The University of Western Australia Law Review

Volume 54(1) | September 2026

THE UNIVERSITY OF WESTERN AUSTRALIA | UWA Law Review

Volume 54 | Issue 1 | September 2026

We acknowledge the generosity of **Bennett: Litigation and Commercial Law** in supporting the launch of this issue.

Cite as: (2026) 54(1) *University of Western Australia Law Review*

ISSN: 0042-0328

The UWA Law Review is committed to open access publishing and is freely accessible online.

UWA Law Review

University of Western Australia Law Review

Volume 54(1)
September 2026

Foreword
Jessica Kerr 1

Introduction
Jacinta Kingsbury, Melanie Fraser and Grace Wholley 2–4

The Scope of the Non-Delegable Duty of Care in 'A Coherent Law of Negligence' under Australian Law
Allison Silink 5–44

Relationships Akin to Employment and Vicarious Liability: A United Kingdom and Australia Comparison
Anthony Gray 45–80

Undue Restraint in *Bird v DP*
Joshua Yuvaraj 81–108

Rethinking Non-Competes: Towards a Meaningful and Comprehensive Ban with Special Reference to Trade Secrets Protection
Darshana Sumanadasa 109–150

The Limits of Celebrity Reputation in Australian Trade Mark Law: *Taylor v Killer Queen*
Nyssa Bull 151–163

Mapping Religion in Western Australian Legislation: An Empirical Analysis of Religious Terms in State Statutes
Renae Barker 164–203

Can We Finally Say 'So Long' to *Longman?*: Delay, Credibility Warnings, and the Case for Evidence Law Reform in Western Australia
Sara M Smyth 204–229

Improving Access to Artificial Reproductive Technology and Surrogacy in Western Australia
Amy Thomasson 230–243

Lim after *NZYQ*: Delimiting Constitutional Constraints on State Power to Punish Non-Citizens
Rebecca Ananian-Welsh and Peter Billings 244–294

Autistic Adults and Supported Decision-Making: Rethinking Australia's Guardianship Frameworks
Sylvia Villios and Abigail Isabella Douglas 295–331

Restorative Justice as Affective Governance: Discursive Control and State Power in Youth Justice in Australia and China
Han Lu 332–370

FOREWORD

Welcome to the 2026 general issue of the UWA Law Review. This issue marks a transition point in the publication cycle of the Review. While in previous years the general issue has been published in the second quarter of each year (with a thematic issue in the fourth quarter), and this year it sits within the third quarter, as of 2027 the general issue will shift to the final quarter. The next general issue will also be our first produced under the auspices of Open Journal Systems, reinforcing our commitment to professional, high-quality open-access publishing.

Part of the motivation for rearranging our publication cycle is to provide more sustained opportunities for editorial involvement by our excellent postgraduate student cohort. The UWA Law Review is and always has been faculty-led, with responsibility for its stewardship and production resting with the General Editor. But after two years in that role, it is clear to me both how much the small group of students accepted to the Law Review unit stand to gain from exposure to the academic research and publication cycle, and how much they have to offer. Units of this kind offer a rare opportunity for development of scholarly instincts, skills and integrity within the increasingly unrelenting schedule of the vocational law degree. The visible contributions of students to this issue, in the form of our beautiful new cover art and a co-written Introduction, are a fitting testament to their collegial and unstinting efforts behind the scenes.

I will leave to the Introduction the task of introducing the contributions to this issue and thanking the authors for placing their trust in us. For my part I am delighted by the range of experience and expertise among our authors, as exemplified by the trio of articles engaging with the recent vicarious liability jurisprudence of the High Court, and particularly proud to continue showcasing the work of impressive emerging scholars. I am, as always, deeply grateful to our external peer reviewers, who continue to carve time out of thin air to provide an indispensable service to their profession.

Finally, it has been a great pleasure this year to welcome as Patron the Hon Justice Edelman, who has joined our newly-constituted Advisory Board. The evident strength of support for the Review, within and beyond Western Australia, is a source of great encouragement as we navigate a period of unprecedented uncertainty in research integrity and publication ethics. It is my hope that the readers of this issue will find similar encouragement.

Dr Jessica Kerr
September 2026

INTRODUCTION

This issue opens with acknowledgements to those whose dedication and contributions made it possible. As general issue student leads, we would first like to express our gratitude to the General Editor of the UWA Law Review, Dr Jessica Kerr. Putting together an academic journal involves considerable coordination between authors, students and academics, and Dr Kerr's support was essential to bringing this issue together seamlessly. We are sincerely grateful for the opportunity to contribute to the publication of this issue under Dr Kerr's guidance.

We would like to thank our student editorial colleagues for their commitment throughout the production of this issue. Their meticulous attention to detail and careful editorial work have ensured that each manuscript has been refined to the highest standard. Beyond the pages, the issue also showcases the breadth of talent within our student community. In particular, we would like to acknowledge the artwork featured internally and on the cover, which was created by student editors Melanie Fraser and Gracelyn Oakley. We also extend our sincere appreciation to the members of the UWA Law Review's newly-formed Advisory Board, including our new Patron, the Hon Justice James Edelman of the High Court of Australia. We deeply value their professional contributions and thank them for their dedication in supporting the journal's continued success.

Finally, we thank our authors and peer reviewers for the time and effort they have invested in the manuscripts, which allowed us to curate a diverse collection of articles and commentaries we are confident readers will find insightful and thought-provoking. We are grateful to each author for entrusting us with their work and for contributing to the scholarly scope of this issue.

The issue begins with a multi-faceted exploration of vicarious liability and relationships akin to employment, following recent High Court decisions. Allison Silink's article, first published as an advance last year, considers the relationship between the non-delegable duty of care and negligence in light of the High Court's decision in *AA v Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle* (2026) 100 ALJR 170. In this case, the Court found that the non-delegable duty of care and ordinary duties in negligence could be breached by intentionally inflicted harm. Silink argues that the decision opens new avenues for compensating survivors of sexual assault and identifies residual uncertainty regarding how this expanded non-delegable duty interacts with vicarious liability. In the next article, Anthony Gray considers the recognition of vicarious liability beyond traditional concepts of employment by both courts in Australia and the United Kingdom ('UK').

Gray argues that the approach adopted in the UK, which accepts that relationships akin to employment can attract vicarious liability, is preferable to the Australian position. Joshua Yuvaraj then unites the topics of the preceding articles in his analysis of the High Court decision in *Bird v DP (A Pseudonym)* (2024) 98 ALJR 1349 (‘*Bird*’). Yuvaraj argues that the majority finding in *Bird* is characterised by undue judicial restraint in its reasoning for maintaining restricted application of the doctrine of vicarious liability, in contrast with UK jurisprudence. Yuvaraj emphasises the Court’s role in shaping the law to reflect evolving social norms, including by way of protecting those most vulnerable.

Maintaining an employment law lens, Darshana Sumanadasa’s article considers Australia’s 2025/26 budget proposal to ban non-compete clauses for workers earning below the *Fair Work Act 2009* (Cth)’s high-income threshold. Given current common law restrictions on non-compete clauses and related employer protections, Sumanadasa argues that a fair balance must be struck between employer and employee interests. While legislative intervention may assist, Sumanadasa also considers alternative solutions. Careful consideration of commercial interests continues in Nyssa Bull’s commentary on the High Court’s decision in *Taylor v Killer Queen LLC* (2026) 100 ALJR 335 (‘*Taylor*’). This case considered a long-standing dispute regarding the cancellation of a trademark. Bull’s commentary sets out the background to the case and the Court’s treatment of reputation-based cancellation under the *Trade Marks Act 1995* (Cth). The commentary provided inspiration for a presentation and panel discussion organised by student editors Hannah Skinner and Grace Wholley. Bull, a member of the UWA Law School faculty, was joined by the Hon Justice Jackson of the Federal Court and Amy Rumble of Bennet Law to discuss the *Taylor* decision and trademark law more generally.

The issue then shifts focus to Western Australia, providing analysis of current legislation and consideration of recent and upcoming reforms including by two members of the UWA Law School faculty. Renae Barker presents an analysis of occurrence, frequency and legislative context of religious terminology in Western Australian legislation, building on earlier work at the federal level. Barker argues that linguistic patterns reflect convergence with Commonwealth legislative practices as well as the ongoing embedding of Christian privilege in state legislation. This article is presented as a scoping study, providing the foundation for further analysis regarding state-religion relations in Australian law. Next, Sara Smyth considers the evolution of the law governing delayed complaint directions in sexual offence trials following the High Court decision in *Longman v The Queen* (1989) 168 CLR 79 (‘*Longman*’). Smyth argues that *Longman* warnings have resulted in contradictory directions which both reject and invite delay-based credibility reasoning. She explains how the new *Evidence Act 2025* (WA) works to reduce discreditation of delayed disclosure by abolishing mandatory *Longman* warnings and restricting judicial commentary on delay. Amy Thomasson then considers the long-anticipated *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) ('*ART Act*'), which seeks to update many of Western Australia's antiquated laws governing artificial reproductive technology. Thomasson's commentary outlines key changes imposed by the *ART Act* and highlights a number of missed opportunities for reform. While the reform provides a key step towards a more contemporary regulatory framework, Thomasson argues that some issues were overlooked, including parentage for international surrogacy arrangements.

Next, the issue shifts to consideration of liberty and dignity at the national level. In their article, which was also previously published as an advance, Rebecca Ananian-Welsh and Peter Billings explore the constitutional scope of administrative power to constrain the liberty of non-citizens, identifying gaps, rifts and trends in recent caselaw invoking the '*Lim* principle' established in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1. Ultimately, the authors argue for a values-centred and substantive approach to the *Lim* principle, in which 'proportionality' is recognised as the relevant assessment standard. This is followed by Sylvia Villios' critical evaluation of Australian guardianship laws and the recognition of functional decision making. Villios argues that the key issue in Australian guardianship frameworks is the lack of formal and autism-responsive support pathways which can be utilised prior to substituting decision-making. Villios proposes a shift away from capacity recognition and toward capacity access by introducing a tribunal-adapted model of voluntary supporter authorisations, structured support orders, and tightly confined representative orders.

Finally, the issue concludes with an Australian-Chinese cross-jurisdictional analysis. Han Lu examines youth restorative justice under Australia's settler-colonial governance and China's state-led correctional governance. Lu argues that, in both jurisdictions, vocabularies embedded in legal and bureaucratic structures manage voice, emotion and agency, thereby limiting State-led restoration.

We believe this issue brings together a very interesting body of scholarship addressing a range of significant and timely issues in the Australian legal landscape and beyond. We hope that the contributions will both engage the UWA Law Review's readership and prompt thoughtful consideration on their broader implications.

Jacinta Kingsbury, Melanie Fraser and Grace Wholley
September 2026

THE SCOPE OF THE NON-DELEGABLE DUTY OF CARE IN 'A COHERENT LAW OF NEGLIGENCE' UNDER AUSTRALIAN LAW

ALLISON SILINK[*]

The appeal in AA v Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle ('AA') presented a long-awaited opportunity for the High Court of Australia to reconsider whether a non-delegable duty of care can be breached by intentionally inflicted harm, such as child sexual abuse, which would require overturning New South Wales v Lepore (2003) 212 CLR 511 ('Lepore'). This article considers the relationship between the non-delegable duty of care and negligence and traces the history of the question whether negligence extended to intentional up to the time the appeal was reserved by the High Court. Judgment was delivered by the High Court on 11 February 2026.[**] In finding the respondent liable, the majority overturned Lepore and held that the non-delegable duty of care and ordinary duties in negligence can be breached by intentionally inflicted harm. It is argued that the High Court's decision in AA marks a significant new direction in the non-delegable duty and for negligence as a whole. It opens new pathways for compensation for survivors of sexual abuse, particularly in the context of sexual abuse by clergy in a religious institution. The case is a lens through which to look back at the law leading up to the appeal, and to look forwards. Whilst its ratio is clear, significant questions remain in relation to how this expanded non-delegable duty interacts with vicarious liability where both doctrines might arise.

---

[*] Associate Professor, Faculty of Law, University of Technology Sydney. I would like to thank Jodi Gardner, Peter Handford, Tim Paine, Pam Stewart and Anita Stuhmcke for their generous comments on earlier drafts, and my particular thanks to Desmond Ryan for many long debates and discussions about these ideas. I gratefully acknowledge the research assistance of Thomas Fleming and Grant Stollery. My sincere thanks also to the anonymous reviewers whose comments were much appreciated and suggestions gratefully incorporated.

[**] [2026] HCA 2. The High Court delivered judgment on 11 February 2026 after this article had been accepted for publication. Minor textual and grammatical amendments have been made to the advance copy of this article made available in September 2025 to acknowledge the fact that judgment has since been delivered, and a postscript has been added that summarises the reasons for judgment and their impact for the issues discussed in the article.

I Introduction 6

II Legal Issues in Institutional Abuse Claims 9

III Facts and Procedural History in *AA* 11

A *At First Instance* 11

B *The New South Wales Court of Appeal* 12

IV The Scope of the Non-Delegable Duty of Care to Apply to Intentionally Caused Harm 14

A *The Nature of the Non-Delegable Duty* 14

B *Does Negligence Extend to Intentionally Caused Harm?* 17

V Postscript — The High Court's Findings in *AA* 37

A *The Nature of the Non-Delegable Duty and Findings of Breach* 38

B *Negligence Extends to Intentionally Inflicted Harm* 40

C *The Interaction Between the Principles of Vicarious Liability and the Non-Delegable Duty* 42

I Introduction

Just over 30 years ago, in *Burnie Port Authority v General Jones Pty Ltd* ('*Burnie Port Authority*'),[1] a five member majority of the High Court spoke of the emergence of 'a coherent law of negligence to dominate the territory of tortious liability for unintentional injury to the person or property of another'.[2] The non-delegable duty of care is a subset of duties of care owed in negligence which cannot be discharged by selection of an appropriately qualified contractor.[3] In *New South Wales v Lepore* ('*Lepore*'),[4] the majority found that a non-delegable duty could *not* be breached by intentionally caused harm so as to render a school authority liable for sexual abuse of a child by a teacher as it 'involves more'[5] and to do so would 'sever the duty from

[1] (1994) 179 CLR 520 ('*Burnie Port Authority*').
[2] Ibid 544 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).
[3] *Pafburn Pty Ltd v The Owners – Strata Plan No 84674* (2024) 99 ALJR 148, 154 [20] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ) ('*Pafburn*').
[4] (2003) 212 CLR 511 ('*Lepore*').
[5] Ibid 532 [31] (Gleeson CJ, Callinan J agreeing at 624 [339]).

its roots in the law of negligence'.[6] In the appeal in *AA v Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle* ('*AA*'),[7] the Court was invited to overturn *Lepore* and recognise that the non-delegable duty of care can be breached by intentionally inflicted harm. This raised broader questions as to whether the law of negligence more generally should remain 'the territory of tortious liability for unintentional injury to the person or property of another'[8] or whether it can already, or should be developed to, apply to intentionally caused harm. In delivering judgment on 11 February 2026,[9] the High Court has taken that step and found that the non-delegable duty of care, and ordinary duties owed in negligence, can be breached by intentionally inflicted harm.

Like *Lepore*, the appeal in *AA* concerned a claim of child sexual abuse in an institutional context, following *Bird v DP (A Pseudonym)* ('*Bird*')[10] and other recent cases that have reached the High Court on different legal issues in the same context.[11] There is a common thread to these cases. Since the 1980s and 1990s, revelations of the extent of historical and ongoing child sexual abuse occurring in institutions entrusted with the care of children have shocked the world, and continue to do so. However, the pathways for survivors to seek compensation from the institutions in whose care they were abused are often blocked by insurmountable doctrinal hurdles. If the institution has not been negligent itself, the question will be whether the institution can be found liable for the wrongdoing of the abuser under the doctrines of vicarious liability, or by the operation of a non-delegable duty of care owed to the plaintiff.

One of the apparent tensions in the law is that claims in respect of institutional child abuse that may be factually very similar can have very different outcomes, depending upon the classification of the working status of the perpetrator. If intentional wrongdoing is committed by an *employee*, then in certain circumstances, the institution can be vicariously liable because it is accepted that vicarious liability applies to intentional torts, like battery. However, if intentional wrongdoing is committed by an *independent contractor* hired by the institution, vicarious liability

---

[6] Ibid 602 [266] (Gummow and Hayne JJ). See also *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v AA* [2025] NSWCA 72, [160] (Leeming JA) ('*Trustees of the Roman Catholic Church*').
[7] (High Court of Australia, S94/2025, commenced 17 June 2025).
[8] *Burnie Port Authority* (n 1) 544 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).
[9] *AA v Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle* (2026) 100 ALJR 170 ('*AA*').
[10] (2024) 98 ALJR 1349 ('*Bird*').
[11] *Prince Alfred College Inc v ADC* (2016) 258 CLR 134 ('*Prince Alfred College*'); *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 97 ALJR 857; *Willmot v Queensland* (2024) 98 ALJR 1407; *RC v The Salvation Army (Western Australia) Property Trust* (2024) 98 ALJR 1453.

is unavailable. There is a bright line drawn around independent contractors,[12] who are supposed to carry their own insurance and manage their own liabilities. The non-delegable duty of care which arises in special circumstances has been historically recognised as rendering an institution personally liable for the *negligence* of independent contractors, but not for their intentional wrongdoing. To the community of families attending a school, a childcare centre, a church or other association, the institutional workforce appears as one. But not in the eye of the law. Given the fortress-like wall around vicarious liability limiting its scope to employee wrongdoing, it is therefore understandable that attention has been trained on the non-delegable duty of care, and whether *it* can be expanded in scope. However, as Professor Paula Giliker has noted, there is a very real question as to whether recourse to the non-delegable duty 'derives from frustration at the limits of vicarious liability rather than any considered conceptual development'.[13]

This article considers the issues in relation to the scope of the non-delegable duty of care to apply to intentionally caused harm. The first aim of this article is to clarify the Australian law prior to the delivery of judgment by the High Court in *AA*.[14] It argues that the scope of the non-delegable duty of care was not as uncertain as had been suggested. It shows that the non-delegable duty of care under Australian law was accepted as a duty of care owed in negligence, albeit one that could not be discharged by selection of an appropriately qualified contractor. It was not a stand-alone duty in tort that had a substantively different nature. Nor was it an absolute duty. The cases confirm that it is a 'species' of negligence.[15] If the non-delegable duty of care were developed as a standalone tort, it would require consideration of the effect that such a development would have on existing doctrines, such as vicarious liability, and the coherence of the law as a whole.[16]

---

[12] See, eg, *CCIG Investments Pty Ltd v Schokman* (2023) 97 ALJR 551, 561–2 [51] (Edelman and Steward JJ) ('*Schokman*'); *Bird* (n 9) [48] (Gageler CJ, Gordon, Edelman, Steward and Beech-Jones JJ; Gleeson J contra at [100]).

[13] Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (Cambridge University Press, 2010) 144, cited in *Cox v Ministry of Justice* [2014] EWCA 132, [61] (Beatson LJ). See also Jonathan Morgan, 'Liability for Independent Contractors in Contract and Tort: Duties to Ensure that Care is Taken' (2015) 74(1) *Cambridge Law Journal* 109, 122.

[14] In doing so, it endeavours to apply the approach described by Jane Stapleton as '[addressing] the law as it is' rather than seeking out a 'best fit' for a 'Grand Theory'. See Jane Stapleton, *Three Essays on Torts* (Oxford University Press, 2021) 17.

[15] See also John Murphy, 'The Liability Bases of Common Law Non-Delegable Duties: A Reply to Christian Witting' (2007) 30(1) *University of New South Wales Law Journal* 86.

[16] *Perera v Genworth Financial Mortgage Insurance Pty Ltd* (2017) 94 NSWLR 83, 94 [42] (Leeming JA) ('*Perera*'), quoting *Breen v Williams* (1996) 186 CLR 71, 115 (Gaudron and McHugh JJ) ('*Breen*').

The second aim of this article is to consider whether the Australian law of negligence prior to judgment by the High Court in *AA* was concerned with 'unintentional injury to the person or property of another'.[17] It is argued that, despite some inconsistency in the cases, and views of scholars to the contrary, the better view is that prior to *AA*, negligence was concerned with unintended injury and did not extend to intentionally inflicted injury. There is no doubt that negligence could always arise from intentional *acts*. But it was not clear whether it could arise from *intentionally inflicted harm*. This distinction is crucial to understanding the limitation on the scope of negligence prior to *AA*, and by extension, the non-delegable duty. In order to maintain coherence within the law of negligence, the expansion of the non-delegable duty to address intentionally inflicted harm required accepting that the law of negligence *as a whole* can be breached by the forms of criminally intentional wrongdoing discussed in *Lepore*. In *AA*, this is the step that the majority in the High Court has taken. 'Homicide, rape, and theft',[18] as identified by Gleeson CJ, can now be forms of negligent conduct. This is a very significant 'conquest in the imperial expansion of the law of negligence'.[19]

The article is structured as follows. The discussion commences in Part II by outlining the legal issues in relation to claims against institutional defendants in the context of institutional child abuse under Australian law. Part III summarises the facts and background to the appeal in *AA.* Part IV considers the historical scope of the non-delegable duty to apply to intentionally caused harm. Part V is a postscript updating the discussion of these issues in light of the findings of the High Court and concluding with some questions that remain.

II Legal Issues in Institutional Abuse Claims

The causes of action at common law typically relied upon in a claim against an institutional defendant will include one or more of negligence, vicarious liability or a non-delegable duty. However, in practice, prior to *AA* there could be a range of obstacles to any action succeeding under Australian law. For example, an unincorporated association cannot be sued in its own name at common law as it has no legal identity. This limits claims against many defendants, particularly faith-based organisations, that have been historically structured as unincorporated

[17] *Burnie Port Authority* (n 1) 544 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).
[18] *Lepore* (n 4) 532 [31].
[19] *Burnie Port Authority* (n 1) 570 (Brennan J). Cf *Astley v Austrust Ltd* (1999) 197 CLR 1, 23 [48] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

associations.[20] There can be significant practical difficulties in establishing that a duty of care was owed at the time of the relevant conduct, particularly where the offence is alleged to have occurred decades ago and prior to the now widespread community awareness of the risks of child sexual abuse in an institutional context.[21] Whilst a defendant may be vicariously liable for the intentional wrongdoing of an employee, including sexual abuse,[22] vicarious liability does not extend to independent contractors. Furthermore, the High Court has recently rejected the extension of vicarious liability to wrongdoing by persons 'akin to an employee'.[23] This precludes vicarious liability in respect of abuse perpetrated by people working in other positions, particularly clergy, that are not traditional relationships of employment, even though vicarious liability under the common law in England and Wales has extended to such relationships for over a decade.[24] The non-delegable duty of care applies to wrongdoing by independent contractors, but prior to AA was not capable of being breached by intentionally caused harm,[25] thus precluding breach of a non-delegable duty arising from child sexual abuse.

Compensation from an institution in relation to the intentional wrongdoing of anyone other than a true employee therefore fell outside the scope of common law actions. The case law records the efforts that have been made through court proceedings to overcome these doctrinal boundaries under Australian law, all with little success.[26] State and territory legislatures have responded to certain obstacles in the pathways to justice for survivors through several rounds of targeted legislative reform to remove limitation periods,[27] and, in some jurisdictions, to reform civil liability legislation to create a statutory form of vicarious liability for institutional child sexual abuse (with prospective operation)[28] and to introduce new statutory

[20] *Trustees of the Roman Catholic Church v Ellis* (2007) 70 NSWLR 565, 575 [47] (Mason P, Ipp JA agreeing at 603 [200], McColl JA agreeing at 603 [201]). This has been addressed by law reform: see below n 29.
[21] *Trustees of the Roman Catholic Church* (n 6) [201].
[22] *Prince Alfred College* (n 10).
[23] *Bird* (n 9).
[24] See, eg, *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1 ('*Catholic Child Welfare*'); *Cox v Ministry of Justice* [2016] AC 660; *Armes v Nottinghamshire County Council* [2018] AC 355 ('*Armes*'); *BXB v Trustees of the Barry Congregation of Jehovah's Witnesses* [2024] AC 567.
[25] *Lepore* (n 4) 531–33 [31]–[34].
[26] See, eg, *Lepore v New South Wales* (2001) 52 NSWLR 420 ('*Lepore (NSWCA)*'); *DP (a Pseudonym) v Bird* [2021] VSC 850; *AA v Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle* (2024) 334 IR 70 ('*AA (NSWSC)*').
[27] *Limitation of Actions Act 1936* (SA) s 3A(1); *Limitation of Actions Act 1958* (Vic) pt IIA div 5; *Limitation Act 1969* (NSW) s 6A(1); *Limitation of Actions Act 1974* (Qld) s 11A(1); *Limitation Act 1974* (Tas) s 5B(1); *Limitation Act 1981* (NT) s 5A(2); *Limitation Act 1985* (ACT) s 21C(2); *Limitation Act 2005* (WA) s 6A(2).
[28] *Civil Liability Act 2002* (SA) pt 7A; *Civil Liability Act 2002* (NSW) pt 1B; *Civil Liability Act 2002* (Tas) pt 10C; *Personal Injuries (Liabilities and Damages) Act 2003* (NT) pt 3A.

duties of care.[29] Further reforms now allow for claims against unincorporated associations in respect of child abuse proceedings; for the appointment of a proper defendant to such claims brought against unincorporated associations; and for the recovery of damages from assets held on trust for an unincorporated association.[30] However, the limitations in the scope of vicarious liability and the non-delegable duty of care at common law remained insuperable obstacles for many survivors of historical institutional child sexual abuse.

The appeal in *AA* raised acutely the interaction of these common law obstacles and statutory complexities in the context of institutional child sexual abuse claims, particularly in relation to the liability of an unincorporated association. The proceedings in *AA* are discussed next.

III FACTS AND PROCEDURAL HISTORY IN *AA*

A *At First Instance*

The appellant in the appeal to the High Court was the plaintiff at first instance. He brought proceedings in relation to claims that he had been sexually abused in the 1960s by a priest, Father Ronald Pickin, in the presbytery of St Patrick's Catholic Church, Wallsend, in the Catholic diocese of Maitland-Newcastle, New South Wales.[31] The Diocese of Maitland-Newcastle is an unincorporated association. The proceedings were commenced against the Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle as the proper defendant under s 6O of the *Civil Liability Act 2002* (NSW) in respect of claims arising against the Diocese in negligence, vicarious liability and breach of a non-delegable duty (although the claims were not brought against the Diocese).

The assaults were alleged to have occurred when the plaintiff and a friend, Mr Perry, were in early high school and were invited by Father Pickin into the presbytery of the local church on Friday nights to consume alcohol, smoke cigarettes and play on a gambling machine in the bedroom when they were teenagers. The plaintiff claimed that Father Pickin committed penile-oral intercourse upon him, when the plaintiff was 'paralytic drunk', and they were alone in the presbytery together. Both Father

[29] *Civil Liability Act 1936* (SA) pt 7A div 2; *Wrongs Act 1958* (Vic) pt XIII; *Civil Liability Act 2002* (NSW) pt 1B div 2; *Civil Liability Act 2002* (Tas) pt 10C div 2; *Personal Injuries (Liabilities and Damages) Act 2003* (NT) pt 3A div 2; *Civil Liability Act 2003* (Qld) pt 2A div 2.
[30] *Civil Liability Act 1936* (SA) s 50K; *Wrongs Act 1958* (Vic) s 92(1); *Civil Liability Act 2002* (NSW) pt 1B div 4 s 6N; *Civil Law (Wrongs) Act 2002* (ACT) pt 8A.2; *Civil Liability Act 2002* (Tas) pt 10C div 4; *Civil Liability Act 2002* (WA) pt 2A div 2; *Personal Injuries (Liabilities and Damages) Act 2003* (NT) pt 3A div 4; *Civil Liability Act 2003* (Qld) pt 2A div 3.
[31] *AA (NSWSC)* (n 26).

Pickin and the Bishop of the Diocese had died before the litigation commenced. Mr Perry was called in the defence case. He agreed that he had visited the presbytery on Friday evenings with the plaintiff, where Father Pickin gave them alcohol and perhaps cigarettes, but said that other youths were present, and denied ever being sent out to buy cigarettes or having ever seen the plaintiff so drunk or assaulted.

The primary judge, Schmidt AJ, found the Diocese both vicariously liable[32] and liable in negligence.[33] The duty of care found by the court was based on a combination of the evidence led by the plaintiff about the awareness which bishops and other senior members of the Church then had about the risks which its priests could pose to children, complaints that had been received, the layout of the presbytery and lack of requirement to have other adults present which enabled Father Pickin to give the boys cigarettes and alcohol. Her Honour accepted that these facts together gave rise to a duty of care owed to *AA*. Despite some inconsistencies in the plaintiff's evidence, the primary judge accepted that the abuse occurred on the basis that the plaintiff's account was 'vivid'[34] and consistent with tendency evidence led that Father Pickin had touched other teenage male students' genitals. Her Honour found that the duty of care was breached and awarded damages of $636,480. Her Honour did not determine the claim in relation to a non-delegable duty.

B *The New South Wales Court of Appeal*

The Trustees appealed, submitting that the primary judge erred in finding that the abuse occurred, and that the appellant owed the plaintiff a duty of care which had been breached. On appeal, it was accepted that the judgment below based on vicarious liability could not stand after the High Court decision in *Bird*. However, by a notice of contention, the plaintiff sought to uphold the judgment of the primary judge based on a non-delegable duty.

Leeming JA, with whose reasons Bell CJ agreed, found that the fact-finding process at trial had miscarried. His Honour found that the primary judge had relied heavily on the vividness of the plaintiff's account without adequately addressing the possibility that this represented 'a sincerely held but unreliable belief'.[35] Leeming JA found that in a number of key respects the plaintiff's evidence was demonstrably unreliable.[36] Leeming JA held that the notice of contention in relation to the non-delegable duty was precluded by the *ratio* of the High Court's decision in *Lepore*

---

[32] Ibid 105 [219].
[33] Ibid 110 [264].
[34] Ibid 97 [164].
[35] *Trustees of the Roman Catholic Church* (n 6) [131], [136], [145].
[36] Ibid [138].

which had not been overturned. Despite questions as to whether the proceedings had been brought properly against the Trustees given that proceedings were not commenced against the Diocese, Leeming JA was prepared to assume that s 60 of the *Civil Liability Act 2002* (NSW) applied to permit the proceedings to be brought against the nominated defendant (although his Honour queried whether the proceedings were still required to be commenced against the association). However, Leeming JA found that no duty of care was owed by the Diocese in 1969. It was held that the existence of a duty of care turned on establishing knowledge by the Bishop or senior members of the Diocese which the plaintiff had not done. Leeming JA concluded that, whilst it may be accepted that a bishop with power to appoint and remove a priest who knew that a priest had a history of sexual assault would be under a duty to take reasonable steps to prevent further assaults,[37] it did not follow that in 1969 a reasonable person in the position of the Bishop would have taken steps 'on the basis that every priest was a potential child abuser'.[38] Leeming JA found that expert evidence about bishops' general awareness of risks was speculative and unsupported, and that a 1987 psychiatric report mentioning a 1954 complaint about another priest who had left the Diocese by 1969 was insufficient to establish relevant knowledge.[39]

Ball JA disagreed that the primary judge had erred in concluding that the plaintiff was sexually abused.[40] However, his Honour accepted that no duty of care was owed in 1969.[41] In the result the appeal was allowed on the grounds that the fact-finding process miscarried; that the claim in vicarious liability was unsustainable and non-delegable duty precluded by authority; and that no duty of care was owed in 1969.

The three grounds of the appeal to the High Court by the plaintiff at trial focused on the non-delegable duty and the duty of care. The first ground of appeal sought to overturn *Lepore* on the question of intentional wrongdoing and the scope of the non-delegable duty.[42] The second ground was whether a Catholic diocese owed a non-delegable duty (of the nature for which the appellant contends) in the 1960s to children entrusted to the pastoral care of a priest for religious education so as to found a cause of action brought against a nominated defendant.[43] The third ground related to the level of knowledge on the part of a bishop required to give rise to a

[37] Ibid [217].
[38] Ibid [218].
[39] Ibid [213]–[217].
[40] Ibid [253].
[41] Ibid.
[42] AA, 'Appellant's Submissions', Submission in *AA v the Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle*, S94/2025, 8 July 2025, [24]–[47].
[43] Ibid [48]–[55].

duty of care in the 1960s, and specifically whether it is necessary to show that 'the Bishop or senior priests in the diocese knew that the priest posed a risk to children'.[44]

Against this background to the appeal to the High Court, Part IV focuses on the historical scope of the non-delegable duty to be breached by intentionally caused harm, and Part V addresses the reasons of the High Court in *AA*.

IV THE SCOPE OF THE NON-DELEGABLE DUTY OF CARE TO APPLY TO INTENTIONALLY CAUSED HARM

Prior to *AA*, the non-delegable duty of care had been identified by courts[45] and scholars[46] as a potential means to render institutional defendants liable for child sexual abuse for some time. This part considers the historical nature of the non-delegable duty of care as a species of negligence and the consequences of that characterisation for its scope to be developed to apply to intentionally caused harm.

A *The Nature of the Non-Delegable Duty*

The nature of a common law non-delegable duty of care was considered by the High Court not long before the appeal in *AA*, in *Pafburn Pty Ltd v The Owners – Strata Plan No 84674* ('*Pafburn*').[47] There it was described by the majority as follows:

> Generally, a "non-delegable duty" is a type of duty of care which, if owed by a person, means that the person cannot exclude or limit their liability for conduct within the scope of the duty of care causing reasonably foreseeable harm merely by the person exercising reasonable care in arranging for another person to perform the function to which the non-delegable duty of care attaches. That is, although the function to which a non-delegable duty of care attaches is "delegable" in that the person subject to the duty may procure performance of any function

[44] Ibid [4].
[45] See, eg, *Schokman* (n 11) [81] (Edelman and Steward JJ).
[46] See, eg, Paula Giliker, 'Analysing Institutional Liability for Child Sexual Abuse in England and Wales and Australia: Vicarious Liability, Non-Delegable Duties and Statutory Intervention' (2018) 77(3) *Cambridge Law Journal* 506; Francis Santayana, 'Vicarious Liability, Non-Delegable Duties and the "Intentional Wrongdoing Problem"' (2019) 25(2) *Torts Law Journal* 152; Robert Stevens, 'Non-Delegable Duties and Vicarious Liability' in Jason Neyers, Erika Chamberlain and Stephen Pitel (eds), *Emerging Issues in Tort Law* (Bloomsbury, 2007) 361; Neil Foster, 'Convergence and Divergence: The Law of Non-Delegable Duties in Australia and the United Kingdom' in Andrew Robertson and Michael Tilbury (eds), *Divergences in Private Law* (Hart, 2016) 197; Christine Beuermann, *Reconceptualising Strict Liability for the Tort of Another* (Hart, 2019) 49. See also Jane Wangmann, 'Liability for Institutional Child Sexual Assault: Where Does Lepore Leave Australia?' (2004) 28(1) *Melbourne University Law Review* 169.
[47] *Pafburn* (n 3).

> within the scope of the duty by another person, the non-delegable duty is not satisfied merely by the taking of reasonable care by the person subject to the duty, because the content of the duty is personally to ensure that that other person performing the function in fact takes reasonable care.[48]

Pafburn lent no support to the conception of the non-delegable duty of care as unrelated to the doctrine of negligence or as a standalone tort.49 This is consistent with earlier cases such as Leichhardt Municipal Council,50 where Kirby J observed that '[t]he supposition of a non-delegable duty does not alter the content of the tort sued for, nor does it substitute a different and free-standing tort.'51 His Honour there said that it 'does no more than to affirm the imposition of personal liability on the duty-holder, which cannot be discharged, as otherwise it would, by selecting an apparently reputable and competent contractor'.52 In Burnie Port Authority,53 Brennan J discussed the suggestion that had been made that the non-delegable duty was 'an absolute duty 'to prevent…mischief',54 a duty higher than a duty to exercise reasonable care. However, his Honour noted that 'the duty in negligence is not so demanding'.55 In that case, the majority also noted that in Kondis v State Transport Authority,56 Mason J had 'identified some of the principal categories of case in which the duty to take reasonable care under the ordinary law of negligence is non-delegable in that sense'. 57 As these cases confirm, it has consistently been treated as a 'species' of negligence, albeit one that cannot be discharged by selection of an appropriately qualified contractor.58

[48] Ibid 154 [20] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), citing *Lepore* (n 4) 527–529 [20]–[21]; *Commonwealth v Introvigne* (1982) 150 CLR 258, 270 (Mason J) ('*Introvigne*'); *McDermid v Nash Dredging & Reclamation Co Ltd* [1987] AC 906, 910 (Lord Hailsham); *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313, 350 (Toohey J); *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22, 29 [9] (Gleeson CJ) ('*Leichhardt Municipal Council*'). As Denning LJ said in *Cassidy v Ministry of Health* [1951] 2 KB 343, 363: '…where a person is himself under a duty to use care, he cannot get rid of his responsibility by delegating the performance of it to someone else, no matter whether the delegation be to a servant under a contract of service or to an independent contractor under a contract for services.'
[49] Cf Christian Witting, 'Breach of the Non-Delegable Duty: Defending Limited Strict Liability in Tort' (2006) 29(3) *University of New South Wales Law Journal* 33.
[50] *Leichhardt Municipal Council* (n 48).
[51] Ibid 62 [109].
[52] Ibid.
[53] *Burnie Port Authority* (n 1).
[54] Ibid 576, quoting *Bower v Peate* (1876) 1 QBD 321, 326–7 (Cockburn CJ).
[55] *Burnie Port Authority* (n 1) 577.
[56] (1984) 154 CLR 672, 679–87 ('*Kondis*').
[57] *Burnie Port Authority* (n 1) 550.
[58] See also John Murphy, 'The Liability Bases of Common Law Non-Delegable Duties: A Reply to Christian Witting' (2007) 30(1) *University of New South Wales Law Journal* 86.

The majority in *Pafburn* cited *Lepore* as one of the authorities for this description of the nature of the non-delegable duty of care.[59] The Court's reasons in *Lepore* are discussed in detail below, but for present purposes, Gummow and Hayne JJ expressly noted that all of the cases in which non-delegable duties have been considered by the High Court 'have been cases in which the plaintiff has been injured as a result of negligence'.[60] The majority also cited the Court's earlier decision in *Introvigne*.[61] Like *Lepore*, *Introvigne* was a case dealing with the non-delegable duty owed by a school authority but unlike *Lepore*, in that case it was found to have been breached. In *Introvigne*, Mason J there described the duty of care owed by the school in classical terms drawn from *Carmarthenshire County Council v Lewis*,[62] observing that the liability of a school authority in negligence for injury suffered by a pupil attending the school is not a purely vicarious liability. His Honour stated:

> A school authority owes to its pupil a duty to ensure that reasonable care is taken of them whilst they are on the school premises during hours when the school is open for attendance…[The decision in *Carmarthenshire*] proceeds on the footing that the duty is not discharged by merely appointing competent teaching staff and leaving it to the staff to take appropriate steps for the care of the children. It is a duty to ensure that reasonable steps are taken for the safety of the children, a duty the performance of which cannot be delegated.[63]

All of these discussions are consistent with the non-delegable duty as a duty owed in negligence, but one that cannot be discharged through delegation to a competent contractor.

