, 'Will the COVID-19 Pandemic Threaten the SDGs?' (2020) 5 *Lancet Public Health* e460. For a report on progress on the SDGs see, United Nations, *The Sustainable Development Goals Report 2021* ('*Sustainable Development Goals Report 2021').*
[5] United Nations, *Sustainable Development Goals Report 2021* (n 4)*.*
[6] For discussion of health across the life course see, Flavia Bustreo et al, 'Editorial: At the Crossroads: Transforming Health Systems to Address Women's Health Across the Life Course' (2013) 91 *Bulletin of the World Health Organization* 622; Shyama Kuruvilla et al, 'A Life-Course Approach to Health: Synergy with Sustainable Development Goals' (2018) 96 *Bulletin of the World Health Organization* 42.

This article analyses this issue using the health of older persons as a lens through which to consider the rights of older persons within the context of the SDGs and debates over the human rights of older persons. It considers the intersection between the SDGs and human rights and how each may contribute to advancing the rights of older persons. As this article will argue, in the absence of a convention to recognise and support the rights of older persons there is a risk that they will be left behind.

Part II begins by analysing the extent to which older persons are expressly included in the SDGs. It argues that the interests of older persons need to be considered expressly as part of the work towards achieving the SDGs. Part III explores the importance of recognising difference in developing understandings of older age. It argues that an appreciation of these differences will be key to developing laws, policies, and programs for older persons. This will mean taking account of the ways in which the experience of older age can also be shaped by other factors such as race and gender. Part IV considers the importance of rights in relation to achieving the SDGs and considers debates over the need for a convention on the rights of older persons, given that there is currently no convention focused on their rights. Part V discusses the importance of measuring progress towards achieving the SDGs. The paper concludes in Part VI with a call for the express consideration of the rights of older persons as part of work towards the SDGs in order to ensure that we leave no one behind.

II OLDER PERSONS AND THE SUSTAINABLE DEVELOPMENT GOALS

The SDGs are relevant to all persons at all ages. As the Sustainable Development Declaration indicated:

> *…we pledge that no one will be left behind. Recognizing that the dignity of the human person is fundamental, we wish to see the Goals and targets met for all nations and peoples and for all segments of society. And we will endeavour to reach the furthest behind first.*[7]

[7] United Nations General Assembly, *Sustainable Development* (n 1) para 4.

While the SDGs apply to all, some of its goals and targets are directed to particular age groups. For example, targets aimed at reducing maternal mortality rates,[8] are clearly directed to women of reproductive age. Similarly, targets directed to reducing mortality rates for children under five years of age,[9] or ensuring pre-primary, primary, and secondary education for children,[10] are clearly directed to improving outcomes for children.

The interests of older persons are also relevant to the SDGs.[11] The goal of improving the health of older persons is encompassed within the general goal of SDG3 of 'health for all at all ages', although there is no specific target within SDG3 addressing the health of older persons. Other goals and targets including reducing poverty (SDG1), ensuring access to universal health coverage (SDG3.8), and reducing inequality (SDG10), will all be relevant to older persons.[12] For example, SDG1.2 sets the target of 'By 2030, reduce at least by half the proportion of men, women and children of all ages living in poverty in all its dimensions according to national definitions'.[13] Given that many older people experience poverty,[14] SDG1.2 will clearly be important for older people, even though it is expressed for people 'of all ages' rather than being expressly directed at poverty related to older age. Also relevant to the rights of older persons is SDG10.2 with its goal to 'empower and promote the social, economic and political inclusion of all, irrespective of age, sex, disability, race, ethnicity, origin, religion or economic or other status'.[15] Older persons are also mentioned in SDG11.7 on the need to provide 'universal access to safe, inclusive and

[8] Ibid, SDG 3.1: 'By 2030, reduce the global maternal mortality ratio to less than 70 per 100,000 live births.'
[9] Ibid, SDG3.2: 'By 2030, end preventable deaths of newborns and children under 5 years of age, with all countries aiming to reduce neonatal mortality to at least as low as 12 per 1,000 live births and under-5 mortality to at least as low as 25 per 1,000 live births.'
[10] Ibid, SDG4.1: 'By 2030, ensure that all girls and boys complete free, equitable and quality primary and secondary education leading to relevant and effective learning outcomes' and SDG4.2: 'By 2030, ensure that all girls and boys have access to quality early childhood development, care, and pre-primary education so that they are ready for primary education.'
[11] World Health Organization, *Global Strategy and Action Plan on Ageing and Health* (World Health Organization, 2017) ('*Global Strategy and Action Plan*') 1: 'Ageing is an issue that is relevant to 15 of the 17 Goals.'
[12] Ibid.
[13] United Nations General Assembly, *Sustainable Development* (n 1) SDG1.2.
[14] World Health Organization, *World Report on Ageing and Health* (World Health Organization, 2015) 161-162 ('*World Report on Ageing and Health*').
[15] United Nations General Assembly, *Sustainable Development* (n 1) SDG10.2. See also, World Health Organization, *Global Strategy and Action Plan* (n 11) 1.