Some cases describe the non-delegable duty as a duty 'to take positive steps' to protect a plaintiff from particular harm.[64] The question has been raised whether this gives the non-delegable duty of care a different scope, such that it is breached if a particular harm (like abuse) occurs. In *Lepore*, Gaudron J addressed this argument. Her Honour noted that positively expressed formulations of the non-delegable duty such as a 'duty to provide a safe system of work' upon an employer, do not amount to strict liability for *any* harm. Her Honour observed that:

---

[59] *Pafburn* (n 3) 154 [20], citing *Lepore* (n 4).
[60] *Lepore* (n 4) 599 [256].
[61] *Pafburn* (n 3) 154 [20], citing *Introvigne* (n 48).
[62] [1955] AC 549 ('*Carmarthenshire*').
[63] *Introvigne* (n 48) 269–70 (Mason J, Gibbs CJ agreeing at 260).
[64] See, eg, *Lepore* (n 4) 552–3 [104]–[105] (Gaudron J); *Kondis* (n 56) 686–7 (Mason J, Deane J agreeing at 694, Dawson J agreeing at 695); *Introvigne* (n 48) 271 (Mason J); *Leichhardt Municipal Council* (n 48) 64–5 [117]–[121] (Kirby J); *Woodland v Swimming Teachers Association* [2014] AC 537, 573 [7], 583 [23], 584–5 [25] (Lord Sumption JSC, Lords Clarke, Wilson and Toulson JJSC agreeing) ('*Woodland*').

> There is a tendency to speak, in the case of an employer, of a duty to provide a safe system of work or, in the case of an education authority, a duty to provide a safe school environment, without acknowledging either that, in that context, "safe" means "free of a foreseeable risk of harm" or that the duty is a duty to take reasonable care. If the duty of an education authority to provide a safe school environment were not confined by considerations of foreseeability and reasonable care, it would result in strict liability in the sense that the authority would be liable upon proof of injury being sustained on school premises during school hours.[65]

In other words, whilst the duty is commonly one that can be expressed positively,[66] that does not convert it into a positive duty to prevent all harm.

Against this brief summary of the nature of the non-delegable duty under Australian law leading up to the appeal in *AA*, the next section considers what support existed for the proposition that *negligence generally* could be breached by intentionally caused harm. It considers the surprising lack of certainty about such a foundational question in the law prior to *AA*. This remains relevant in other common law jurisdictions that still lack a clear answer to the question and for which the Australian developments will be of interest when the issue arises for consideration.

B *Does Negligence Extend to Intentionally Caused Harm?*

This section addresses the historical development of negligence and differing views prior to *AA* as to whether it encompassed intentionally caused harm, or 'deliberately and criminally inflict[ed] injury.'[67] It is argued here that the better view of earlier High Court authority was that intentionally caused harm did not fall within the scope of the negligence under Australian law.[68]

It is important to recognise that whilst the historical form of action moulded the early development of negligence, its contemporary form is shaped by precedent. As discussed in this section, there is little to support the argument that prior to *AA*, the courts had recognised that negligence extended to intentionally inflicted harm. For example, in *Burnie Port Authority*, the High Court noted that from the historical action on the case we can trace 'the subsequent emergence of a coherent law of negligence to dominate the territory of tortious liability for unintentional injury to the person or property of another'.[69] In *Lepore* the reasons given by the majority for rejecting such scope for the non-delegable duty of care also rejected, by necessary

---

[65] *Lepore* (n 4) 552 [103] (Gaudron J).
[66] Ibid 552–3 [104] (Gaudron J).
[67] Ibid 531 [31] (Gleeson CJ).
[68] Ibid 531–2 [31] (Gleeson CJ).
[69] *Burnie Port Authority* (n 1) 544 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

inference, the argument that negligence could apply to intentionally inflicted personal injury.[70] Gleeson CJ, with whom Callinan J agreed, found that intentional criminality introduces a factor of legal relevance beyond a mere failure to take care in negligence. Gummow and Hayne JJ commented that all of the cases in which a non-delegable duty has been found have been cases of negligence, so to extend non-delegable duty to intentional acts would be to 'sever the duty from its roots in the law of negligence'.[71] There were some judicial *dicta* suggesting that negligence could apply to intentionally caused harm. For example, in *Schokman*, Edelman and Steward JJ observed that 'it is at least arguable that the assault claim [in *Lepore*] could nevertheless have been pleaded as a breach of a duty of care'.[72] In *Carrier v Bonham*,[73] McPherson JA suggested that '[w]hat we really have now is not two distinct torts of trespass and negligence, but a single tort of failing to use reasonable care to avoid damage however caused.'[74] However these cases did not need to decide the issue.

There has been stronger academic support for the view that the modern law of negligence is conduct-based only and, therefore, whether harm is intentionally caused or not is irrelevant. Cane for example, had argued that '[n]egligence in tort law is failure to comply with a legally specified standard of conduct, pure and simple. It has no mental element.'[75] On this view, arguably, '[h]omicide, rape, and theft'[76] are acts that fall below the standard of conduct required and this is all that matters. Accordingly, as argued by Stevens, 'liability for deliberate abuse follows *a fortiori* from liability for want of care'.[77] Handford comprehensively surveyed scholarly support for the proposition and also argued that 'the tort of negligence is a valuable addition to the armoury of weapons available for deliberate wrongdoing'.[78]

---

[70] *Lepore* (n 4) 535 [38]–[39] (Gleeson CJ, Callinan J agreeing at 624 [339]), 601 [265] (Gummow and Hayne JJ).
[71] Ibid 602 [266] (Gummow and Hayne JJ).
[72] *Schokman* (n 12) 198 [78], citing *Lepore* (n 4); *Williams v Milotin* (1957) 97 CLR 465, 470–1 (Dixon CJ, McTiernan, Williams, Webb and Kitto JJ) ('*Milotin*'); *Gray v Motor Accident Commission* (1998) 196 CLR 1, 9–10 [22] (Gleeson CJ, McHugh, Gummow, and Hayne JJ), 28 [85] (Kirby J) ('*Gray*').
[73] [2002] 1 Qd R 474.
[74] Ibid 484 [27] (McPherson JA).
[75] Peter Cane, 'Mens Rea in Tort Law' (2000) 20(4) *Oxford Journal of Legal Studies* 535, 536.
[76] *Lepore* (n 4) 531–2 [31] (Gleeson CJ).
[77] Stevens, 'Non-Delegable Duties and Vicarious Liability' (n 46) 361. See also Jack Maxwell, 'Liability of Educational Institutions for Child Abuse' (2019) 93(6) *Australian Law Journal* 477, 480, citing Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) 271.
[78] Peter Handford, 'Intentional Negligence: A Contradiction in Terms?' (2010) 32(1) *Sydney Law Review* 29, 61.

There is no question that *mens rea* is not an express element of negligence. From 19th century expressions of principle in cases such as *Heaven v Pender*,[79] in which Brett MR described 'actionable negligence' as 'the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill', through to Lord Atkin's famous dictum in *Donoghue v Stevenson,*[80] to modern formulations,[81] it is conspicuously absent. It is expressly rejected by the authors of the 11th edition of *Fleming's Law of Torts*:

> … it is important to grasp at the outset that negligence is not a state of mind, but conduct that falls below the standard regarded as normal or desirable. The subjective notion of personal 'fault' has long been discarded in favour of the stricter, impersonal standard of how a reasonable person should have acted in the circumstances.[82]

It is surprising that such a fundamental question has apparently not been authoritatively settled under Australian law. As discussed below, it is argued that the better view of the law of Australia prior to *AA* was that negligence does *not* apply to intentionally inflicted harm. However, it is not clear how this limitation arose, other than by judicial implication, or whether there remains a logical rationale for it. As discussed in Part V, the High Court has now found that the non-delegable duty does extend to intentionally inflicted harm.

1 *The meaning of 'intention'*

A brief exercise in ground clearing is necessary to address the meaning of 'intention' as it is used in relation to arguments that negligence does, or does not, extend to 'intentional conduct', 'intentional wrongdoing', and 'intentionally inflicted injury'. A comprehensive discussion of the role of intention in tort law is beyond the scope of this article, and this article is not intended to engage with various theoretical underpinnings for tortious liability, or the relevance of intention to any particular model.[83] However, there are two narrow points to clarify for the limited purpose of understanding the different ways in which these terms are used in cases.

---

[79] (1883) 11 QBD 503, 509 ('*Heaven*').
[80] [1932] AC 562, 579–80 ('*Donoghue*').
[81] See, eg, Carolyn Sappideen et al, *Fleming's The Law of Torts* (Thomson Reuters, 11th ed, 2023) 141.
[82] Ibid.
[83] There have been a number of significant scholarly considerations of its role. See, eg, Cane (n 71); Handford (n 748; Peter Cane, 'Justice and Justifications for Tort Liability' (1982) 2(1) *Oxford Journal of Legal Studies* 30; FA Trindade, 'Intentional Torts: Some Thoughts on Assault and Battery' (1982) 2(2) *Oxford Journal of Legal Studies* 211; Philip Sales and Daniel Stilitz, 'Intentional Infliction of Harm by Unlawful Means' (1999) 115 *Law Quarterly Review* 411, 436–7.

First, the word 'intentional' in the phrase an 'intentional act' is sometimes used simply to denote a *voluntary* act as opposed to an involuntary act.[84] There is no doubt that negligence can arise from an 'intentional act' in this sense. Voluntary acts are often conscious deliberate choices. I can choose to kick a ball. However, this does not imply an *intention to inflict harm* from that conduct.

Second, it is clear that negligence can arise from intentional conduct and even give rise to exemplary damages where the defendant is shown to have acted 'consciously in contumelious disregard of the rights of the plaintiff or persons in the position of the plaintiff'.[85] These are relatively rare cases in negligence. However, the instances in which it has been awarded were still *unintentional* injury cases, rather than instances of an intention to cause harm. For example, exemplary damages have been awarded in employment cases where an employer has consciously allowed a risk of harm to continue on a worksite, such as the presence of asbestos, where the employer knew or ought to have known that it could cause harm. It has been held in some of these cases that the employer's decisions preferencing corporate profits were 'in contumelious disregard of the rights of the plaintiff' who later contracts a deadly lung disease or other physical illness. However, they did not arise from an intention to *cause* such harm. As observed by Mahoney P:

> One may, I think, act "in contumelious disregard of the plaintiff's rights" by doing recklessly and negligently what is likely to cause damage to the plaintiff even though it is not one's intention to cause it.[86]

Accordingly, acting intentionally, even 'in contumelious disregard of the plaintiff's rights', is not to be equated with intentionally caused harm or 'intentional wrongdoing' and can arise in relation to unintentionally caused injuries within the law of negligence.

In some contexts, negligence is used to indicate 'inadvertence to consequences' as opposed to intention which signifies 'advertence to consequences'.[87] However, difficult questions arise in relation to reckless indifference as to a foreseeable outcome that was not desired, but not avoided. Cane has noted that recklessness can sometimes be elided with an intention to produce that harm.[88] It is beyond the scope of this article to explore in detail the role of recklessness in negligence. The focus here is on intentionally inflicted, direct physical contact in the form of child sexual

[84] Cane (n 83) 35.
[85] *Gray* (n 72) 9–10 [22] (Gleeson CJ, McHugh, Gummow and Hayne JJ).
[86] *Trend Management Ltd v Borg* (1996) 40 NSWLR 500, 504 (Mahoney P) ('*Trend Management*').
[87] Cane (n 83) 38.
[88] Ibid.

abuse. In these cases, the perpetrator has intentionally committed this form of direct and unlawful harm that amounts to the tort of battery.

2 *19th and 20th century developments*

A brief sketch of the history of intentional and unintentional torts and their relationship to the forms of action in the nineteenth century provides context for the discussion of the development of negligence which follows. The point has been made that the distinction between the historical forms of action was originally between direct and indirect harm,[89] rather than between intentional and unintentional conduct. However, as noted by Cane,[90] gradually the distinction between negligence as inadvertent (careless) and unintentionally inflicted harm, on the one hand, and wilfully inflicted injury, on the other, became evident in the cases.

(a) Intentionally caused harm

Prior to the judicature reforms, choosing the appropriate form of action turned on whether the harm was direct or indirect. The presence of intention to cause the harm could be relevant to the appropriate cause of action. Directly caused harm was actionable in trespass, including if intentionally caused. These came to be known as the 'intentional' torts: of battery, assault and false imprisonment.[91] Harm caused intentionally but *indirectly* came to be recognised in discrete actions on the case. For example, in *Bird v Holbrook* ('*Holbrook*'),[92] the Court recognised that indirectly but intentionally caused physical injury was actionable on the case. *Holbrook* concerned the deliberate setting of a loaded gun, or 'spring gun', set in a garden with a trip wire 'for the express purpose of doing injury'.[93] The teenage plaintiff was badly injured by a spring gun when he trespassed into the defendant's garden to retrieve his pea fowl which had strayed onto the defendant's property. In *Wilkinson v Downton*,[94] the defendant was found liable for the plaintiff's injuries arising from severe shock following the defendant's conduct in deliberately telling the plaintiff a practical joke about her husband having been badly injured. Wright J found that:

[89] *Scott v Shepherd* (1773) 2 Black W 892; 96 ER 525, 527-8 (Blackstone J).
[90] Cane (n 83) 37, citing *Ogle v Barnes* (1799) 8 TR 188; 101 ER 1338, *Williams v Holland* (1833) 6 Car & P 23; 172 ER 1129. Cane (n 82) observes (at 38) that '[t]hus it was, in the area of personal injuries, that the exclusive territory of Trespass came to be restricted to intentional, direct injuries.'
[91] See, eg, Trindade (n 83) for a discussion of these intentional torts.
[92] (1828) 4 Bing 628; 130 ER 911 ('*Holbrook*').
[93] Ibid 916 (Best CJ).
[94] [1897] 2 QB 57 ('*Downton*'). See generally Handford (n 748; M Lunney, 'Practical Joking and its Penalty: *Wilkinson v Downton* in Context' (2002) 10(3) *Tort Law Review* 168.

> The defendant has … wilfully done an act calculated to cause physical harm to the plaintiff — that is to say, to infringe her legal right to personal safety, and has in fact caused physical harm to her. That proposition without more appears to me to state a good cause of action, there being no justification for the act.[95]

The conduct was characterised there as 'calculated to harm' because:

> It is difficult to imagine that such a statement, made suddenly and with apparent seriousness, could fail to produce grave effects under the circumstances upon any but an exceptionally indifferent person, and therefore *an intention to produce such an effect must be imputed*…[96]

Handford notes that in order to find for the plaintiff, Wright J had to create a new tort as no existing tort fitted the facts: it was treated as a cause of action arising from intentionally caused, indirect harm. Handford observed that '[t]he tort that he created is potentially quite wide-ranging: it covers any sort of conduct which is calculated to cause physical harm to the person',[97] and that a tort for intentionally inflicted, indirect harm could in theory apply to other intentionally caused, indirect harm cases, such as spring-gun cases like Bird v Holbrook, the administration of drugs or poison, the infliction of disease, and the well-known examples of logs on the highway.[98] However, its subsequent reach has been largely confined to physical harm by way of nervous shock. Different views have been taken as to whether it was properly a case of intentionally inflicted harm if the intention had to be imputed. As there was no intention to injure by telling the joke which caused the readily foreseeable harm, it has been suggested that the circumstances might be better analysed now under negligence.[99]

---

[95] *Downton* (n 94) 58-–9.
[96] Ibid 59 (emphasis added).
[97] Peter Handford, 'Wilkinson v Downton and Acts Calculated to Cause Physical Harm' (1985) 16(1–2) *University of Western Australia Law Review* 31, 34.
[98] Ibid 35.
[99] The proper understanding of the case continues to be debated. There has been *obiter* in the High Court to suggest that the case might have been subsumed by negligence. See *Magill v Magill* (2006) 226 CLR 551, 589 [117] (Gummow, Kirby and Crennan JJ) ('*Magill*'). This was doubted by Spigelman CJ in *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471, 486–7 [71]–[74] ('*Nationwide News*'). See also Scott Wotherspoon, 'Resuscitating the Wilkinson v Downton Tort in Australia' (2011) 85(1) *Australian Law Journal* 37.

(b) Unintentionally caused harm

In *Williams v Holland,*[100] a significant nineteenth century case resolving that negligence was not confined by the existing forms of action, both the parties and the court confined intentional wrongdoing (or *wilful* harm) to trespass and excluded it from the scope of negligence. Tindal CJ held that:

> We think [*Moreton v Hardern* (1825) 4 B & C 223; 107 ER 1042] has laid down a plain and intelligible rule, that where the injury is occasioned by the carelessness and negligence of the Defendant, the Plaintiff is at liberty to bring an action on the case, notwithstanding the act is immediate, *so long as it is not a wilful act;* and, upon the authority of that case, we think the present form of action maintainable to recover damages for the injury.[101]

For present purposes, it is this express exclusion of intentionally caused harm from the scope of negligence that is important. This was adopted under Australian law. *Williams* was applied in *Elliott v Barnes*.[102] Street CJ found that, '[i]f of course, the plaintiff were able to establish a wilful and deliberate act on the part of the plaintiff causing injury to the plaintiff then trespass would lie and the plaintiff should bring his action in that form.'[103] Similarly, Maxwell J held that 'in relation to a wilful act the plaintiff is confined to an action for trespass against the defendant for his own personal act'.[104]

The action on the case for indirect harm was the forerunner of the modern law of negligence. By the nineteenth century, the law had come to recognise particular duties to take care in certain relationships that would be breached by an act or omission that caused harm to another inadvertently. These cases were 'directly opposed to intention where the mind fully appreciates the duty'.[105] Following the abolition of the forms of action,[106] it took another 50 years before Lord Atkin articulated a general conception of a duty of care in tort in *Donoghue*, such that in *Grant v Australian Knitting Mills*,[107] it was said that 'the decision treats negligence,

---

[100] (1833) 10 Bing 112; 131 ER 848 ('*Williams*').
[101] Ibid 850 (emphasis added). In *Moreton v Hardern* (1825) 4 B & C 223; 107 ER 1042, it was claimed that the defendants so carelessly managed their coach and horses, that the coach ran against the plaintiff and broke his leg. The jury found that it happened through his defendant's negligent driving.
[102] (1951) 51 SR (NSW) 179.
[103] Ibid 182 (Street CJ, with whom Owen J agreed).
[104] Ibid, (Maxwell J, with whom Owen J also agreed).
[105] See generally Percy H Winfield, 'The History of Negligence in the Law of Torts' (1926) 42(2) *Law Quarterly Review* 184.
[106] *Supreme Court of Judicature Act 1873*, 36 & 37 Vict, c 66; *Supreme Court of Judicature Act 1875*, 38 & 39 Vict, c 77. See, eg, Winfield (n 105).
[107] (1935) 54 CLR 49 ('*Australian Knitting Mills*').

where there is a duty to take care, as a specific tort in itself'.[108] The correlation that developed between negligence and careless or inadvertent injury, as contrasted with wilfully inflicted injury actionable in trespass, was evident in scholarly analysis. For example, in the first edition of Salmond*'s Law of Torts,* published in 1907, the exclusion of intentionally inflicted injury from the scope of negligence was discussed as follows:

> §5-Negligence
>
> Negligence is the breach of a legal duty to take care. It is carelessness in a matter in which carefulness is made obligatory by law. Negligence and wrongful intent are the two alternative forms of *mens rea*, one or other of which is commonly required as a condition of liability. Each consists in a certain mental attitude of the defendant towards the consequences of his act. He intends those consequences when he foresees and desires them, and there does the act in order that they may happen. He is guilty of negligence, on the other hand, when he does not desire the consequences, and does not act in order to produce them, but is nevertheless indifferent or careless whether they happen or not, therefore does not refrain from the act notwithstanding the risk. The careless man is he who does not care — who is not anxious that his activities shall not be the cause of loss to others. The wilful wrongdoer is he who desires harm; the negligent wrongdoer is he who does not sufficiently desire to avoid doing it. Negligence and wrongful intent are inconsistent and mutually exclusive states of mind. He who causes a result intentionally cannot have caused it negligently, and vice versa.
>
> ….
>
> The term negligence is used to denote not merely the mental attitude that has been described, but also conduct produced by such a mental attitude. In other words negligence means either subjectively a careless state of mind, or objectively careless conduct…This double use causes no difficulty or confusion, for negligence in the one sense is necessarily accompanied by negligence in the other also…Negligence in the subjective sense is opposed to wrongful intent; negligence in the objective sense is opposed to intentional wrongdoing.
>
> It is negligence in its objective sense that is referred to in the well-known definition of Alderson B in *Blyth v Birmingham Waterworks Co*:[109] "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct

[108] Ibid 63 (Lord Wright for the Board).
[109] (1856) 11 Ex 781, 784.

> of human affairs, would do, or doing something which a prudent and reasonable man would not do".[110]

Understood this way, negligent conduct and intentionally inflicted injury are mutually exclusive. There is a purpose for tracing this early development of negligence by the courts and contemporaneous scholarly analysis. It suggests that the exclusion of intentionally inflicted harm was not a constraint imposed by forms of action and discarded with their abolition: it was a limitation that had shaped the scope of negligence as it developed an independent tort. Dias observed that:

> The recognition of carelessness as a mode of inflicting harm has been variously traced by legal historians. When a sufficiently large volume of case-law has accumulated dealing with the careless infliction of harm, it is possible to draw a ring round them on paper, extract principles according to which remedies have been granted and refused, and then say that this is the "tort of negligence."[111]

(c) 20th century developments

Many of the key 20th century cases were limitation cases, where the shorter limitation period for intentional torts was an obstacle sought to be overcome by pleading in negligence which attracted a longer limitation period. *Milotin* concerned limitation periods in respect of injuries caused by negligent driving of a car by the defendant. The issue was whether the action for damages for personal injury was available in either of negligence (for which the limitation period was six years) or in trespass (for which the three-year limitation period had expired), at the election of the plaintiff. It was held that in the circumstances, it could have been brought in either and so was not out of time. However, in so finding, the majority distinguished the facts from intentional harm, saying '[t]here is no suggestion that the defendant intended to strike him. If that had been the allegation the action could have been brought in trespass and not otherwise.'[112] The court cited *Williams* as one of the authorities for the finding.

Following *Milotin*, another case arising from limitation issues under English law was decided by the Court of Appeal in *Letang v Cooper*.[113] On the scope of negligence, Lord Denning MR found that '[i]f [a person] does not inflict injury intentionally, but only unintentionally, the plaintiff has no cause of action today in trespass. His only

---

110 Salmond, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries* (Stevens and Haynes, 1907) 18–20.
111 RWM Dias, 'The Duty Problem in Negligence' (1955) 13(2) *Cambridge Law Journal* 198, 199.
112 *Milotin* (n 72) 470 (Dixon CJ, McTiernan, Williams, Webb and Kitto JJ).
113 [1965] 1 QB 232 ('*Letang*').

cause of action is in negligence, and then only on proof of reasonable care.'[114] Handford has rightly noted that Lord Denning MR did not say, in terms, that for *intentionally caused* injuries, the *only* cause of action was trespass.[115] However, subsequently in *Gray v Barr*,[116] Lord Denning MR held so unambiguously. The issue was whether Mr Barr's home insurance policy coverage of 'accidents' applied to the circumstances where he had gone into Mr Gray's house with a loaded gun (suspecting that Mr Gray was with Mr Barr's wife), firing one shot deliberately. During a physical fight between the men, the gun went off again, killing Mr Gray. Lord Denning MR held that the 'dominant and effective cause' of the shooting was the 'deliberate act in going up the stairs with a loaded shotgun',[117] observing that:

> If the death of Mr Gray was caused by the deliberate act of Mr Barr in going up the stairs with a loaded gun, it was no accident ... The first question, therefore, is whether Mr Gray, had he lived, would have had a cause of action. The answer is: Yes, he would: but it would have been an action for assault, not for negligence. Whenever two men have a fight and one is injured, the action is for assault, not for negligence. … The idea of negligence — and contributory negligence — is quite foreign to men grappling in a struggle.[118]

Prior to *AA*, the High Court of Australia had continued to distinguish intentionally inflicted harm from negligence. In *Burnie Port Authority*, the majority of the High Court described negligence as 'the territory of tortious liability for *unintentional injury* to the person or property of another'[119] and in *Northern Territory v Mengel* ('*Mengel*'),[120] the majority distinguished negligence from 'torts which impose liability on private individuals for the intentional infliction of harm',[121] noting that 'the recent trend of legal development…has been to the effect that liability in tort depends on either the intentional or the negligent infliction of harm'.[122] Four judges, Mason CJ, Dawson, Toohey and Gaudron JJ, were in the majority in both *Burnie Port Authority* and *Mengel*.

Twenty years before his appointment to the United Kingdom Supreme Court, Philip Sales (as he then was) and Daniel Stilitz cited these views of the Australian High

[114] Ibid 239.
[115] Handford (n 78) 41.
[116] [1971] 2 QB 554 ('*Barr*'). See also Trindade (n 83).
[117] *Barr* (n 116) 567.
[118] Ibid 569.
[119] *Burnie Port Authority* (n 1) 544 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ) (emphasis added).
[120] (1995) 185 CLR 307 ('*Mengel*').
[121] Ibid 347 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ).
[122] Ibid 341.

Court in *Mengel*, amongst other judicial references,[123] for the proposition that the law of tort could be 'organised at the two levels of intentional infliction of harm and failure to take reasonable care',[124] distinguishing 'harm inflicted intentionally, as a counterpart to the generalisation of the reasonable care or reasonable behaviour standard in the non-intentional sphere'.[125] The authors noted that the Australian High Court's observation in *Mengel* referred to above echoed the words of Lord Denning MR in *Letang* that claims for personal injury were now classified by whether 'the defendant did the injury intentionally or unintentionally'.[126]

In their article, Sales and Stilitz were not addressing the non-delegable duty of care; rather, the scope of the tort of interference with trade or business by unlawful means. The authors argued that the tort would be more accurately described as 'intentional infliction of harm by unlawful means' and that 'a more helpful approach to understanding the limits of the tort lies in focusing more closely upon the element of intention'.[127] But the authors' broader thesis remains relevant to this discussion. The authors argued for an organisation of torts such that 'the two principles of liability, for intentional infliction of harm and for failure to take reasonable care, should be regarded as base rules'.[128] These 'base rules' are consistent with the statements in *Burnie Port Authority* and *Mengel* discussed above, and with the *ratio* of *Lepore* considered next.

(d) Lepore

Lepore concerned the scope of the non-delegable duty of care owed by the State to a child in a State school in respect of sexual abuse of the child by the schoolteacher. The New South Wales Court of Appeal had found that the non-delegable duty of care owed by the State *could* be breached by such intentional wrongdoing.[129] In that case, a teacher was convicted of common assault of a child in punishing him for misbehaviour by sending him to a small room adjacent to the classroom, making him take his clothes off, and smacking the child on his bare buttocks and indecently handling him. It is noteworthy that the Court of Appeal regarded the question as novel. Mason P noted that '[i]t sometimes happens that a court is faced with a

[123] Including *Hunter v Canary Wharf* [1997] AC 655, 707E–G (Lord Hoffmann).
[124] Sales and Stilitz (n 83) 436–7.
[125] Ibid 436.
[126] *Letang* (n 113) 239E–240B (Lord Denning MR).
[127] Sales and Stilitz (n 83) 411.
[128] Ibid 437.
[129] *Lepore (NSWCA)* (n 26).

specific new situation in which there is no direct authority.'[130] The majority held that the non-delegable duty was breached by the deliberate assault. Mason P held:

> In my view the State's obligations to school pupils on school premises and during school hours extend to ensuring that they are not injured physically at the hands of an employed teacher (*whether acting negligently or intentionally*).[131]

The same question arose in *Rich v State of Queensland*.[132] The Queensland Court of Appeal unanimously refused to apply the majority's reasons in the New South Wales Court of Appeal in *Lepore* on this issue, agreeing with the reasons of Heydon JA in dissent. McPherson JA observed that:

> Having regard to what I consider was decided in *Commonwealth v Introvigne,* the "undertaking" [in a non-delegable duty], if that is what it really is, is not "to ensure that no harm befalls the plaintiff", but at most an undertaking that the State would take reasonable steps to ensure the safety of persons like the plaintiffs. That is consistent with the decision in *Carmarthenshire County Council v Lewis* [1955] AC 549, from which the liability is derived.[133]

Thomas and Williams JJA each observed that to give it such scope would introduce a new rule rendering the employer absolutely liable. Thus, this question was squarely in issue in the appeal to the High Court.

In the High Court, a majority also rejected the application of the non-delegable duty of care to intentionally inflicted harm. Gleeson CJ, with whom Callinan J agreed, observed that

> although deliberately and criminally inflicting injury on another person involves a failure to take care of that person, it involves more. If a member of a hospital's staff with homicidal propensities were to attack and injure a patient, in circumstances where there was no fault on the part of the hospital authorities, or any other person for whose acts or omissions the hospital was vicariously responsible, the common law should not determine the question of the hospital's liability to the patient on the footing that the staff member had neglected to take reasonable care of the patient. It should face up to the fact that the staff member had criminally assaulted the patient, and address the problem of the

---

[130] Ibid 421–2 [1] (Mason P, Davies AJA agreeing at 448 [127]).
[131] Ibid 432 [61] (Mason P, Davies AJA agreeing at 448 [127]) (emphasis added).
[132] (2001) Aust Torts Reports 81-626 (McPherson, Thomas and Williams JJA).
[133] Ibid 67,392 [18].

> circumstances in which an employer may be vicariously liable for the criminal acts of an employee. Intentional wrongdoing, especially intentional criminality, introduces a factor of legal relevance beyond a mere failure to take care. *Homicide, rape, and theft are all acts that are inconsistent with care of person or property, but to characterise them as failure to take care, for the purpose of assigning tortious responsibility to a third party, would be to evade an issue.*[134]

Gleeson CJ's example of the act of a homicidal hospital staff member constituting a crime, not negligence, directly illustrated the question of the scope of negligence to apply to intentionally inflicted harm and it was rejected. Gummow and Hayne JJ similarly commented that all of the cases in which a non-delegable duty has been found have been cases of negligence, so to extend non-delegable duty to intentional acts would be to 'sever the duty from its roots in the law of negligence'.[135] *Milotin* was applied as authority for the exclusion from negligence of intentionally caused harm. Their Honours said:

> As *Williams v Milotin* makes plain, negligently inflicted injury to the person can, in at least some circumstances, be pleaded as trespass to the person, but the intentional infliction of harm cannot be pleaded as negligence.[136]

This reasoning clearly demonstrates that the scope of the non-delegable duty was viewed by the Court through the lens of negligence, and that criminally intentional wrongdoing was regarded as lying beyond its focus.

However, McHugh J dissented on the issue. His Honour held that

> a State education authority owes a duty to a pupil to take reasonable care to prevent harm to the pupil. The duty cannot be delegated. If, as is invariably the case, the State delegates the *performance* of the duty to a teacher, the State is liable if the teacher fails to take reasonable care to prevent harm to the pupil. The State is liable even if the teacher intentionally harms the pupil. The State cannot avoid liability by establishing that the teacher intentionally caused the harm even if the conduct of the teacher constitutes a criminal offence. It is the State's duty to protect the pupil, and the conduct of the teacher constitutes a breach of the State's own duty.[137]

---

[134] *Lepore* (n 4) 531–2 [31] (emphasis added).
[135] Ibid 602 [266] (Gummow and Hayne JJ).
[136] Ibid 602–3 [270].
[137] Ibid 562 [136] (emphasis added).

McHugh J reasoned further that an action for negligent infliction of harm is not barred by reason of the intentional act of the person causing the harm and that following abolition of the forms of action, a plaintiff may, if he or she chooses, sue in negligence for the intentional infliction of harm.[138] McHugh J was the only judge in the Court who clearly accepted that negligence conceptually extends to intentionally caused harm.

Following *Lepore*, its *ratio* was applied to prevent negligence from extending to intentionally inflicted harm. For example, *Nationwide News Pty Ltd v Naidu* concerned the liability of an employer for intentional conduct by way of racial slurs and vilification by one employee of another. Spigelman CJ noted that in respect of the wrongdoer's 'intentional course of conduct, which brutalised the respondent, it is artificial to analyse his conduct in terms of a duty of care owed by either appellant'.[139] The Chief Justice observed that the imperial march of negligence had sometimes led to a 'lack of rigour' in the analysis of a cause of action, particularly in the context of differentiating negligence from intentional conduct,[140] citing both *Lepore* and *Milotin* for the proposition that 'negligently inflicted injury to the person can, in at least some circumstances, be pleaded as trespass to the person, but the intentional infliction of harm cannot be pleaded as negligence'.[141]

There was strong scholarly criticism of the *ratio* in *Lepore*. In particular, Robert Stevens has described the decision as 'indefensible' and argued that:

> Liability for the breach of a primary duty cannot be avoided by showing that the breach was gross .... If the duty assumed is a duty that care will be taken, this is breached where the child is abused. This does not mean that the duty assumed is absolute. A child who falls over in the playground does not necessarily have a claim. However, liability for deliberate abuse follows a fortiori from liability for want of care.142

This argument supported the reasons of McHugh J in *Lepore* that negligence is simply concerned with conduct that falls below the legal standard, however caused, and that following the abolition of forms of action, the gates of negligence have been opened to intentionally inflicted harm. However, as discussed above, writing exactly a century before Robert Stevens,[143] Sir John Salmond had noted that attempts were sometimes made to define negligence as 'a purely objective fact in terms of

---

[138] Ibid 572 [162].
[139] *Nationwide News* (n 99) 484 [61].
[140] Ibid 484–5 [62].
[141] Ibid 485 [65].
[142] Stevens, 'Non-Delegable Duties and Vicarious Liability' (n 46) 361.
[143] See Salmond (n 110) 19–21. Cf Stevens, *Torts and Rights* (n 77) 271.

unreasonable conduct or a failure to take care, regardless of the state of mind of the actor'. Salmond regarded this as a 'defective analysis of the conception'.[144] This was because harm arising from a failure to take precautions may be 'either intentional wrongdoing or a mere accident'. Salmond opined that 'negligence in the subjective sense is opposed to wrongful intent; negligence in the objective sense is opposed to intentional wrongdoing'.[145]

Neither the abolition of forms of action,[146] nor the lack of express *mens rea* in the elements of the tort, provided a complete answer to the scope of negligence to apply to intentionally inflicted harm under Australian law. Its historical foundation in inadvertent harm seems to have shaped its development as a cause of action. Its elements set the parameters for when a duty will arise and when it will be breached, but the underlying restriction to unintentional harm appears to derive from precedent. Following *Lepore*, in *Magill v Magill*, Gleeson CJ again discussed the duty of care in negligence as controlling 'potential liability for carelessness'. His Honour expressly distinguished between false representations (in that case about paternity) which could be the result of 'carelessness' or ''deliberate fraud'.[147] Gummow, Kirby and Crennan JJ also referred to negligence as an 'unintentional tort'.[148] Another way in which the limitation to unintentional harm or careless conduct seemed to have found expression was in the notion of identifying a relevantly foreseeable risk. For example, in *Minister for the Environment v Sharma*,[149] Beach J observed that:

> The question posed by the consideration of foreseeability at the stage of considering whether a duty of care exists is whether "it is reasonably foreseeable as a possibility that *careless conduct* of any kind on the part of the defendant may result in damage of some kind to the person or property of the plaintiff" …[150]

Similarly, in *Sullivan v Moody*,[151] the majority observed:

> But the fact that it is foreseeable, in the sense of being a real and not far-fetched possibility, *that a careless act or omission on the part of one person may cause harm* to another does not mean that the first person is subject to a legal liability to compensate the second by way of damages for negligence if there is such carelessness, and harm results. … A defendant will only be liable, in negligence, for failure to take reasonable

---

[144] Salmond (n 110) 20.
[145] Ibid.
[146] See above n 106.
[147] *Magill* (n 99) 563 [21] (Gleeson CJ).
[148] Ibid 589 [117].
[149] (2022) 291 FCR 311 ('*Sharma*').
[150] Ibid 423 [417] (Beach J) (emphasis added).
[151] (2001) 207 CLR 562 ('*Sullivan*').

> care to prevent a certain kind of foreseeable harm to a plaintiff, in circumstances where the law imposes a duty to take such care.[152]

(e) Limited judicial support for negligence to apply to intentionally caused harm

Prior to *AA*, the judicial support for the extension of negligence to intentionally inflicted harm was thin. In *Australian Securities and Investments Commission v Cassimatis (No 8)* ('*Cassimatis*'),[153] Edelman J said that, '[i]n Australia, an action for the tort of negligence can succeed even where the conduct of the defendant was intentional.'[154] Assuming his Honour was referring to intentionally inflicted harm, rather than merely voluntary conduct, the authorities cited for the proposition need to be considered. These were *Milotin*;[155] *Wilson v Horne* ('*Wilson*');[156] *Gray v Motor Accident Commission* ('*Gray*');[157] and *Croucher v Cachia* ('*Croucher*').[158] They are considered below. It is respectfully suggested that with the exception of *Wilson* (which clearly supported the extension of negligence to intentionally inflicted harm in the form of sexual abuse, but which pre-dated *Lepore*), the cases do not lend strong support to the proposition that intentionally inflicted injury was properly characterised or pleaded as negligence under Australian law prior to *AA*.

Milotin is authority for the fact that direct contact may amount to trespass or negligence under Australian law, but that intentional harm cannot be pleaded as negligence. Even if rationalised as a case dealing with pre-judicature reforms, this does not directly support the reach of negligence to intentionally caused harm. As discussed above, the abolition of forms of action is a separate question to the development of the elements of the causes of action in tort in the cases.[159]

Gray[160] was decided by the High Court five years before *Lepore*.[161] The appellant (the plaintiff at trial) was struck by a car intentionally driven at him by a person who was convicted of causing grievous bodily harm with intent to cause such harm. In 1993, the appellant commenced proceedings against the wrongdoer in the District Court

[152] Ibid 576 [42] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ) (emphasis added).
[153] (2016) 336 ALR 209 ('*Cassimatis*').
[154] Ibid 306 [504] (Edelman J).
[155] *Milotin* (n 72).
[156] (1999) 8 Tas R 363 ('*Wilson*').
[157] *Gray* (n 72).
[158] (2016) 95 NSWLR 117 ('*Croucher*').
[159] As noted by Edelman J in *H Lundbeck A/S v Sandoz Pty Ltd* (2022) 276 CLR 170, 212 [117]: 'The most common use of "cause of action" under Australian law is in the sense set out in *Letang v Cooper*, where Diplock LJ commenced his reasons with the description of a cause of action as "simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person".'
[160] *Gray* (n 72).
[161] *Lepore* (n 4).

of South Australia, claiming damages for personal injury. As noted by the High Court, the District Court action was framed as a claim in negligence, but appeared to be conducted as a claim in trespass.[162] The respondent, who was the compulsory third party insurer of the wrongdoer, was substituted as defendant in the action pursuant to provisions of the *Motor Vehicles Act 1959* (SA). Although the respondent did not admit liability, the High Court noted there seems to have been no real dispute about liability at trial. Accordingly, the finding of negligence in the District Court arising from intentionally caused harm does not appear to have been the subject of argument at trial or in the Court of Appeal or High Court.

The issue before the High Court was the availability of exemplary damages in relation to negligence. As discussed above in the section addressing intention, it had already been accepted before *Gray*'s case that highhanded conduct in contumelious disregard of the rights of a plaintiff could give rise to exemplary damages in negligence. The cases cited by the majority in *Gray*[163] were cases where an employer had acted consciously with respect to the conditions in the workplace, with a high-handed disregard for the health of the workers and exposure to harmful substances such as asbestos or benzol fumes preferencing corporate profits over installing safety equipment. In none of those cases was the defendant found to have intended to injure the plaintiff, nor was the harm direct. In the joint judgment of Gleeson CJ, McHugh, Gummow and Hayne JJ, their Honours observed that

> exemplary damages could not properly be awarded in a case of alleged negligence in which there was no conscious wrongdoing by the defendant. Ordinarily, then, questions of exemplary damages will not arise in most negligence cases be they motor accident or other kinds of case. But there can be cases, framed in negligence, in which the defendant can be shown to have acted consciously in contumelious disregard of the rights of the plaintiff or persons in the position of the plaintiff. Cases of an employer's failure to provide a safe system of work for employees in which it is demonstrated that the employer, well knowing of an extreme danger thus created, persisted in employing the unsafe system might, perhaps, be of that latter kind. No doubt other examples can be found.[164]

This passage has been considered difficult to reconcile with a limitation of negligence as not applying to intentionally inflicted harm because of the Court's acceptance that exemplary damages were available in these circumstances of deliberate wrongdoing. One the one hand, the Court expressed no criticism of the

---

[162] *Gray* (n 72) 9–10 [24].
[163] Ibid 27 [40], citing *Midalco Pty Ltd v Rabenalt* [1989] VR 461, 29 [86], *Trend Management* (n 85); *Coloca v BP Australia Ltd* [1992] 2 VR 441. See also Kirby J at [82].
[164] *Gray* (n 72) 9-10 [22].

finding of negligence below, but on the other, it was not in issue. Given that the finding of negligence was not argued at any stage in the litigation, the case cannot be regarded as authority for the proposition that negligence applies to intentionally inflicted harm. A case is not authority for a proposition that was not argued, or was simply agreed or assumed.[165] Accordingly, *Gray* provides limited support at best for the scope of negligence to apply to intentionally inflicted harm.

Wilson[166] was a decision of the Full Court of the Supreme Court of Tasmania, decided the year after *Gray*, and before *Lepore*. This case directly supported the scope of negligence to apply to intentionally caused harm in the form of sexual abuse. It was also a case in which the effect of then existing limitation periods loomed large in the disposition of the case. The cause of action in trespass had expired, but an action in negligence remained available. The Court found that sexual abuse of the plaintiff as a child by her uncle could be pleaded as negligence. Cox CJ limited the relevance of *Milotin* to pre-judicature reforms. His Honour cited *Gray* as a (then) recent 'example of conduct involving an intentional trespass to the plaintiff's person but pleaded in negligence',[167] noting that it was 'implicit' 'that the court at first instance had jurisdiction to entertain an action for damages based on negligence as the pleaded cause of action, notwithstanding that the tortfeasor's conduct might also have given rise to a cause of action in trespass'.[168] However, his Honour did not discuss the fact that the issue was effectively agreed at trial in the District Court and not the subject of appeal in the High Court. Wright J similarly regarded *Milotin* as no bar to the claim.[169] Evans J took a similar view, and also noted that the trial judge had cited from the 9th edition of Charlesworth & Percy on *Negligence* (1997) for the proposition that '[n]egligence in this context may consist in a wilful or an intentional act.'[170]

As discussed above, there was never any doubt that negligence could arise from an intentional act. The uncertain question was whether it can arise from intentionally inflicted harm. In the 16th edition of Charlesworth and Percy's *The Law of Negligence*,[171] which was in almost identical terms to the edition cited in *Wilson*, the editors state that '[n]egligence may consist in a wilful or an intentional act. This is because negligence as the breach of a duty to take care is concerned with conduct

---

[165] *CSR Ltd v Eddy* (2005) 226 CLR 1, 11 [13] (Gleeson CJ, Gummow and Heydon JJ).
[166] *Wilson* (n 156).
[167] Ibid 367 [7].
[168] Ibid.
[169] Ibid 373-4 [21].
[170] Ibid 382 [40].
[171] Mark Armitage et al (eds), *Charlesworth & Percy on Negligence* (Sweet & Maxwell, 16th ed, 2025) 12–13.

and not with intention.'[172] However, the sole authority cited for the proposition is a somewhat unusual case, *Emblen v Myers*.[173] While the case supports the availability of exemplary damages in negligence, in *Rookes v Barnard*[174] Lord Devlin described the case as one in trespass, and one of six early cases dealing with exemplary damages without 'any clear ruling'.[175]

Croucher[176] is the final case to which Edelman J referred to in *Cassimatis* as supporting the proposition that negligence can apply to intentional conduct. The case is relevant to understanding the divergence between Australian and English law insofar as English law[177] does not allow unintentional, direct contact to be pleaded in trespass, whereas Australian law does. Although battery is classed as an 'intentional tort', a battery may occur when the defendant is merely negligent, so that depending on the circumstances, 'the actual facts will or may fulfil the requirements of [battery and negligence]'.[178] However, it is respectfully suggested that *Croucher* is not authority for the inverse proposition that intentionally inflicted harm can be pleaded as negligence.

(f) The position under English law in relation to the non-delegable duty

The most detailed consideration of the scope of the non-delegable duty in the United Kingdom was by Lord Sumption JSC in *Woodland v Swimming Teachers Association* ('*Woodland*').[179] *Woodland* was not a case addressing intentional wrongdoing. The facts concerned a child who suffered a hypoxic brain injury during swimming lessons at a local pool. The school was found liable under a non-delegable duty of care. Lord Sumption carefully reviewed the authorities, including from Australia,

---

[172] John Charlesworth, *The Law of Negligence*, (Sweet & Maxwell, 2nd ed, 1938) 9. I note that for the purposes of this discussion, intentional conduct is discussed in terms of the deliberate act intending to cause the consequences, rather than simply in terms of a voluntary act. See Cane (n 82) 35.

[173] *Emblen v Myers* (1860) 6 H & N 54; 158 ER 23. The plaintiff owned land with a stable. The defendant owned an adjoining house that had been ordered to be demolished. The plaintiff refused to sell his property to the defendant. The defendant's workmen subsequently recklessly demolished the building, causing a beam to fall on the plaintiff's property. Following an argument, the defendant instructed his workmen to continue, and they threw brick onto the stable. During the course of the trial, the defendant's counsel did not object to evidence in a claim in trespass being introduced in the action that had been brought in negligence. The trial judge allowed the jury to award exemplary damages in the negligence action if they found the defendant had wilfully attempted to drive the plaintiff from his stable.

[174] [1964] AC 1129.

[175] Ibid 1223. Lord Devlin noted that Wilde B at trial had directed the jury that they might find exemplary damages 'without recourse to legal principle'.

[176] Above n 158.

[177] See, eg, *Letang* (n 113).

[178] *Croucher* (n 156) 121 [22] (Leeming JA, Beazley P agreeing at 118–19 [1], Ward JA agreeing at 119 [2]).

[179] *Woodland* (n 64).

and specifically *Lepore*, and observed that they 'are broadly correct in their analysis of the factors that have given rise to non-delegable duties of care'.[180] If His Lordship disagreed with the express reasons of the majority in *Lepore* in restricting the scope of the non-delegable duty to negligent and not intentionally caused harm, that would have been the place to say it, even in *obiter*. His Lordship identified five elements of the non-delegable duty, but also noted that:

> This is not an open-ended liability, for there are important limitations on the range of matters for which a school or education authority assumes non-delegable duties. They are liable for the negligence of independent contractors only if and so far as the latter are performing functions which the school has assumed for itself a duty to perform, generally in school hours and on school premises (or at other times or places where the school may carry out its educational functions). In the absence of negligence of their own, for example in the selection of contractors, they will not be liable for the negligence of independent contractors where on analysis their own duty is not to perform the relevant function but only to arrange for its performance.[181]

It is argued here that Lord Sumption JSC's reasons do not confirm or necessarily even support the reach of the non-delegable duty to criminally intentional wrongdoing.

It is noteworthy that in *Armes*,[182] a decision of the UK Supreme Court, there is *obiter* to the effect that a non-delegable duty of care *can* be breached by the intentional criminal wrongdoing of a delegate. In Lord Reed JSC observed:

> Nor am I able to agree that a non-delegable duty cannot be breached by a deliberate wrong: see, for example, *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716, a bailment case which was treated as a case of non-delegable duty in *Woodland's* case [2014] AC 537, 573–574, para 7. On Burnett LJ's approach, the local authority would seemingly be liable if the foster parents negligently enabled a third party to abuse the child, but not if they abused her themselves. That can hardly be right.[183]

---

[180] Ibid 583 [23]. In *Woodland*, Lord Sumption identified two broad categories of case in which a non-delegable duty of care has been held to arise. The first was 'a large, varied and anomalous class of cases in which the defendant employs an independent contractor to perform some function which is either inherently hazardous or liable to become so in the course of his work.' The second broad category was said to comprise cases where the common law imposed a duty which had three critical characteristics. First, the duty arises because of an antecedent relationship between the defendant and the claimant. Secondly, the duty is a positive or affirmative duty to protect a particular class of persons against a particular class of risks, and not simply a duty to refrain from acting in a way that foreseeably causes injury. Thirdly, the duty is by virtue of that relationship personal to the defendant.
[181] Ibid 584–5 [23], [25(3)].
[182] *Armes* (n 24).
[183] Ibid 375 [51] (Lord Reed, with whom Baroness Hale PSC, Lord Kerr and Lord Clarke JJSC agreed).

It is respectfully suggested that the conclusion that it can 'hardly be right' that there is a gap in the law leaving a plaintiff without a pathway to compensation raises questions beyond the scope of the non-delegable duty. The law also accepts the limitations of vicarious liability not applying to independent contractors, even where that leaves a plaintiff without a basis for a claim for compensation. Accordingly it is not clear why 'it can hardly be right' that a non-delegable duty does not apply to circumstances relating to intentional wrongdoing if they lie beyond the doctrinal limits of the cause of action. Both the limitations of vicarious liability, and the limited scope of the non-delegable duty of care in negligence, reflect the limitations of separate doctrines that serve different normative purposes. It is respectfully submitted that an unacceptable gap in the law is a separate question, and may properly be one for law reform.

It is beyond the scope of this article to consider the position under the law of England and Wales in detail, but it is to be hoped that the UK Supreme Court will also have an opportunity to clarify the scope of the non-delegable duty and its relationship with negligence, as well as address the anterior question of the scope of negligence to apply to intentionally inflicted injury.

V Postscript — The High Court's Findings in *AA*

The majority of the High Court in *AA*[184] held the Diocese was liable to the appellant for harm suffered as a result of the sexual abuse by Fr Pickin. The reasons of the majority differed in certain respects but afford a clear *ratio* on this issue.[185] In finding that the non-delegable duty and duty of care in negligence can be breached by intentionally inflicted harm, the majority overturned *Lepore*. The case recognises a new class of relationship giving rise to a non-delegable duty of care and will open pathways for compensation that have hitherto been blocked under Australian law, particularly in the context of sexual abuse by clergy in a religious institution. It is a significant development in Australian tort law. Over a decade ago, Lord Phillips in the UK Supreme Court said that vicarious liability under English law was 'on the move'.[186] The same might now be said of negligence and the non-delegable duty under Australian law.

---

[184] *AA* (n 9). The majority comprised Gageler CJ, Jagot and Beech-Jones JJ in a joint judgment, and separate judgments by Gordon J and Edelman J. Steward J and Gleeson J delivered separate judgments in dissent. This postscript does not rehearse the facts or procedural history of *AA* discussed in Part III above, or address all issues canvassed in the reasons for judgment. It focuses on the High Court's reasons on the issues discussed in this article and considers two questions that arguably remain.
[185] At least where it is expressed at a higher level of generality: see *MJZP v Director-General of Security* [2025] HCA 26, [36]–[40] (Edelman J).
[186] *Catholic Child Welfare* (n 24) 11 [19].

A *The Nature of the Non-Delegable Duty and Findings of Breach*

The plurality (Gageler CJ, Jagot and Beech-Jones JJ) found that the duty assumed by the Diocese was 'a duty to a child to ensure that while the child was under the care, supervision or control of a priest of the Diocese, as a result of the priest purportedly performing a function of a priest of the Diocese, reasonable care was taken to prevent reasonably foreseeable personal injury to the child'.[187] They reasoned that whilst it may be accepted that Fr Pickin was not performing a 'function of a priest of the Diocese' when sexually assaulting AA, the relevant question was 'whether AA came to be under the care, supervision or control of Fr Pickin in the presbytery as a result of Fr Pickin having purportedly performed a function of a priest of the Diocese'.[188] Critically, their Honours did not appear to regard it as necessary that the Friday night events were an authorised church activity, as long as the boys were attending the presbytery '*as a result of*' Fr Pickin having performed an authorised function, which they found that he did in having delivered religious instruction to the boys in high school.[189] Their Honours held that 'a non-delegable duty is a "special" kind of common law duty of care in negligence'.[190]

Gordon J also found the Diocese liable under a non-delegable duty, but analysed the nature of the duty somewhat differently to the plurality. Her Honour did not accept that the non-delegable duty was a duty owed in negligence or that non-delegable duties should be subsumed into negligence.[191] Her Honour found that the Diocese had assumed[192] or undertaken[193] a duty to ensure that reasonable care was taken 'to avoid the risk of personal injury to child parishioners such as AA while they remained in the care of a priest of the Diocese at the presbytery'[194] which arose because:

> (1) AA, as a child parishioner who was taught to respect and obey priests, was specially vulnerable; and (2) the Diocese undertook the care of child parishioners such as AA in circumstances where it appointed priests to a parish and expected and required them to engage with young people as part of their ministry, the Diocese made the presbytery available to

[187] *AA* (n 9) 180 [2].
[188] Ibid 205 [115].
[189] Ibid 202 [97]–[98] (emphasis added).
[190] Ibid 184 [21].
[191] Ibid 234 [277].
[192] Ibid 233–4 [271]–[273].
[193] Ibid 238 [299].
[194] Ibid 242 [323].

> priests such as Father Pickin to perform that ministry, and AA's parents entrusted the care of AA to Father Pickin.[195]

Edelman J also characterised non-delegable duties as duties arising from an ‘assumption of responsibility’, as distinguished from the common law duty of care.[196] His Honour held that the Diocese objectively undertook responsibility not merely to take reasonable care, but to ensure that reasonable care to avoid personal injury would be taken by priests for child parishioners invited onto Diocesan premises and in the care of the parish priest.[197] His Honour found that the objective circumstances from which any undertaking and assumption of responsibility by the Diocese that might be inferred include:

> (i) the Diocese delegating the control of the presbytery to a priest over whom the Diocese exercised extreme control, including over aspects of his appointment, duties, responsibilities, and priorities; (ii) the Diocese inviting the heightened trust placed by child parishioners in priests, with corresponding degrees of substantial control by priests over those children; (iii) the Diocese encouraging and expecting priests to engage with children in the community; and (iv) the Diocese permitting the presbytery to be used by a priest for that engagement. …[198]

Edelman J held that this assumption of responsibility did not depend upon a duty of care imposed by the common law,[199] and that ‘confusion is only heaped on confusion’ by the suggestion that an ordinary common law duty of care was a ‘hurdle’ to recognition of this assumed duty.’[200]

In dissent, Steward J accepted that the Diocese owed a non-delegable duty of care but did not find that it was breached as Fr Pickin acted outside the scope of any authorised church activities.[201] Gleeson J also dissented, finding that a non-delegable duty did not arise.[202]

It is suggested here that the analysis of the plurality most clearly reflects the classical theorisation of a non-delegable duty of care as a more stringent or ‘special’ type of duty of care owed in negligence.[203] This is in effect a sub-type of duty of care in negligence, rather than a different type of tortious duty. In *Leichhardt Municipal*

[195] Ibid 238 [300].
[196] Ibid 246 [345], 247 [349], 247 [351].
[197] Ibid 243 [334].
[198] Ibid 254 [385].
[199] Ibid 253 [375].
[200] Ibid.
[201] Ibid 265 [447] .
[202] Ibid 269 [470] (Gleeson J).
[203] *Kondis* (n 56) 686–7.

Council, Gleeson CJ described the non-delegable duty of care confirmed by Mason J in *Kondis* as 'a proposition of law concerning the nature or content of the duty of care, being the conclusion that 'a defendant who is sued in negligence owed a duty going beyond a duty to exercise reasonable care to avoid injury (or injury of a certain kind) to a plaintiff, and extending to a duty to ensure that reasonable care to avoid injury to the plaintiff was exercised'.[204] This is consistent with the plurality in *AA* describing the non-delegable duty as 'a "special" kind of common law duty of care in negligence'.

B *Negligence Extends to Intentionally Inflicted Harm*

All judges in the majority agreed that *Lepore* should be overturned and that the non-delegable duty, and ordinary duties in negligence, could be breached by intentionally inflicted harm.[205] This is a new direction for the Australian law of negligence. Edelman J described the common law as like Janus, the Roman god with two faces, for the purpose of distinguishing between common law duties that are imposed and those that are assumed.[206] The analogy is apt for another reason. Janus was said to have had one face looking to the past and another to the future; the god of transitions and new beginnings, presiding over the end of conflict. *AA* is a lens through which to look back at the development of negligence, ending the conflict as to its scope, and to look forward to how the law will develop.

Looking back, it is surprising that such a foundational question as to the scope of negligence to apply to intentionally inflicted harm has not been the subject of more direct judicial consideration. The plurality referred to *McInnes v Wardle* ('*McInnes*')[207] as authority for the proposition.[208] In *McInnes*, an independent contractor engaged to fumigate rabbits lit fires during a prohibited season that spread to a neighbour's property. The appellant was held liable under a non-delegable duty on the basis that burning was an ordinary and foreseeable incident of the authorised work[209] and the appellant knew or ought to have known that fire would be used and had failed to take adequate precautions against its spread.[210] However, the contractor did not *intend* to harm the plaintiff and

---

[204] *Leichhardt Municipal Council* (n 48) [6] (emphasis added), citing *Kondis* (n 56) 687.
[205] *AA* (n 9) 183 [18], 184 [19], 189 [37]–[38] (Gageler CJ, Jagot and Beech-Jones JJ); 235 [282], 237 [294]–[295] (Gordon J); [339] (Edelman J).
[206] Ibid 245 [342] (Edelman J).
[207] *McInnes v Wardle* (1931) 45 CLR 548 ('*McInnes*').
[208] *AA* (n 9) 183 [18].
[209] *McInnes* (n 207) 548–9 (Gavan Duffy CJ and Starke J); 552 (Dixon J); 555–6 (Evatt J); 558–9 (McTiernan J).
[210] See ibid 551–2 (Dixon J), emphasising that McInnes 'knew, or ought to have known' that fire would likely be used in the course of the fumigation works.

McTiernan J noted that he did not light the fires *'for amusement or maliciously*'.[211] This is another example of the distinction between an intentional *act* and an intention to *inflict harm*:[212] *McInnes* is a paradigm case of the former, not the latter. It is respectfully suggested that this case does not support the extension of the scope of negligence to intentionally inflicted harm.

As discussed in Part IV above, only *Wilson*[213] (which predated *Lepore*) turned on whether negligence can be breached by intentionally inflicted harm. The Full Court of the Supreme Court of Tasmania[214] upheld the trial judge's rejection of the defendant's limitation argument that as the defendant's sexual abuse involved intentional acts, the plaintiff could only sue in trespass and not in negligence, finding:

> There is no doubt that the defendant owed the plaintiff a duty of care to take reasonable steps not to expose her to the risk of reasonably foreseeable injury and there is equally no doubt that by treating her as he did the defendant was in breach of that duty.[215]

Gray[216] involved intentional wrongdoing and could have been a vehicle to raise these issues, but the course of the litigation took a different turn. There, the appellant was seriously injured when he was struck by a car driven at him deliberately by another. Whilst liability in negligence was not admitted by the wrongdoer's insurer in the District Court, 'there seems to have been no real dispute about that issue at trial'.[217] The trial judge refused exemplary damages for negligence, and this narrow question was the only issue that was appealed.

Notwithstanding the lack of clear authority supporting the proposition, the *ratio* of the majority in *AA* is clear: negligence, including non-delegable duties of care, now extends to intentionally inflicted harm. This will redirect and reframe scholarly debate and judicial discussion. For example, in 1989, Samuel Stoljar wrote an essay arguing against recognising absolute liability as a third type of tortious liability independent of 'liability in tort for intentional or deliberate harm *on the one hand*, and liability for harm caused by negligence *on the other*'.[218] Such statements today

---

[211] Ibid 553 (emphasis added), citing *Black v Christchurch Finance Co Ltd* [1894] AC 48, 51.
[212] See above Part IV(B)(2), discussing the distinction between an 'intentional act' in the sense of a voluntary act and an intention to inflict harm.
[213] *Wilson* (n 156).
[214] Cox CJ, Wright J, and Evans J.
[215] Wilson (n 156) 366 [5].
[216] *Gray* (n 72).
[217] Ibid 3 [2].
[218] Samuel Stoljar, 'Concerning Strict Liability' in PD Finn (ed), *Essays on Torts* (Law Book Company, 1989) 267, 267 (emphasis added).

would not represent the scope of negligence following *AA*. Of the spectrum of scholarly views considered in Part IV, ranging from Salmond's view[219] that 'negligence and wrongful intent are two alternative forms of *mens rea'* to Fleming's view that 'negligence is not a state of mind, but conduct that falls below the standard regarded as normal or desirable',[220] the latter has been confirmed.[221] This article began with a reference to *Burnie Port Authority*[222] in which the majority of the High Court spoke of the 'emergence of a coherent law of negligence to dominate the territory of tortious liability for unintentional injury to the person or property of another'.[223] Following *AA*, referring to negligence as 'unintentional injury' is no longer correct under Australian law.

C *The Interaction Between the Principles of Vicarious Liability and the Non-Delegable Duty*

Questions will no doubt emerge as to the implications of the decision in *AA*. One is the interaction of vicarious liability and the non-delegable duty. Prior to *AA*, the wrongdoing of an *employee* was not determined under principles of a non-delegable duty of care even in relationships recognised as giving rise to such a duty, such as in schools. In *Geyer v Downs*[224] the liability of the New South Wales government for the negligence of the employed school headmaster was resolved by way of vicarious liability, not a non-delegable duty of care. In *Prince Alfred College*[225] the High Court developed careful criteria for determining when intentionally inflicted harm by way of sexual abuse of a child would fall within the employee's 'course of employment'. However, *AA* has already been construed as applying the non-delegable duty to the wrongdoing of any 'delegate', *including employees*, without constraint by those criteria. For example, in *St Paul's College Ltd v Allan ('Allan')*[226] the New South Wales Court of Appeal considered the pleading of liability of a school for the sexual assault of a student by an employed teacher. Justice Kirk (with whom Price AJA agreed) noted that in *AA* the majority affirmed that 'the duty will be breached if either the duty-holder itself, or any person to whom it has delegated the duty, fails to take

---

[219] Salmond (n 110) 20.
[220] *Fleming's The Law of Torts* (n 81) 143 [6.20].
[221] Cited by the plurality in *AA* (n 9) at 189 [38].
[222] *Burnie Port Authority* (n 1).
[223] Ibid 544.
[224] See, eg, *Geyer v Downs* (1977) 138 CLR 91. The claim against the Government of New South Wales was in respect of its vicarious liability for the negligence of the school headmaster in his duty to the plaintiff as a pupil attending his school when she was struck on the head by another student playing softball.
[225] *Prince Alfred College* (n 11), requiring that the course of employment was the 'occasion' for the wrong, as opposed to a mere 'opportunity'.
[226] *St Paul's College Ltd v Allan* [2026] NSWCA 22 ('*Allan*').

reasonable care to avoid the relevant risk of harm (where lack of reasonable care encompasses intentional acts)'.[227] His Honour clearly interpreted the new scope of the non-delegable duty for the wrongdoing of 'delegates' as encompassing employees.[228] His Honour said that in pleading the breach, 'it suffices to allege that the claimant was sexually or physically abused by a person for whom the defendant was responsible (in the sense that the defendant could be characterised as having delegated its duty to that person), and this abuse occurred at a time and a place within the scope of the defendant's duty'.[229] Justice Kirk concluded that:

> These aspects of the reasoning in *AA* have profound consequences for the potential liability of school authorities with respect to abuse of students by those for whom the authorities are responsible.[230]

In effect, this appears to render the principles in *Prince Alfred College*[231] redundant in a school context.[232] This potential is illustrated by *BYM v Brisbane Catholic Education.*[233] The plaintiff alleged that as a child she was permitted to go to the toilet block alone and was raped there by a school groundskeeper who entered her stall.[234] The trial judge found that the assault did not occur, but held that even if it had, the groundsman's duties provided the 'opportunity' for the wrongdoing, not the 'occasion' for it.[235] If the approach in *Allan* were applied to these facts and the abuse was found to have occurred, the expanded non-delegable duty would appear to apply regardless of the groundsman's particular duties of employment.[236] In *AA*, the plurality noted that vicarious liability and the non-delegable duty have different 'pre-conditions'[237] but their overlap did not arise on the facts.

---

[227] Ibid [78].
[228] Ibid [83].
[229] Ibid.
[230] Ibid [83].
[231] *Prince Alfred College* (n 11) 151 [52], approved in *CCIG Investments v Schokman* (n 12) 181 [32]–[34].
[232] In *Allan* (n 226) Kirk JA noted at [84] the submission made by the respondent that although he 'has pleaded a further case of vicarious liability it may be unnecessary for the Court to determine that alternative case given the effect of the decision in *AA*'.
[233] *BYM v Brisbane Catholic Education* [2026] QCA 6.
[234] Ibid [2].
[235] Ibid [43]–[50]. The non-delegable duty claim was rejected applying *Lepore* and the appeal was dismissed two weeks before *AA* was delivered.
[236] *Allan* (n 226) [85]–[87] (Kirk JA). As noted by Gleeson J in *AA* (n 9) at 286 [545], in *Introvigne* 'Mason J explained that a "school authority owes to its pupil a duty to ensure that reasonable care is taken of them whilst they are on the school premises during hours when the school is open for attendance", being "a duty the performance of which cannot be delegated".'
[237] *AA* (n 9) 191 [48].

The non-delegable duty is clearly 'on the move' following *AA* and these issues will no doubt be watched closely by courts in other jurisdictions.

RELATIONSHIPS AKIN TO EMPLOYMENT AND VICARIOUS LIABILITY: A UNITED KINGDOM AND AUSTRALIA COMPARISON

ANTHONY GRAY*

Recently, the High Court of Australia denied a religious institution was vicariously liable for sexual abuse committed upon a child by a priest. In doing so, it set the Australian law on a different path than the United Kingdom, where such claims have been allowed. This article explains this difference of opinion in the context of strains placed on vicarious liability by changes in realities of work and broader societal standards. The law has been asked to evolve to accommodate these changes. It has to some extent in both jurisdictions, but the High Court refused to accept relationships akin to employment could found an action for vicarious liability. This article argues the United Kingdom approach is preferred; the High Court's reasoning for rejecting that approach is unconvincing, and worsens incoherence of principle in this troubled area.

I Introduction 46

II Strains on Vicarious Liability and Legal Responses 49

A *Beyond Control* *49*

B *Beyond Work* *50*

C *Contracting Out* *50*

D *Religious Institutions* *51*

* Professor of Law and Associate Dean — Research, Faculty of Law, Bond University, Australia.

III UK Application of Vicarious Liability to Relationships Akin to Employment 53

A *Summary of the UK Position* 56

B *Reflections on the UK Position* 56

IV The High Court Decision in *Bird v DP (A Pseudonym*) 61

A *Majority Reasoning* 62

B *Justice Gleeson (Dissenting on the Principle, Not the Result)* 64

V Reflections on the High Court Decision 66

A *Unconvincing Attempt to Distinguish Australian from UK Law* 66

B *Unconvincing Argument UK Position Affects the Employee/Contractor Distinction* 67

C *Unconvincing Claim Applying Vicarious Liability to Relationships Akin to Employment Would Require Overruling Past Cases* 68

D *Incoherence between Vicarious Liability Limbs* 71

E *Incoherence with the Policy Rationale of Vicarious Liability* 74

F *Interaction with Narrow View of Employment Relationships* 76

G *Whether Reform Is for Parliament Rather than Courts* 77

H *Recommendations of the Royal Commission* 79

I *Summary of Reflections* 79

VI Conclusion 81

I Introduction

Traditionally, the law of vicarious liability was cast in terms of two elements. The first considered whether the parties (the defendant and the wrongdoer) were in an employment relationship ('first element'); the second considered whether the wrong complained of occurred within the course of that relationship ('second element'). If the answer to both questions was yes, the employer would be liable to the injured third party for the wrong committed by the employee.[1] The archetypal opposite of an employee was an independent contractor. A person engaging someone classified as an independent contractor would *not* be vicariously liable for the contractor's actions. Traditionally, the law utilised concepts like "control" to determine whether parties were within an employment relationship; specifically, the right of the organisation said to be the employer to control what the person said to be the employee did, and how they did it, together with other factors.[2] Vicarious liability was easier to apply in previous times, where businesses were at least originally often household-focussed, with a relatively small number of employees, and where the nature of work was simplified.[3] The Court applied a scope of employment test to the second element.[4] Vicarious liability is strict liability. It is imposed upon an employer regardless of personal fault on their part. It imposes liability upon an employer because of the wrongdoing of another. In this way, it is unusual. It is generally exceptional to impose liability on one person or organisation for the wrongdoing of another person or organisation.[5] And strict liability has become somewhat unfashionable today, given the explosive growth in the fault-based tort of negligence.[6] Both of these factors may naturally restrict its scope of operation.

This group of principles would become strained. This strain was primarily caused by changes in the nature and structure of work,[7] and pressure to recognise vicarious liability in situations beyond traditional conceptions of employment.[8] Though

---

[1] *BXB v Trustees of the Barry Congregation of Jehovah's Witnesses* [2024] AC 567, 572 (Lord Burrows for the Court) ('*BXB*').
[2] *Zujis v Wirth Brothers Pty Ltd* (1955) 93 CLR 561, 571 (Dixon CJ, Williams, Webb and Taylor JJ) ('*Zujis*'); *Stevens v Brodribb Sawmilling Co Ltd* (1986) 160 CLR 16, 24 (Mason J, Brennan J agreeing at 47, Deane J agreeing at 49), 36 (Wilson and Dawson JJ) ('*Stevens*').
[3] Anthony Gray, *Vicarious Liability: Critique and Reform* (Hart Publishing, 2018) 24–5 ('*Vicarious Liability*').
[4] *Lloyd v Grace, Smith & Co* [1912] AC 716, 725 (Earl Loreburn), 736–7 (Lord Macnaghten, Lord Atkinson agreeing at 739), 741 (Lord Shaw) ('*Lloyd*'); *Prince Alfred College Inc v ADC* (2016) 258 CLR 134, 148–9 (French CJ, Kiefel, Bell, Keane and Nettle JJ) ('*Prince Alfred College*'); RFV Heuston and RA Buckley, *Salmond and Heuston on the Law of Torts* (Sweet and Maxwell, 19th ed, 1987) 521–5.
[5] *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254, 264–5 (Gleeson CJ, Gaudron J agreeing at 270, Hayne J agreeing at 288), 299 (Callinan J).
[6] Tony Weir, 'The Staggering March of Negligence' in Peter Cane and Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (Clarendon Press, 1998).
[7] Pauline Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (2021) 43 *Sydney Law Review* 83, 105 ('Entrepreneurship'); Douglas Brodie, 'Enterprise Liability: Justifying Vicarious Liability' (2007) 27(3) *Oxford Journal of Legal Studies* 493, 503.
[8] Justice Deane has referred to the distinction as 'increasingly amorphous': *Stevens* (n 2) 49. Paula Giliker criticises its formality given changes in the labour market: *Vicarious Liability in Tort: A*

principles relevant to both elements became strained, and important work has been done to identify this and suggest solutions,[9] I focus in this article particularly on strains relating to the *first* element of a vicarious liability claim, *not* the second element (except as briefly noted below in Part V(F), because on one view this is also relevant to discussion of the first element). Further, this article is *not* focused on alternative potential paths to liability, particularly the question of non-delegable duties.[10] There has been pressure for the law to respond to these strains by adaptation and refinement of relevant principles. The current question, whether relationships akin to employment can attract vicarious liability, should be seen in that context.

Part II of the article identifies these strains and summarises how the law has responded. This discussion can be applied both to the United Kingdom ('UK') and Australia, because in relation to these principles, those jurisdictions took a similar approach, unless specifically noted otherwise. The law of the former provided a basis for the law of the latter. Part III considers UK developments, particularly related to the first element of vicarious liability, and whether relationships akin to employment can found such an action. This is another way in which the law has evolved to deal with changes in society. The UK courts have considered this issue on several occasions, providing valuable potential guidance for Australian courts. It is considered worthwhile reflecting on these developments at some length in determining which path Australian law should follow. The recent Australian decision was the first occasion the matter was considered by the High Court. This makes it particularly useful to consider the law of a jurisdiction which has heard many more cases in this area, and has a similar culture and society to Australia. It will also identify specific instances in which the law of the UK and that of Australia differ in ways material to the current context. Part IV considers the recent High Court of

---

Comparative Perspective (Cambridge University Press, 2010) 60 ('*Vicarious Liability in Tort*'). Douglas Brodie suggests acceptance of enterprise risk theory might herald changes to the traditional distinction: (n 7) 506–8.

[9] Christine Beuermann, 'Conferred Authority Strict Liability and Institutional Child Sexual Abuse' (2015) 37 *Sydney Law Review* 113 ('Conferred Authority Strict Liability'); Christine Beuermann, *Reconceptualising Strict Liability for the Tort of Another* (Hart Publishing, 2019) ch 4 ('*Reconceptualising Strict Liability*'); Christine Beuermann, 'Up in Armes: The Need for a Map of Strict Liability for the Wrongdoing of Another in Tort' (2018) 25 *Torts Law Journal* 1 ('Up in Armes').

[10] Support for non-delegable duties in this context appears in Christine Beuermann, 'Vicarious Liability and Conferred Authority: Trustees of the Barry Congregation of Jehovah's Witnesses v BXB' (2024) 87(4) *Modern Law Review* 995 ('Vicarious Liability and Conferred Authority'); Christine Beuermann, 'Discerning the Form at the Second Stage of Vicarious Liability' (2022) 81(3) *Cambridge Law Journal* 495 ('Discerning the Form'); Beuermann, 'Conferred Authority Strict Liability' (n 9); Allison Silink, 'The Scope of the Non-Delegable Duty of Care in a Coherent Law of Negligence under Australian Law' (2026) 54(1) *University of Western Australia Law Review* (advance); *AA v Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle* (2026) 100 ALJR 170.

Australia decision in which the question whether vicarious liability could apply to relationships akin to employment was considered. Part V offers a detailed critique of the High Court's reasoning in this case, explaining why it was wrong to reject the notion relationships akin to employment could be the basis of vicarious liability. Rather, Australian law in this respect should have followed the path taken by the UK courts. Part VI concludes.

The article makes an original contribution to the literature. There had been no primary authority, and thus little discussion in the secondary literature, in terms of whether Australian law should accept that relationships akin to employment could attract vicarious liability. The article considers the recent High Court decision and its reasoning regarding the issue in depth, comparing it with the UK approach, and questioning the High Court's reasoning. It demonstrates that the High Court's claim that acceptance of the UK position would undermine the traditional distinction between employees and independent contractors is false, as is the claim that acceptance of that position would require overrule of past cases. These are not criticisms that currently appear in the literature. The article demonstrates that the decision creates incoherence between the two limbs of vicarious liability, and with the policy rationale for vicarious liability. Neither proposition currently appears in the literature. Most of the vicarious liability literature ignores developments occurring elsewhere in the law, specifically employment law. This article considers those developments. The High Court has recently taken a narrow, legalistic view of the nature of a working relationship.[11] It will be shown that this fact exacerbates the problems caused by the Court's rejection of the notion that relationships akin to employment can found a vicarious liability claim. But most of the vicarious liability literature does not accommodate changes in the law outside the law of tort. These interact with developments in vicarious liability, and must be part of the discussion.

II Strains on Vicarious Liability and Legal Responses

A *Beyond Control*

Firstly, as the world of work became more sophisticated and the nature of work more specialised, it became less likely an employer would, or would seek to, control in detail how an employee did work, or even in some cases what they did. Employees would frequently have greater expertise than their employer, making the suggestion the employer would seek to, or conceivably could, control these kinds of details

[11] *CFMMEU v Personnel Contracting* (2022) 275 CLR 165 ('*CFMMEU*').

sometimes incongruous.[12] As a result, there was a move to a "right to control" test, as opposed to actual control.[13] The law also responded by developing a (somewhat complementary) organisation test, considering the extent to which the worker was associated with the organisation, or the extent to which they conducted a business of their own.[14]

B *Beyond Work*

Courts decided vicarious liability should be applied in circumstances beyond employment, including what were described as 'agency' situations.[15] This strained the traditional first element of a vicarious liability action, since some of those to whom it applied were not employees.[16] There remains uncertainty as to the precise meaning of agency in this context.[17]

C *Contracting Out*

Thirdly, work would increasingly be contracted out to third parties, rather than done in-house.[18] In this context the law first considered the extent, if any, to which vicarious liability in the broad context of "work" might apply to those who were not employees according to traditional tests including control. This occurred in *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd and Others* ('*Viasystems*').[19] There the plaintiffs engaged the first defendant to install air conditioning. The first defendant sub-contracted the work to the second defendant. The second defendant then further sub-contracted the work to the third defendant, under the second defendant's supervision. A worker employed by the third

[12] *Various Claimants v Catholic Child Welfare Society and Others* [2013] 2 AC 1, 15–16 (Lord Phillips for the Court) ('*Catholic Child Welfare Society*').
[13] *Zujis* (n 2) 569–71 (Dixon CJ, Williams, Webb and Taylor JJ); *Stevens* (n 2) 29 (Mason J, Brennan J agreeing at 47, Deane J agreeing at 49), 36–7 (Wilson and Dawson JJ).
[14] *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210, 217 (Windeyer J); *CFMMEU* (n 11) 208–9 (Gageler and Gleeson JJ), 234 (Gordon J, adopting a similar test); Bomball, 'Entrepreneurship' (n 7). This is reflected in the definition of 'worker' in s 230(3)(b) of the *Employment Rights Act 1996* (UK), as distinguished from a person carrying on business.
[15] *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-Operative Assurance Company of Australia Ltd* (1931) 46 CLR 41, 49 (Dixon J) ('*Colonial Mutual Life*'); *Lloyd* (n 4) 731 (Lord Macnaghten, Lord Atkinson agreeing at 739); *Morgan v Launchbury* [1973] AC 127, 135 (Lord Wilberforce).
[16] Strain would also be placed on the second element of a vicarious liability action — considering whether wrongdoing occurred within the course of employment — in the face of deliberate or criminal wrongdoing by an employee. However, the focus of this article is mainly the first element.
[17] Giliker, *Vicarious Liability in Tort* (n 8) 132–3.
[18] Ewan McKendrick, 'Vicarious Liability and Independent Contractors: A Re-Examination' (1990) 53 *Modern Law Review* 770 referred to the growth of an 'atypical workforce' presenting challenges for tort law, straining concepts of employment in this context: at 770, 781.
[19] [2006] QB 510 ('*Viasystems*').

defendant did the work negligently, resulting in damage to the plaintiff's premises. The question was whether, and to what extent, the second and third defendants could be held liable for the damage.