accessible, green and public spaces'.[16] While the SDGs are relevant to older persons, the World Health Organization ('WHO') has noted '[a]chieving these ambitious Goals will require concerted action both to harness the many contributions that older people can make to sustainable development and to ensure that they are not left behind'.[17] Furthermore, the impact of the COVID-19 pandemic risks undermining progress on the SDGs[18] and, as a result, progress in areas relevant to older persons. The disproportionate impact of the COVID-19 pandemic on older persons has given a new focus to consideration of the needs of older persons.[19]

The imperative to address age-related health needs is becoming more compelling, with ageing becoming a key feature of global populations, and thus of global health. Around the world, populations are ageing. While globally there were 205 million people aged 60 or older in 1950, by 2012 there were almost 810 million, with this figure expected to increase to 2 billion by 2050.[20] The United Nations has commented that 'population ageing is poised to become one of the most significant social transformations of the twenty-first century, with implications for nearly all sections of society'.[21]

On the one hand, contemporary narratives of ageing reflect the idea of ageing as a story of the successes of modern medicine and public health to provide increasing life expectancies.[22] Average life expectancies in developed countries have increased from 45–50 years in 1900, to 80 years currently.[23] A 2012 report by the United Nations Population Fund and HelpAge International described the ageing of the world's population as 'a celebration and a challenge',[24] stating that '[a]geing is a triumph of development.

[16] United Nations General Assembly, *Sustainable Development* (n 1) SDG11.7. See also, World Health Organization, *Global Strategy and Action Plan* (n 11) 1.
[17] World Health Organization, *Global Strategy and Action Plan* (n 11) 1.
[18] United Nations, *Sustainable Development Goals Report 2021* (n 4); Editorial (n 4).
[19] United Nations, *Sustainable Development Goals Report 2021* (n 4) 32; United Nations, *Policy Brief: The Impact of COVID-19 on Older Persons* (May 2020) ('*Impact of COVID-19 on Older Persons*'). See also, Belinda Bennett et al, 'Australian Law During COVID-19: Meeting the Needs of Older Australians? (2022) 41(2) *University of Queensland Law Journal* (forthcoming) ('Australian Law During COVID-19'); Belinda Bennett, Ian Freckelton and Gabrielle Wolf, *COVID-19, Law & Regulation: Rights, Freedoms and Obligations in a Pandemic* (Oxford University Press, forthcoming) ch 7.
[20] United Nations Population Fund and HelpAge International, *Ageing in the Twenty-First Century: A Celebration and a Challenge* (United Nations Population Fund and HelpAge International, 2012) 19.
[21] United Nations, *Ageing* <un.org/en/ global-issues /ageing> (accessed 3 May 2022).
[22] Alison Kesby, 'Narratives of Aging and the Human Rights of Older Persons' (2017) 18(4) *Human Rights Review* 371, 371.
[23] United Nations Population Fund and HelpAge International (n 20) 20.
[24] United Nations Population Fund and HelpAge International (n 20).

Increasing longevity is one of humanity's greatest achievements'.[25] The Madrid International Plan of Action on Ageing refers to 'a revolution in longevity' during the 20th century, and a 'demographic triumph'.[26] More recently, the United Nations Department of Economic and Social Affairs has noted:

> *The world continues to experience a sustained change in the age structure of the population, driven by increasing life expectancy and decreasing levels of fertility. People are living longer lives, and both the share and the number of older people in the total population are increasing rapidly*.[27]

Statistics of life expectancies at birth are seen as a marker for the economic development of a country[28] and its ability to deliver quality health care and the conditions for a healthy life to its population. Importantly, increasing life expectancies is associated with reduced childhood mortality:

> *…as countries develop economically, more people live into adulthood and so life expectancy at birth increases. The majority of the increases in life expectancy seen around the world during the past 100 years […] reflect this reduced mortality at younger ages rather than older people living longer*.[29]

On the other hand however, contemporary narratives of ageing are not only about the successes associated with increasing life expectancies but can also reflect concerns of an impending crisis,[30] fuelled by ageing populations, falling birth rates, and budgetary pressures from rising health care costs to care for the elderly,[31] with expected increases

[25] Ibid 12.
[26] United Nations, *Madrid International Plan of Action on Ageing* (Second World Assembly on Ageing, Madrid, 8-12 April 2002), para 2. For further discussion of the Madrid International Plan of Action on Ageing see, United Nations Population Fund and HelpAge International (n 20) 30-32.
[27] United Nations, Department of Economic and Social Affairs, *World Population Ageing 2020 Highlights: Living Arrangements of Older Persons* (2020) 3.
[28] World Health Organization, *World Report on Ageing and Health* (n 14) 45.
[29] Ibid.
[30] Kesby (n 22) 371, 374.
[31] Ibid 374. Neven and Peine refer to this as the 'crisis account of ageing': Louis Neven and Alexander Peine, 'From Triple Win to Triple Sin: How a Problematic Future Discourse is Shaping the Way People Age with Technology' (2017) 7 *Societies* 26 at 3.

in health care costs, for example with the number of people living with dementia expected to contribute to these rising costs.[32]

WHO has noted that 'Because older people are often stereotyped as part of the past, they can be overlooked in the surge towards the future'.[33] This makes it particularly important to address expressly the needs of older persons as part of the work towards achieving the SDGs and the goal that 'no one will be left behind'.[34] Addressing the needs of older persons, including age-related poverty, inadequate income security, threats to safety, and in relation to access to medical and social care, will all be important for achieving sustainable development and 'development for all'.[35] For example, ensuring adequate housing for older persons is important, with the Australian Human Rights Commission noting that 'Older women are the fastest growing cohort of people at risk of homelessness'.[36] SDG11.1 addresses the issue of housing: 'By 2030, ensure access for all to adequate, safe and affordable housing and basic services and upgrade slums'.[37] Furthermore, failing to address the health needs of an older person may have implications for other family members, often female, who may then need to provide care for the older person, with a potential consequent effect on their own employment or educational possibilities.[38] Recognition of the diversity of older populations is also important in identifying which policy initiatives will support equity and which will not.[39] Such initiatives are key to ensuring that the SDGs meet the needs of older persons. The importance of recognising difference is discussed in Part III.

III RECOGNISING DIFFERENCE

As noted above, recognising the needs of older persons across all aspects of their lives will be key to ensuring that they are not left behind in the work towards achieving the

[32] 'With no disease-modifying treatments for dementia currently available, health-care systems are in danger of becoming overwhelmed by the future costs of caring for people with dementia.': Helen Frankish and Richard Horton, 'Prevention and Management of Dementia: A Priority for Public Health' (2017) 390(10113) *Lancet* 2614.
[33] World Health Organization, *World Report on Ageing and Health* (n 14) 15.
[34] United Nations General Assembly, *Sustainable Development* (n 1) preamble.
[35] World Health Organization, *World Report on Ageing and Health* (n 14) 15.
[36] Australian Human Rights Commission, *What's Age Got to Do With It? A Snapshot of Ageism Across the Australian Lifespan* (September 2021) 103.
[37] United Nations General Assembly, *Sustainable Development* (n 1) SDG 11.1.
[38] World Health Organization, *World Report on Ageing and Health* (n 14) 15.
[39] Ibid 16. See also, Bennett et al, 'Australian Law During COVID-19' (n 19).

SDGs. However, recognising the diversity that exists within older populations is also key to meeting the needs of older persons. Yet, homogeneity is an underlying narrative of contemporary discourses about ageing.[40] References are made to 'the elderly', 'older persons', and 'the aged' as if reaching old age renders other characteristics invisible, although just when these categories begin is less clear. In some instances it is equated with traditional ages for retirement, or when age-related social security entitlements take effect.[41] Even this line has moved in recent years, with pension ages in Australia rising incrementally from the traditional age-pension entitlement age of 65 years to 67 years in July 2023.[42] There is also a growing focus on 'healthy ageing',[43] and changing social expectations of social engagement in which '70 becomes the new 60'.[44]