The Court of Appeal found *both* could be held vicariously liable. For present purposes, the significance of this finding is the finding the *second* defendant could be held vicariously liable for the wrongdoing, although they were not the employer of the wrongdoer.[20] The reasoning is important. Only two judges heard the case, adopting different reasons. Lord Justice May held it was the entitlement of the second defendant to control the wrongdoer that permitted them to be held (jointly) vicariously liable.[21] For Rix LJ, the question was whether the wrongdoer was a sufficiently integral part of a defendant's business to make it just for the defendant to be vicariously liable for the wrongdoer's actions.[22] Importantly, the Court indicated preparedness to look beyond the strict contractual situation, in favour of an approach focussed on the substance of the parties' relevant relationships.[23] Though applying different tests, the judges found the second defendant could be vicariously liable for wrongdoing committed by someone who was not their employee. The precedent was set. It would subsequently be utilised in contexts far removed from this one, as we will see.

D *Religious Institutions*

Another challenge was to deal with vicarious liability in the context of religious institutions. Obviously, the concept of religious institutions is not new. However, recent years have seen a marked increase in the number of claims brought against religious institutions for alleged abuse committed by those apparently working for the institution. These workers would not meet the definition of an employee, as traditionally conceived.[24] At a societal level, there has been increased awareness of abuse. Relatedly, there are community demands alleged perpetrators be brought to justice, and the wrongfulness of and responsibility for the behaviour addressed.[25]

[20] On this question, Australian authority has differed in the past: *Oceanic Crest Shipping Company v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626, 641 (Gibbs CJ), 646 (Wilson J), 685 (Dawson J) ('*Oceanic Crest*'). This position was derived from English authority. Given changes in English law on this matter, the High Court's view today is unclear.

[21] *Viasystems* (n 19) 519 (May LJ).

[22] Ibid 537 (Rix LJ). Subsequent decisions favour this approach: *Catholic Child Welfare Society* (n 12) 18.

[23] *Viasystems* (n 19) 529–32 (Rix LJ), reflecting *Mersey Docks and Harbour Board v Coggins and Griffith (Liverpool) Ltd* [1947] AC 1, 15 (Lord Porter), 22 (Lort Uthwatt). Such an approach is supported in Mat Campbell, 'Vicarious Liability: Analysing Relationships Akin to Employment' (2023) 39(4) *Journal of Professional Negligence* 153.

[24] *Catholic Child Welfare Society* (n 12) 26.

[25] Ibid 25–6.

Religious institutions were typically in the best position to provide compensation, or be insured in respect of it. Thus, existing vicarious liability principles, crafted in a different context and prima facie applicable to the employer-employee relationship, were potentially strained if applied here.

As I will soon demonstrate, the English law of vicarious liability responded to these strains by adapting. It eventually accepted relationships akin to employment might be sufficient to meet the first element of a vicarious liability claim. In this regard, it followed the same path as the Canadian courts. That jurisdiction's Supreme Court had accepted this approach in finding a religious institution could be vicariously liable for sexual abuse committed by a priest, although the priest was not in a traditional employment relationship with the institution.[26] McLachlin CJ for the Court concluded:

> The relationship between the bishop and a priest in a diocese is not only spiritual, but temporal. The priest takes a vow of obedience to the bishop. The bishop exercises extensive control over the priest, including the power of assignment, the power to remove the priest from his post, and the power to discipline him. It is akin to an employment relationship … the priest is reasonably perceived as an agent of the diocesan enterprise. The relationship between the bishop and the priest is sufficiently close.[27]

This is important because a recent Australian High Court decision considered the same question for the first time. In sharp contrast to the English and Canadian precedent, and in contrast to earlier occasions where the High Court had adapted relevant principles of vicarious liability, this time it refused to adapt principle to accept vicarious liability could apply to relationships akin to employment.[28] This article will now discuss development of the concept of relationships akin to employment in English law and its application to extend the ambit of vicarious liability, before considering the Australian High Court's recent decision to refuse to do so.

---

[26] *John Doe v Bennett* [2004] 1 SCR 436.
[27] Ibid 449.
[28] *Bird v DP (a pseudonym)* (2024) 283 CLR 45 ('*Bird*'). Similar sentiments appear in *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis* (2007) 70 NSWLR 565, 577: 'the relationship between an assistant parish priest and the "members" (of the church) is too slender and diffuse to establish … vicarious liability in tort' (Mason P, Ipp JA agreeing at 604 [200], McColl JA agreeing at 604 [201]).

III UK Application of Vicarious Liability to Relationships Akin to Employment

The matter was considered in a different context to *Viasystems* in *E v English Province of Our Lady of Charity and Another* ('*E*').[29] There the question was whether the defendant trustees could be liable for abuse committed by a priest within the Diocese. The defendant argued it could not be held vicariously liable for the abuse, because the priest was not an employee. The plaintiff argued *Viasystems* had established vicarious liability could apply to relationships akin to employment. The priest was not appointed by written agreement, and there were no terms and conditions, other than those in canon law. The defendant did not pay the priest remuneration; he was paid from donations to the Diocese. The priest had general responsibility to run the parish as he saw fit, with little to no direction given, or control exercised, by the bishop. However, the bishop could remove a priest from a diocese.

The UK Court of Appeal found the priest was not an employee of the Diocese. Nor was he an independent contractor. It held vicarious liability could be applied to relationships akin to employment,[30] if fair and reasonable to do so. In deciding this, questions of control by the defendant over what the wrongdoer did, the extent to which the wrongdoer had freedom to organise and perform the work, whether the work done was central to the defendant's enterprise or organisation, and whether the wrongdoer was in business of their own account, were relevant.[31] The church could exercise control over the priest's activities, and the priest was appointed to further the defendant's aims and purposes.[32]

These matters were subsequently considered by the UK Supreme Court. In *Various Claimants v Catholic Child Welfare Society and Others* ('*Catholic Child Welfare Society*'),[33] the question again arose regarding the vicarious liability (if any) of a religious order for abuse committed by brother teachers within its educational institutions. The Supreme Court unanimously accepted vicarious liability could arise in relationships akin to employment.[34] This was because the rationale for imposing vicarious liability in employment relationships was equally applicable in such

---

[29] [2013] QB 722 ('*E*').
[30] Ibid 768 (Ward LJ).
[31] Ibid 768–9 (Ward LJ). Lord Justice Ward acknowledged assistance from Richard Kidner, 'Vicarious Liability: For Whom Should 'the Employer' Be Liable?' (1995) 15 *Legal Studies* 47, 63–4 in crafting this approach.
[32] *E* (n 29) 785 (Davis LJ).
[33] *Catholic Child Welfare Society* (n 12).
[34] Ibid 18.

relationships. That rationale was explained in terms of five factors ('the five-factor test'). These were: (a) the employer was more likely to have the means to compensate the victim and can be expected to be insured against the risk; (b) the wrongdoing was committed as a result of activity conducted by the wrongdoer on behalf of the defendant; (c) the wrongdoer's activity was likely part of the defendant's business or organisation; (d) the defendant created the risk of the wrongdoer's wrongdoing; and (e) the wrongdoer was at least partly under the defendant's control.[35] On the facts, the relationship between defendant and wrongdoer was akin to employment. The defendant directed the wrongdoer to engage in teaching activity. It was done in pursuit of the defendant's objects and purposes, and was required to be done within the defendant's rules and policies.[36]

The five-factor test was refined. In *Cox v Ministry of Justice* ('*Cox*'),[37] the question of vicarious liability arose in the context of the potential liability of the defendant for negligence committed by an inmate. The Supreme Court clarified the first factor was typically of marginal significance, if any. The last factor was not as important today as previously. The remaining factors overlapped. The Court reframed the test:

> [A] relationship other than one of employment is in principle capable of giving rise to vicarious liability where harm is wrongfully done by an individual who carries on activities as an integral part of the business activities carried on by a defendant and for its benefit (rather than his activities being entirely attributable to the conduct of a recognisably independent business of his own or of a third party), and where the commission of the wrongful act is a risk created by the defendant by assigning those activities to the individual in question.[38]

The Court explained this flexible approach responded to the dynamic nature of modern workplace situations, where often no written employment contract existed. It was consistent with a theory that organisations should be held liable for materialisation of risks inherently created in pursuit of their activities. However, it drew the line in situations where the wrongdoer was engaged in their own business. The decision also signalled cases involving the sexual abuse of children were not subject to exceptional rules.[39] The Court again noted it was taking a substantive, rather than formalistic, approach.[40]

---

[35] Ibid 15.
[36] Ibid 20.
[37] [2016] AC 660, 670 [24] (Lord Reed for the Court) ('*Cox*').
[38] Ibid.
[39] Ibid 672.
[40] Ibid 673. Subsequent cases emphasised the traditional distinction between employment and relationships akin to employment, on the one hand, and independent contractor situations on the

Subsequently, the Supreme Court held foster parents may be in a relationship with a statutory authority charged with care of minors sufficiently akin to employment to attract vicarious liability.[41] The *Armes v Nottinghamshire County Council* ('*Armes*') decision attracted criticism that the concept of relationships akin to employment had stretched 'too far'.[42] Such criticism is typically not of the essential idea relationships akin to employment should be equated with those of employment (for vicarious liability purposes), but rather application of that principle to foster parents.[43]

In *Various Claimants v Barclays Bank* ('*Barclays Bank*'), the Supreme Court held a bank could not be vicariously liable for abuse allegedly committed by a doctor. The doctor had been retained by the bank to perform preemployment health checks. He was paid a fee per report completed. The Court found he was operating a business of his own, rather than constituting an inherent part of the bank's business. Thus, the bank was not vicariously liable for his alleged wrongdoing. In so confirming, the Court re-committed to the distinction between an employee and an independent contractor.[44] On the five-factor test, the Court held it did not apply where clearly a person was an independent contractor; rather, it was useful in marginal cases.[45]

Finally, in *BXB v Trustees of the Barry Congregation of Jehovah's Witnesses*,[46] the Supreme Court found that, in determining whether a relationship was sufficiently akin to employment to attract vicarious liability, a court might consider factors like whether the work was remunerated in money or in kind, the extent to which the wrongdoer's actions were integral to the defendant's organisation, the extent to which the defendant had control over the wrongdoer's work, whether the work was

---

other: *Various Claimants v Barclays Bank Plc* [2020] AC 973, 986 (Baroness Hale for the Court) ('*Barclays Bank*').

[41] *Armes v Nottinghamshire County Council* [2018] AC 355 ('*Armes*'); *DJ v Barnsley Metropolitan Borough Council* [2025] 1 WLR 148 ('*Barnsley Metropolitan*').

[42] Paula Giliker, 'Analysing Institutional Liability for Child Sexual Abuse in England and Wales and Australia: Vicarious Liability, Non-Delegable Duties and Statutory Intervention' (2018) 77(3) *Cambridge Law Journal* 506, 508 ('Analysing Institutional Liability').

[43] Aaron Yoong and Sui Yi Siong, 'Back to Basics? Recent Developments in Vicarious Liability in the UK Supreme Court' (2021) 28 *Tort Law Review* 18, 29; Beuermann, 'Up in Armes' (n 9); Giliker, 'Analysing Institutional Liability' (n 42) 534.

[44] *Barclays Bank* (n 40) 985–6. See also *BXB* (n 1) 587. Others have questioned it: Allison Silink and Desmond Ryan, 'Vicarious Liability for Independent Contractors' (2018) 77 *Cambridge Law Journal* 458, 460: '[t]here is no bright-line distinction between the status of an employer [sic] and that of an independent contractor … '. Others have argued it should be discarded: Phillip Morgan, 'Recasting Vicarious Liability' (2012) 71(3) *Cambridge Law Journal* 615, 616; Giliker, 'Analysing Institutional Liability' (n 42) 516–17.

[45] *Barclays Bank* (n 40) 987. A similar view was expressed in *BXB* (n 1), in which the Court referred to the five-factor test as a useful 'final check' in marginal cases: at 588.

[46] *BXB* (n 1).

being conducted for the defendant's benefit and in furtherance of its aims, arrangements regarding appointment and termination, and whether there was a hierarchy of seniority into which the work fitted.[47]

A *Summary of the UK Position*

The Supreme Court has accepted vicarious liability can apply to relationships akin to employment. This is because the rationale for imposition of vicarious liability upon employees may be applicable in other relationships, including those with features similar to employment, but not traditionally regarded as employment. It has been determined it would be arbitrary to rely on technical distinctions in such cases to deny vicarious liability for wrongdoing. This embraces changes in employment practices, accepting the law must evolve rather than insist on traditional rules that often no longer reflect workplace realities. It accepts organisations sometimes "dress up" arrangements as independent-contractor relationships, contrary to reality.[48] They may do this for numerous reasons, including to avoid vicarious liability. The law can respond by favouring substance over form.[49] Changes in the UK law also reflect changes in community standards, including greater awareness of child sexual abuse, general community abhorrence of it, and the felt need to hold institutions accountable for abuse committed by those closely associated with them.

This does not obliterate the traditional distinction between employees and independent contractors, and the relevant rationales may only be useful in borderline cases where a worker is not clearly an employee or an independent contractor. It remains important to consider how integrated the worker is to the relevant organisation, whether the worker is engaged in an enterprise of their own, to what extent they are acting in furtherance of the organisation's purposes and objectives, the extent to which the organisation controlled the worker's activities, and appointment and termination arrangements.

B *Reflections on the UK Position*

The UK position has much to commend it. Particularly where there is a lack of precedent, analogies with equivalent situations can be useful. Obviously, this is how the common law has developed over time. The High Court specifically endorsed this

[47] Ibid 587. The parties' motivations are irrelevant: *Barnsley Metropolitan* (n 41) 168 (Lady Carr CJ, Bean and Baker LLJ).
[48] Campbell, 'Analysing Relationships' (n 23) 154–5.
[49] Donal Nolan, 'Reining in Vicarious Liability' (2020) 49 *Industrial Law Journal* 609, 617; ibid 155.

approach in an earlier vicarious liability case.[50] This is consistent with a position that, just as employment can ground vicarious liability, so too can relationships akin to employment.

Vicarious liability has a policy basis. Although the precise policies it is designed to further are contested, it is considered coherent that if the relevant agreed policies underlying vicarious liability are applicable to situations outside of what is traditionally regarded as employment, they should be applied in this broader context. Relatedly, where we have no clear answer to a particular legal issue, like whether relationships akin to employment can ground vicarious liability (which was for a time undetermined), we should be guided by principles, rather than deciding in an ad hoc fashion. A similar approach has been articulated by the Supreme Court of Canada.[51]

Further, the alternative is worth considering. If the law were to take a narrow position and refuse to accept relationships akin to employment could ground vicarious liability, while accepting employment relationships do, it would encourage parties to engage in opportunistic behaviour to craft relationships to deny vicarious liability.[52] These can be highly formalistic and not reflective of substance. In principle, one should generally take a substantive view of situations and relationships in applying the law, not an unrealistic, formalistic approach.[53] The latter would invite undesirable arbitrariness in legal outcome.

Law must respond to changes in the society it purports to regulate. This applies both to evolving employment situations, and changes in attitude regarding sexual abuse in our society. It is dangerous for the law to be out of touch with society.[54] The world of work has changed substantially from when original rules regarding vicarious liability were crafted. The law has largely proven adaptable to respond to these and broader societal changes around accountability of various kinds of organisations, as

[50] *Prince Alfred College* (n 4) 150 (French CJ, Kiefel, Bell, Keane and Nettle JJ).
[51] *Bazley v Curry* [1999] 2 SCR 534, where McLachlin CJ (for the Court) explained that increasingly, courts confronted with vicarious liability disputes where precedent suggested no clear answer were examining the policy of vicarious liability and whether finding liability in a novel case would further it: at 545 [14]–[15](‘*Bazley*’).
[52] This can also occur where employers claim a worker is an independent contractor, whereas in fact they operate more as an employee: *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 (‘*Hollis*’).
[53] Anthony Gray, ‘Relational Contract Theory, the Relevance of Actual Performance in Contract Interpretation and Its Application to Employment Contracts in the United Kingdom and Australia’ (2023) 52(2–3) *Common Law World Review* 61.
[54] Patrick Devlin, ‘Commercial Law and Commercial Practice’ (1951) 14 *Modern Law Review* 249; Michael McHugh, ‘The Law-Making Function of the Judicial Process: Part I’ (1988) 62 *Australian Law Journal* 15 (‘Part I’); Michael McHugh, ‘The Law-Making Function of the Judicial Process: Part II’ (1988) 62 *Australian Law Journal* 116 (‘Part II’).

earlier explained. The way UK law has adapted vicarious liability to accommodate these changes is positive. This does not mean every decision or all of the reasoning is entirely defensible. It is the general acceptance relationships akin to employment can meet the first element of a vicarious liability action that is applauded here.

As noted above, there has been both criticism[55] and support[56] of the akin to employment test. There remains doubt as to the application of the test to the so-called "gig economy".[57] One commentator states it is evidence vicarious liability has gone 'too far', lacking theoretical underpinning and involving definitional uncertainty.[58] This article does not defend *Armes*, used by some as evidence of the law having gone too far. There is valid criticism of uncertainty created by the concept of akin to employment, in that reasonable minds might differ on whether a relationship is sufficiently akin to employment to justify vicarious liability. However, uncertainty in this area appears inevitable, as Lord Reed noted in *Cox*.[59] It is also sometimes difficult to determine whether a worker is an employee or an independent contractor, yet that is a venerable legal distinction.

This article adopts the factors identified by the UK courts in determining whether a relationship is akin to employment. As discussed above in the context of *E* and *Cox*, these include the extent to which the wrongdoer is integrated into the business of the organisation sought to be made liable for their activity or whether they are acting as a separate entity, the extent to which the wrongdoer is acting independently or under the control (notional or real) of the organisation, the extent to which the wrongdoer pursues that organisation's purposes, payment arrangements (if any), etc. As elaborated shortly, the focus should be on the practical reality of the arrangements, not their formal structure, and whether the practical reality is sufficiently akin to an employment relationship, as we conceive of it today. Notions of enterprise risk can provide a theoretical underpinning for an akin to employment

---

[55] David Tan, 'A Sufficiently Close Relationship Akin to Employment' (2013) 129 *Law Quarterly Review* 30, 34.

[56] Philip Morgan, 'Vicarious Liability on the Move' (2013) 129 *Law Quarterly Review* 139, 143; John Bell, 'The Basis of Vicarious Liability' (2013) 72 *Cambridge Law Journal* 17, 19; Andrew Bell, 'Vicarious Liability: Quasi-Employment and Close Connection' (2016) 32 *Professional Negligence* 153, referring to *Cox* (n 37) (also involving the concept of relationship akin to employment) as an 'admirably explicit and pragmatic response to a world where employment relationships are increasingly complex and variable': at 155.

[57] Devon Airey, ''The Gig Is Up': The Politics and Policy of Compensating Harms Caused by Gig Workers' in Jodi Gardner et al (eds), *Politics, Policy and Private Law Volume I: Tort, Property and Equity* (Hart Publishing, 2023) 25.

[58] Giliker, 'Analysing Institutional Liability' (n 42) 506, 508, 532. James Plunkett observed akin to employment was being applied broadly: 'Taking Stock of Vicarious Liability' (2016) 132 *Law Quarterly Review* 556, 560 ('Taking Stock').

[59] *Cox* (n 37) 672.

test. A person in this situation may be said to be part of the organisation of the "employer", not running their own business. As noted above, the UK courts have emphasised the approach does not abandon the traditional distinction between employees and independent contractors.

The article will soon discuss the very different position recently taken on this issue by the High Court of Australia. Of course, the article does not assume Australian law should always mirror that of the UK. Indeed, there are important differences between UK law and Australian law material to the current context that ought to be borne in mind. Firstly, in determining whether an employment relationship exists, a majority of the Australian High Court applies a highly formalistic approach.[60] It is largely a matter of contract interpretation, with very limited exceptions concerning variation by subsequent conduct, shams, etc. A majority of the Court generally refused to consider how the contract worked in practice in determining the legal nature of the parties' relationship. This approach has been criticised.[61] It presents a marked contrast with the UK position, which has demonstrated much greater willingness to consider the true nature of the parties' relationship, including the realities of the parties' engagement.[62] Simply, while UK law here favours substance over form,[63] the Australian (common) law does the reverse.[64]

Given employment contacts are typically written by the party in the stronger position, usually the engaging firm, it is not surprising a focus on contract formalities will generally make it less likely a worker will be deemed an employee. This is for a range of reasons, including the kind of (employee-protective) regulation to which an

---

[60] *CFMMEU* (n 14) 186–7 (Kiefel CJ, Keane and Edelman JJ), 229 (Gordon J, Steward J agreeing at 243 [203]); *ZG Operations Australia Pty Ltd v Jamsek* (2022) 275 CLR 254, 261 (Kiefel CJ, Keane and Edelman JJ), 286 (Gordon and Steward JJ) ('*ZG Operations*'). Cf *CFMMEU* (n 14) 214–16 (Gageler and Gleeson JJ);
ZG Operations (n 60) 280–5 (Gageler and Gleeson JJ). See also Andrew Stewart, Mark Irving and Pauline Bomball, 'Shifting and Ignoring the Balance of Power: The High Court's New Rules for Determining Employment Status' (2023) 46(4) *University of New South Wales Law Journal* 1214.

[61] Stewart, Irving and Bomball (n 60) 1245–8; Carolyn Sutherland, 'Judging the Employment Status of Workers: An Analysis of Commonsense Reasoning' (2022) 46(1) *Melbourne University Law Review* 281, 310.

[62] *Autoclenz Ltd v Belcher* [2011] 4 All ER 745, 754–7 [26]–[35] (Lord Clarke for the Court) ('*Autoclenz*'); *Uber BV v Aslam* [2021] ICR 657, 679–81 (Lord Leggatt for the Court).

[63] Pauline Bomball, 'Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work' (2019) 42(2) *Melbourne University Law Review* 370, 387 ('Statutory Norms').

[64] The *Fair Work Act 2009* (Cth) s 15AA(1) requires a court to consider the substance, reality and true nature of a relationship in determining whether it meets the definition of an employment relationship. It reasserts the multi-factorial test in determining whether an employment relationship exists: at s 15AA(2). Of course, there is no guarantee this will translate to the vicarious liability context.

employment relationship is subject, and the consequences for vicarious liability. The article will return below to the consequences for the current discussion, in terms of this material difference in approach.

Another way in which UK law has evolved is to recognise employment relationships as relational in nature,[65] in some respects different from typical contracting.[66] This again tends toward a flexible view of the parties' relationship, emphasising its actualities, and including preparedness to imply terms into the relationship.[67] In contrast, the High Court of Australia has maintained its view of employment relationships primarily through the prism of contract law and rules such as the parol evidence rule, declining to imply terms accepted in the UK.[68] Principles governing interpretation of a contract of employment in Australia are those governing the interpretation of a contract generally.[69] Unlike the High Court,[70] English courts apply a multi-factorial test in determining whether an employment relationship exists.[71]

The third way in which UK law has evolved has been to accept the close connection test for the *second* element of vicarious liability. For many years, UK courts applied the Salmond test to vicarious liability. In employment contexts, employers were liable for: (a) wrongful acts committed by the employee; and (b) a wrongful and unauthorised mode of doing an act authorised by the employer. Salmond indicated the employer was also liable for unauthorised acts, if so connected with authorised acts that they ought to be regarded as modes, albeit improper modes, of doing them.[72] Strain was placed on this formulation when applied to intentional wrongdoing by an employee.[73] It was difficult to argue criminal behaviour of an employee was a wrongful and unauthorised mode of doing that which they were employed to do.[74] The courts applied these tests to intentional criminal acts by

[65] *Johnson v Unisys Ltd* [2003] 1 AC 518, 539 (Lord Hoffmann).
[66] *Autoclenz* (n 62) 757 [34]; Pauline Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (2020) 44(2) *Melbourne University Law Review* 502, 532–3 ('Contractual Autonomy').
[67] *Malik v Bank of Credit & Commerce International SA (in liq)* [1998] AC 20.
[68] *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169.
[69] *CFMMEU* (n 14) 193 (Kiefel CJ, Keane and Edelman JJ), 212 (Gageler and Gleeson JJ), 229–31 (Gordon J, Steward J agreeing at 243 [203]).
[70] Ibid 183 (Kiefel CJ, Keane and Edelman JJ), 238 (Gordon J, Steward J agreeing at 243 [203]). Cf the joint reasons of Gageler and Gleeson JJ: at 211–12. Earlier Australian cases had embraced a multi-factorial approach: *Hollis* (n 52) 33 (Gleeson CJ, Gaudron, Gummow, Kirby, and Hayne JJ).
[71] *Professional Game Match Officials v Revenue and Customs Commissioners* [2024] ICR 1480.
[72] John Salmond, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries* (Steven & Haynes, 1st ed, 1907) 83.
[73] *Lister v Hesley Hall Ltd* [2002] 1 AC 215, 226 (Lord Steyn, Lord Hutton agreeing at 238 [52]), 232 (Lord Clyde), 244 (Lord Millett) ('*Lister*'); *BXB* (n 1) 573.
[74] Christine Beuermann, 'Discerning the Form' (n 10) 513.

employees, and sometimes found employers vicariously liable for them.[75] Particular difficulties were noted in applying the test (or in finding the test was met)[76] in the context of child sexual abuse within an institutional setting, because that type of activity is anathema to the purposes of such institutions and beyond the scope of employment. This eventually led the House of Lords to adopt a close connection test, derived from Canada.[77] The question became whether there was a sufficiently close connection between the wrongdoing and the employment to make it fair and just to impose vicarious liability.[78] Only a minority of the High Court of Australia has accepted this test,[79] and a majority has favoured a different test.[80] Although this development relates primarily to the *second* element of vicarious liability identified above, not the *first* element, and the main focus of this article is on the first element, there is an argument the two elements are (or ought to be) considered together, so this close connection test *might* impact decisions regarding the first element. This argument is elaborated upon in Part IV.

IV THE HIGH COURT DECISION IN *BIRD V DP (A PSEUDONYM)*

A priest (Father Coffey) sexually assaulted the respondent (DP) in the latter's family home. DP was aged 5 at the relevant time. Coffey had been engaged as an assistant parish priest. He was not engaged by the relevant diocese as either an employee or an independent contractor. However, he was engaged to pursue the church's work in the Diocese. The relevant bishop exercised significant control over Coffey, expressed to be 'at least as great as, if not greater than' that relating to a typical employee.[81]

[75] *Lloyd* (n 4); *Morris v C W Martin and Sons Ltd* [1966] 1 QB 716. Cf *Deatons Pty Ltd v Flew* (1949) 79 CLR 370 ('*Deatons*').
[76] *Trotman v North Yorkshire County Council* [1999] LGR 584, 591 (Butler-Sloss LJ, Thorpe LJ agreeing at 592).
[77] *Bazley* (n 51); *Jacobi v Griffiths* [1999] 2 SCR 570. Beuermann says the close connection test and Salmond approach are 'not dissimilar': 'Vicarious Liability and Conferred Authority' (n 10) 1004.
[78] *Lister* (n 73) 230 (Lord Steyn, Lord Hutton agreeing at 238 [52]), 232 (Lord Clyde), 245 (Lord Millett); *BXB* (n 1) 587–8. The close connection test has been criticised: Beuermann, 'Discerning the Form' (n 10) 520–2.
[79] *New South Wales v Lepore* (2003) 212 CLR 511, 543–4 (Gleeson CJ), 604 (Kirby J) ('*Lepore*'). Gummow and Hayne JJ conceded it was relevant to consider the closeness of connection, but considered it was really another way of stating the course of employment test: at 586. In *Prince Alfred College* (n 4), all members of the Court rejected the close connection test, although some of its factors might be relevant to the test the Court favoured: at 149–50 (French CJ, Kiefel, Bell, Keane and Nettle JJ), 172 (Gageler and Gordon JJ).
[80] This is whether the employment provided not merely the opportunity, but the occasion, for the wrongdoing to occur: *Prince Alfred College* (n 4) 159–60 (French CJ, Kiefel, Bell, Keane and Nettle JJ, Gageler and Gordon JJ agreeing at 172). See Paula Giliker, 'Vicarious Liability in the UK Supreme Court and High Court of Australia' (2024) 44 *Legal Studies* 191, 198.
[81] *Bird* (n 28) 53 (Gageler CJ, Gordon, Edelman, Steward and Beech-Jones JJ), quoting the Court of Appeal: *Bird v DP (a pseudonym)* (2023) 69 VR 408, 439–40 [125] ('*Bird* (VSCA)').

The Court accepted Coffey was not an employee of the Diocese.[82] According to the traditional approach, this precluded the possibility the church could be vicariously liable for his actions. The Court was asked to extend the first element of vicarious liability to include relationships akin to employment, as had occurred in the UK. It was argued that, on the facts, the relationship between the Diocese and Coffey was akin to employment. The Diocese through the bishop could potentially exercise, and did exercise, substantial control over Coffey's work. It was responsible for his appointment, including where he worked and for how long, what he did, and his benefits. It provided him with clerical clothing. Coffey was regarded as representing the church in his community activities, furthering the objectives of the church. These points convinced both the trial judge and the Court of Appeal the relationship was akin to employment, and that this was (or should be) sufficient to meet the first element to ground vicarious liability.[83] However, a majority of the High Court disagreed. It was not the law in Australia that relationships akin to employment could attract vicarious liability.[84] To be clear, the appeal was allowed unanimously, but there were important differences in reasoning. The view of Justice Gleeson substantially diverged from that of her Honour's colleagues.

A *Majority Reasoning*

The joint reasons found it had always been necessary that an employment relationship be found to exist between the defendant and the alleged wrongdoer for vicarious liability to apply.[85] They noted developments in English law that relationships akin to employment could be sufficient to meet the first element of vicarious liability. The joint reasons characterised English law as having a 'radically different set of starting principles' regarding vicarious liability compared with Australia.[86] They found Australian law had not accepted some of these principles. One was that vicarious liability could potentially apply in relation to criminal activity, including assault. The joint reasons (incorrectly) suggested this principle was 'in tension with the requirement that the acts must be committed in the course of employment'.[87]

---

[82] *Bird* (n 28) 58 (Gageler CJ, Gordon, Edelman, Steward and Beech-Jones JJ).
[83] *DP (a pseudonym) v Bird* [2021] VSC 850; *Bird* (VSCA) (n 81).
[84] *Bird* (n 28) 59 [5] (Gageler CJ, Gordon, Edelman, Steward and Beech-Jones JJ).
[85] Ibid 74.
[86] Ibid 77.
[87] Ibid. The High Court in *Prince Alfred College* (n 4) accepted vicarious liability could apply to sexual assault (clearly a criminal activity). The (main) joint reasons held 'the fact that a wrongful act is a criminal offence does not preclude the possibility of vicarious liability': at 159 (French CJ, Kiefel, Bell, Keane and Nettle JJ, Gageler and Gordon JJ agreeing at 172). Respectfully, Jagot J correctly held in *Bird*

The UK Supreme Court had referred to the need to fairly, justly and reasonably allocate liability in seeking to justify extension of vicarious liability to relationships akin to employment. The joint reasons in *Bird v DP (a pseudonym)* ('*Bird*') correctly noted this concept had not been applied in Australian vicarious liability cases. The phrase 'fair, just and reasonable' in the context of determining whether or not tortious liability exists has been more broadly applied to duty of care questions in the UK.[88] Australian law rejected this approach to establishing a duty of care,[89] and to vicarious liability.[90] As a result, one can justify this distinction between English and Australian tort law principles at the broader level of the law of tort, of which vicarious liability is part. Of course, this difference does not necessarily mean relationships akin to employment should never be regarded in Australian law as sufficient to meet the first element of vicarious liability.

It was noted the UK Supreme Court had applied five factors relevant to the question whether it was 'fair, just and reasonable' to impose vicarious liability regarding relationships akin to employment.[91] The joint reasons noted concern the five-factor test might cause uncertainty, and that this had been observed in subsequent case law. These decisions had been the subject of trenchant criticism.[92] As explained above, these cases had applied vicarious liability to make a prison authority legally liable for the conduct of a prisoner who was under their control. It had been applied to make a local authority vicariously liable for abuse committed by foster carers to whom the authority had delegated responsibility. The joint reasons reflected concern that, if Australian law applied the five factors identified in *Catholic Child Welfare Society* to determine whether a relationship was sufficiently akin to employment to justify vicarious liability, the traditional distinction between

(n 28) that 'criminal and intentional tortious conduct may nevertheless be within the course of an employee's employment': at 135, citing *Prince Alfred College* (n 4) 159–60 [80].

[88] *Caparo Industries Plc v Dickman* [1990] 2 AC 605, 618 (Lord Bridge) ('*Caparo*'). Lords Oliver and Jauncey, writing separately, each phrased this as whether imposing liability is 'just and reasonable': at 633 (Lord Oliver), 655 (Lord Jauncey). Lords Roskill and Ackner agreed with all judgments: at 627 (Lord Roskill), 629 (Lord Ackner). Subsequently, *Robinson v Chief Constable of South Yorkshire Police* [2018] AC 736 narrowed application of the *Caparo* (n 88) three-stage test, including the 'fair, just and reasonable' requirement: at 745–7.

[89] *Sullivan v Moody* (2001) 207 CLR 562, 579 (The Court).

[90] *Prince Alfred College* (n 4) 150 (French CJ, Kiefel, Bell, Keane and Nettle JJ).

[91] These five factors were: (a) the employer was more likely to have resources to compensate the victim and was expected to insure against such risk; (b) the tort was likely committed by the wrongdoer as a result of activity on the employer's behalf; (c) the activity was likely part of the employer's business activity; (d) the employer likely increased the risk of the tort being committed by engaging the wrongdoer; and (e) the wrongdoer was under the employer's control: *Catholic Child Welfare Society* (n 12) 15 [35].

[92] *Bird* (n 28) 79 [60], referring to *Cox* (n 37); *Armes* (n 41).

employees and independent contractors would be impacted.[93] This directly contradicts the insistence by all members of the UK Supreme Court in *Barclays Bank* that there was

> nothing … in the … Supreme Court cases discussed above to suggest that the classic distinction between employment and relationships akin or analogous to employment, on the one hand, and the relationship with an independent contractor, on the other hand, has been eroded. Two cases decided by common law courts since [*Catholic Child Welfare Society*] and *Cox* have reached the same conclusion.[94]

The joint reasons suggested reform of vicarious liability to extend the first requirement to include relationships akin to employment was for the legislature, not the courts.[95] They considered that to extend the first element in the way suggested would require overrule of earlier Australian High Court decisions,[96] and parts of other decisions.[97]

Justice Jagot agreed, holding it was essential to maintain the clear distinction between the first and second elements.[98] Her Honour rejected the Court of Appeal's position that the situation of someone such as Coffey was unique, in that they could not be classified as either an employee or an independent contractor.[99]

B *Justice Gleeson (Dissenting on the Principle, Not the Result)*

Justice Gleeson disagreed with the joint reasons on whether relationships akin to employment could attract vicarious liability. To be clear, her Honour did not dissent on the ultimate question of whether vicarious liability applied on these facts. She held that such relationships could give rise to such liability, as one legislature in Australia has recognised.[100] On the facts, she agreed with the conclusion of the Court

---

[93] *Bird* (n 28) 81–2 [66].
[94] *Barclays Bank* (n 40) 986 [24].
[95] *Bird* (n 28) 82 [67] (Gageler CJ, Gordon, Edelman, Steward and Beech-Jones JJ), citing, amongst other cases, *Breen v Williams* (1996) 186 CLR 71, 115 ('*Breen*'). Their Honours noted recent legislative reform in this area had not made this extension: at 83–4 [69]. See also the reasons of Jagot J: at 141–3.
[96] *Hollis* (n 52); *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 ('*Sweeney*'). See *Bird* (n 28) 74 [49].
[97] *Scott v Davis* (2000) 204 CLR 333 ('*Scott*'); *Lepore* (n 79). See *Bird* (n 28) 74 [49].
[98] *Bird* (n 28) 134 [230].
[99] Ibid 133 [226].
[100] *Civil Liability Act 2002* (NSW) s 6G ('*CLA* NSW'). Cf *Civil Liability Act 1936* (SA) ('*CLA* SA') (vicarious liability only applies to employees). The *Civil Liability Act 2002* (WA) s 15C ('*CLA* WA') provides judgment against an individual in the current context can be satisfied against assets of the relevant institution, but does not refer to vicarious liability. Some jurisdictions provide that a religious institution can be liable for actions of an individual 'associated' with it: *Wrongs Act 1958* (Vic) s 91; *Civil Liability Act 2003* (Qld) s 33D ('*CLA* Qld'); *Civil Liability Act 2002* (Tas) s 49H ('*CLA* Tas'); *Civil*

in deciding the defendant should not be held vicariously liable for Coffey's behaviour. However, for Gleeson J this was because the *second* element of vicarious liability, whether the wrongdoer's behaviour was within the scope of employment, had not been met.[101] Justice Gleeson held the factual context in the case could potentially meet the *first* element.

Her Honour claimed the majority position was a 'missed opportunity' to develop Australian common law in response to an evolution in social conditions.[102] Her Honour referred particularly to increased recognition of the rights of children. Justice Gleeson noted a general reduction in deference to religious or charitable organisations, and a greater preparedness to hold such organisations accountable for abuse committed within their field of activity.[103]

Justice Gleeson supported the traditional distinction between employment, on the one hand, and independent contracting, on the other. However, she acknowledged there were relationships akin to employment, to which vicarious liability should (or potentially could) attach. This was justified on the basis that, as a matter of substance, the relationships had the same essential qualities as employment relationships. Justice Gleeson claimed that, if vicarious liability were not extended to such relationships, anomalies would arise.[104]

Her Honour disagreed with the majority that there was inadequate theoretical foundation for such extension. She found vicarious liability was based on notions of enterprise risk, as accepted in the UK and Canada. She held this was also the philosophical foundation for vicarious liability in Australia.[105] The theory is that businesses should be held legally responsible for the materialisation of risks considered inherently part of their activities. These are risks considered characteristic of those activities.[106] Justice Gleeson claimed it was consistent with this theory that vicarious liability apply to situations akin to employment.[107] On the

Law (Wrongs) Act 2002 (ACT) s 114BBD. However, this is not vicarious liability; it is simply the imposition of a duty of care. An institution might not have breached its duty, and thus would not be liable for abuse committed.

[101] *Bird* (n 28) 88 [80].

[102] Ibid 87 [79].

[103] Ibid 87 [78].

[104] Ibid 89.

[105] Ibid 92. This is supported in *Hollis* (n 52) 40–1 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

[106] *Hollis* (n 52) 40 (Gleeson CJ, Gummow, Kirby and Hayne JJ). There is doubt as to whether enterprise risk theory continues to underpin vicarious liability in Australia. It is not mentioned in *Prince Alfred College* (n 4) or *CCIG Investments Pty Ltd v Schokman* (2023) 278 CLR 165, aside from a single mention in the context of explaining the approach of other jurisdictions: at 175 [13] (Kiefel CJ, Gageler, Gordon and Jagot JJ) ('*CCIG Investments*').

[107] *Bird* (n 28) 93.

facts before the Court, there was no argument Coffey was an independent contractor. Extension of vicarious liability to him did not undermine the traditional division between employees and independent contractors.[108] Nor was such an extension inconsistent with past High Court authority, according to Gleeson J.[109] Her Honour cited earlier Australian cases where vicarious liability was held to exist, though no employment relationship existed between the parties.[110]

Her Honour concluded the church and Coffey were in a relationship akin to employment, in line with the reasoning of the lower courts. The church represented to the community that Coffey acted for them. His activities were pivotal to the church's mission and function. He was accountable to the bishop for his activities and effectively subservient to him. He had no other vocation or source of income, and was dependent on the church. The Diocese gave him accommodation. He wore clerical clothing supplied by the Diocese. This had the effect of visibly connecting him to the church in the eyes of the community.[111]

V REFLECTIONS ON THE HIGH COURT DECISION

A *Unconvincing Attempt to Distinguish Australian from UK Law*

As indicated above, the joint reasons claimed English law had a 'radically different set of starting principles' regarding vicarious liability compared with Australia.[112] They stated Australian law had never accepted some of them. One such principle was that it was possible for vicarious liability to apply to criminal acts, including criminal assault. The joint reasons claimed this principle was 'in tension with the requirement that the acts must be committed in the course of employment'.[113] Respectfully, this is wrong. In *Prince Alfred College Incorporated v ADC* ('*Prince Alfred College*'),[114] all members of the High Court clearly contemplated application of vicarious liability to criminal conduct. The main joint reasons (with which the other joint reasons relevantly agreed) were emphatic: 'the fact that a wrongful act is a

---

[108] Ibid.
[109] Ibid 94 [101]. Justice Gleeson quoted Gaudron J in *Lepore* (n 79) 561 [130] in support of this proposition: at 95 [102].
[110] *Scott* (n 97); *Soblusky v Egan* (1960) 103 CLR 215, cited in *Bird* (n 28) 95. See also *CFMMEU* (n 14) 200 (Kiefel CJ, Keane and Edelman JJ); *Colonial Mutual Life* (n 15), cited in *Bird* (n 28) 96. Hollis (n 52) 46 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ) noted vicarious liability 'more usually flows' from an employment relationship.
[111] *Bird* (n 28) 110–15.
[112] Ibid 77 [55].
[113] Ibid 77 [56]. The High Court in *Prince Alfred College* (n 4) 148 confirmed the course of employment doctrine, but added a supplemental test based on whether the employment provided the occasion for the wrongdoing: at 159–60 (French CJ, Kiefel, Bell, Keane and Nettle JJ).
[114] *Prince Alfred College* (n 4).

criminal offence does *not* preclude the possibility of vicarious liability'.[115] In the earlier High Court case of *Deatons Pty Ltd v Flew* ('*Deatons*'),[116] involving an employee throwing a glass at the plaintiff, vicarious liability was held not to apply. However, there was no mention this was because the employee's acts likely amounted to criminal assault. Similarly, in *New South Wales v Lepore* ('*Lepore*'),[117] there was no suggestion the fact the wrongdoer was engaged in serious criminal behaviour precluded application of vicarious liability. Thus, it is simply wrong to attempt to distinguish Australian from UK vicarious liability law by claiming that the latter, but not the former, contemplates application of vicarious liability in the context of criminality. Justice Jagot was correct, with respect, in acknowledging Australian law contemplated that vicarious liability could attach to criminal activity, citing *Prince Alfred College*.[118]

Of course, if members of the High Court now wish to say criminal conduct cannot be the basis of vicarious liability, because such actions could never be within the course of employment, that is valid. But respectfully, it would be better to concede past Australian authority had accepted that vicarious liability could apply to criminal acts, rather than apparently assert that it had not. And that would require the overrule of past Australian case law to the contrary, something which apparently is a roadblock for some justices (see below).

B *Unconvincing Argument UK Position Affects the Employee/Contractor Distinction*

The joint reasons expressed concern that adoption of the five-factor test identified in *Catholic Child Welfare Society* to determine whether a relationship was sufficiently akin to employment to justify imposition of vicarious liability might undermine the distinction between employees and independent contractors.[119]

With respect, this is hard to square with the position in the UK, which continues to apply the five factors, at least in marginal cases. In recently reaffirming the potential utility of the factors, the UK Supreme Court emphasised their use did *not* mean the traditional distinction between an employee and an independent contractor was undermined:

---

[115] Ibid 159 (French CJ, Kiefel, Bell, Keane and Nettle JJ, Gageler and Gordon JJ agreeing at 172) (emphasis added).
[116] *Deatons* (n 75).
[117] *Lepore* (n 79).
[118] *Bird* (n 28) 135.
[119] Ibid 81–2.

> There is nothing in the … Supreme Court cases discussed above to suggest that the classic distinction between employment and relationships akin to employment, on the one hand, and the relationship with an independent contractor, on the other hand, has been eroded. Two cases decided by common law courts since [*Catholic Child Welfare Society*] and *Cox* have reached the same conclusion.[120]

Thus, the claim in the joint reasons in *Bird* that acceptance of the five factors — or at least some of them, in some circumstances — would obliterate the traditional distinction between employees and independent contractors is also incorrect. It is not suggested the High Court should embrace the five factors. However, it is (with respect) inaccurate to criticise them as the joint reasons did in *Bird*. The reasoning directly contradicts the UK Supreme Court on point. That jurisdiction's case law does not reflect erosion of the distinction between employee and independent contractor.

It is conceded that, theoretically, some factors may cut across the traditional distinction. For example, consideration (b), whether the wrong was committed as a result of activity conducted by the wrongdoer on the defendant's behalf, could be applied to an independent contractor. Similarly, (d), whether the defendant created the risk of the tortfeasor's wrongdoing, could be applied to an independent contractor. This is noted elsewhere.[121] However, the proof is in the pudding. The case law does not reflect that the five factors have eroded the traditional distinction, and the Supreme Court emphasised in *Barclays Bank* that distinction ought to be maintained. The justices may (respectfully) be taken at their word.

C *Unconvincing Claim Applying Vicarious Liability to Relationships Akin to Employment Would Require Overruling Past Cases*

The joint reasons stated:

> This Court has repeatedly refused to extend the boundaries [of vicarious liability] to include independent contractors, or to extend the doctrine by reference to policy considerations as the sole or determinative basis for developing the principle. For the Court to do so now would require the Court to revisit and overrule *Hollis* and *Sweeney*, and at least aspects of *Scott* and *Lepore*.[122]

In sharp contrast is Gleeson J:

> I … do not agree with the plurality's contention that a decision imposing vicarious liability on the Diocese in this case would require this Court to

[120] *Barclays Bank* (n 40) 986 [24]. See also *BXB* (n 1) 587.
[121] Silink and Ryan (n 44) 459.
[122] *Bird* (n 28) 74.

> overturn *Hollis, Sweeney, Scott v Davis* and *Lepore*. The question whether vicarious liability arises in the context of the relationship between a diocese and a parish priest has not previously arisen in this Court … those cases [which have typically concerned whether a particular wrong was within the scope of employment, or the dichotomy between employee and independent contractor] … do not bear directly on the question in this appeal of whether relationships that are akin to employment attract vicarious liability. A case is not authority for a proposition that is not argued.[123]

Which of these opposed positions is correct? The first part of the first sentence in the joint reasons, that the High Court had repeatedly refused to extend the principle of vicarious liability to independent contractors, may be regarded as a straw person argument. So much may be accepted. But that was not relevant in *Bird*. It was not and could not be seriously suggested the wrongdoer in *Bird* was an independent contractor. He was far from being engaged in his own enterprise.

The second part of the first sentence then dismisses the extension of vicarious liability by way of policy factors. This is presumably a reference to the five-factor test in *Catholic Child Welfare Society*, which applies, at least to some extent, in the UK, and which is expressly policy-based.[124] I do not defend the first of those factors here, relating to so-called "deep pockets" considerations, nor suggest it should be relevant in assessing whether or not vicarious liability should apply. However, the other factors are defensible — these typically relate to the extent to which the wrongdoer is integrated in the defendant's activities, is pursuing their purposes, is running a business of their own, and questions of control. With respect, they underlie the current approach the High Court takes to determine whether a worker is an employee or an independent contractor. Indeed, they were utilised by the High Court recently in this context:

> The value of the own business/employer's business dichotomy in determining whether a person engaged to undertake work for another is an employee of that other has long been recognised … while the … dichotomy may not be perfect so as to be of universal application … the dichotomy usefully focusses attention upon those aspects of the relationship … which bear more directly upon whether the putative employee's work was so subordinate to the employer's business that it

[123] Ibid 94. Justice Gleeson noted that Gaudron J in *Lepore* had specifically contemplated vicarious liability could extend beyond relationships of employment: *Lepore* (n 79) 561.
[124] *Catholic Child Welfare Society* (n 12) 15.

> can be seen to have been performed as an employee of that business rather than as part of an independent enterprise.[125]

So, respectfully, it is concerning the High Court dismisses the five-factor test, where it continues to use virtually the same considerations as those comprised in four of those factors in determining whether an employment relationship exists.

What of the claim in the second sentence that acceptance that relationships akin to employment could give rise to vicarious liability would require overruling of *Sweeney v Boylan Nominees Pty Ltd* (‘*Sweeney*’)[126] and *Hollis v Vabu Pty Ltd* (‘*Hollis*’)?[127] The joint reasons provide a reference at least to the relevant paragraph in *Sweeney* they claim to be inconsistent with such a development. That paragraph is [33], found at page 173 of the judgment.[128] This relates to the distinction between employment and independent contractor arrangements. As discussed, the fact that the UK Supreme Court has emphasised that acceptance of relationships akin to employment might ground a vicarious liability claim *does not* mean the traditional distinction between an employee and an independent contractor is discarded.[129] Given this, I am unable to accept the position of the joint reasons that acceptance that relationships akin to employment might ground a vicarious liability claim would require overruling of *Sweeney*.

What of the claim such acceptance would require the overruling of *Hollis*? On this occasion, the High Court in *Bird* does not refer to any specific paragraph of the judgment in *Hollis* that apparently would require overruling. There is nothing in the joint reasons that would require overruling to accept relationships akin to employment could ground vicarious liability. The High Court’s reference might just be a repeat of its claim *Sweeney* would require overruling, in that the distinction between employee and independent contractor was live in *Hollis* as well. But repetition of the same claim does not make it convincing. Nothing in *Hollis* nor in *Sweeney* states relationships akin to employment *cannot* found a vicarious liability claim. This is not surprising; the issue was not live in either case.

---

[125] *CFMMEU* (n 14) 184–5 (Kiefel CJ, Keane and Edelman JJ). Gageler and Gleeson JJ expressed a similar view: at 208–9. So too did Gordon J: at 234.

[126] *Sweeney* (n 96).

[127] *Hollis* (n 52).

[128] This is deduced from *Bird* (n 28) 74 n 81, which refers to 81 [63] of the same judgment. There the Court cites the joint reasons in *Sweeney* (n 96) 173 [33]: ‘[w]hatever may be the logical and doctrinal imperfections and difficulties of the origins of the law relating to vicarious liability, the two central conceptions of distinguishing between independent contractors and employees and attaching determinative significance to course of employment are now too deeply rooted to be pulled out’ (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

[129] *BXB* (n 1) 587 [58].

The claim that acceptance of this principle would require aspects of *Scott*[130] and *Lepore*[131] to be overruled is also highly questionable. *Scott* was not an employment case, so it cannot be taken to have decided anything regarding the extent to which vicarious liability applies in the context of work. In *Lepore*, the wrongdoers were teachers, and an employment relationship clearly existed between defendant and wrongdoer. Thus, anything said in either case that might be interpreted to suggest relationships akin to employment cannot found the basis of a vicarious liability claim could only be obiter dicta. By definition, it could not require overruling in the current context. In sum, Gleeson J was (with respect) correct in disagreeing with the joint reasons' claim that the appellant's argument would require overrule of two cases and partial overrule of another two. The claim is unfounded.

D *Incoherence between Vicarious Liability Limbs*

It *seems* the High Court has settled upon an approach to the *second* limb of vicarious liability that considers whether the employment situation provided the occasion for the wrongdoing to occur. Five members of the Court, in terms with which the other two members agreed, stated it was relevant to consider whether

> the employment not only provided an opportunity but also was the occasion for the commission of the wrongful act … it may be sufficient to hold an employer vicariously liable for a criminal act committed by an employee where, in the commission of that act, the employee used or took advantage of the position in which the employment placed the employee vis-à-vis the victim … In determining whether the apparent performance of such a role may be said to give the "occasion" for the wrongful act, particular features may be taken into account. They include authority, power, trust, control and the ability to achieve intimacy with the victim … Where … the employee takes advantage of his or her position with respect to the victim, that may suffice to determine that the wrongful act should be regarded as committed in the course or scope of employment and as such render the employer vicariously liable.[132]

Three preliminary points must be made. Firstly, it is acknowledged the question whether relationships akin to employment can found vicarious liability claims relates to the *first, not the second*, limb of vicarious liability.[133] On the other hand, the

[130] *Scott* (n 97).
[131] *Lepore* (n 79).
[132] *Prince Alfred College* (n 4) 159–60 (French CJ, Kiefel, Bell, Keane and Nettle JJ, Gageler and Gordon JJ agreeing at 172).
[133] In *Bird* (n 28), Jagot J emphasised the distinctness of the two limbs, stating material relevant to one limb was irrelevant to the other: at 134.

two limbs may not be totally independent.[134] The second point is it is appropriate to be tentative in addressing the High Court's use of the occasion test. Although announced for the first time in *Prince Alfred College*, it was barely sighted in the subsequent decision in *CCIG Investments Pty Ltd v Schokman*,[135] and was not discussed in *Bird*.[136] I have been critical of the test elsewhere,[137] but that is irrelevant for current purposes.

The point for present purposes is that, on the assumption that the occasion test is to be utilised in relation to the second limb, and on the assumption there is or may be some link between the limbs, the contents of the test do not justify limiting the first limb to employment strictly so-called. In other words, both relationships of employment and relationships akin to employment might provide the occasion for wrongdoing to occur.[138]

Specifically, an organisation that places a person in a position akin to employment may be placing them such that it provides the occasion for wrongdoing to occur. Recall the factors the High Court itself cited in seeking to apply the occasion test — authority, power, trust, control and the ability to achieve intimacy. On the facts in *Bird*, the religious body was in a position of high authority and power. It placed the wrongdoer in a position of great trust. The victim's family trusted the church, and the person chosen by the church to do the work of the church. Through these means he achieved intimacy with the victim. On one view, whether he was strictly speaking an employee or in a situation akin to employment (but not employment, according to a strict definition) is irrelevant to the question whether the relationship between the wrongdoer and the defendant provided occasion for the breach. Whether or not he is strictly an employee, the religious organisation placed him in a position where he could commit the abuse — physically, by essentially requiring him to have close contact with members of the Diocese, and spiritually, by conferring upon him a

---

[134] *Cox* (n 37) 664, where Lord Reed (for the Court) noted the two limbs were 'inter-connected'. Of course, the position is not necessarily the same in Australia; the matter remains open here.

[135] *CCIG Investments* (n 106) 182 (the only reference being to an argument the respondent made based on *Prince Alfred College* (n 4), to which the Court's response was 'no such enquiry is presented by the circumstances of this case' (Kiefel CJ, Gageler, Gordon and Jagot JJ)). Edelman and Steward JJ did not refer to it. Justice Gleeson said it may not be easy to distinguish cases where employment provided the 'opportunity' for the wrongdoing (which the High Court had said in *Prince Alfred College* (n 4) was not sufficient), and where it provided the occasion for the breach (which the Court found in *Prince Alfred College* (n 4) was sufficient): at 204 [95].

[136] Its omission in *Bird* (n 28) is less surprising, because that case focussed on the first element, while *CCIG Investments* (n 106) was focussed on the second.

[137] Gray, *Vicarious Liability* (n 3) 71–2.

[138] The High Court did not claim acceptance of the akin to employment test would be inconsistent with the occasion test. I have independently considered the matter, with a view to coherence in the law.

position of high authority, which inherently created high trust and significant control over members of the Diocese. Again, this article does not seek to defend the High Court's recently established occasion test for the second limb. However, on the basis it is currently part of the law unless and until revisited or formally discarded, it does not justify exclusion of relationships akin to employment from the first limb.[139] And there is sense in interpreting the limbs so that they work together, rather than in an antagonistic fashion, so matters pertaining to one limb might be (tangentially, at least) relevant to matters pertaining to the second. At the least, the two limbs should not be at cross-purposes with one another.

There is a suggestion in the literature the UK's adoption of a close connection test is linked with its adoption of the akin to employment principle:

> [T]he [UK] Supreme Court [has] held that an employment relationship is no longer required for vicarious liability to be imposed. In the Supreme Court's view, strict liability could be imposed if the Catholic Church had generated a sufficiently 'close connection' between the lay brothers and the claimants. *Consequently,* a relationship 'akin' to employment was sufficient. It is unlikely that this decision would have been reached without the earlier developments in *Bazley* and *Lister.*[140]

The logic of this argument would suggest that, given the High Court of Australia has not accepted the close connection test espoused in *Bazley v Curry*[141] and *Lister v Hesley Hall Ltd*,[142] it would (or should) not accept that relationships akin to employment could found an action for vicarious liability. Respectfully, one does not necessarily follow from the other. It would be congruent with the High Court's occasion test to include relationships akin to employment within the first limb. Relationships akin to employment can provide the occasion for wrongdoing, just as relationships of employment can. In other words, I do not accept the High Court's apparent rejection of the close connection test does or should preclude it from accepting relationships akin to employment can found vicarious liability.

---

[139] Laura Griffin and Gemma Briffa, 'Still Awaiting Clarity: Why Victoria's New Civil Liability Laws for Organisational Child Abuse Are Less Helpful than They Appear' (2020) 43(2) *University of New South Wales Law Journal* 452, 475; Stephen Todd, 'Personal Liability, Vicarious Liability, Non-Delegable Duties and Protecting Vulnerable People' (2016) 23(2) *Torts Law Journal* 105, 119.

[140] Beuermann, 'Conferred Authority Strict Liability' (n 9) 120–1 (emphasis added). *Bazley* (n 51) and *Lister* (n 73) accepted the close connection test in relation to the second limb of vicarious liability.

[141] *Bazley* (n 51).

[142] *Lister* (n 73).

E *Incoherence with the Policy Rationale of Vicarious Liability*

Use of the word "seems" is again appropriate here — it *seems* the High Court accepts (at least, has sometimes accepted) an enterprise risk rationale for vicarious liability. Authority for this appears in the joint reasons in *Hollis*, where five justices state:

> In general, under contemporary Australian conditions, the conduct by the defendant of an enterprise in which persons are identified as representing that enterprise should carry an obligation to third persons to bear the cost of injury or damage to them which may fairly be said to be characteristic of the conduct of that enterprise.[143]

This is a clear endorsement of enterprise risk theory. Enterprise risk theory originated in the Canadian law,[144] before subsequently being accepted in the UK.[145] The judgment of Gleeson J in *Bird* operates on the basis Australian law accepts enterprise risk as the rationale for vicarious liability.[146] On the other hand, caution is appropriate. Five members of the High Court in *Prince Alfred College* doubted the approach, and this was repeated in *CCIG Investments*.[147] Enterprise risk theory was not mentioned in the joint reasons in *Bird*, nor by Jagot J, but was embraced explicitly by Gleeson J (dissenting on the principle).[148]

So, frankly it is not known whether the High Court accepts enterprise risk to explain or rationalise vicarious liability. The Court seemed to accept it in *Hollis* and *Sweeney*, but not in *Prince Alfred College* and *CCIG Investments*, though it did not expressly dissent from the earlier support. As indicated, Gleeson J proceeded in *Bird* as if Australian law accepted it as the basis for vicarious liability.

If the High Court does accept enterprise risk as the primary theoretical basis, or at least a major basis, for vicarious liability, it is difficult to justify why relationships akin to employment cannot found vicarious liability. This is because such a person

---

[143] *Hollis* (n 52) 40 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ), approved in *Sweeney* (n 96) 172 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

[144] *Bazley* (n 51) 557.

[145] *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366, 377 (Lord Nicholls, Lord Slynn agreeing at 386 [65], Lord Hutton agreeing at 386 [66]); *Armes* (n 41) 381.

[146] *Bird* (n 28) 92: '[t]he enterprise liability theory … is the central justification for vicarious liability in Australia'.

[147] '[T]he risk-allocation aspect of the [enterprise risk] theory is based largely on considerations of policy, that an employer should be liable for a risk its business enterprise has created. Such policy considerations have found no real support in Australia or the United Kingdom': *Prince Alfred College* (n 4) 153 (French CJ, Kiefel, Bell, Keane and Nettle JJ), cited in *CCIG Investments* (n 106) 175–6 (Kiefel CJ, Gageler, Gordon and Jagot JJ). Cf the United Kingdom's embrace of enterprise risk theory: *Armes* (n 41) 381.

[148] See *Bird* (n 28) 92: '[t]he enterprise liability theory … is the central justification for vicarious liability in Australia'.

may well be engaged in activity directly relevant to the kind of risk an organisation of that type generates. They may by their actions have created the risk characteristic of the organisation's activities. According to enterprise risk theory, costs associated with the materialisation of those risks should be borne by the organisation. Thus, there is incoherence between the theory the High Court apparently still applies to determination of vicarious liability questions and the exclusion of relationships akin to employment from the potential scope of vicarious liability. The logic of enterprise risk theory is that the status of the worker is irrelevant, provided they are implicated in materialisation of a risk that is inherent in the defendant organisation's activities.

The traditional exclusion of independent contractors from the scope of vicarious liability does not create incoherence with enterprise risk theory.[149] This is because, if we accept the organisation test, a finding that a worker is engaged in an enterprise of their own, rather than as part of the organisation that retained them to provide a particular service, then enterprise risk would favour allocation of that risk to the worker's enterprise, and not the organisation that retained the worker for a particular service.[150] This argument reflects the current Australian position that disfavours possible dual vicarious liability.[151] Thus, enterprise risk theory is entirely congruent with the employee/contractor distinction.[152] The same cannot be said for those in a relationship akin to employment. They are *not* in an enterprise of their own; if they were, they would be independent contractors, not in a position akin to employment. Thus, excluding them from the scope of vicarious liability is incoherent with enterprise risk theory. There is no (other) enterprise to which to allocate the risk in such a situation.

Though this article is primarily concerned with the question whether relationships akin to employment should potentially be able to found an action for vicarious liability, there is another relevant question — whether the difficulties in relation to establishing the required employment relationship, particularly in cases involving religious institutions, justify a special rule. Others have suggested, at least in cases

[149] Cf Brodie (n 7) 506–8.

[150] In *Cox* (n 37) 670, Lord Reed (for the Court) held a relationship other than employment (such as one akin to employment) could give rise to vicarious liability where the wrongdoer's activities were integral to the defendant's business activities and for their benefit rather than attributable to the conduct of a recognisably independent business. Cf James Goudkamp and James Plunkett, 'Vicarious Liability in Australia: On the Move?' (2017) 17 *Oxford University Commonwealth Law Journal* 162, 169; Plunkett, 'Taking Stock' (n 58) 559.

[151] *Oceanic Crest* (n 20) 641 (Gibbs CJ), 646 (Wilson J), 685 (Dawson J).

[152] Bomball argues the organisation test for determining whether a worker is an employee or an independent contractor is consistent with enterprise risk theory: Entrepreneurship (n 7) 101–2. Cf Marco Cappelletti, 'A Pluralist View of Vicarious Liability in Tort' (2024) 140 *Law Quarterly Review* 61, 74.

of institutional child abuse (many of which, but not all, involve religious institutions), the law might *abolish* the requirement of an employment relationship.[153] This would be justified on the basis of the sometimes ambiguous status upon which religious figures are engaged by religious organisations.

Respectfully responding, if the High Court has not accepted relationships akin to employment can found vicarious liability, it is unlikely to go further and discard the need for an employment relationship altogether. It would of course be open for parliament to carve out this exception. However, the response to the *Royal Commission into Institutional Child Sexual Abuse* (discussed below at Part V(H)) suggests, at least at present, disinclination to do so. Secondly, it is not satisfactory to carve out a special rule to deal with institutional child sexual abuse, on principle, because the rationale for extending vicarious liability to situations akin to employment holds true, regardless of whether we are dealing with child sexual abuse, adult sexual abuse, child physical but non-sexual abuse, adult non-sexual abuse, or other types of injury or damage. Of course, we find child sexual abuse abhorrent, in a way that we do not find other types of injury abhorrent. However, this is not regarded as sufficient for a special carveout. The UK Supreme Court has not favoured special rules for vicarious liability as it relates to sexual abuse.[154] Thus, while I acknowledge the special difficulties in applying vicarious liability in this context, my preferred response is to accept that relationships akin to employment can found such liability, rather than recognise a special exception to the general rule.

F *Interaction with Narrow View of Employment Relationships*

The effect of the High Court's refusal to apply vicarious liability to relationships akin to employment is exacerbated by the Court's narrow approach to determining whether an employment relationship exists. It was noted earlier that Australian law had taken a different path to the UK here. The High Court has utilised a formalistic, technical approach to the interpretation of employment contracts.[155] If the contract as written reflects an apparent view of a non-employment relationship, a majority of the Court will likely take this on face value, even if the reality of how the contract works is different. In other words, the fact the Court takes a technical approach to interpreting employment contracts means there is potentially less scope for vicarious liability — the party drafting the contract, if well-advised, will know how to draft a contract to reflect its wishes regarding whether the engagement is

---

[153] Griffin and Briffa (n 139) 474–5; Beuermann, 'Vicarious Liability and Conferred Authority' (n 10) 1007.
[154] *Cox* (n 37) 672; *BXB* (n 1) 588–9.
[155] *CFMMEU* (n 14).

employment or not. Given the raft of regulation and the spectre of vicarious liability surrounding employment relationships, assume the party drafting the contract (the organisation procuring the work) will draft the contract to suggest a non-employment agreement,[156] even though as the contract actually runs (and is intended to run) it is essentially employment.[157] Courts will heed the label given to the arrangements.[158] Unless the court views it as a sham (possible, but rare), the effect will be to limit the scope of vicarious liability, more narrowly than the substance of the contract requires. This is made worse by the fact that, on another issue, the Court refuses to consider whether relationships somewhat like employment can ground vicarious liability. Of course, some such relationships might be those subject to the drafting just discussed, but there could be others.

There is a "flipside" to an observation that the difficulties created by the High Court's refusal to accept relationships akin to employment can ground vicarious liability are exacerbated by the High Court's technical approach to determining whether or not an employment relationship exists. That flipside is that the High Court should accept that relationships akin to employment can ground vicarious liability. This would appropriately focus the law on the substance of the parties' relationship, not how it is technically structured.

In other words, there is logical alignment between a focus on the substance of the parties' actual relationship and agreement that relationships that are akin to employment can have the same legal consequences (at least, for vicarious liability) as employment. And there is a depressing consistency in a court that focuses on form rather than substance, and one that refuses to accept relationships akin to employment should be treated (at least for some purposes) as identical in effect to employment.

G *Whether Reform Is for Parliament Rather than Courts*

Another reason the majority gave for refusing to accept relationships akin to employment could meet the first element was that reform was a matter for the legislature, not courts.[159] Reasonable people will differ on the proper scope of

[156] For example, a clause specifying the worker may not accept work: *Consistent Group Ltd v Kalwak* [2007] IRLR 560, 566 [57]–[58] (Elias J).
[157] See Stewart, Irving and Bomball (n 60) 1245.
[158] *CFMMEU* (n 14) 214 (Gageler and Gleeson JJ), 234–5 (Gordon J, Steward J agreeing at 243); ibid 1224–5.
[159] *Bird* (n 28) 83–4 (Gageler CJ, Gordon, Edelman, Steward and Beech-Jones JJ), 141–2 (Jagot J). The joint reasons claimed 'abandoning the threshold requirement of a relationship of employment for the purposes of vicarious liability does not fit within the body of accepted rules and principles': at 82. Their Honours had just cited *Breen* (n 95) 115: '[j]udges have no authority to invent legal doctrine

judicial power. One view is that vicarious liability is a creature of the common law. It was the common law that established the two elements to be met for vicarious liability to apply. It would, on this view, be proper for the Court to modify either requirement, as new scenarios are considered. Vicarious liability has evolved through the centuries through courts. It seems timid to refuse to countenance a relatively modest refinement to one existing element of the doctrine, and Gleeson J acknowledged its modesty.[160] The UK courts, hardly radical in nature, took this step. It would not amount to an 'invention' or 'distortion' of legal doctrine, to adopt the test in *Breen v Williams*,[161] cited above. What courts have created, they can modify.[162] Giliker, writing of the Australian position before *Bird*, is critical:

> [R]etaining a narrow interpretation of "employee" is misguided in that it fails to respond to the casualisation of modern working relationships … [r]ecognising the impact of the gig economy is not a sign of weakness, but one of progress.[163]

It may be added that retaining a narrow interpretation of employee in the current context fails to take account of changed societal attitudes towards abuse, including the need for accountability. The High Court's timidity is unwarranted.

The alternative is legislative reform. This is a state responsibility, so the spectre arises of eight different sets of principles. All jurisdictions have had the opportunity to reform civil liability legislation in light of greater awareness of these issues. Only New South Wales has specifically legislated to provide vicarious liability could apply to relationships akin to employment, and that was limited to child sexual abuse.[164] Other jurisdictions have resorted to duty of care principles in this context, rather than vicarious liability. Obviously, this is a less certain path to liability, because on a given set of facts, it may or may not be found that a duty of care has been breached, and the plaintiff has suffered loss as a result of it. For these reasons, statutory reform is not a realistic alternative.

---

that distorts or does not extend or modify accepted legal rules and principles' (Gaudron and McHugh JJ).

[160] *Bird* (n 28) 93.

[161] *Breen* (n 95).

[162] *Jaensch v Coffey* (1984) 155 CLR 549, 599–600 (Deane J); McHugh, 'Part II' (n 54) 116.

[163] Giliker, 'Analysing Institutional Liability' (n 42) 533. Giliker describes the Australian position as 'overly cautious'.

[164] *CLA* (NSW) (n 100) s 6G. Western Australia has provided judgment against an individual in this context can be enforced against the relevant institution's assets: *CLA* WA (n 100) s 15C (though it does not use the words 'vicarious liability'). Other states have preferred duty of care (which may or may not have been breached), not vicarious liability: *Wrongs Act* s 91; *CLA* Qld (n 100) s 33D; *CLA* Tas (n 100) s 49H. Only the South Australian legislation specifically contradicts the suggestion relationships akin to employment can give rise to vicarious liability: *CLA* SA (n 100) s 50G.

H *Recommendations of the Royal Commission*

Finally, it should be noted the *Redress and Civil Litigation Report* (2015), compiled in association with the *Royal Commission into Institutional Responses to Child Sexual Abuse* (2017), recommended legislation making institutions liable for child sexual abuse committed by those 'associated' with the institution, subject to a reverse onus provision. The institution would need to demonstrate it had taken all reasonable steps to avoid the abuse. It concluded:

> For the purposes of the … imposition of liability with a reverse onus of proof, the persons associated with the institution should include the institution's officers, office holders, employees, agents, volunteers and contractors. For religious organisations, persons associated with the institution also include religious leaders, officers and personnel of the religious organisation.[165]

Of course, it is not suggested courts should make reforms to the law just because a royal commission has so recommended. It is one relevant factor that after an investigation, a royal commission has made this recommendation to extend vicarious liability beyond those traditionally regarded as employees to include those 'associated' with the institution.

I *Summary of Reflections*

In summary, the High Court decision in *Bird* is unsatisfactory because: (a) in attempting to distinguish Australian law from that in the UK, it makes misleading statements about Australian law; (b) in attempting to explain why the UK position should not be taken, it claims it would result in the removal of a traditional distinction drawn in the context of employment. The UK Supreme Court decision earlier in the same year (cited by members of the High Court) emphatically *rejects* that suggestion; (c) in attempting to explain why Australian law should not recognise relationships akin to employment could attract vicarious liability, the judgment wrongly claims that step would require overrule or partial overrule of past decisions; (d) it leads to incoherence between the first and second elements of vicarious liability, assuming they should be read together; (e) it is inconsistent with the policy rationale the High Court has previously accepted underlies vicarious liability; (f) it does not recognise that vicarious liability is a creature of the common law, so it is appropriate for courts to reform it when required; and (g) it runs counter

[165] *Royal Commission into Institutional Responses to Child Sexual Abuse* (Redress and Civil Litigation Report, 2015) 495 Recommendation 92. The joint reasons in *Bird* (n 28) noted this Report but not its recommendation vicarious liability be extended beyond traditional conceptions of employment: at 83.

to specific recommendations of the Royal Commission in this area to permit vicarious liability to apply in non-employment situations, at least in this context.

And I do not forget the practical outcome — the law denies liability of a religious institution, although they placed a wrongdoer in a trusted position which facilitated his egregious wrongdoing against a trusting family in the context of functions performed for the religious institution.

VI CONCLUSION

Changes in the nature and realities of employment, and in societal values, have strained existing principles relating to vicarious liability. The law has proven itself to be reasonably nimble in responding to many of these changes. As part of this evolution, the UK Supreme Court has accepted relationships akin to employment can attract vicarious liability. The Australian High Court recently rejected this development. This article has argued the High Court was wrong to do so. The reasoning of the majority approach is unconvincing and, at times, plainly incorrect. The decision creates incoherence between the two limbs of vicarious liability, and with the rationale of the doctrine apparently accepted by the Court. It is generally not favoured by commentators, and contradicts recommendations of the Royal Commission. Given these are all principles of the common law, courts can readily address these matters. And the practical result of this decision is denial of a legal remedy to someone who has been the victim of disgraceful sexual abuse by a person in a position of trust, put there by the defendant, and failure of the law to allocate any legal responsibility to an institution that employed a person who committed such abuse. Many would regard this as manifestly unjust.

UNDUE JUDICIAL RESTRAINT IN *BIRD V DP*

JOSHUA YUVARAJ*

This article argues that the decision of the majority in Bird v DP (a pseudonym) [2024] HCA 41 ('Bird') was characterised by undue judicial restraint, principally in its reasoning for maintaining the restriction of the doctrine of vicarious liability in tort to employment relationships (rather than including relationships 'akin to employment' as in the United Kingdom). The majority was unduly restrained in rejecting the role of policy considerations in making its determination; in under-emphasising the logic of expanding the scope of the doctrine; and in overstating concerns about maintaining the certainty of the doctrine. This analysis still matters even after the High Court expanded non-delegable duties to cover intentional tortious acts in AA v The Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle [2026] HCA 2, and the Victorian Parliament imposed retrospective statutory vicarious liability: non-delegable duties have different aims and thresholds, while legislative solutions are politically fragile and inconsistent. The article thus situates Bird in the longstanding debate in Australian jurisprudence between the Kirby/Mason school of legal realism and the Dixon/Heydon school of legal originalism, showing why Bird presents no clear obstacle to expanding the first stage of the vicarious liability enquiry. In doing so, it provides a Kirby-ian reminder that concerns about the law's coherence need not obviate the Court's role in shaping the law in response to changing social circumstances, not least in the protection of the most vulnerable in society.

* Senior Lecturer, Faculty of Law, University of Auckland. Email: joshua.yuvaraj@auckland.ac.nz.
Thanks to Stelios Tofaris, Liron Shmilovits and Nick McBride for fruitful discussions on the topic while visiting the University of Cambridge as part of the Herbert Smith Freehills Global Visitor Program, funded by the University of Cambridge and the University of Auckland. Thanks also to Jodi Gardner, Anna Broadmore, Stelios Tofaris, Warren Swain, Jessica Kerr, Marcus Roberts and the anonymous reviewers for helpful comments on earlier drafts, and to Jack McKenzie for research and editorial assistance. All views and errors remain the author's.

I Introduction....82
II Background....85
A *The First Stage of Vicarious Liability Generally*....85
B *The Majority's Reasoning*....86
C *Why an Analysis of Bird Matters*....87
III The Majority's Undue Dismissal of the 'Akin to Employment' Category....92
A *The Appropriate Role of Policy Considerations*....92
B *The Expansion as Logically Derived from Vicarious Liability's Rules and Principles*....99
C *Overstated Concerns about Certainty*....105
IV Conclusion....107

I Introduction

Tort law provides multiple avenues for imposing liability on institutions for abuse and misconduct perpetrated against those in their care.[1] Breach of a non-delegable duty is one avenue; that is, the positive duty an institution has to ensure those for whom it is responsible are treated with reasonable care by independent contractors or employees who are engaged to provide that care.[2] In *AA v The Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle* ('*AA*'), the High Court of Australia confirmed that non-delegable duties applied to intentional wrongdoing,

---

[1] See further David Tan, 'An Enterprise Risk Approach to Vicarious Liability in the 21st Century' (2015) 27 Singapore Academy of Law Journal 822, 823.

[2] Neil Foster, 'Non-Delegable Duty and Intentional Torts: AA v Trustees of the Roman Catholic Church before the High Court of Australia' (Seminar Paper, Australian and New Zealand Tort and Compensation Researchers and Teachers Network Symposium, 16–17 February 2026) 5 <https://lawandreligionaustralia.blog/>.

overturning a longstanding precedent in *New South Wales v Lepore* ('*Lepore*').[3] This decision was widely celebrated for its vindication of institutional abuse survivors.[4]

AA follows closely on the heels of another, more controversial High Court determination, which neglected to find a Catholic Diocese *vicariously* liable for the actions of a now-deceased priest against the plaintiff, *Bird v DP (a pseudonym)* ('*Bird*').[5] A majority of the Court neglected to expand vicarious liability to cover the non-employment relationship between the priest and the Diocese (diverging from the United Kingdom Supreme Court ('UKSC'), which had developed a category of 'akin to employment' that addressed such relationships). *Bird* was heavily criticised, and the Victorian government passed retrospective legislation making churches vicariously liable for such abuse in the first half of 2026, specifically including relationships 'akin to employment'.[6]

AA and the Victorian legislation may suggest that survivors are now more well-equipped to pursue redress against institutions for historical (and not so historic) abuse, and abuse that sadly still likely occurs today.[7] Vicarious liability still matters, though, insofar as (a) the Victorian legislation has not been uniformly replicated at the time of writing, leaving uneven statutory protections for survivors of

[3] *AA v The Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle* (2026) 427 ALR 67 ('*AA*'); *New South Wales v Lepore* (2003) 212 CLR 511 ('*Lepore*'). See further Paula Giliker, 'Reparation for Non-Recent Institutional Child Sexual Abuse in England and Wales and Australia: A Matter for Private Law or the State?' (2024) 44 *Legal Studies* 591, 595. For a discussion of *AA* and non-delegable duties, see Joshua Yuvaraj, 'Opening the Floodgates? *AA v Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle* [2026] HCA 2' (2027) *Singapore Journal of Legal Studies* (forthcoming).