Instead of homogeneity, older age is instead characterised by diversity, with some older people retaining their physical and mental capacities into old age, while others may require assistance with daily activities.[45] This diversity is relevant for the development of age-related public policy.[46] For example, one measure — the old-age dependency ratio — measures the number of people over the age of 65 years relative to those of working age (15–64 years).[47] However, as WHO has noted, this measure assumes that all people between 15–65 years are working, when many in fact are not, and that all people over the age of 64 years are dependent, when in fact many are still participating in employment.[48] Furthermore, these assumptions fail to take account of the economic contributions made by older people through their spending, through the financial contributions that older family members may make to younger family members,[49] or through the contribution that grandparents make in caring for their grandchildren.[50]

In addition, when one becomes 'old' and how ageing is experienced are also not universal. Across the globe, differences in life expectancies[51] mean that ageing and old age are

[40] Kesby (n 22) 376.
[41] Ibid 377.
[42] Australian Government, Department of Social Services, *Age Pension* <www.dss.gov.au/seniors/benefits-payments/age-pension> (accessed 8 August 2022).
[43] World Health Organization, *World Report on Ageing and Health* (n 14) ch 2.
[44] Ibid 8.
[45] Ibid 7. For discussion see also Bennett et al, 'Australian Law During COVID-19' (n 19).
[46] World Health Organization, *World Report on Ageing and Health* (n 14) 7.
[47] Ibid 16. See also Kesby (n 22) 375.
[48] World Health Organization, *World Report on Ageing and Health* (n 14) 16.
[49] Ibid.
[50] United Nations Population Fund and HelpAge International (n 20) 35.
[51] World Health Organization, *World Report on Ageing and Health* (n 14) 48.

experienced differently. Thus, ageing differs within and between countries, with race, socio-economic status, and gender all shaping the experience of ageing.[52] In Australia, the life expectancies of Indigenous Australians are lower than those of the general Australian population. In 2015–17, Indigenous men had a life expectancy at birth of 71.6 years, 8.6 years lower than the life expectancy for non-Indigenous men of 80.2 years, and Indigenous women had a life expectancy at birth of 75.6 years – 7.8 years lower than the life expectancy of non-Indigenous women.[53]

There are also gendered aspects to ageing.[54] As the Committee on the Elimination of Discrimination Against Women noted in its *General Recommendation No 27 on Older Women and Protection of Their Human Rights* in 2010, 'The gendered nature of ageing reveals that women tend to live longer than men, and that more older women than men live alone'.[55] In 2012, there were 84 men for every 100 women aged 60, but only 61 men for every 100 women aged 80 or over,[56] representing a 'feminization of ageing'.[57] Although women tend to live longer than men, they are also likely to have more years lived with poor health,[58] with earlier life inequalities including multiple pregnancies, poor access to education and health care, and lower education and earnings all contributing to health problems experienced by older women.[59] However, the gendered nature of older age does not only affect women. Loss of earning potential in retirement may impact upon men's roles in society, men's social networks may be weaker than those of older women, and both men and women may experience age discrimination.[60] These issues make it important to develop gendered understandings of older age that reflect the experiences and needs of both men and women.[61]

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[52] United Nations, Department of Economic and Social Affairs Programme on Ageing, *Health Inequalities in Old Age* 3; Editorial, 'Compounding Inequalities: Racism, Ageism, and Health' (2021) 2(3) *Lancet Healthy Longevity* e112.
[53] Australian Institute of Health and Welfare, 'Deaths in Australia' (2022) <https://www.aihw.gov.au/reports/life-expectancy-death/deaths-in-australia/contents/life-expectancy> (accessed 8 August 2022).
[54] Editorial, 'Ageing Unequally' (2021) 2(5) *Lancet Healthy Longevity* e231.
[55] Committee on the Elimination of Discrimination Against Women, *General Recommendation No 27 on Older Women and Protection of Their Human Rights* (2010) (CEDAW/C/GC/27), para 5.
[56] United Nations Population Fund and HelpAge International (n 20) 27.
[57] Ibid.
[58] Ibid 28.
[59] Ibid.
[60] Ibid.
[61] Ibid. For discussion of gender in global health debates generally see, Sarah Hawkes and Kent Buse, 'Gender and Global Health: Evidence, Policy and Inconvenient Truths' (2013) 381(9879) *Lancet* 1783.