[4] See, eg, Christopher Knaus, 'Landmark High Court Ruling Finds Catholic Church Had Duty to Protect NSW Child from Paedophile Priest', *The Guardian* (online, 18 February 2026) <www.theguardian.com/au>.

[5] *Bird v DP (a pseudonym)* (2024) 283 CLR 45 ('*Bird*'). Vicarious liability has been conceptualised in different ways: see, eg, Samuel Goldberg, 'Vicarious Liability for Equitable Wrongdoing' (2024) 48(1) *Melbourne University Law Review* 42, 48–9; *CCIG Investments Pty Ltd v Schokman* (2023) 278 CLR 165 [48]–[51] (Kiefel CJ, Gageler, Gordon and Jagot JJ) ('*Schokman*'); James Goudkamp, 'Rethinking Fault Liability and Strict Liability in the Law of Torts' (2023) 139 *Law Quarterly Review* 269, 287; Elise Bant, 'Rethinking Corporate Groups: Insights from Systems Intentionality' (2025) 47 *Sydney Law Review* 1, 6; Christine Beuermann, 'Dissociating the Two Forms of So-Called 'Vicarious Liability' in Stephen GA Pitel, Jason W Neyers and Erika Chamberlain (eds), *Tort Law: Challenging Orthodoxy* (Hart Publishing, 2013) 477.

[6] *Justice Legislation Amendment (Vicarious Liability for Child Abuse) Act 2026* (Vic) s 93C(1); Eden Hynninen, '"Thunderous Applause" as Vicarious Liability Laws Pass Victoria's Upper House', *ABC* (online, 18 February 2026) <www.abc.net.au>; Richard Willingham, 'Churches to Be Held Vicariously Liable for Abuse under New Victorian Laws to be Proposed to Parliament', *ABC* (online, 17 June 2025) <www.abc.net.au>.

[7] See further *Schokman* (n 5) [81]. Non-delegable duties could conceivably "fill the gap" where vicarious liability falters, for example where a locum doctor commits torts not in the course of their employment: see, eg, Craig Purshouse and Ilias Trispiotis, 'Is "Conversion Therapy" Tortious?' (2022) 42 *Legal Studies* 23, 37–8.

institutional abuse across Australia; and (b) the doctrines of vicarious liability and non-delegable duties still have different thresholds, emphases and roles in the matrix of tortious liability.[8] Thus, we should not willingly jettison the opportunity to highlight potential improvements in one area of the law due to developments in another, particularly in the absence of uniform statutory protections, given the importance of providing means of redress to those who have suffered under the care of institutions.

This article develops the crowded field of vicarious liability scholarship, and the emerging post-*Bird* scholarship on vicarious liability, by showing that the majority's reasoning was governed by undue judicial restraint ('a disposition to conserve existing law, refraining from pursuing the more innovative route'),[9] grounded in misguided concerns about the role of policy, the doctrinal boundaries of the akin to employment test and the need to preserve certainty in the doctrine.[10] It suggests that given the fast-moving nature of social circumstances, primarily but not exclusively in relation to institutional abuse, courts are not limited from responding in the manner the majority appeared to consider it was in *Bird*; and therefore that in the future an expansion of the first stage of the vicarious liability determination, alongside non-delegable duties applicable to intentional torts and as a backstop to legislative action, can be seriously considered. This article uses *Bird* to highlight the inverse of the common trope that the High Court engages in 'judicial activism' far too

[8] Stelios Tofaris, 'Vicarious Liability and Non-Delegable Duty for Child Abuse in Foster Care: A Step Too Far?' (2016) 79(5) *Modern Law Review* 884, 885, 899; Allison Silink, 'The Scope of the Non-Delegable Duty of Care in "a Coherent Law of Negligence" under Australian Law' (2026) 54(1) *University of Western Australia Law Review* (advance); Simon Deakin, 'Organisational Torts: Vicarious Liability versus Non-Delegable Duty' (2018) 77(1) *Cambridge Law Journal* 15, 16.

[9] Aileen Kavanagh, 'Judicial Restraint in the Pursuit of Justice' (2010) 60(1) *University of Toronto Law Journal* 23, 24–5. Note that judicial restraint also has particular applications in administrative law which are not in view in this article: see, eg, *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 [128]–[129] (Edelman J).

[10] For different angles on *Bird*, see Nicholas Chen and Naomi Oreb, 'The High Court Decision in *Bird v DP (A Pseudonym)*: Where Are we at with Employment, Quasi-Employment and Vicarious Liability in Australia?' (2025) 30(1) *Torts Law Journal* 1; Anthony Gray, 'Relationships Akin to Employment and Vicarious Liability: The High Court's Rejection in *Bird v DP (A Pseudonym)*' (2024) 29(4) *Tort Law Review* 376; Douglas Freeburn, '"Employment or Nothing": An Analysis of *Bird v DP* and the Australian Approach to Vicarious Liability in Cases of Institutional Abuse' (2025) 44(1) *University of Queensland Law Journal* 183; Aryan Mohseni and Zachary Gomes, 'Vicarious Liability and the Triumph of Form in *Bird*: Coming Home to Roost?' (2026) 100 *Australian Law Journal* (forthcoming).

readily:[11] that is, undue restraint is just as problematic as ungrounded activism.[12] To do so, this article sets out the doctrinal and procedural background for the *Bird* determination in Part II, before critiquing the majority's reasons for dismissing the akin to employment test in Part III. It concludes in Part IV.

II BACKGROUND

A *The First Stage of Vicarious Liability Generally*

Vicarious liability comprises two stages under Australian common law: (a) whether the relationship between A, typically an organisation, and B, typically an employee, is one that is capable of giving rise to vicarious liability; and (b) whether B was acting in the course or scope of employment (in relation to party A) when they committed the tort.[13] If both of these stages are met then A will be vicariously liable for the tortious actions of B: A will not be regarded as having *done* the act, but the liability that would have been attributed to B will fall on A.[14]

In *Bird*, the High Court reaffirmed that the first stage was only satisfied if there was an employment relationship. This was out of step with other apex courts in the common law world. For example, the UKSC in *Various Claimants v Catholic Child Welfare Society* ('*Christian Brothers*') confirmed the first stage can be satisfied with relationships that are 'akin to employment'.[15] That decision involved a religious 'institute' constituted as an unincorporated association of lay members of the

[11] See, eg, James Allan, 'The Three "Rs" of Recent Australian Judicial Activism: *Roach*, *Rowe* and (No)'Riginalism' (2012) 36(2) *Melbourne University Law Review* 743; Johnny M Sakr and Augusto Zimmermann, 'Judicial Activism and Constitutional (Mis)Interpretation: A Critical Appraisal' (2021) 40(1) *University of Queensland Law Journal* 119, 147–8; Fiona Wheeler and John Williams, '"Restrained Activism" in the High Court of Australia' in Brice Dickson (ed), *Judicial Activism in Common Law Supreme Courts* (Oxford University Press, 2007) 20; Michael Kirby, 'Judicial Activism: Power without Responsibility? No, Appropriate Activism Conforming to Duty' (2006) 30(2) *Melbourne University Law Review* 576, 590 ('Judicial Activism: Power without Responsibility?').

[12] Thus, the original contribution of this paper is of the 'micro-legal' type: 'research that analyses a specific legal problem, such as a specific provision of a statute or code, or a specific case or line of cases [with] … something new', namely the balance between internal coherence and the Court's wider role to respond to society: Mathias M Siems, 'Legal Originality' (2008) 28(1) *Oxford Journal of Legal Studies* 147, 148–9. By analogy, see Rosalind Dixon and Po Jen Yap, 'Responsive Judicial Remedies' (2025) 14(2) *Global Constitutionalism* 323, 342.

[13] Paula Giliker, 'Vicarious Liability in the Common Law World: An Introduction' in Paula Giliker (ed), *Vicarious Liability in the Common Law World* (Hart Publishing, 2022) 3. Cf Tan (n 1) 829.

[14] *Bird* (n 5) 71–2 [44].

[15] *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1 ('*Christian Brothers*'). *Christian Brothers* built on the approach introduced in *JGE v Portsmouth Roman Catholic Diocesan Trust* [2013] QB 722 and the approach has subsequently been followed in cases like *Cox v Ministry of Justice* [2016] AC 660 and *Armes v Nottinghamshire County Council* [2018] AC 355 ('*Armes*'). See further Paula Giliker, 'Vicarious Liability in England and Wales' in Paula Giliker (ed), *Vicarious Liability in the Common Law World* (Hart Publishing, 2022) 48–52.

Catholic Church, specifically an institution for the care of boys in need, at which members of the class action suffered sexual abuse at the hands of both employees and lay members of the institute.[16] The focus of the appeal was on vicarious liability for the actions of the non-employee members. The UKSC concluded that the institute should be regarded as vicariously liable for the actions of those members because its relationship with those members bore enough similarities to employment to make it 'fair, just and reasonable' to do so.[17] The UKSC set out the relevant similarities as a 'five incidents' test, which included whether party B's 'activity is likely to be part of the business activity' of party A and the likelihood of party B being more able to compensate the aggrieved party than party A.[18]

The UKSC subsequently refined the 'akin to employment' relationship in *Various Claimants v Barclays Bank* ('*Barclays Bank*').[19] That decision involved the liability of Barclays Bank for alleged sexual assaults committed by a doctor engaged to perform pre-employment reports for the bank's employees. The UKSC found that the doctor was not an employee of the bank and was clearly carrying on business on his own account;[20] accordingly, vicarious liability could not attach to Barclays Bank. The UKSC emphasised that the line running through the cases, including *Christian Brothers*, was 'understanding the details of the relationship', and that when it was clear the person was carrying on business independently, there was no reason to apply the 'five incidents' test.[21] That test would apply only in 'doubtful' circumstances, though the overarching test still appears whether it was 'fair, just and reasonable to impose vicarious liability' on that particular relationship.[22]

B *The Majority's Reasoning*

In *Bird*, the Victorian Supreme Court and the Court of Appeal applied a similar approach to a relationship that was neither one of employment nor an independent contract (priest and Diocese).[23] On appeal to the High Court, however, the majority (Gageler CJ, Gordon, Edelman, Steward and Beech-Jones JJ) found that an employment relationship was required for vicarious liability. The majority had five reasons for reaching this conclusion.

---

[16] *Christian Brothers* (n 15) [3]–[4].
[17] Ibid.
[18] Ibid [35].
[19] *Various Claimants v Barclays Bank plc* [2020] 4 All ER 19 ('*Barclays Bank*').
[20] Ibid [28].
[21] Ibid [27].
[22] Ibid.
[23] *DP (a pseudonym) v Bird* [2021] VSC 850 [116]–[214]; *Bird v DP (a pseudonym)* (2023) 69 VR 408 [77]–[131].

First, the High Court has 'repeatedly rejected' the idea that fairness, justice and reasonableness should be the basis for 'determining and developing the law of vicarious liability'.[24] The majority was influenced by the fact that such determinations appear too subjective to ground reliable development of the doctrine: they 'depend … on contestable policy choices and the allocation of risk, *which are matters upon which minds might differ*'.[25]

Second, the employment relationship was a solution with 'deep roots' that should not be arbitrarily discarded, even though this was 'harsh' given the heinous acts at issue.[26]

Third, expanding the first stage beyond employment risked creating 'uncertainty and indeterminacy' in unduly expanding the doctrine 'to relationships which hitherto would not have been understood to involve one party being liable for another's wrongs', and when it comes to distinguishing relationships 'akin to employment' from those involving independent contractors.[27]

Fourth, it was not within 'the body of accepted rules and principles' of the law to expand the first-stage test.[28]

Fifth, it was the responsibility of Parliament, not the Courts, to develop or '[r]eformulat[e] the law on vicarious liability'.[29] Despite (pre-Victorian) statutory reforms seeking to hold institutions to account for abuse across different jurisdictions in Australia, the majority did not consider it had the remit to expand the first-stage test by analogy to those statutory developments.[30]

Accordingly, the majority declined to expand the first-stage test for vicarious liability to cover non-employment relationships. The appeal was therefore allowed, and the Diocese bore no vicarious liability for the priest's offences.

C *Why an Analysis of Bird Matters*

The outcome in *Bird* is consistent with the development of the vicarious liability doctrine in Australia in that it steadfastly upholds the distinction between employment and non-employment relationships.[31] Putting aside consequentialist

[24] *Bird* (n 5) 80 [62].
[25] Ibid (emphasis added).
[26] Ibid 81 [63]–[64].
[27] Ibid 81–2 [65]–[66].
[28] Ibid 82 [67], citing *Breen v Williams* (1996) 186 CLR 71, 115 (Gaudron and McHugh JJ) ('*Breen*').
[29] *Bird* (n 5) 82 [67].
[30] Ibid 84 [71].
[31] See also Henry Ea, 'High Court Narrows Vicarious Liability for Institutional Abuse', *Law Society Journal* (online, 21 November 2024) <https://lsj.com.au/>.

criticisms (which merit examination but are not the focus of this article), a doctrinal critique requires us to assess whether the majority had good reasons to maintain the restriction of vicarious liability doctrine; or more specifically, when confronted with the potential to expand the doctrine to relationships akin to employment, whether its reasons for not doing so stand up to scrutiny.[32]

This analysis matters despite the broadening of non-delegable duties to intentional acts in *AA*; non-delegable duties and vicarious liability still achieve different ends by different tests.[33] Vicarious liability focuses on the relationship between the institution and the tortfeasor; non-delegable duties focus on the relationship between the institution and the plaintiff.[34] Depending on the situation, a non-delegable duty may remain even more difficult to prove than vicarious liability.[35] This is consistent with the idea that the non-delegable duty is an exception to the general rule that A is generally not liable for the conduct of C, an independent contractor, against B, the plaintiff,[36] and to the 'fault-based principles on which the law of negligence is based' generally.[37]

The other avenue for protection is statutory, but even here, there remains scope for the common law of vicarious liability. If there is no legislation making an institution vicariously liable, the plaintiff will need to rely on the common law. And if there is legislation, plaintiffs will need to meet statutory thresholds to hold an institution liable, which can vary per jurisdiction.[38] Legislation is also inherently political (and therefore fragile) in a way the common law is not. Parliament can legislate to respond to, and in some cases functionally invalidate, a decision of the courts, as appears to be the case in *Bird*. The flip side of relying on legislation, though, is the fragility of political will. In an age of increasing political division, it is not impossible, nor improbable, to imagine a world in which protections like the Victorian and

---

[32] See also Kenneth Hayne, 'Letting Justice Be Done without the Heavens Falling' (2001) 27(1) *Monash University Law Review* 12, 19.

[33] See also *AA* (n 3) [137] (Gordon J); Warren Swain, 'Vicarious Liability: A Pailful of Slops and Other Hazards' in Kit Barker and Ross Grantham (eds), *Apportionment in Private Law* (Hart Publishing, 2018) 89, 108–9.

[34] Tofaris, 'Vicarious Liability and Non-Delegable Duty for Child Abuse in Foster Care' (n 8) 890.

[35] See, eg, *The Commonwealth v Introvigne* (1982) 150 CLR 258, 271 (Mason J), cited with approval in *AA* (n 3) [15]. See also *Armes* (n 15) [49]–[50].

[36] Francis Santayana, 'Vicarious Liability, Non-Delegable Duties and the "Intentional Wrongdoing Problem"' (2019) 25(2) *Torts Law Journal* 152, 159–60.

[37] *Woodland v Essex County Council* [2014] AC 537, [22] (Lord Sumption), cited with approval in *AA* (n 3) [22]. For a normative evaluation of non-delegable duties, see Anthony Gray, 'Reinvigorating Non-Delegable Duties in Australia?' (2017) 25(2) *Tort Law Review* 59, 74–7.

[38] Gray, 'Relationships Akin to Employment' (n 10) 379 n 23. A table comparing the different approaches taken in Australia, current as of February 2026, is on file with the author. Thanks to Jack McKenzie for preparing this information.

Australian Capital Territory legislation are rolled back on the back of targeted lobbying by institutions and other entities to limit, or avoid, primary or secondary tortious liability for abuse.[39] Corporate roll-backs of diversity and inclusion programs in Australia (consistently with trends in the United States[40]) are a salient reminder that understandings we may take as accepted — like the need for vicarious liability legislation to hold institutions to account for abuse — are far more fragile than we might otherwise think in a globalised, polarised world. As Brennan J noted in his dissenting judgment in *Dietrich v The Queen*:

> In modern times, the function of the courts in developing the common law has been freely acknowledged … The reluctance of the courts in earlier times to acknowledge that function was due in part to the theory that it was the exclusive function to keep the law in a serviceable state. *But legislatures have disappointed the theorists and the courts have been left with a substantial part of the responsibility for keeping the law in a serviceable state, a function which calls for consideration of the contemporary values of the community*.[41]

This does not mean we should not *rely* on legislation; only that the presence of legislation itself is no good reason to avoid considering how the common law doctrine should be developed alongside it.

More broadly, vicarious liability still matters given the context of a widespread shift towards the gig economy in Australia.[42] With the narrow approach in *Bird*, tortious actions are also less likely to be brought against large technology platforms if their 'partners' (eg rideshare drivers) cannot be assessed as being in relationships 'akin to employment', and they are still regarded as independent contractors under the law. The Victorian legislation was targeted at survivors of abuse in institutional settings: a worthy end, but limited to particular factual matrices. To that end, *Bird* arguably limits civil recourse not just in the case of institutional abuse, but in broader contexts to which vicarious liability can apply.

Accordingly, neither the Victorian legislation nor *AA* completely obviate the value of critically analysing the majority's approach in *Bird*. Scholars have taken different approaches to doing so. For instance, Chen and Oreb delineate the different

---

[39] On the influence of lobbying, see, eg, Yee-Fui Ng, 'Regulating the Influencers: The Evolution of Lobbying Regulation in Australia' (2020) 41(2) *Adelaide Law Review* 507, 509–12.
[40] Luca Ittimani, 'Australian Employers Cut Back on Diversity and Inclusion Programs Amid US "Anti-Woke" Backlash', *The Guardian* (online, 10 December 2025) <www.theguardian.com/au>.
[41] *Dietrich v The Queen* (1992) 177 CLR 292, 319 (Brennan J) (emphasis added) ('*Dietrich*').
[42] See also Devon Airey, '"The Gig is Up": The Politics and Policy of Compensating Harms Caused by Gig Workers' in Jodi Gardner et al (eds), *Politics, Policy and Private Law: Volume I: Tort, Property and Equity* (Hart Publishing, 2023) 25.

approaches to vicarious liability in England and Australia, highlighting the *potential* for employment *pro hac vice* (typically used to allow lawyers not yet admitted to practice in a specific jurisdiction to appear in particular cases in that jurisdiction) as an in-between category in the absence of acknowledgement of the 'akin to employment' category.[43] Gray looks back at prior High Court jurisprudence and theories of vicarious liability to ascertain whether vicarious liability *could* have been applied to relationships akin to employment.[44] Gomes and Mohseni decry the apparent shift towards non-delegable duties and away from vicarious liability,[45] while Freeburn argues that policy *can* drive the development of the vicarious liability doctrine, and that policy (eg deterrence) justifies the application of vicarious liability to any relationship characterised by factors set out in the English courts.[46]

In this article, I supplement those analyses by reverse-engineering a warning provided by Gleeson J in *AA*. In her minority judgment, Gleeson J expressed concern that non-delegable duties had been heavily criticised, given the lack of doctrinal development or clarity behind them, and if expanded, may cause incoherence with legislation in New South Wales ('NSW') that appeared to prefer the statutory imposition of vicarious liability in situations of institutional abuse.[47] On these grounds, Gleeson J indicated 'caution [should be exercised] … in expanding the scope of non-delegable duties or expanding the categories of relationship in which non-delegable duties are imposed'.[48] To the extent that this instinct is commendable to preserve the coherence and efficacy of the common law (a Heydonian/Dixonian emphasis),[49] I argue that the inverse is true in *Bird*: that the majority in *Bird* were overly restrained in rejecting the opportunity to expand the first stage of the vicarious liability test. That critique is necessarily Kirby-ian,[50] but it is not a wholesale rejection of Dixonian originalism (a claim which would require

---

[43] Chen and Oreb (n 10) 25–7.
[44] Gray, 'Relationships Akin to Employment' (n 10) 383–91.
[45] Mohseni and Gomes (n 10).
[46] Freeburn (n 10) 197–200.
[47] *AA* (n 3) [477]–[482] (Gleeson J). See also Silink (n 8) 34–5.
[48] *AA* (n 3) [483].
[49] Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (2004) 10(4) *Otago Law Review* 493, 507–8.
[50] Michael Kirby, '"Judicial Activism"? A Riposte to the Counter-Reformation' (2005) 11(1) *Otago Law Review* 1, 4–5. See also Kirby, 'Judicial Activism: Power without Responsibility?' (n 11) 593:

> So long as law is something more than mere rules, so long as it speaks of deep values and human aspirations, of human dignity and fundamental rights, there will be people called judges who have the responsibility to express and apply the law and, in new circumstances, to push it forward and adapt it in a principled way.

considerably more reasoning than is the focus of this article).[51] The history of the High Court reveals ebbs and flows between restraint and activism, with no one governing theory of the Court's role.[52] Accordingly, the argument in this article is more about recovering balance in the legal method to be applied when facing a vicarious liability determination.

After all, any decision to overturn prior case law of the High Court depends on applying principles established by the Court in *John v Federal Commissioner of Taxation*:

> that the earlier decisions did not rest upon a principle carefully worked out in a significant succession of cases … a difference between the reasons of the justices constituting the majority in one of the earlier decisions … the earlier decisions had achieved no useful result but on the contrary had led to considerable inconvenience … the earlier decisions had not been independently acted on in a manner which militated against reconsideration …[53]

An application of those factors to *Bird* is beyond the scope of this article. Nevertheless, the analysis adopts the normative force of, and is designed to supplement, Gleeson J's conclusion (again in the minority) that *Bird* represented 'a missed opportunity for the Australian common law to develop in accordance with changed social conditions and in tandem with developments in other common law jurisdictions'[54] by showing the lack of persuasiveness in the majority's reasoning. In doing so, this article aims to remove the obstacles set up by the majority against the expansion of the first stage, in anticipation of future analyses showing why employers *should* be held vicariously liable for the actions of non-employees with whom they have a particular type of professional relationship (ie 'akin to employment') in Australia.

---

[51] See, eg, Frank Carrigan, 'A Blast from the Past: The Resurgence of Legal Formalism' (2003) 27 *Melbourne University Law Review* 163, 183. Cf John Gava, 'Another Blast from the Past or Why the Left Should Embrace Strict Legalism: A Reply to Frank Carrigan' (2003) 27(1) *Melbourne University Law Review* 186. On the 'wide and unbridgeable gulf' between these two schools of legal method, see Michael Coper, 'Concern about Judicial Method' (2006) 30(2) *Melbourne University Law Review* 554, 571; Michael Coper, 'The Seven Habits of a Highly Effective High Court' (2003) 28(2) *Alternative Law Journal* 59, 63; Fiona Wheeler and John Williams, '"Restrained Activism" in the High Court of Australia' in Brice Dickson (ed), *Judicial Activism in Common Law Supreme Courts* (Oxford University Press, 2007) 19, 30–2.

[52] See, eg, Sonali Walpola, 'After the Australia Acts: The High Court's Attitude to Changing the Common Law (1987–2016)' (2021) 21(1) *Oxford University Commonwealth Law Journal* 31, 41–63; Gava (n 50) 189; Kit Barker, 'Unjust Enrichment in Australia: What Is(n't) it?' (2020) 43(3) *Melbourne University Law Review* 903, 903–5.

[53] *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438–9 ('*John*').

[54] *Bird* (n 5) 87 [79].

III The Majority's Undue Dismissal of the 'Akin to Employment' Category

This Part shows that the *Bird* majority's reasons for declining to adopt an 'akin to employment' approach to the first stage of a vicarious liability determination are characterised by undue judicial restraint because they (a) neglect the proper role of policy considerations; (b) under-emphasise the logical nature of expanding the doctrine to non-employment, non-contractor relationships; and (c) over-emphasise concerns about certainty. None of the above suggests there is no merit to the employment test — merely that the *Bird* majority's caution in maintaining the test was unpersuasive.

A *The Appropriate Role of Policy Considerations*

The first way in which the majority displayed undue restraint in *Bird* was in its rejection of policy considerations as a basis for determining whether to expand the first stage of the vicarious liability enquiry. The majority reasoned as follows:

> The … assessment of what is fair, just and reasonable … depended upon contestable policy choices and the allocation of risk, which are matters upon which minds might differ and which this Court has repeatedly rejected as a sound basis for determining and developing the law of vicarious liability and duties of care.[55]

In the first instance, this argument seems deceptively persuasive, particularly if, as Gomes and Mohseni argue, vicarious liability is not 'a question of policy — *should* vicarious liability be found? — [but instead a matter of] incremental development by reference to the doctrine's fundamental concerns'.[56] Indeed, a frequent trope in jurisprudence and scholarship is that there is no coherent *overarching* theoretical rationale for the doctrine.[57] The lack of a comprehensive engagement with the doctrine's theoretical basis in *Bird* is, as Goudkamp and Plunkett (writing in a pre-*Bird* context) note, 'unfortunate as understanding why such a rule exists is … crucial to determining the circumstances in which it should apply'.[58] Nevertheless, it is not necessary to delineate a particular basis for vicarious liability (insofar as that may be possible, which is far from certain) to conclude that the Court was not precluded

---

[55] Ibid 80 [62] (citations omitted).
[56] Mohseni and Gomes (n 10) 11.
[57] Giliker, 'An Introduction' (n 13) 17.
[58] James Goudkamp and James Plunkett, 'Vicarious Liability in Australia: On the Move?' (2017) 17(1) *Oxford University Commonwealth Law Journal* 162, 168; *Prince Alfred College v ADC* (2016) 258 CLR 134 ('*Prince Alfred*'). See also Rick Bigwood and Joachim Dietrich, 'Uncertainty in Private Law: Rhetorical Device or Substantive Legal Argument?' (2021) 45(1) *Melbourne University Law Review* 60, 83–4.

from, and perhaps may have benefited from, taking into account policy considerations like fairness, justice and reasonableness when making that determination. Two arguments ground this claim.

1 *The Weakness of Prior Case Law to Ground the Argument*

First, it is not clear that the case law relied on by the majority as a barrier to considering policy considerations actually barred it from doing so.[59] In *Hollis v Vabu* (‘*Hollis*’), the High Court noted that vicarious liability in the employment context ‘was adopted not by way of an exercise in analytical jurisprudence but as a matter of policy’.[60] The majority in *Bird* referred to this statement, but did not substantively engage with it when arguing against policy considerations.[61] The majority only said that engaging policy considerations ‘as the sole or determinative basis for developing the principle … would require the Court to revisit and overrule’ various prominent High Court judgments dealing with vicarious liability, or parts thereof.[62]

However, the *Bird* majority did not elaborate on exactly what overruling would occur, nor why it would have been inappropriate to overrule those judgments. Such justifications are important because, as an apex court, the High Court’s overruling function is key, and despite its general reticence to overrule its prior cases, the Court does so when required (most notably and recently in *AA*).[63] Given the seriousness of the acts at issue and the broader context of holding institutions to account for such behaviour, it would have been beneficial for the majority to articulate a more cogent basis if it decided not to overrule prior case law in this instance.

Meanwhile, the majority cited extracts from two High Court judgments in *Lepore* and *Prince Alfred College v ADC* (‘*Prince Alfred*’) as examples of when the Court has previously rejected policy considerations when invited to expand vicarious liability.[64] However, those cases do not provide as strong support as may initially seem the case. *Lepore* involved joined claims against the NSW and Queensland

---

[59] This analysis develops Freeburn’s justification for the use of policy, which centred on the lack of a ‘clear principled foundation for vicarious liability’ and how common law development ‘sometimes requires judges to make some initial move in logic that is not otherwise justified by established legal principle’: Freeburn (n 10) 196–7.
[60] *Hollis v Vabu* (2001) 207 CLR 21 [34] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ) (‘*Hollis*’).
[61] *Bird* (n 5) 73–4 [48].
[62] Ibid 74 [49] (citations omitted).
[63] See generally Sonali Walpola, ‘The Development of the High Court’s Willingness to Overrule Common Law Precedent’ (2017) 45(2) *Federal Law Review* 291 (‘The High Court’s Willingness to Overrule’); Nicholas Aroney, ‘The High Court of Australia: A Federal Supreme Court in a Common Law Federation’ (2017) 17 *Fédéralisme Régionalisme* 1, 3–5; Matthew Harding and Ian Malkin, ‘Overruling in the High Court of Australia in Common Law Cases’ (2010) 34(2) *Melbourne University Law Review* 519, 520.
[64] *Bird* (n 5) 80 [62], referring to *Lepore* (n 3) 560 [128], 586 [212] and *Prince Alfred* (n 58) [38]–[47].

Governments made in respect of assaults by teachers against students.[65] The paragraphs cited from the judgments of Gaudron, Gummow and Hayne JJ respectively in *Lepore* should not be taken as authoritatively dismissing those policy considerations in the context of determining the type of relationship giving rise to vicarious liability.[66] And as Beuermann notes, *Lepore* 'left the law in an entirely unsatisfactory state', a deficiency the High Court sought to rectify with its reasoning in *Prince Alfred*.[67]

Yet *Prince Alfred* also provides limited authority for the *Bird* majority's proposition: '[a]ll comments on vicarious liability … in *Prince Alfred …* were dicta'.[68] *Prince Alfred*, another case in which the respondent sought damages from the College in respect of sexual abuse perpetrated by a housemaster, dealt only with the second stage of vicarious liability, not the first (because there was already an employment relationship).[69] This means the *Bird* majority was free to depart from the reasoning and dicta in *Lepore* and *Prince Alfred* if it considered appropriate. It was not necessarily bound by those cases to reject policy considerations in the context of a first-stage vicarious liability analysis.

What then of the assertion that the law of tort in Australia does not develop by recourse to policy?[70] This position was articulated in *Sullivan v Moody* ('*Sullivan*') and accepted by the majority in *Bird* without further elaboration.[71] Yet much of the normative weight of that position rests on the distinction, elucidated in *Sullivan*, between 'principle' and 'policy':

> The question as to what is fair, and just and reasonable is capable of being misunderstood as an invitation to formulate policy rather than to search for principle. The concept of policy, in this context, is often ill-defined. There are policies at work in the law which can be identified and applied to novel problems, but the law of tort [in Australia] develops by reference

[65] *Lepore* (n 3) 416 [7].
[66] The Gummow and Hayne JJ paragraph (ibid [212]) is inconclusive as a rejection of policy considerations. The Gaudron J paragraph (ibid [128]) comes closest by saying that 'vicarious liability ought to be imposed only in circumstances where it can be justified by reference to legal principle'. As argued below, however, the distinction between principle and policy is questionable.
[67] Christine Beuermann, 'Vicarious Liability in Australia' in Paula Giliker (ed), *Vicarious Liability in the Common Law World* (Hart Publishing, 2022) 73, 78.
[68] Ibid.
[69] *Prince Alfred* (n 58) [1]–[2], [80]–[85].
[70] Mohseni and Gomes (n 10) 13 n 99; Gray, 'Relationships Akin to Employment' (n 10) 380; *Sullivan v Moody* (2001) 207 CLR 562 [49] ('*Sullivan*'). Chen and Oreb (n 10) at 21–2 hint at, but do not directly address, this point.
[71] *Sullivan* (n 70) [49]; *Bird* (n 5) 80 [62].

> to principles, which must be capable of general application, not discretionary decision-making in individual cases.[72]

The distinction has been considered questionable for decades.[73] As Witting argues, 'policy feeds into the development of legal principles … the law *is an instrument* of policy. It is shaped by pre-determined ideas of what law should do — in guiding conduct and/or in resolving disputes between persons'.[74] And even if we were to accept that a binary *of sorts* exists between the two, it does not follow that policy automatically leads to 'discretionary decision-making': policy can instead be as broad as the need to maintain coherence in the law, or to preserve the interests of vulnerable parties — all of which are features of Australian tort jurisprudence going back decades.[75] As Burns notes, 'public or social policy is widely utilised by judges in the High Court as part of their judicial reasoning in negligence cases'.[76] Burns has also studied the use of 'social facts' in judicial reasoning: 'general statements [made by courts] about the nature and behaviour of people and institutions and the nature of the world and society'.[77] Such facts are used to ground policy and other arguments.[78] In negligence cases, such facts are very rarely grounded in empirical evidence, but are often based on 'common sense' understandings of the world.[79] While a detailed consideration of social facts in tort law decision-making is outside the scope of this article, Burns' research strongly suggests judges in Australia are influenced by, and resort to, concerns about the world around them in their reasoning and decision-making processes, both in tort jurisprudence and more generally.

Finally, the approach the High Court took in deciding to overturn *Lepore* in *AA* (as to whether non-delegable duties can apply to intentional wrongdoing) lends itself to the application of policy factors in a vicarious liability analysis. In deciding whether

[72] *Sullivan* (n 70) [49].
[73] Kylie Burns, 'Fulfilling the Promise of the Golden Thread? Vulnerability and Australian Negligence Law' in Kylie Burns et al (eds), *Torts on Three Continents* (Oxford University Press, 2024) 89; Jane Stapleton, 'The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable' (2003) 24 *Australian Bar Review* 135, 136–7.
[74] Christian Witting, 'Tort Law, Policy and the High Court of Australia' (2007) 31(3) *Melbourne University Law Review* 569, 572 (emphasis in original).
[75] Harold Luntz, 'The Use of Policy in Negligence Cases in the High Court of Australia' in Michael Bryan (ed), *Private Law in Theory and Practice* (Routledge-Cavendish, 2007) 77–8.
[76] Kylie Burns, 'It's Not Just Policy: The Role of Social Facts in Judicial Reasoning in Negligence Cases' (2013) 21(2) *Torts Law Journal* 73, 76 ('It's Not Just Policy'). See also Dan Priel, 'Land Use Priorities and the Law of Nuisance' (2015) 39(1) *Melbourne University Law Review* 346, 383.
[77] Kylie Burns, 'The Australian High Court and Social Facts: A Content Analysis Study' (2012) 40(3) *Federal Law Review* 317, 317–8.
[78] Burns, 'It's Not Just Policy' (n 76) 83.
[79] Kylie Burns, 'Judges, "Common Sense" and Judicial Cognition' (2016) 25(3) *Griffith Law Review* 319, 321–2.

to overturn *Lepore*, Gageler CJ, Jagot and Beech-Jones JJ applied the factors in *John v Federal Commissioner of Taxation*[80] as to when it is acceptable for the Court to depart from its prior decisions:

> The exclusion of an intentional criminal act from a non-delegable duty of care established by *Lepore* reflected judicial policy choices which are unable to be sustained consistently with principle, have not led to any useful result but rather have created incoherence in the common law, and have not been independently acted upon. For these reasons *Lepore*, to the extent it decided that a non-delegable duty to ensure that reasonable care is taken cannot apply to an intentional criminal act, should be overturned.[81]

This passage suggests that it would have been acceptable to maintain the approach in *Lepore*: (a) if it were based on judicial policy choices which could be sustained consistently with principle; (b) if *Lepore* had led to 'useful result[s]' in reality; and (c) if *Lepore* were coherent with the common law. For at least points (a) and (b), there is a strong argument that policy considerations, broadly construed as above, play a role: what were the 'judicial policy choices' of the judges in deciding to restrain non-delegable duties in *Lepore*? And what is the real-world impact of *Lepore* when it comes to 'usefulness' — a concept which appears to at least open the door to questions of policy?[82] As acknowledged above, non-delegable duties and vicarious liability are profoundly different, though they address similar subject matter. Nevertheless, the readiness of the High Court to entertain, however indirectly, the role of policy in overruling itself on *Lepore* in *AA* merely highlights the undue restraint of the majority in *Bird* to do the same when considering whether to expand the first stage of the vicarious liability determination to relationships akin to employment.

---

[80] *John* (n 53) 620, applying the reasoning in *Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49, 56–8 (Gibbs CJ).

[81] *AA* (n 3) [50] (Gageler CJ, Jagot and Beech-Jones JJ).

[82] Harding and Malkin (n 63) 536–7. See also Lisa Burton Crawford and Dan Meagher, 'Statutory Precedents under the "Modern Approach" to Statutory Interpretation' (2020) 42(2) *Sydney Law Review* 209, 222. The "useful result" step does appear under-theorised: see, eg, Anthony Gray, '*Vanderstock v Victoria*: Are "True" Consumption Taxes Forbidden to the States by Section 90 of the *Australian Constitution*?' (2022) 44(4) *Sydney Law Review* 591, 599; Kristen Walker, 'When Can a Court's Decision Be Ignored?' (2022) 46(2) *Melbourne University Law Review* 572, 597; Ashleigh Barnes, 'Stare Decisis and Constitutional Guarantees: *Commonwealth v Yunupingu*' (2024) 46(3) *Sydney Law Review* 347, 352; David Tan et al, 'How Does the High Court Interpret the *Constitution*? A Qualitative Analysis Between 2019–21' (2024) 47(1) *University of New South Wales Law Journal* 179, 200; Stephen Gageler, 'Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process' (2011) 37(2) *Monash University Law Review* 1, 9.