These factors highlight the fact that ageing is not only a matter of chronological age, but is also 'constructed by a series of continuously evolving social phenomena and representations'.[62] Recognition of the diversity that exists within older populations is important if we are to avoid essentialist conceptualisations of older age.[63] Furthermore, understanding older age as part of a range of experiences and capabilities, instead of grouping older persons into one group, allows for the development of policy initiatives that address the needs of all older members of the community.[64] At the same time, however, this diversity itself poses challenges for the development of policy and for the articulation of age-related rights as the threshold definitional issue of when 'old age' begins remains open to debate.[65]

IV THE IMPORTANCE OF RIGHTS IN ACHIEVING THE SDGS

The Sustainable Development Declaration articulates a vision in which human rights play a key role, including:

> *We envisage a world of universal respect for human rights and human dignity, the rule of law, justice, equality, and non-discrimination; of respect for race, ethnicity and cultural diversity; and of equal opportunity permitting the full realization of human potential and contributing to shared prosperity.*[66]

The Declaration also reaffirmed the 'the importance of the Universal Declaration of Human Rights, as well as other international instruments relating to human rights and international law'.[67] Despite these statements, it has been noted that the targets in SDG3

[62] Frederic Mégret, 'The Human Rights of Older Persons: A Growing Challenge' (2011) 11 *Human Rights Law Review* 37, 44.
[63] Ibid 43.
[64] World Health Organization, *World Report on Ageing and Health* (n 14) 7-8, 16. See also, Bennett et al, 'Australian Law During COVID-19' (n 19).
[65] Kesby (n 22) 373–74; Mégret (n 62) 42–43; Bennett et al, 'Australian Law During COVID-19' (n 19).
[66] United Nations General Assembly, *Sustainable Development* (n 1) para 8. For discussion see Audrey R Chapman, 'Evaluating the Health-Related Targets in the Sustainable Development Goals from a Human Rights Perspective' (2017) 21(8) *International Journal of Human Rights* 1098, 1099.
[67] United Nations General Assembly, *Sustainable Development* (n 1) para 19.

relating to health are not expressed in terms of rights,[68] and there is discussion about the role of rights in the SDGs in relation to health.[69]

The policy landscape and the experience of older age are, however, increasingly shaped by the language of rights and the degree to which the rights and needs of older persons are expressly recognised and protected. There are two aspects to this. The first is the way in which the rights of older persons are conceptualised within international human rights law. The second is the relationship between health and human rights and the potential this has for recognition of rights at the intersections between older age and health. Importantly, ascribing rights to individuals or groups provides a formal recognition of the values of equality and non-discrimination,[70] and depending on the context in which rights are provided, may also provide remedies if rights are not upheld.[71]

The human rights of older people have been the subject of considerable discussion. The Madrid International Plan of Action on Ageing stated that '[m]ainstreaming ageing into global agendas is essential',[72] and recognised the importance of protecting the human rights of older persons:

> *The promotion and protection of all human rights and fundamental freedoms, including the right to development, is essential for the creation of an inclusive society for all ages in which older persons participate fully and without discrimination and on the basis of equality.*[73]

In 2016, the Report of the Independent Expert on the enjoyment of all human rights by older persons noted that 'As the world population continues to age, the human rights

[68] Chapman (n 66) 1099.
[69] Chapman (n 66); Lisa Forman, Gorik Ooms, and Claire E Brolan, 'Rights Language in the Sustainable Development Agenda: Has Right to Health Discourse and Norms Shaped Health Goals?' (2015) 4(12) *International Journal of Health Policy Management* 799; Sarah Hawkes and Kent Buse, 'Searching for the Right to Health in the Sustainable Development Agenda: Comment on "Rights Language in the Sustainable Development Agenda: Has Right to Health Discourse and Norms Shaped Health Goals?"' (2016) 5(5) *International Journal of Health Policy Management* 337.
[70] Mégret (n 62) 64–65. As Mégret notes at 65: 'There are also many powerful symbolic advantages to group-specific human rights instruments, including a recognition that the issue is fully one of human rights, and a strong at least implicit claim to equality in relation to other groups'. For discussion see also, Bennett et al, 'Australian Law During COVID-19' (n 19).
[71] Mégret (n 62) 47; Bennett et al, 'Australian Law During COVID-19' (n 19).
[72] United Nations, *Madrid International Action Plan on Ageing* (n 26) para 15.
[73] Ibid para 13.

dimension of ageing becomes an ever-growing concern'.[74] In 2016, the 69th World Health Assembly adopted the Global Strategy and Action Plan on Ageing and Health.[75]

To date however, there is no international instrument for the rights of older persons within international human rights law.[76] This is in contrast with the human rights of other groups including women, children, and persons with disabilities which have all been the subject of conventions,[77] and despite the growing recognition of the need for formal recognition of the rights of older persons.[78] This phenomenon of specific human rights instruments for different groups has been described as reflecting the 'fragmentation of human rights'.[79] However, the absence of a human rights instrument addressing the rights of older persons is significant. Indeed, one commentator has stated that, '[t]he rights of the elderly in the twenty-first century are what women's rights were to the twentieth — equally as momentous yet largely unstudied and unrecognised'.[80] Furthermore, the COVID-19 pandemic has provided a renewed focus on the rights of older persons.[81]

[74] United Nations, Human Rights Council, Report of the Independent Expert on the Enjoyment of All Human Rights by Older Persons (A/HRC/33/44) (8 July 2016) para 121. The Independent Expert was appointed by the Human Rights Council of the United Nations in 2013, ibid para 1.
[75] World Health Assembly, *WHA69.3 Global Strategy and Action Plan on Ageing and Health 2016-2020: Towards a World in Which Everyone Can Live a Long and Healthy Life* (WHA69/2016/REC/1). See also, World Health Organization, *Global Strategy and Action Plan* (n 11) Annex 1.
[76] Mégret (n 62) 39; United Nations Population Fund and HelpAge International (n 20) 32; Léon Poffé, 'Towards a New United Nations Human Rights Convention for Older Persons?' (2015) 15(3) *Human Rights Law Review* 591; Annie Herro, 'The Human Rights of Older Persons: The Politics and Substance of the UN Open-Ended Working Group on Ageing' (2017) 23(1) *Australian Journal of Human Rights* 90.
[77] Mégret (n 62) 39; Bennett et al, 'Australian Law During COVID-19' (n 19). See: *Convention on the Elimination of All Forms of Discrimination Against Women* 1249 UNTS 1 (entered into force 3 September 1981); *Convention on the Rights of the Child* 1557 UNTS 3 (entered into force 2 September 1990); *Convention on the Rights of Persons with Disabilities* 2515 UNTS 3 (entered into force 3 May 2008).
[78] Bennett et al, 'Australian Law During COVID-19' (n 19); Kesby (n 22); Mégret (n 62) 39; Poffé (n 76); Herro (n 76); Britta Baer et al, 'The Right to Health of Older People' (2016) 56(S2) *Gerontologist* S206; Barbara Mikołajczyk, 'Older Persons' Right to Health: A Challenge to International Law' (2019) 39 *Ageing & Society* 1611.
[79] Mégret (n 62) 39. As Mégret comments at 41: 'The fragmentation of the human rights project may be in line with a more post-modern sensitivity to rights, one more attuned to the diversity of human experience, but it also poses some dangers in terms of the intelligibility and coherence of the idea of universal rights.'
[80] Herro (n 76) 90.
[81] John E Ataguba, David E Bloom, Andrew J Scott, 'A Timely Call to Establish an International Convention on the Rights of Older People' (2021) 2(9) *Lancet Healthy Longevity* e540; Benjamin Mason Meier, Victoria Matus, and Maximillian Seunik, 'COVID-19 Raises a Health and Human Rights Imperative to Advance a UN Convention on the Rights of Older Persons' (2021) 6 *BMJ Global Health* e007710; Bennett et al, 'Australian Law During COVID-19' (n 19).

Law is increasingly seen as playing an important role in supporting global health by providing the regulatory frameworks that support the right to health and achievement of health-related goals for sustainable development.[82] As WHO noted in its 2015 *World Report on Ageing and Health:* 'A rights-based approach to healthy ageing can help address the legal, social and structural barriers to good health for older people, and clarify the legal obligations of state and non-state actors to respect, protect, and fulfil these rights'.[83] Furthermore, in the context of the SDGs, formal recognition of the rights of older persons, such as through a new convention, could provide new awareness of the rights and interests of older persons and help to ensure that they are expressly included in the work towards achieving the SDGs.

The diversity that exists within older populations can present challenges for conceptualising the elderly as a specific group to be the subject of a human rights instrument. As Mégret notes, although like children, the elderly are defined by their age, they may be more difficult than children to define as a group.[84] Furthermore, some older persons may not see themselves as belonging to the category of 'elderly'.[85] However, as a practical matter, it will be necessary to have some definition of 'old age' for the purposes of an international treaty.[86]

Given these difficulties of defining 'old age' and the recognition that already exists within some existing international instruments for the rights of older persons, it could be argued that a new convention that expressly addresses the rights of older persons is unnecessary.[87] Furthermore, might a convention that focuses on older persons reinforce negative perceptions of older persons as vulnerable?[88] Could the *Convention on the Rights of Persons with Disabilities* (*'CRPD'*) and other human rights instruments be seen as already covering the needs of older persons?[89] However, as Clough and Brazier have