2 *The Particular Policy Considerations at Issue Can Be Implemented without Undue Subjectivity*

On the assumption, then, that policy considerations (insofar as they are different from principles, which is far from certain) can play a role in the vicarious liability determination, we come to the concern that doing so would end up being unduly subjective — the 'discretionary' concern in *Sullivan*. The approach here reflects the caution the Court has previously indicated it will apply to the use of policy, with a preference for 'established policies rather than ad hoc policy concerns'.[83] However, I argue below that policy considerations like fairness, justice and reasonableness *can* be incorporated into the vicarious liability analysis in a way that does not obviate the doctrine of precedent or make the decision entirely subjective.[84]

Part of the problem lies in the false dichotomy between reliance on case law and reliance on policy. In *Prince Alfred*, the High Court referred to a statement by Binnie J in the Supreme Court of Canada that '[o]verly frequent resort to general principles opens the door to subjective judicial evaluations that may promote uncertainty and litigation at the expense of predictability and settlement'.[85] To that end, the High Court in *Prince Alfred* favoured 'considering whether the approach taken in decided cases furnishes a solution to further cases as they arise'.[86] Yet in doing so, the High Court created a false dichotomy between the policy choices influencing an individual judge's decisions and prior case law; the former as irredeemably subjective and the latter as a pragmatic guarantee of consistency and predictability.[87]

This dichotomy may well have justified the *Bird* majority's reticence to adopt fairness, justice and reasonableness *if* those factors were overriding mandatory considerations that needed to be considered *separately from* the legal threshold questions.[88] However, the High Court was free to incorporate those factors in ways that maintained subordination to established doctrine. The UKSC may be a model of restraint here. In *Trustees of the Barry Congregation of Jehovah's Witnesses v BXB*, Lord Burrows appeared to relegate policy considerations to 'an afterthought … a

[83] Witting (n 74) 582.
[84] This is a development of Freeburn's (n 10) 186–8 justification for policy in this context, because it more directly addresses the majority's concerns in rejecting policy.
[85] *Prince Alfred* (n 58) [44], referring to *EB v Order of the Oblates of Mary Immaculate in the Province of British Columbia* [2005] 3 SCR 45 [41] (Binnie J).
[86] *Prince Alfred* (n 58) [46].
[87] Cf Stevens, who views any consideration of policy by the courts as inappropriate because of its subjective nature (unless judges are appointed differently with 'political legitimacy'): Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) 306–19.
[88] See, eg, Desmond Ryan, 'From Opportunity to Occasion: Vicarious Liability in the High Court of Australia' (2017) 76(1) *Cambridge Law Journal* 14, 16; *Sullivan* (n 70) [53].

final check *after* the two-stage test has been applied',[89] such that policy should only be considered 'in difficult cases where no doctrinal answer is apparent'.[90]

Notwithstanding the exact method of incorporating these policy considerations, they cannot be dismissed out of hand: fairness, justice and reasonableness arguably underlie tort law itself. The heart of tort law, the negligence claim, requires the establishment of the defendant's duty to the plaintiff.[91] Founding case law establishing the negligence claim permits, and even requires, the Court to assess 'whether it is fair, just and reasonable that a duty be recognised in all the circumstances of the case' where the application of prior case law leaves the issue uncertain (ie in 'borderline' cases).[92] And as Raz concedes, '[t]he content of the duties of care we are subject to … is … a matter of *fair distribution of the risk of liability to damages*'.[93]

The foundational role of these factors suggests applying them to vicarious liability is not the morass of subjectivity that the majority feared, but an approach that is within the very heart of tort law.[94] If indeed the 'core application [of vicarious liability] has been in relation to the tort of negligence',[95] it would, as Freeburn argues, seem strange to accept fairness, justice and reasonableness in the latter context but dismiss them as too subjective in the former.[96] And indeed, in at least some decisions involving vicarious liability, fairness has been influential.[97] A more nuanced position would be to acknowledge that these policy factors have *some* role in the assessment

89 *Trustees of the Barry Congregation of Jehovah's Witnesses v BXB* [2024] AC 567, [58(iv)]; Paula Giliker, 'Vicarious Liability in the UK Supreme Court and High Court of Australia' (2024) 44(1) *Legal Studies* 191, 195.

90 Giliker, 'Reparation for Non-Recent Institutional Child Sexual Abuse' (n 3) 609. For a more expansive view of the use of fairness, justice and reasonableness in the assessment of negligence, see Janet O'Sullivan, 'Negligence, Policy and "Novel Exceptions"' in Jodi Gardner et al (eds), *Politics, Policy and Private Law, Volume 1: Tort, Property and Equity* (Hart Publishing, 2023) 118.

91 Stephen Todd, 'Personal Liability, Vicarious Liability, Non-Delegable Duties and Protecting Vulnerable People' (2016) 23(2) *Torts Law Journal* 105, 106.

92 Ibid 107; Stelios Tofaris, 'Duty of Care in Negligence: A Return to Orthodoxy?' (2018) 77(3) *Cambridge Law Journal* 454, 455. See also John D Ford, 'Children in Need and the Law of Torts' (1995) 54(1) *Cambridge Law Journal* 32, 34, referring to *M (A Minor) v Newham London Borough Council* [1994] 2 WLR 554 (CA).

93 Joseph Raz, 'Responsibility and the Negligence Standard' (2010) 30(1) *Oxford Journal of Legal Studies* 1, 18 (emphasis added), cf 12–13; Peter Cane, 'Justice and Justifications for Tort Liability' (1982) 2(1) *Oxford Journal of Legal Studies* 30, 34. See also Nick Sage, 'Relational Wrongs and Agency in Tort Theory' (2021) 41(4) *Oxford Journal of Legal Studies* 1012, 1014 on the role of justice in civil disputes.

94 See Raz (n 93) 12–13.

95 Paula Giliker, 'Vicarious Liability in the Common Law World: Comparative Conclusions' in Paula Giliker (ed), *Vicarious Liability in the Common Law World* (Hart Publishing, 2022) 3.

96 Freeburn (n 10) 197–8.

97 Gray, 'Reinvigorating Non-Delegable Duties' (n 37) 72–3.

of whether to impose vicarious liability, but that this does not require bypassing objectivity and adherence to precedent.[98] It is also arguable that those values are consistent with the 'golden thread' Stapleton identified in High Court jurisprudence in a 2003 paper ('Protection of the Vulnerable'), and which has sporadically arisen in the years since.[99]

Of course, the fact that it is so difficult to find a consistent rationale for vicarious liability[100] means the role of fairness, justice and reasonableness can be subject to ongoing debate. While they are 'regularly invoked in … cases' involving vicarious liability in the UK and Canada,[101] McBride and Bagshaw suggest that, as with other purported rationales for vicarious liability, fairness, justice and reasonableness are either illusory in explaining the doctrine, or the doctrine does not actually reflect them in practice.[102] Doubtless, a more fulsome normative evaluation of the role of fairness, justice and reasonableness as motivating rationales for vicarious liability (in the context of the first stage) would usefully supplement tort jurisprudence and scholarship.[103] However, the point made above still stands: the majority in *Bird* did not provide valid reasons for neglecting the use of fairness, justice and reasonableness in its consideration of whether to expand the first stage of the vicarious liability enquiry.

B *The Expansion as Logically Derived from Vicarious Liability's Rules and Principles*

1 *The Court's Opportunity to Respond to Shifting Social Circumstances*

The second way in which the majority displayed undue restraint is by wrongly identifying an unbreakable link between the employment threshold of the first stage determination on the one hand, and the principles and rules of vicarious liability: '[a]bandoning the threshold requirement of a relationship of employment for the

[98] See Pearl Davidson, 'Availability of Vicarious Liability for Intentional Abuse Committed by Foster Carers against Foster Children' (2019) (3) 25 *Torts Law Journal* 252, 277.
[99] Burns, 'Fulfilling the Promise of the Golden Thread' (n 73); Stapleton (n 73).
[100] Stevens (n 87) 259; Gray, 'Reinvigorating Non-Delegable Duties' (n 37) 70–1. See also Warren Swain, 'A Historical Examination of Vicarious Liability: A "Veritable Upas Tree"?' (2019) 78(3) *Cambridge Law Journal* 640 on the doctrine's theoretical incoherence.
[101] Justin Tan, 'Vicarious Liability as Risk-Through-Placing' (2022) 51(4) *Common Law World Review* 268, 269–70.
[102] Nicholas J McBride and Roderick Bagshaw, *Tort Law* (Pearson, 7th ed, 2024) 664.
[103] See, eg, James Brown, 'Developing a Contextual-Pluralist Model of Vicarious Liability' (2021) 28(2) *Tort Law Review* 123.

purposes of vicarious liability does not fit within the body of accepted rules and principles'.[104]

The majority provided no further explanation for their argument except to suggest that there was no basis in the 'difficulties' caused by vicarious liability to expand the doctrine, such expansion being the proper role of the legislature.[105] The majority cited Gaudron and McHugh JJ in *Breen v Williams* on this point with approval, those Justices having made a general comment about how the common law advances.[106] Yet in so relying on Gaudron and McHugh JJ, the *Bird* majority opened the door to what those Justices said next regarding the courts' role to advance common law doctrines when confronted with shifting social circumstances:

> In a democratic society, changes in the law that cannot logically or analogically be related to existing common law rules and principles are the province of the legislature. *From time to time it is necessary for the common law courts to re-formulate existing legal rules and principles to take account of changing social conditions*. Less frequently, the courts may even reject the continuing operation of an established rule or principle. But such steps can be taken only when it can be seen that the "new" rule or principle that has been created has been derived *logically or analogically from other legal principles, rules and institutions*.[107]

In other words, the *Bird* majority applied dicta from *Breen* outside its context: development of the common law in response to social circumstances is part of the analysis when evaluating the legitimacy of a judicial development of common law doctrine. This argument is consistent with Gordon J's (extrajudicial) exhortation:

> [J]udges … have a responsibility to develop the common law aside from the need to ensure coherence. The common law cannot remain static. The common law must respond to 'developments of the society in which it rules'. A previously understood principle of the common law may become ill-adapted to modern circumstances.[108]

There is an argument that restricting vicarious liability to employment relationships is 'ill-adapted to modern circumstances'. First, the changing nature of work — especially given the shift to a gig economy in many sectors — means 'workers may not have a contract of employment even though they are in reality part of an

---

[104] *Bird* (n 5) 82 [67].
[105] Ibid.
[106] Ibid, citing *Breen* (n 28).
[107] *Breen* (n 28) [47] (emphasis added).
[108] Michelle Gordon, 'Analogical Reasoning by Reference to Statute: What is the Judicial Function?' (2019) 42(1) *University of New South Wales Law Journal* 4, 24 (citation omitted).

organisation'.[109] Thus, in *Hollis*, a majority of the High Court (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ) classified a relationship between a courier company and its bicycle couriers as one of employment.[110] However, the extent to which economies have been transformed by large-scale platformisation has further muddied the waters since *Hollis*,[111] which suggests the employer-contractor distinction may be artificial at best and unhelpful at worst by absolving large corporations of liability for 'partners' with whom they are in 'non-employment' relationships. Closely related is the fact that religious institutions structure their relationships with clergy in numerous ways, which can make it challenging to apply a strict employment test.[112]

Second, there is in Australia 'a general intolerance of physical, sexual and psychological abuse of children, and increased recognition of societal responsibility for setting and maintaining appropriate standards of care for children, especially in institutional settings'.[113] Third, and relatedly, the protection of children as vulnerable parties aligns with the emphasis on vulnerability in negligence doctrine in Australia,[114] and the argument that '[v]icarious liability exists because of the legal policy to protect innocent third parties'.[115] Insofar as the plaintiff in *Bird* was not able to seek recourse against the Catholic Diocese for the abuse they suffered, there is a strong argument that would in any case be an 'exceptional case … where a rule of the common law produces a manifest injustice, [in which the High Court] will change the rule so as to avoid perpetuating the injustice'.[116]

These circumstances suggest a response from the courts in the form of a 'reformulat[ion]'[117] of the first stage would be justified if it would hold more organisations liable for tortious conduct by those affiliated with them,

---

[109] Davidson (n 98) 274.
[110] *Hollis v Vabu* (n 60) [47]–[56].
[111] Paula Giliker, 'Vicarious Liability and Corporations' in Martin Petrin and Christian Witting (eds), *Research Handbook on Corporate Liability* (Edward Elgar, 2023) 274, 277–8. Platformisation here is understood as 'the penetration of the infrastructures, economic processes, and governmental frameworks of digital platforms in different economic sectors and spheres of life, as well as the reorganisation of cultural practices and imaginations around these platforms': Thomas Poell, David Nieborg and José van Dijck, 'Platformisation' (2019) 8(4) *Internet Policy Review* 1, 1.
[112] See, eg, *Bread of Life Christian Church in Auckland v Chen* [2024] NZEmpC 69; *New Testament Church of God v Stewart* [2008] ICR 282.
[113] *Bird* (n 5) 87 [78].
[114] James Gallen, 'Institutional Liability, Historical Abuses and Vulnerability' in James Gallen and Tanya Ni Mhuirthile (eds), *Law, Responsibility and Vulnerability: State Accountability and Responsiveness* (Routledge, 2021) 110, 115.
[115] Stephen Simblet, 'Abuse of Power and Vicarious Liability' (1994) 53(3) *Cambridge Law Journal* 430, 432.
[116] *Dietrich* (n 41) 319 (Brennan J dissenting).
[117] *Bird* (n 5) 87 [79].

including abuse perpetrated by those affiliated with religious organisations. This is consistent with Gleeson J's argument in *Bird* that changes in statutory obligations on religious organisations, and case law overseas involving such organisations, suggest 'a marked social change in which relationships established under non-legal frameworks … *are not an acceptable justification for the non-imposition of vicarious liability where the relevant relationships are regarded as … akin to employment*'.[118]

Expanding the first stage to cover relationships 'akin to employment' would not *necessarily* contravene *Breen* as cited by the majority: it derives logically or analogically from the legal principles, rules and institutions underlying vicarious liability. Determining whether a relationship of employment exists *already* requires a detailed analysis of a particular relationship, with no definitive criteria and a holistic approach to be applied.[119] An 'akin to employment' approach, as in *Barclays Bank*, is much the same, requiring the Court to analyse whether the relationship bears similar enough characteristics to the employment relationship to warrant the application of vicarious liability.[120] In any case, the majority's recourse to established 'principles' reengages the false binary between policy and principle articulated above; as one bleeds into the other, the majority here appears to have created a rod for its own back, insofar as the very considerations it rejected as the basis for broadening the first stage of the vicarious liability enquiry may in fact be the same considerations that justify that expansion on the logic of Gaudron and McHugh JJ in *Breen*.

Importantly, this article does not suggest that the Court is *obliged* to develop the law in this instance. The normativity of the Court's role is a complex issue to be discussed elsewhere, and the High Court's conservatism can be commendable, particularly when it comes to overruling its own decisions to improve the law.[121] The argument in this article is more nuanced; it is that the *Bird* majority did not present valid reasons for neglecting to broaden the scope of relationships recognised by vicarious liability. Doing so could have been normatively justified by shifting social circumstances (as outlined in *Breen*), and would arguably have reflected the

---

[118] Ibid 109 [150] (emphasis added).

[119] *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, [20] (Mason J); Pam Stewart and Anita Stuhmcke, *Australian Principles of Tort Law* (Federation Press, 4th ed, 2017) 572–3.

[120] See also Gleeson J's argument that doing so is consistent with the enterprise liability theory of vicarious liability: at [86]–[93]. For more on enterprise liability as a prominent rationale of vicarious liability, see, eg, Douglas Brodie, 'Enterprise Liability: Justifying Vicarious Liability' (2007) 27(3) *Oxford Journal of Legal Studies* 493; Tofaris, 'Vicarious Liability and Non-Delegable Duty for Child Abuse in Foster Care' (n 8) 888; John Bell, 'Vicarious Liability for Child Abuse' (2010) 69(3) *Cambridge Law Journal* 440, 442; Po Jen Yap, 'Enlisting Close Connections: A Matter of Course for Vicarious Liability?' (2008) 28(2) *Legal Studies* 197, 213–4.

[121] See also Harding and Malkin (n 63) 555–6.

common law's 'proven ability … to adapt and respond to changing societal attitudes and values'.[122]

2 *The Unnecessary Recourse to Statutory Responses*

The response may well be that '[r]eformulation of the law of vicarious liability is properly the province of the legislature'.[123] The majority cited *Breen* as authority for that proposition; however, Gaudron and McHugh JJ only made that concession in the context of 'changes in the law that cannot logically or analogically be related to existing common law rules and principles'[124] — which, as I have articulated above, do not necessarily stand in the way of an expansion.

This does not necessarily make the common law the *preferred* solution. After all, parliamentary intervention in tort law typically occurs where there is 'dissatisfaction with the operation of the common law',[125] and vicarious liability is one doctrine that has repeatedly caused difficulty for courts in Australia and elsewhere. And as we have seen, legislation has already been passed in Victoria to more effectively address liability for institutional abuse. Nevertheless, there are three reasons why the common law can still play an important role when it comes to vicarious liability determinations, in Australia at least.

First, vicarious liability is a creature of the common law, not statute. The courts set the parameters of that doctrine according to the doctrine of precedent. The High Court, meanwhile, has 'the final authority to determine what is the common law of Australia' and 'to develop the common law to meet the needs and conditions of Australia'.[126] This position strongly suggests that where the common law *can* be developed by the court, the Court retains a responsibility to do so, cognisant of but not abdicating its own bespoke role to legislators. Unless legislation expressly

[122] Pam Stewart and Anita Stuhmcke, 'High Court Negligence Cases 2000–10' (2014) 36(4) *Sydney Law Review* 585, 609. See also Walpola, 'The High Court's Willingness to Overrule' (n 63) 314: 'As illustrated by *Mabo* and subsequent decisions, the [High] Court has been prepared to overturn foundation common law rules, and has also been willing to adapt the common law to Australian circumstances'.

[123] *Bird* (n 5) 83–4 [68]–[70].

[124] *Breen* (n 28) [47].

[125] Giliker, 'Reparation for Non-Recent Institutional Child Sexual Abuse' (n 3) 599.

[126] Robert C Beckman, 'Divergent Development of the Common Law in Jurisdictions which Retain Appeals to the Privy Council' (1987) 29(2) *Malaya Law Review* 254, 259. For the longstanding debate between declaratory (courts "discover" the law) and change (courts "make" the law) conceptions of judicial decision-making, see, eg, Samuel Beswick, 'The Declaratory Theory of Judicial Law-Making' (2026) 39(1) *Canadian Journal of Jurisprudence* 1. This paper reflects the "change" position, in that judges develop and change the law of vicarious liability to reflect social circumstances: see further Gageler and Gordon JJ (writing in the minority) in *Prince Alfred* (n 58) [127]; though it can be consistent with the declaratory position as well, in that judges 'discover' the heart of that doctrine was always meant to address broader relationships than those in the employment context.

replaces the common law (which is not apparent on the face of the *Justice Legislation Amendment (Vicarious Liability for Child Abuse) Act 2026* (Vic)), it can remain a live issue for courts to adjudicate — especially so in Australian jurisdictions without such legislative protection.

Second, Australian statutory responses to institutional abuse in this context are inconsistent across jurisdictions, and have appeared not to hold institutions to account for the tortious acts of those associated with them in non-employment relationships.[127] Compared to that fragmented approach, the High Court is better positioned to provide a unified statement of the law of vicarious liability in Australia,[128] granting greater certainty to litigants and organisations.

Third, even where statutory reform is instituted to expand vicarious liability, the parameters of that reform may be inconsistent. The post-*Bird* Victorian legislation applies retrospectively; however, statutory reform recommendations and responses in Australia have generally tended to be *prospective* rather than retroactive.[129] This approach limits the ability of victims to seek redress for actions that have already occurred. That limitation would exist even if the statutory responses were coherent and unified, unless Parliament expressly provided for retrospective application, which typically only occurs in 'exceptional and questionable case[s]'.[130] Yet there is less of an equivalent limitation on courts because their declaratory power generally operates retrospectively.[131] The potential injustice of retrospective application of statutes is limited in the case of judges because by nature, they 'are likely to … make more limited decisions, and have neither the power nor the inclination to make more far-reaching decisions'.[132] And even when courts overrule prior decisions with retrospective effect, there are principles that constrain that exercise to a reasonable degree, for example, where the principle being overruled has been the subject of 'justifiable reliance' by the public.[133] The default position in the common law, unlike

[127] See Giliker, 'Reparation for Non-Recent Institutional Child Sexual Abuse' (n 3) 600–1; Giliker, 'Vicarious Liability and Corporations' (n 111) 279–80 n 42; Luke Borgert, 'An Update on Vicarious Liability: Legislative Reform', Mills Oakley (Web Page, 24 November 2025) <www.millsoakley.com.au>.

[128] Giliker, 'Reparation for Non-Recent Institutional Child Sexual Abuse' (n 3) 601.

[129] *Bird* (n 5) 83–4 [69]–[70], 139 [242], 140–3 [245]–[247]; *Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018* (NSW) s 2(2); *AA* (n 3) [49].

[130] Jack Beatson, 'Has the Common Law a Future?' (1997) 56(2) *Cambridge Law Journal* 291, 313.

[131] *Ha v New South Wales* (1997) 189 CLR 465, 475; *Kleinwort Benson v Lincoln City Council* [1999] 2 AC 349, 378–9 (Lord Goff); Beatson (n 131) 314; Lucas Clover Alcolea, 'Why is there "But One Common Law in Australia"? (2025) 99(7) *Australian Law Journal* 530, 538.

[132] Andrew Palmer and Chales Sampford, 'Judicial Retrospectivity in Australia' (1995) 4(2) *Griffith Law Review* 170, 184.

[133] Ibid 188–91.

in statute, is retrospective application, with a prospective-only approach in exceptional circumstances.[134]

Thus, while statutory reforms represent positive steps in response to historical institutional abuse, particularly where they are retrospective as in Victoria,[135] the courts retain an important role in the application and development of the vicarious liability doctrine, in ways that can better reflect its varied policy aims. The majority, in acknowledging the positive impact of legislation, need not have jettisoned its own opportunity to so develop the common law. This was the second example of its undue restraint in the *Bird* majority's reasoning.

C *Overstated Concerns about Certainty*

The third manifestation of undue restraint in *Bird* was the majority's overstated concerns about the uncertainty that moving beyond the employment relationship would create. The majority suggested this was because expanding the first stage would blur the lines even further between employers and independent contractors.[136] To an extent, uncertainty in vicarious liability is unavoidable. As Lord Dyson MR has said, '[t]o search for certainty and precision in vicarious liability is to undertake a quest for a chimaera'.[137] However, while the majority's desire to maintain certainty in this context is still commendable,[138] it overstated the risk of uncertainty for the following reasons.[139]

1 *The UK Position Has Been Clarified since Christian Brothers*

Christian Brothers may well have created uncertainty, leading the UKSC to clarify the position in *Barclays Bank*.[140] Yet that clarification showcases the role of the courts: to develop and reformulate common law doctrines where appropriate. If a refined test, as in *Barclays Bank*, more effectively addresses the uncertainty of creating a

---

134 Richard HS Tur, 'Time and Law' (2002) 22(3) *Oxford Journal of Legal Studies* 463, 474.
135 See also the third recommendation in Paula Giliker, 'Caging the Bird: Vicarious Liability in the High Court of Australia', *University of Bristol Law School Blog* (Blog Post, 13 January 2025) <https://legalresearch.blogs.bris.ac.uk>.
136 *Bird* (n 5) 81–2 [65]–[66].
137 *Mohamud v WM Morrison Supermarkets Plc (Rev 1)* [2016] AC 677, [54].
138 Phillip Morgan, 'Certainty in Vicarious Liability: A Quest for a Chimaera?' (2016) 75(2) *Cambridge Law Journal* 202, 204.
139 This analysis supplements Freeburn's approach to certainty, which is largely supportive while identifying the inherent uncertainty of the first stage of a vicarious liability determination, the 'onerous' nature of the akin to employment test in the UK, and the remaining 'stage two' requirement: Freeburn (n 10) 201.
140 *Bird* (n 5) 79–80 [61], citing *Christian Brothers* (n 15) [27].

new category between employment and independent contractor relationships, the *Bird* majority's opposition is less coherent.

The *Bird* majority considered that this updated test ('whether the tortfeasor is carrying on business on his own account or whether [the tortfeasor] is in a relationship akin to employment with the defendant') still created uncertainty.[141] This was because only using some of Lord Phillips' 'five incidents' in *Christian Brothers* would likely lead to challenges in differentiating between employment and independent contractor relationships, especially in 'borderline' cases.[142]

However, it is not clear that *Barclays Bank* would require using some of the indicia only in those borderline cases. In that case, Lady Hale stated that such 'doubtful cases' may engender the use of the five incidents, yet without specifying that only some may be helpful or that only some may be used.[143] Even if courts were permitted to use only some of the indicia — thereby justifying the majority's hesitation — a simple correction would be for the High Court to specify that all the indicia should be used.

2 *Certainty Concerns about the Five Incidents Test May Be Overstated*

In any case, concerns about the uncertainty of the five incidents test may be overstated following *Barclays Bank*. The 'carrying on business on his own account' test clarifies, rather than blurs, the lines between employment and independent contractor relationships, even if a third category is considered; that category would always be under the *conceptual* umbrella of employment and defined by a person *not* carrying on business on their own account.[144]

There is, of course, a residual uncertainty as to how and when exactly the five-incident test will be applied, which would benefit from judicial clarification.[145] Complicated facts may also render the determination of whether a person is undertaking business for another party or themselves — like the doctor in *Barclays Bank*, who sexually assaulted patients he had been engaged to medically evaluate[146] — difficult. The point remains, however, that there may be more certainty in defining coverage of vicarious liability by whether a person is *not* carrying on business on their own account. Doing so emphasises the independence of the person's

[141] *Bird* (n 5) 81–2 [66].
[142] Ibid.
[143] *Barclays Bank* (n 19) [27].
[144] See McBride and Bagshaw (n 102) 655.
[145] Alison Silink and Desmond Ryan, 'Vicarious Liability for Independent Contractors' (2018) 77(3) *Cambridge Law Journal* 458, 461; Freeburn (n 10) 201.
[146] *Barclays Bank* (n 19) [2]–[8].

endeavours as the deciding factor, rather than diving too deeply into whether they formally meet the status of employee.[147]

All things considered, expanding the first stage along the lines of the UK's approach in *Barclays Bank* would not *necessarily* have created the uncertainty the *Bird* majority appeared so concerned by.[148] The majority appeared unduly fixated on the five incidents, without recognising that the UKSC had adopted a much more flexible approach in *Barclays Bank*, which could have been a prototype for the High Court and the development of Australian laws in this area.

IV Conclusion

In *Bird*, the majority neglected to expand the first stage of the vicarious liability test in a way that would have covered non-employment, non-contractor relationships that nonetheless reflect policy considerations which appear consistent with the doctrine. The undue judicial restraint characterising the majority's approach was defined by three aspects. First, the majority unjustifiably dismissed the role of policy considerations, despite those considerations being at the heart of tort law and appearing to consistently influence tort jurisprudence in Australia (as shown in *AA*). Second, the majority incorrectly deemed an expansion beyond the employment relationship inconsistent with the established rules and principles of Australian common law, and in any case, relinquished responsibility over this area of significant need to Parliament. Third, the majority over-emphasised the potential uncertainty an expansion of the first stage to relationships 'akin to employment' would cause, failing to give proper weight to the flexibility of the refined approach the UKSC adopted in *Barclays Bank*. For these reasons, the majority would not have strayed into the realm of 'arbitrary departures from basic doctrine' had it decided to so expand the first stage of vicarious liability; that alternative outcome instead appears, in the first instance at least, to be a development of 'the common law in new circumstances in ways that are logically reasoned and shown to be a consistent development of past decisional law'.[149]

Bird is an example of how undue judicial restraint can be as problematic as undue judicial activism, insofar as courts may not respond to social circumstances in

[147] Of course, one of the advantages of a 'closed' approach is that it does not create uncertainty in other areas of law like employment or tax law. This is a potentially fruitful avenue of exploration but is beyond the scope of this article.

[148] See also Neil Foster, 'Convergence and Divergence: The Law of Non-Delegable Duties in Australia and the United Kingdom' in Andrew Robertson and Michael Tillbury (eds), *Divergences in Private Law* (Hart Publishing, 2016) 109, 132–3, though Foster acknowledges he does not canvass the criticism in detail.

[149] *Cattanach v Melchior* (2003) 215 CLR 1, [137] (Kirby J).

situations where such responses may be justified and urgently needed. The analysis in this article thus emphasises the importance of being *appropriately* cautious when confronted with a controversial doctrine with significant policy implications. Preservation of the law's coherence need not obviate the court's opportunity (some may argue responsibility) to develop the law in response to shifting social conditions and circumstances[150] — especially insofar as the pursuit of total coherence may well be a mirage, or at least of overstated importance.[151] *Bird* was, in Gleeson J's words, a 'missed opportunity' to reach an outcome driven by appropriate, rather than undue, caution, as to the relationships covered by vicarious liability.[152]

Accordingly, while the law is settled following *Bird* — vicarious liability only applies to employment relationships — there are good reasons for the High Court to reconsider the majority's employment-only approach should the question of overturning *Bird* arise in the future, not least of which is the pressing need to ensure the most vulnerable members of society are protected from, and given recourse against, heinous acts of abuse perpetrated within the auspices of institutional care.

---

[150] See *Dietrich* (n 41) 319–22 (Brennan J).

[151] John Murphy, 'Anomalies in Tort Law' (2023) 86(4) *Modern Law Review* 872, 895–7; Andrew Fell, 'The Concept of Coherence in Australian Private Law' (2018) 41(3) *Melbourne University Law Review* 1160. Cf Silink (n 8) 35.

[152] Cf Robert French, who extrajudicially decried the phrase 'missed opportunity' in scholarly critiques of judgments as showing 'an insufficient appreciation of the nature and limits of the judicial function … [as t]he court's first task is always to decide the case before it': 'Judges and Academics: Dialogue of the Hard of Hearing' (2013) 87(2) *Australian Law Journal* 96, 102.

RETHINKING NON-COMPETES: TOWARDS A MEANINGFUL AND COMPREHENSIVE BAN WITH SPECIAL REFERENCE TO TRADE SECRETS PROTECTION

DARSHANA SUMANADASA*

One of the more unconventional budget proposals of the year 2025–2026 is Australia's complete ban on non-compete clauses for workers earning below the Fair Work Act 2009 (Cth) high-income threshold of AUD183,100. This raises two key questions: (1) Why is an outright ban necessary? and (2) What additional concerns should policymakers address beyond the income threshold? This paper examines these questions, focusing on the rights of both employees and employers, especially in the context of protecting trade secrets. While non-compete clauses can restrict employee mobility and affect the broader economy, they also serve to protect employers' trade secrets and commercially valuable information. Striking a fair balance is crucial, as the common law already limits non-competes to what is reasonable in scope, geography, and duration. While supporting legislative intervention, this paper also explores alternative, practical solutions to effectively balance employer and employee interests.

I Introduction 110

II Role of NCCs Safeguarding Trade Secrets 113

III Existing Legal Approach in Balancing Employers' and Employees' Rights 116

A *Test of Reasonableness* *116*

B *A Strict View on Employment Contracts* *119*

---

* Lecturer, Curtin Law School, Faculty of Business and Law, Curtin University. Substantive portions of this article are drawn from the author's PhD thesis, titled 'The Impact of Trade Secrets Law on Employees and Society: In Search of a Balanced Theoretical and Legal Approach with Special Reference to Australia and Sri Lanka', submitted to the Queensland University of Technology and available at <https://eprints.qut.edu.au/128074/>. The author gratefully acknowledges the guidance of his PhD supervisors, Professor Des Butler and Associate Professor Kylie Pappalardo.

C *Judicial Power of Severance* 120

D *New South Wales Approach* 122

IV Impact On The Rights Of Employees 123

A *Right to Enter into Employment Contracts Freely and Voluntarily* 124

B *Right to Choose and Change Employment or Employee Mobility* 126

C *Blurry Line Between Trade Secrets and Employee Know-How* 127

D *Non-Competes and Lower-Income Workers* 130

E *Extending the Scope of Trade Secrecy to Include Mundane Information* 131

F *Non-Existence of a Measure to Compensate Employees during the Restraint Period* 133

G *Economic Implications, Knowledge Spill-over, and Endogenous Growth* 135

V A Way Forward 137

A *Selective or Limited Ban* 138

B *Defining the Boundaries: Protectable vs Non-Protectable Interests in Restrictive Covenants* 139

C *Demarcating Employee Know-How from Trade Secrets: Embracing the Memory Rule* 143

D *Advocating for Garden Leave as a Mandatory Compensation Mechanism for Restricted Employees* 146

E *Legislative Provisions and Guarantees Not to be Excluded by Contracts* 149

VI Conclusion 149

I Introduction

Restraint of trade clauses, which restrict an employee's personal liberties and freedom to work for other employers or start their own business after leaving a job, are now common across a wide range of industries in modern economies. A survey by the Australian Bureau of Statistics in 2023 revealed that Australian businesses frequently include restraint of trade clauses in employment contracts.[1] These clauses take various forms, including non-disclosure agreements ('NDAs'), non-compete clauses ('NCCs'), non-solicitation agreements, and non-poaching provisions. Among these, NCCs are the most impactful, with at least 20% of Australian workers subject to such restrictions in their employment agreements.[2] The gravity of NCCs is that they bind an employee even after leaving the present employment which is one form of post-employment restraint. Recent research highlights the negative impact of NCCs on employee mobility, particularly in limiting job transitions within the same industry.[3] Workers in businesses that extensively use NCCs are also paid, on average, 4% less than their counterparts in similar firms that only require NDAs.[4] This is for the reason that NCCs operate as restraints on labour competition which impede employee mobility and wage bargaining. In order to resolve this issue, the Federal Government, based on a report of the competition task force, made an unconventional budget proposal last year (2025–2026) to completely ban NCCs in Australia, for workers earning less than the *Fair Work Act 2009* (Cth) high-income threshold of AUD183,100.[5] This ban will come into effect from 2027.

Notwithstanding these well-documented adverse effects and the proposed legislative response, the continued prevalence of NCCs is largely driven by employers' concerns about the protection of commercially valuable information, specifically, trade secrets.[6] This concern is especially pronounced in Australia, where Small and Medium Enterprises ('SMEs') account for 97.2% of all businesses.[7] Across various industries, employees are frequently identified as the greatest threat to trade secret security, not only due to their access to sensitive information but also because they may have contributed to its creation or compilation. Employers commonly express concern that departing employees may transfer proprietary knowledge to competitors or utilise it in their own ventures, thereby compromising

---

[1] 'Restraint Clauses, Australia, 2023', *Australian Bureau of Statistics* (Web Page, 21 February 2024) <www.abs.gov.au>. See also Dan Andrews and Bjorn Jarvis, 'The Ghosts of Employers' Past: How Prevalent are Non-compete Clauses in Australia?' (Research Note, e61 Institute, 20 June 2023) <https://e61.in/>.
[2] Ibid.
[3] Jack Buckley, Ewan Rankin and Dan Andrews, 'Non-Compete Clauses, Job Mobility and Wages in Australia' (Research Note, e61 Institute, 14 October 2024) 1 <https://e61.in>; Hon Dr Andrew Leigh MP, *Opinion Piece: Non-compete Clauses are Costing Workers $7 Billion a Year* (2024) Ministers Treasury Portfolio <https://ministers.treasury.gov.au>.
[4] Australian Government, *Budget Strategy and Outlook 2025–26* (Budget Paper No 1, 25 March 2025).
[5] Ibid.
[6] 'Intellectual Property Protection Methods 2012-13', *Australian Bureau of Statistics* (Web Page, 21 August 2014) <www.abs.gov.au>; 'Intellectual Property Protection Methods 2014-15', *Australian Bureau of Statistics* (Web Page, 28 July 2016) <www.abs.gov.au>.
[7] Stefan Dittmer and James Pooley, 'Secrecy: The IP Right Most Often Used by SMEs', *WIPO Magazine* (online, 15 March 2021) <www.wipo.int>.

the competitive advantage of their former employers. Robert Dean, a leading Australian scholar and practitioner in trade secrets, observes that approximately 80% of trade secret litigation involves employers bringing claims against former employees.[8] In a similar vein, William Van Caenegem asserts that 'the law surrounding the post-employment phase is perhaps the most significant part of the law of trade secrets, and it certainly attracts a great proportion of litigation in trade secrets cases.'[9] These dynamics underscore the need for a balanced legal framework that effectively safeguards employers' proprietary interests without unduly infringing upon the post-employment freedoms and rights of employees.

The key issue at hand is whether the prohibition of NCCs should be considered as an isolated legislative or regulatory intervention, or whether a more nuanced approach is necessary to address the issue without unduly compromising the interests of both employers and employees. As stated, this is particularly relevant in the context of safeguarding valuable proprietary information, such as trade secrets. Accordingly, it is essential to explore complementary legislative measures that could enhance the regulation of NCCs. This article argues that any legal reform in this area must strike an appropriate balance between the competing interests of employers and employees. In a nutshell, the proposed prohibition of NCCs may have unintended adverse effects on businesses that rely on trade secret protection. Conversely, overly restrictive NCCs can hinder employee mobility, limit career progression, and suppress industry innovation. Therefore, this article examines how a fair and equitable regulatory framework can be developed to avoid disproportionately disadvantaging either party. First, after establishing the role of NCCs in protecting trade secrets, this article evaluates the extent to which existing common law principles seek to balance employer and employee interests in the enforcement of NCCs. Traditionally, the common law permits the enforcement of NCCs only where they are reasonable in scope, duration, and geographical reach, ensuring that they do not impose undue burdens on employees. Second, this article analyses the broader employment and economic implications of NCCs, particularly their impact on job mobility. Finally, the article proposes policy recommendations for refining the regulation of NCCs, with the aim of protecting both business interests and the economic well-being of workers. By addressing these critical issues, this article contributes to the ongoing debate on the regulation of NCCs in Australia, offering

[8] Robert Dean, *Employers, Ex-employers and Trade Secrets* (Lawbook Co, 2004) 1.

[9] William Van Caenegem, *Trade Secrets and Intellectual Property: Breach of Confidence, Misappropriation and Unfair Competition* (Wolters Kluwer, Netherlands, 2014) 223 ('*Trade Secrets and Intellectual Property*'). See also Robert G Bone, 'A New Look at Trade Secret Law: Doctrine in Search of Justification' (1998) 86 *California Law Review* 241, 244.

practical legal and policy solutions that promote both economic growth and fair employment practices.

II Role of NCCs Safeguarding Trade Secrets

Trade secrets or commercially valuable confidential information are often treated as the crown jewels of a firm's intellectual capital.[10] They represent one of the most significant forms of intellectual property protection in Australia and beyond.[11] For these enterprises, safeguarding proprietary information through confidentiality is a vital strategy for protecting intellectual assets. A major reason for the popularity and significance of trade secrets may be their flexibility in attracting and protecting a wide array of information which is not generally known or readily ascertainable.[12] Trade secrets are not limited to protection of technical or scientific information, but cover mere commercial information as well; for example, formulas, know-how, contract terms, software, customer lists, engineering, marketing, finance or strategic information, and information about suppliers, competitors, and other industrial participants. Their reach now spreads to sectors such as food and beverages,[13] sports,[14] mass media,[15] pharmaceuticals,[16] chemicals,[17] music,[18] information

[10] Karl F Jorda, 'Trade Secrets and Trade-Secret Licensing' in Anatole Krattiger et al (eds), *Intellectual Property Management in Health and Agricultural Innovation: A Handbook of Best Practices* (MIHR and PIPRA, 2007) 1043, 1046.

[11] Dittmer and Pooley (n 7). See also Suzana Nashkova, 'Addressing Criminal Liability for Misuse of Trade Secrets Under Australian Law: Is the Current Legal Framework Adequate to Protect the Interests of Owners of Trade Secrets?' (2024) 55(8) *IIC – International Review of Intellectual Property and Competition Law* 1281, 1281–82.

[12] See art 39(2) of the *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 320 (1999) 1869 UNTS 299, 33 ILM 1197 (1994) ('*TRIPS Agreement*').

[13] Eg the formula of Coca-Cola (*Coca-Cola Bottling Co v Coca-Cola Co*, 107 FRD 288, 289, 294 (D. Del. 1985)), ingredients of the original recipe of Kentucky Fried Chicken (*KFC Corp v Marion-Kay Co*, 620 F Supp 1160, 1172 (SD Ind, 1985)) and the recipe of Nutella.

[14] Eg Lena Blackburne's baseball rubbing mud: this mud is used to dull the surface of a baseball enabling pitchers to get a good grip. The source of mud is a secret.

[15] Eg the New York Times' bestseller list. United States Patent and Trademark Office, *Patent Basics Presentation* (Presentation, 1 March 2024) 20 <www.uspto.gov>.