[82] Lawrence O Gostin et al, 'The Legal Determinants of Health: Harnessing the Power of Law for Global Health and Sustainable Development' (2019) 393(10183) *Lancet* 1857.
[83] World Health Organization, *World Report on Ageing and Health* (n 14) 14.
[84] Mégret (n 62) 42. See also, Bennett et al, 'Australian Law During COVID-19' (n 19).
[85] Mégret (n 62) 43.
[86] Ibid. See also Bennett et al, 'Australian Law During COVID-19' (n 19).
[87] For discussion see Beverley Clough and Margaret Brazier, 'Never Too Old for Health and Human Rights?' (2014) 14(3) *Medical Law International* 133, 153–154. See also Bennett et al, 'Australian Law During COVID-19' (n 19).
[88] Clough and Brazier (n 87) 154.
[89] For discussion see ibid 153–154.

argued, the *CRPD* does not adequately address all age-related rights issues.[90] Furthermore, 'Despite the relatively high level of concurrent disability in older people, older people do not tend to identify themselves with disability rights movements',[91] thus making a specific human rights instrument for older persons appropriate. Mégret argues that in deciding whether the experience of older persons is sufficiently distinctive to justify an approach focused on the elderly, the starting point should be 'the actual rights experience of the elderly, in an effort to determine what is distinctive about the way in which their rights can be violated or protected'.[92]

The issue of a formal human rights convention for older persons is also made more complex by critiques of rights, which have challenged the idea of rights as providing solutions to inequality. Amongst feminist critiques of rights for example, have been concerns that human rights law presupposes an individualistic legal subject as the bearer of the rights,[93] and that this fails to adequately address the experiences and needs of women,[94] with many important issues for women falling outside the traditional public sphere of human rights law.[95] Furthermore, it has been argued that the individualised nature of rights may fail to address the needs of the group as a whole, while a group approach to rights may fail to recognise that the group itself may be characterised by diversity,[96] as has been argued above, is the case with older persons.

It has also been pointed out that 'the dominant narrative of a human rights approach to ageing is that of the reconceptualization of older persons as active and entitled subjects as opposed to passive recipients of welfare or charity'.[97] This reconceptualisation is to be welcomed, although Kesby cautions that there is a need to ensure that we do not base the need for human rights for older persons on their (potential) economic productivity.[98]

[90] Ibid. Bennett et al, 'Australian Law During COVID-19' (n 19).
[91] Clough and Brazier (n 87) 154.
[92] Mégret (n 62) 51.
[93] Laura Pritchard-Jones, 'Revisiting the Feminist Critique of Rights: Lessons for a New Older Persons' Convention?' in Beverley Clough and Jonathan Herring (eds), *Ageing, Gender and Family Law* (Routledge, 2018) 109, 110.
[94] Ibid 110–112.
[95] Ibid 113.
[96] Ibid 112.
[97] Kesby (n 22) 386.
[98] Ibid 387-388.

Such an approach could, Kesby argues, raise the question of the justification for rights for those who are not 'productive',[99] such as those who are frail and unwell.

However, even without a dedicated convention for older persons, a human rights approach can provide a valuable framework for evaluating the degree to which policies and measures are supportive of the interests and needs of older persons. For example, assistive technologies can help to support improved functioning, and support continued independence,[100] although it is also important to note broader privacy and autonomy-related interests.[101] It is this potential for some interventions to either enhance or undermine autonomy, privacy, and other interests that makes a human rights analysis of these interventions essential.[102]

V MEASURING PROGRESS

Finally, it is important to be able to measure progress — or lack thereof — in relation to the SDGs. In many respects, this call for measuring progress should appear unsurprising, as it has played an increasingly important role in contemporary human rights, with quantitative indicators becoming an important tool in measuring progress towards realisation of rights, health-related goals, or other benchmarks.[103] In the context of healthy ageing, WHO has noted that enhancing our understanding of age-related issues will require that we improve our measurement, our monitoring and our understanding.[104] As an initial measure at a global level it will be important for older persons to be included in population surveys and in vital statistics.[105]

The importance of disaggregated data was also recognised in the Sustainable Development Agenda, with SDG17.18 stating:

[99] Ibid 388.
[100] World Health Organization, *World Report on Ageing and Health* (n 14) 111, 137, 166–168.
[101] Belinda Bennett et al, 'Assistive Technologies for People with Dementia: Ethical Considerations' (2017) 95 *Bulletin of the World Health Organization* 749; Belinda Bennett, 'Technology, Ageing and Human Rights: Challenges for an Ageing World' (2019) 66 *International Journal of Law and Psychiatry* 101449.
[102] Bennett et al (n 101); Bennett (n 101).
[103] Thérèse Murphy, *Health and Human Rights* (Hart Publishing, 2013) ch 4.
[104] World Health Organization, *World Report on Ageing and Health* (n 14) 221.
[105] Ibid.

> *By 2020, enhance capacity-building support to developing countries, including for least developed countries and small island developing States, to increase significantly the availability of high-quality, timely and reliable data disaggregated by income, gender, age, race, ethnicity, migratory status, disability, geographic location and other characteristics relevant in national contexts.*[106]

Furthermore, data needs to be disaggregated to be able to distinguish between different age groupings of older persons, with the United Nations suggesting that data for older persons be available 'by five-year age groups'.[107] Even when data are disaggregated, it has also been noted that there is a need for standardised age groupings to enable comparisons to be made within and between countries.[108]

Strategic objective 5 of the Global Strategy and Action Plan on Ageing and Health is 'Improving measurement, monitoring and research on Healthy Ageing'.[109] Measuring progress for older persons will require data collection to be age-inclusive, and for data to be disaggregated on the basis of age, sex and other characteristics.[110] Strategic objective 5.1 in the Global Strategy and Action Plan is to 'agree on ways to measure, analyse, describe and monitor Healthy Ageing',[111] to allow a more comprehensive understanding of the health of older persons and interventions to address health issues.[112] Access to data that are disaggregated by age has been particularly important during the COVID-19 pandemic as disaggregated data can help to identify the impact of the pandemic,[113] and to inform policy development.[114]

While data are not self-evidently about autonomy or rights, it is also the case that what gets measured gets done. The availability of disaggregated data is an essential element of

[106] United Nations General Assembly, *Sustainable Development* (n 1) SDG17.18. See also Winkler and Satterthwaite (n 2) 1074: 'This target makes clear that data-gathering and analysis for *all* goals and targets, where disaggregable, should aim at highlighting inequalities.'
[107] United Nations, *Impact of COVID-19 on Older Persons* (n 19) 15.
[108] Theresa Diaz, et al. 'A Call for Standardised Age-Disaggregated Health Data' (2021) 2(7) *Lancet Healthy Longevity* e436, e436.
[109] World Health Organization, *Global Strategy and Action Plan* (n 11) 6.
[110] Ibid 21.
[111] Ibid 22.
[112] Ibid.
[113] Diaz et al (n 108) e437. See also, Bennett, Freckelton and Wolf (n 19) ch 3.
[114] United Nations, *The Impact of COVID-19 on Older Persons* (n 19) 4.

tracking progress in outcomes, both between and within countries. As Winkler and Satterthwaite argue:

> *The framing of indicators and the disaggregation they call for are therefore not just technical details; they have significant influence on what data governments and development partners will gather over the next 15 years or more and 'what matters' in the implementation of the Sustainable Development Agenda. The SDG indicators will help shape what governments, development partners and people — disadvantaged or powerful — will* know *about discrimination, exclusion, and equality*.[115]

Having age-related information available is important to be able to measure progress against the SDGs and in providing an evidence-base for policy making to address the health needs of members of the community, including older persons.

VI CONCLUSION

The United Nations has noted that the COVID-19 pandemic 'has brought unprecedented challenges to humanity and presents a disproportionate threat to the health, lives, rights and well-being of older persons'.[116] However, the United Nations also notes that the recovery from COVID-19 'is an opportunity to set the stage for a more inclusive, equitable and age-friendly society, anchored in human rights and guided by the shared promise of the 2030 Agenda for Sustainable Development to *Leave No One Behind*'.[117] While the SDGs set new targets for global health and development, there is a risk that older people will be left behind unless attention is paid to their needs. From a regulatory perspective the issues are complex, with no agreed definition of when one becomes old, and with older populations characterised by diversity in their experience of ageing and in their health and functional ability. While a convention specifically focused on ageing would give profile to the interests of older persons, in the absence of a convention it is important to consider how best to conceptualise rights and how they relate to autonomy and vulnerability in representing the realities of people's lives and promoting their interests.

[115] Winkler and Satterthwaite (n 2) 1077.
[116] United Nations, *The Impact of COVID-19 on Older Persons* (n 19) 16.
[117] Ibid.

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