[16] Eg the Pfizer-BioNTech COVID-19 vaccine which combines lipids and mRNA to produce lipid nanoparticles, including precise mixing, flow rates, concentrations and temperature controls. See Olga Gurgula and John Hull, 'Compulsory Licensing of Trade Secrets: Ensuring Access to COVID-19 Vaccines via Involuntary Technology Transfer' (2021) 16(11) *Journal of Intellectual Property Law & Practice* 1242, 1248.

[17] Eg WD-40. See United States Patent and Trademark Office, *Patent Basics Presentation* (Presentation, 1 March 2024) 20.

[18] Eg Antonio Stradivarius' violins and Zildjian cymbals. Andrew A Schwartz, 'The Corporate Preference for Trade Secrets' (2013) 74 *Ohio State Law Journal* 623, 651.

technology, and social media.[19] Moreover, when compared to other intellectual property rights, trade secrets are 'everlasting, apparently cheaper and faster to protect and do not (obviously) require disclosure'.[20] This feature reflects a deeper strategic choice. A business holding valuable information must weigh two options. The first is the patent route, which secures a finite monopoly only by surrendering the secret to the public, and only where the threshold for patentability is met. The second is reliance on the equitable and common law protection of trade secrets. Their durability depends entirely on the maintenance of secrecy, but they avoid the cost, delay, and disclosure that patenting demands. As such, they are comparatively more attractive, easy to obtain, and more common.

Restraint of trade clauses, or restrictive covenants, have become the primary tool for Australian employers to safeguard trade secrets, reflecting the central role of contractual agreements in modern employment and business relationships.[21] In general, these restraints may include non-disclosures, non-competitions, and non-solicitations of customers, and of employees.[22] NDAs prohibit employees from disclosing and using trade secrets in an unauthorised manner during and at the end of the employment. Non-solicitation agreements prevent employees from soliciting the customers of the ex-employer for his or her own benefit or for the benefit of a competitor after leaving the ex-employer. Broader still, NCCs prevent former employees from engaging in competing activities, such as joining a rival firm or launching a competing business, thereby creating a protective barrier against the misuse of sensitive commercial information gained during the course of employment. The reliance of employers on restrictive covenants to protect their trade secrets has been recognised as a 'belt and suspenders' approach.[23] That is a two-way protection, where employers use contracts to augment their trade secrets rights in addition to other legal protections.[24] From an employer's perspective, such restrictive covenants are a primary way of protecting their legitimate business

---

[19] Eg Google search algorithm and the algorithms social media platforms use to rank and moderate content.
[20] Nuno Sousa e Silva, 'What Exactly is a Trade Secret under the Proposed Directive?' (2014) 9(11) *Journal of Intellectual Property Law and Practice* 923, 923.
[21] See, eg, *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555, 587: 'in modern times the relationship between master and servant, between employer and employed, is inherently one of contract'. See also *Deta Nominees Pty Ltd v Viscount Plastic Products Pty Ltd* [1979] VR 167, 190: 'Express contracts not to divulge confidential information are made every day … between employers and employees'.
[22] *Lindner v Murdock's Garage* (1950) 83 CLR 628, 633.
[23] Viva R Moffat, 'The Wrong Tool for the Job' (2010) 52 *William and Mary Law Review* 873, 876.
[24] Rachel Arnow-Richman, 'Cubewrap Contracts: The Rise of Delayed Term, Standard Form Employment Agreements' (2007) 49 *Arizona Law Review* 637, 638–9 ('Cubewrap Contracts').

interests, including trade secrets. [25]As such, restrictive covenants are a helpful tool to prevent employees who have been exposed to confidential business information from joining a rival company immediately after leaving their present employment.

In the trade secrets regime, restrictive covenants may be considered as a way to incentivise investing 'in the development of knowledge *[trade secrets]* with some certainty that it will not fall immediately into the hands of a competitor if the employee moves'.[26] In other words, these restraints *inter alia* intend to control and limit the wide circulation of firm-specific information and knowledge. Employers consider that having an express written term in an employment contract may be an effective way of informing employees about their confidentiality obligation and protecting confidential information from current and ex-employees.[27] Consequently, restrictive covenants, whether in the form of NDAs or NCCs, have become increasingly prevalent in commercial practice.[28] Such covenants are frequently treated as a threshold component of trade secret protection, as they demonstrate that the employer has taken reasonable steps to preserve secrecy.[29] The significance of NCCs in this regard has long been recognised by both courts[30] and commentators[31] as an effective means of protecting confidential information and trade secrets. As Lord Denning MR observed, confidentiality obligations alone may be insufficient, given the difficulty of distinguishing confidential information from general skill and knowledge, and of proving misuse of information retained in an employee's mind.[32] In such circumstances, a restraint on competitive employment may constitute the only practical form of protection.[33] The next section explores how the current legal framework balances the competing interests of employers and employees in enforcing NCCs. It examines the principles governing their

---

[25] Iain Ross, 'Non-compete Clauses in Employment Contracts: The Case for Regulatory Response' (2024) 35(4) *The Economic and Labour Relations Review* 806, 813, 816–17.
[26] Christopher Arup, Chris Dent, John Howe and William Van Caenegem, 'Restraint of Trade: The Legal Practice' (2013) 36 (1) *UNSW Law Journal* 1, 2.
[27] Harald Irgens-Jensen, 'Departing Employees, Confidentiality Clauses and European Trade Secret Protection' (2023) 54(4) *IIC – International Review of Intellectual Property and Competition Law* 495, 511.
[28] Ross (n 25) 810–11.
[29] See *TRIPS Agreement* (n 12) art 39(2).
[30] See, eg, *Printers & Finishers Ltd v Holloway (No 2)* [1965] RPC 239, 256; *Rentokil Pty Ltd v Lee* (1995) 66 SASR 301, 340; *Woolworths Ltd v Olson* [2004] NSWCA 372, 380; *Quantum Service and Logistics Pty Ltd v Schenker Australia Pty Ltd* [2019] NSWSC 2, 16.
[31] Andrew Stewart et al, *Intellectual Property in Australia* (LexisNexis, 5th ed, 2014) 122; Van Caenegem (n 9) 46: '... parties are encouraged to engage in contractual bargains that promise greater certainty'.
[32] *Littlewoods Organisation Ltd v Harris* [1977] 1 WLR 1472, 1479.
[33] Ibid.

enforceability and the extent to which they protect trade secrets while ensuring fair employment opportunities.

III Existing Legal Approach in Balancing Employers' and Employees' Rights

Whereas NCCs are considered to be a popular method of protecting employers' trade secrets, such clauses cannot be automatically enforced by an employer. This is because the common law holds that restraint of trade clauses are *prima facie* void as contrary to public policy, since it considers the likelihood of reducing competition and freedom of trade.[34] Nonetheless, these restraints will be enforced if they are reasonable between the parties (employer and employee) and in the public interest.[35] This can be regarded as a balance of 'two competing policy considerations: the policy of freedom of contract and enforcing contractual obligations, and the policy of preserving freedom of trade from unreasonable contractual restrictions'.[36] In essence, the common law seeks to strike a balance between an employer's interests, ie, protecting trade secrets, and an employee's interests in protecting their rights.

A *Test of Reasonableness*

The modern legal principles of restraint of trade were established in *Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co Ltd* (*'Nordenfelt'*),[37] where the House of Lords set out what has come to be known as the *Nordenfelt* test. Lord Macnaghten held that while trade restraints are generally void as against public policy, they may be justified if they are reasonable in protecting legitimate business interests without harming the public.[38] This test, which balances individual freedom with commercial protection, has been widely adopted across common law jurisdictions, including Australia,[39] making it a cornerstone of restraint of trade jurisprudence. There are two aspects that need to be considered by the courts in determining the validity of

---

[34] John Gooley, Peter Radan and Ilija Vickovich, *Principles of Australian Contract Law* (LexisNexis, 3rd ed, 2014) 543.

[35] *Lindner v Murdock's Garage* (1950) 83 CLR 628, 633.

[36] Lindy Willmott et al, *Contract Law* (Oxford University Press, 5th ed, 2018) [18.35]. See also *Peters (WA) Ltd v Petersville Ltd* (2001) 181 ALR 337, 348.

[37] [1894] AC 535, 565 ('*Nordenfelt*').

[38] Ibid.

[39] See *Emeco International v O'Shea (No 2)* (2012) 225 IR 423, [3]: Edelman J states that 'the modern law in relation to restraints of trade began with the speech of Lord Macnaghten'. See also *Peters (WA) Ltd v Petersville Ltd* (2001) 205 CLR 126, 139; *Ross v IceTV* [2010] NSWCA 272, [86]; Rob Jackson, *Post-employment Restraint of Trade* (Federation Press, 2014) 12–15; Chris Dent, 'Nordenfelt v Maxim-Nordenfelt: An Expanded Reading' (2015) 36 *Adelaide Law Review* 329, 329.

NCCs. First, the NCC must be reasonable between employer and employee. Second, it should be reasonable in terms of public policy considerations.

Determining the reasonableness of NCCs is a complex task for courts. Generally, a restraint is considered reasonable if it is proportionate to the employer's legitimate need for protection, such as safeguarding trade secrets.[40] However, the mere existence of trade secrets does not automatically justify an NCC. Employers must also demonstrate that the restriction does not extend beyond what is necessary to protect their legitimate interests. Courts generally strike down overly broad restraint clauses on the basis that a restraint will only be enforceable where it is reasonably necessary to protect a legitimate interest of the party seeking to rely on it.[41] A restraint that exceeds what is necessary for that protective purpose will ordinarily be regarded as unreasonable and therefore unenforceable.[42]

The key question is whether the restraint exceeds what is reasonably required for such protection.[43] The burden of proving that a restrictive covenant is reasonable falls on the employer, as they are best positioned to assess the firm's interests. As Heydon J noted, the onus is not to prove reasonableness itself but to establish special circumstances from which reasonableness can be inferred.[44] Beyond reasonableness between parties, an employee may challenge an NCC by proving it is against public interest.[45] However, courts generally assume that a restraint deemed reasonable between the parties is also reasonable in the public interest.[46] While some argue for two distinct tests, others suggest that in most employment cases, proving reasonableness between the parties effectively resolves the matter.[47] Nonetheless, exceptions may arise where a restriction, though fair between the parties, is harmful to the public, warranting further scrutiny.[48] Even with two tests, proving the unreasonableness of NCCs can be challenging. In *Maggbury v Hafele*, Callinan J (dissenting) emphasised that restraints should be upheld unless they clearly harm

---

[40] *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* (1973) 133 CLR 288, 315–6 ('*Amoco Australia')*; *Lindner v Murdock's Garage* (1950) 83 CLR 628, 633 (Latham CJ). See also *Liberty Financial Pty Ltd v Jugovic* [2021] FCA 607, [194] (Beach J).
[41] *Pennytel Australia Pty Ltd v Engelke* [2025] FCA 1384, 1476.
[42] *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688, 708. See also, more recently, the run of decisions striking down or sharply reading down overly broad restraints: *2nd Chapter Pty Ltd v Sealey (No 2)* (2024) 336 IR 1; *DXC Eclipse Pty Ltd v Wildsmith* (2023) 324 IR 89; *Pennytel Australia Pty Ltd v Engelke* [2025] FCA 1384.
[43] *Amoco Australia* (n 40) 315–6. See also *Heron v Port Huon Fruitgrowers' Co-operative Association Ltd* (1922) 30 CLR 315, 324.
[44] J D Heydon, *Restraint of Trade Doctrine* (LexisNexis, 3rd ed, 2008) 35.
[45] *Amoco Australia* (n 40) 307.
[46] Ibid.
[47] Heydon (n 44) 34.
[48] See *Amoco Australia* (n 40) 307. See also Willmott et al (n 36) [18.85].

the public interest, such as by reducing competition or causing economic detriment.[49] This suggests that courts may take a strict view, requiring employees to demonstrate a restraint's anti-competitive impact to have it struck down.[50]

Courts have, over time, developed a rule of thumb in determining the reasonableness of restrictive covenants. For example, in *Brilliant Lighting (Aust) Pty Ltd v Baillieu,*[51] the Supreme Court of Victoria set out five considerations in deciding the reasonableness of a restrictive covenant:

1. The scope of the restraint in terms of both the geographic area[52] and duration;[53]
2. The activities covered by the restraint;[54]
3. The relative bargaining power of the parties;[55]
4. The consideration paid in exchange for the restraint;[56] and
5. The context of the contract.

However, in general, courts do not consider these factors in isolation and this may be a combined test. In other words, determining the reasonableness of a restraint of trade clause is a subjective decision of the presiding judges, depending on the prevailing circumstances of the case.[57] As a result, the courts focus on the practical effects of the restraints in each case in assessing reasonableness.[58] It may be, ultimately, a matter of ascertaining the intention of the parties.[59] However,

---

[49] *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 185 ALR 152, 177 ('*Maggbury v Hafele*').
[50] See below Part II(B) for more details.
[51] *Brilliant Lighting (Aust) Pty Ltd v Baillieu* [2004] VSC 248, [11].
[52] See, eg, *Papastravou v Gavan* [1968] 2 NSWR 286.
[53] See, eg, *Peters American Delicacy Co Ltd v Patricia's Chocolates and Candies Pty Ltd* (1947) 77 CLR 574.
[54] See, eg, *Geraghty v Minister* (1979) 142 CLR 177.
[55] *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 All ER 171. See *Amoco Australia* (n 40) 317: 'The fact that the parties have bargained from a position of equality is therefore one of the circumstances to be considered in determining whether the covenants were reasonable, but it does not save from invalidity a covenant found to be unreasonable or contrary to the public interest'. See also *Creamoata Ltd* v *Rice Equalization Association Ltd* (1953) 89 CLR 286, 318.
[56] The High Court of Australia mentioned in *Amoco Australia* (n 40) 315–6 that the remuneration of the employee may be (but not 'must be') taken into account when considering reasonableness. See also *Smith v Nomad Modular Building Pty Ltd* [2007] WASCA 169.
[57] See *IF Asia Pacific Pty Ltd v Galbally* (2003) 59 IPR 43, 103.
[58] Gooley, Radan and Vickovich (n 34) 545.
[59] *Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd* (1968) 118 CLR 429, 437.

determining reasonableness based on the specific facts of each case can create uncertainty in the law, potentially disadvantaging the parties involved.[60]

B *A Strict View on Employment Contracts*

At common law, contractual restraints imposed on employees have traditionally been subject to more exacting scrutiny than those arising in commercial or business transactions. This heightened level of judicial oversight is grounded in the law's fundamental commitment to preserving the freedom of the individual to engage in work and pursue livelihood, interests that are deemed essential both for personal autonomy and for the broader functioning of a competitive economy.[61] Courts have consistently viewed attempts to restrict productive labour or suppress market competition with disfavour, recognising that such restraints may have adverse consequences for both the individual and the public at large. This approach reflects a well-established principle that, unlike commercial parties negotiating on relatively equal terms, and receiving payment for a restraint, employees often occupy a weaker bargaining position when entering into contracts of employment.[62] As such, judicial intervention serves a protective function, ensuring that any contractual limitation on an employee's post-employment freedom is justified by a legitimate proprietary interest and is reasonable in scope, duration, and geographic reach.

As Lord Macnaghten famously stated in *Nordenfelt,* the courts must adopt a more rigorous standard when evaluating the validity of employee restraints, recognising the distinct power dynamics and the potential for overreach in the employment context.[63] This distinction remains a central feature of Australian law. In *IF Asia Pacific Pty Ltd v Galbally*, Dodds-Streeton CJ reaffirmed that employment restraints warrant closer scrutiny, in contrast to those between commercial entities where parties are presumed to have equal bargaining power.[64] Heydon identifies four principal reasons underpinning this stricter judicial approach in employment cases: first, the inequality of bargaining power between the parties; second, the employee may be giving up their only asset, which depends on specialised training and may not be at all negotiable; third, once labour is hired it remains valuable whether or not the employee later competes; and fourth, once the employee accepts post-employment restraints, the employer's power during the contract is

[60] Arup et al (n 26) 4.
[61] Adrian Brooks, 'The Limits of Competition: Restraint of Trade in the Context of Employment Contracts' (2001) 24(2) *University of New South Wales Law Journal* 346, 346–7.
[62] Heydon (n 44) 89. The development of the Unfair Contract Terms regimes shows that even business contracts too are subject to statutory regulation to ensure fairness for businesses.
[63] *Nordenfelt* (n 37) 543–4.
[64] (2003) 59 IPR 43, [102]. See also *Woolworths Ltd v Olson* [2004] NSWCA 372, [38].

significantly increased by reason of the inhibition on the employee's ability to threaten to leave and seek work elsewhere.[65] This reasoning has found direct judicial endorsement in *Trademax Australia Ltd v Huang*, where the court cited Heydon with approval.[66]

In *Marquett v Walsh*, Long Innes J questioned whether this reasoning applied in Australia, given strong labour protections, trade unions, and industrial tribunals.[67] However, the *Fair Work Act 2009* (Cth), which governs industrial relations, is silent on the regulation of NCCs and other forms of post-employment restraints, focusing on terms and conditions during the employment relationship and not after the relationship has ceased. Moreover, as Cross J explained in *Printers & Finishers Ltd v Holloway (No 2)*, trade secrets are distinct from skills acquired through experience.[68] Courts, in fact, balance two key policy considerations: upholding contractual confidentiality obligations and protecting employees' rights to advance their careers.[69] As such, while employers can safeguard trade secrets, employees retain the right to use their accumulated skills and expertise. Arguably, this may ensure a fair approach that respects both business interests and job mobility.

C *Judicial Power of Severance*

An important feature of the common law is the doctrine of severance, which allows courts to sever the contractual provisions deemed to be void at common law and enforce the remainder of the contract.[70] As explained by Campbell J in *Del Casale v Artedomus (Aust) Pty Ltd*:

> The *first question* for the court, when considering the reasonableness of the restraint at common law, is whether the *particular restriction* that the parties have agreed, imposed upon that *particular employee*, to protect that *particular "trade secret" falls within the range of reasonableness*. The *second question* is whether, if it does not pass the reasonableness test, *it can be severed*, by the rather mechanical test of severance that the common law uses, to cut out words so that what remains after the cutting out has occurred is reasonable and not of a different nature to the clause upon which the parties had actually agreed.[71]

[65] J D Heydon, *The Restraint of Trade Doctrine* (LexisNexis Butterworths, 4th ed, 2018) 96–9.
[66] (2024) 336 IR 205,220.
[67] (1929) 29 SR (NSW) 298, 312.
[68] [1965] RPC 239, 255.
[69] See, eg, *Maggbury v Hafele* (n 49) [68]; *GSK Australia Pty Ltd v Ritchie* (2009) 22 VR 482, [25].
[70] *Attwood v Lamont* [1929] 3 KB 571; *IF Asia Pacific Pty Ltd v Galbally* (2003) 59 IPR 43, [171], [174].
[71] *Del Casale v Artedomus (Aust) Pty Ltd* (2007) 165 IR 148, 172 [132] (emphasis added).

Hence, when a contract contains restraint of trade clauses comprising both reasonable and unreasonable restraints, a court may utilise this doctrine to disregard the unreasonable parts and implement instead the reasonable parts. Where there is an identifiably separate or divisible unreasonable restraint, a court may strike down such a restraint of trade clause and enforce the rest of the contract.[72] Applying the common law, Australian courts, except New South Wales ('NSW'), follow an 'all or nothing' approach and courts do not modify or re-write unreasonable restraints. Instead, courts can only enforce the reasonable part of the contract as far as the reasonable part is severable from the unreasonable part.[73] Thus, Australian courts show a restrictive application of the doctrine of severance. As a result, if a restraint is too broad, unreasonable and indivisible, it is unenforceable. As a result, employees will be free to use their employment-related knowledge and skills in subsequent employment.

Nonetheless, employers may attempt to overcome this legal challenge by including a cascading list of restraints in employment contracts. Cascading, ladder or step clauses were held valid in Australia by Spender J in *Lloyd's Ships Holdings Pty Ltd v Davros Pty Ltd.*[74] In this case, a cascading clause included 10 potential time periods of restraint, ranging from one to ten years, and several geographical scopes of restraints, such as United States and Australia, Australia and New Zealand, or the East Coast of Australia.[75] Notwithstanding that the clause contained 120 possible meanings, the Court did not hold it void.[76] Further, in *Workpac Pty Ltd v Steel Cap Recruitment Pty Ltd,*[77] the cascading clause included five restraint areas, ranging from a 5 to 500 kilometre radii from the plaintiff's offices, and four restraint periods ranging from 3 to 12 months. Since the plaintiff had 26 offices, there were 520 different possible combinations of potential restraint.[78] Cabrelli and Floyd argue that 'the cascading restraint looks set to remain valid practice in many parts of Australia'.[79] Therefore, the existence of a cascading clause has the potential to draw a blurred picture in an employment contract, and consequently an employee would

[72] See *Thomas Brown and Sons Ltd v Fazal Deen* (1962) 108 CLR 391.
[73] Willmott et al (n 36) [18.440].
[74] (1987) 17 FCR 505 ('*Lloyd's Ships Holdings*'). See also *Hydron Pty Ltd v Harous* [2005] SASC 176.
[75] *Lloyd's Ships Holdings* (n 74) [46].
[76] Ibid.
[77] (2008) 178 IR 464.
[78] Ibid [35]. Since this was an application for interlocutory injunction, considering the balance of convenience, the court held for defendants. However, the court did not hold invalid the restraint of trade clause, which was severable.
[79] David Cabrelli and Louise Floyd, 'New light through old windows: Restraint of trade in English, Scottish and Australian Employment Laws: Emerging and enduring issues' (2010) 26(2) *International Journal of Comparative Labour Law and Industrial Relations* 167, 173.

be uncertain as to the reasonable scope of restraints until the matter is determined by a court.[80]

D *New South Wales Approach*

NSW is the only Australian jurisdiction to have enacted a *Restraint of Trade Act 1976* (NSW) ('the Act'). The NSW approach differs from the common law approach for two reasons. First, according to s 4(1) of the Act, 'a restraint of trade is valid to the extent to which it is not against public policy, whether it is in severable terms or not'. As such, unlike in other jurisdictions, restraint of trade clauses are not *prima facie* void in NSW, unless the restraint goes against public policy. This approach was confirmed by the Supreme Court of NSW in *Stacks Taree v Marshall (No 2)*.[81] In that case, McDougall J accepted the fact that, 'In New South Wales, it is not strictly correct that a restraint is prima facie void; a restraint is valid to the extent to which it is not against public policy, even if not in severable terms'.[82]

However, as mentioned by Ball J in *Metcash v Jardim (No 3)*,[83] this public policy requirement is satisfied if the restraint is reasonable between the employer and employee, and not unreasonable in the public interest. In this respect, NSW courts may be able to conduct the same test adopted by other states.

Second, s 4(3) allows courts to exercise a discretion not only to invalidate a restraint which goes beyond the public policy requirement, but also to modify a restraint that might otherwise be unreasonable.[84] Hence, unlike other jurisdictions, NSW courts are able to read down an unreasonable restraint of trade clause irrespective of whether or not the covenant is divisible in nature.[85] However, this is permissible only if the covenantee (employer) can demonstrate that they have made a genuine

---

[80] However, this drafting technique does not appear to be commonly adopted in England and Wales. Variable or cascading restraint clauses remain unusual, and there appears to be no reported English decision finally upholding such a covenant. Instead, English law generally requires the restraint to be clear, certain and reasonable at the time of contracting, with only limited blue-pencil severance available to remove offending words. See *Jump Trading International Ltd v Couture* [2023] EWHC 1305 (KB); *Verition Advisors (UK Partners) LLP v Jump Trading International Ltd* [2023] EWCA Civ 701; *Tillman v Egon Zehnder Ltd* [2019] UKSC 32; *Prophet plc v Huggett* [2014] EWCA Civ 1013.
[81] [2010] NSWSC 77.
[82] Ibid [44]. See also *Koops Martin Financial Services Pty Ltd v Reeves* [2006] NSWSC 449, [27] (Brereton J).
[83] [2010] NSWSC 1096, [46]. See also *Stacks/Taree v Marshall [No.2]* [2010] NSWSC 77, [44].
[84] For a recent application of the statutory read-down power, see *Moroney v TM Insight Operations Pty Ltd* [2025] FCA 1337 (confining the restraint to six months and striking down an uncertain definition of 'Identified Prospective Client'); cf *Industrial Rollformers Pty Ltd v Ingersoll-Rand Co (Aust) Pty Ltd* [2001] NSWCA 111 (reading a five-year worldwide restraint down to nine months and Australia), the paradigm of the s 4 power.
[85] Willmott et al (n 36) [18.495].

effort to impose a reasonable restraint.[86] The statutory discretion will not operate to uphold a restraint where no such attempt at reasonableness was made from the outset.[87] As such, the judiciary is empowered with a discretion to enforce an otherwise offensive restraint of trade clause, whether cascading or with only singular prohibitions.[88]

It may be submitted that the common law relating to restraint of trade, which measures the reasonability of restrictive covenants, attempts to strike a balance between the employer's concerns in protecting trade secrets and the employee's right to earn a living. Commentators have even identified common law countries such as Australia as low-enforcers of restrictive covenants as these countries ensure that restraints do not impede employee mobility.[89] Nonetheless, issues such as judicial dependence on the factual matrices of each case, jurisdictional variations in NSW, and the application of cascading clauses may contribute to creating clouds of uncertainties. Moreover, even though Australian courts largely rely on the notion that post-employment restraints should not be extended to the employee know-how of general stock of knowledge, still there is a practical difficulty in defining the line between trade secrets and know-how. Even if courts are able to do so, some courts suggest that using employee know-how in a subsequent employment can be restrained by restrictive covenants.[90]

IV Impact on The Rights of Employees

As discussed, restrictive covenants are highly prevalent in the Australian employment landscape. While the common law seeks to balance the interests of employers and employees, NCCs often undermine employees' rights in significant ways, as explored in the following sections. This analysis examines the impact of non-competes from the negotiation stage through to enforcement, highlighting how they unfairly restrict employees' ability to change jobs and, consequently, their right to earn a livelihood. The effects may be particularly severe for low-income and low-skilled workers, who have limited bargaining power and are less able to sustain themselves financially during the restrictive period.

---

[86] *Restraint of Trade Act 1976* (NSW) s 4(3). See also *Orton v Melman* [1981] 1 NSWLR 583, 589; *Woolworths Ltd v Olson* [2004] NSWCA 372; *Provida Pty Ltd v Sharpe* [2012] NSWSC 1041.
[87] Willmott et al (n 36) [18.495].
[88] Jackson (n 39) 60.
[89] Alan Hyde and Emanuele Menegatti, 'Legal Protection for Employee Mobility' in Matthew W Finkin, and Guy Mundlak (eds), *Comparative Labor Law* (Edward Elgar Publishing, 2015) 195, 203–206.
[90] *IM Maintenance Ltd v Brunt* [2004] WASC 49, [64]–[74].

A *Right to Enter into Employment Contracts Freely and Voluntarily*

An employment contract establishes the rights and obligations of both employers and employees, serving as the foundation for their working relationship. However, the extent to which employees freely and voluntarily assume contractual obligations, particularly restrictive covenants such as NCCs, remains open to question.[91] Voluntariness presupposes both freedom from coercion and a meaningful understanding of the contractual consequences.[92] In practice, however, structural power imbalances inherent in employment relationships may significantly undermine genuine choice. Consequently, it is difficult to maintain that employees voluntarily assume restrictive covenants in circumstances characterised by markedly unequal bargaining power. Indeed, the employment relationship is recognised as 'the paradigmatic example of inequality of bargaining power in contract law'.[93] It is uncommon for a post-employment restraint to be the subject of negotiation at the stage an offer of employment is made, where the focus is typically on negotiating remuneration. Further, in a depressed job market, a candidate who questions the scope of any post-employment protection, not just an NCC, may be at a disadvantage compared to a candidate that says nothing about such clauses.[94]

This asymmetry of power between employer and employee not only shapes the prevalence of restrictive covenants, including non-disclosure and non-compete clauses, but also profoundly influences their content and operation.[95] For example, terms and conditions of an employment contract may be unilaterally defined by an employer and presented in a boilerplate format.[96] Even though there is, theoretically at least, a negotiation period in any contract, for employment contracts this may be less and less in evidence.[97] Moreover, there is evidence that employees are often asked to sign an employment contract as a 'take-it-or-leave' condition.[98] Moreover, modern businesses frequently follow 'agreement-now-terms-later'

---

[91] This issue is particularly relevant to lower incomes workers. See Part IV(D).
[92] Aristotle, *Nicomachean Ethics* (Sir David Ross trans, 1925 ed) Book III. According to Aristotle, there are two major conditions of voluntary action: freedom from coercion and an understanding of the circumstances and implication of the action.
[93] Rachel S Arnow-Richman, 'Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power via Standard Form Noncompetes' (2006) *Michigan State Law Review* 963, 963.
[94] Ross (n 25) 820.
[95] Moffat (n 23) 885. See also John Howe and Andrew Newman, 'Collective Bargaining and Ownership of Employee Creation: An Empirical Examination of Statutory Industrial Instruments' (Research Paper No 677, Legal Studies, University of Melbourne, May 2014) 6.
[96] Arnow-Richman, 'Cubewrap Contracts' (n 24) 639.
[97] Orly Lobel, 'Enforceability TBD: From Status to Contract in Intellectual Property Law' (2016) 96 *Boston University Law Review* 869, 877.
[98] Ibid 869.

model of contracting.[99] Thus, employees may, in general, not be properly aware of issues such as post-termination competition at the time of signing a contract, whereas they may be more immediately concerned over issues such as salary, duties, and title.[100] Worse, it is doubtful whether the average employee understands the subtleties of a confidentiality contract.[101] Therefore, employees may not have accepted their restraints voluntarily and in a non-coercive manner.

The vulnerability of employees within the employment relationship is well recognised in Australian labour law, most notably through the *Fair Work Act 2009* (Cth), which establishes the National Employment Standards, enterprise bargaining frameworks, and unfair dismissal protections directed at redressing the structural imbalance of bargaining power inherent in the employment relationship. However, involuntary assumption of obligations by an employee through an employment contract is not identified as a ground to repudiate the contract unless the contract has been concluded where there is misrepresentation, mistake, unconscionable conduct, duress or undue influence.[102] Even mere economic pressure or asymmetrical bargaining power is not considered as grounds for claiming duress or unconscionability.[103] Moreover, there is no legal recourse for the *ex ante* scrutiny of restraint of trade clauses in an employment contract. Instead, legal action in this regard is largely *ex post* and in such cases courts are unlikely to strike down an employment contract solely on the ground that the contract was not concluded with the genuine consent of the employee.[104] That is to say, the law only focuses on the reasonableness of restrictive covenants and contracts which would be held invalid to the extent restrictive covenants are unreasonable. For instance, in *John Fairfax Publications Pty Limited v Birt,*[105] Brereton J, by upholding a post-employment restraint, stated that

[99] Arnow-Richman, 'Cubewrap Contracts' (n 24) 640.
[100] Ibid 640.
[101] Charles Tait Graves, 'Trade Secrecy and Common Law Confidentiality: The Problem of Multiple Regimes' in Rochelle C Dreyfuss and Katherine J Strandburg (eds) *The Law and Theory of Trade Secrecy: A Handbook of Contemporary Research* (Edward Elgar, 2011) 91.
[102] *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, 182 [46], [57].
[103] See, eg, *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40; *Parkesinclair Chemicals (Aust) Pty Ltd v Asia Associates Inc* [2000] VSC 362.
[104] Arup et al (n 26) 2–3: 'The common law starts with a presumption that restraints are unenforceable as contrary to public policy. This is not because of the quality of the bargain between the employer and employee, whether, for the contract is void for unconscionability of duress or lack of consideration.'
[105] [2006] NSWSC 995. See also *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, [45] (citations omitted) where the High Court stated: 'It should not be overlooked that to sign a document known and intended to affect legal relations is an act which itself ordinarily conveys a representation to a reasonable reader of the document. The representation is that the person who signs either has

> an employee who pursues such employment despite the terms of a restraint is the author of his or her own misfortune. I do not think that sympathy for the position in which Mr. Birt [the employee] now finds himself can justify not enforcing the contractual rights of Fairfax Publications.[106]

It follows that, where valuable consideration has been exchanged and the restrictions are reasonable in scope, time, and geographical boundaries, courts will generally not examine the circumstances in which the contract was formed. [107] In practice, consideration for a restraint is rarely offered as a distinct or additional payment; rather, it is typically expressed as forming part of the employee's overall remuneration for performing their duties under the contract.[108] This approach reveals a significant gap in the law's protection of employees: provided the restraint is framed as reasonable in scope, duration, and geography, courts will enforce it without inquiring into the circumstances in which the employee came to accept the restriction or whether meaningful consideration was specifically provided for it. The result is that the law's focus on reasonableness, while necessary, may be insufficient to fully address the structural inequality of bargaining power that characterises the employment relationship

B *Right to Choose and Change Employment or Employee Mobility*

One of the major implications of non-competes is that their excessive use can stifle competition, restrict talent mobility, and limit employees' right to pursue job opportunities. Free mobility of labour or the right to change jobs is a crucial issue where 'employment security' or 'free employability' is seen as more important than 'job security' or 'life-long jobs'.[109] From an employee's perspective, the right to choose and change employers or employment is a key factor in the flow of knowledge and in acquiring new knowledge.[110] In other words, employees may develop, sharpen and further enhance their employment capabilities, skills and

---

read and approved the contents of the document or is willing to take the chance of being bound by those contents, as Latham CJ put it, whatever they might be.'

[106] Ibid [49].

[107] This issue is not even dealt with in the *Competition and Consumer Act 2010* (Cth) since s 51(2)(d) of that Act excludes employment contracts.

[108] Andrew Fell and Elizabeth Rudz, 'Employee Non-Compete Restraints: Resolving Uncertainty' (2023) 46(4) *University of New South Wales Law Journal* 1252, 1260.

[109] Nuna Zekic, 'Job Security or Employment Security: What's in a Name?' Job Security or Employment Security: What's in a Name?' (2016) 7(4) *European Labour Law Journal* 548, 548–9. For example, in Australia today the average tenure of employment is seven years. See Patrick D'Arcy, Linus Gustafsson, Christine Lewis and Trent Wiltshire, 'Labour Market Turnover and Mobility' (2012) *Reserve Bank of Australia Bulletin* 1, 2.

[110] Johan Westerman, 'Should I Learn or Should I Turn? Implications of Job Mobility for Subsequent Learning at Work' (2021) 37(6) *European Sociological Review* 935, 935–6.

professional connections by changing jobs. Freedom of changing employment may also provide an opportunity for employees whose skills or aspirations are a poor match for the current job, employer, or sector in which they work. Therefore, having the freedom or right to change employment may be regarded as a key aspect of the meaningful realisation of the right to work.[111] As discussed, courts are generally sympathetic to a situation where an employee would lose the right to earn a living if a particular NCC is enforced. Courts are, thereby, of the view that post-employment restraints should only be extended to protect employers' trade secrets, not employee know-how or general stock of knowledge. However, in a practical sense, for the following reasons, the existence and enforcement of NCCs may prejudice employees in exercising their freedom in changing employments.

C *Blurry Line between Trade Secrets and Employee Know-How*

There is a doubt whether courts can successfully demarcate employee know-how from the employer's trade secrets which justify the enforcement of NCCs. The approach of Australian courts in this regard is to classify information into three categories: trade secrets (which would be protected by injunction, even in the absence of some contractual covenant according to the principles of equity); know-how (which would be protected by a valid restraint of trade covenant); and trivial information (which is not entitled to any protection).[112] The strategy Australian courts utilise in demarcating trade secrets from employee know-how is the adoption of the reasonable person test.[113] Accordingly, the test is whether 'the information be regarded as a separate part of the employee's stock of knowledge which a man of ordinary honesty and intelligence would recognise to be the property of his old employer and not his own to do as he likes with'.[114] Dean explains that the courts adopt an objective approach — the reasonable person test — in determining what constitutes a trade secret, whereas a subjective approach is used in determining whether information amounts to skill and general technical experience held by a particular employee at the time.[115] Therefore, the court considers the circumstances, such as 'the nature of the employment, the nature of information, whether the employer impressed on the employee the confidentiality

[111] Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press, 2014) 272.
[112] See *Sameh Refaat v Michael Barry* [2015] VSCA 218, [131]; *Faccenda Chicken Ltd v Fowler* [1985] 1 All ER 724, 731–2.
[113] *GD Searle and Co Ltd v Celltech Ltd* [1982] FSR 92, 255.
[114] Ibid. See also *Printers & Finishers Ltd v Holloway (No 2)* [1965] RPC 239, 255 (Lord Cross).
[115] Dean, *Employers, Ex-employers and Trade Secrets* (n 8) 11.

of the information and whether the relevant information can be easily isolated from other information'.[116]

Nonetheless, protection of trade secrets is invariably connected to the protection of information or information-related knowledge. Employee know-how or stock of knowledge acquired through employment is inevitably mixed with that knowledge. For this reason, Merges describes the blurry line between trade secrets and employee know-how as 'one of the most litigated issues in the pantheon of intellectual property disputes'.[117] In *GSK Australia Pty Ltd v Ritchie,* Harper J observed that 'it may not be easy to distinguish between information which remains the property of the former employer and that which forms the general stock knowledge of the ex-employee'.[118] Justice Campbell in *Del Casale v Artedomus (Aust) Pty* held that 'as a matter of ordinary English usage, there is no bright line between things that are of their nature trade secrets and things that are not'.[119] As Dean remarks, 'great difficulty remains in defining the line between trade secrets and know-how. "The difficulty … is that of drawing the line between that which in conscience is his employer's … and that which has become the employee's own".'[120]

In a similar vein, Van Caenegem argues that

> the conceptual, practical and evidentiary difficulties of separating trade secrets from general knowledge, know-how and experience are daunting, particularly where the claim relates to information that is not recorded in a document, file, date storage device or the like allegedly removed by the ex-employee.[121]

---

[116] Ibid 9. See also *New Aim Pty Ltd v Leung (No 4)* [2023] FCAFC 67, emphasising that confidentiality turns on the nature and content of the information rather than where it is stored, and that an employer who fails to take adequate protective steps, for example by permitting storage on an employee's personal device, may lose protection.

[117] Robert P Merges, 'From Medieval Guilds to Open Source Software: Informal Norms, Appropriability Institutions, and Innovation' (Working Paper, Conference on the Legal History of Intellectual Property, University of Wisconsin Law School Institute for Legal Studies, 13 November 2004) 9.

[118] (2009) 22 VR 482, [29]–[30]. See also *O'Brien v Komesaroff* (1982) 150 CLR 310.

[119] (2007) 165 IR 148, [128].

[120] Robert Dean, *The Law of Trade Secrets* (LawBook Co, 1990) 208, citing *Metrans Pty Ltd v Courtney-Smith* (1983) 8 IR 379, 381.

[121] William Van Caenegem, 'Employee Know-how, Non-compete Clauses and Job Mobility across Civil and Common Law Systems' (2013) 29 (3) *International Journal of Comparative Labour Law* 219, 228 ('Employee Know-how').

Thus, courts face the unenviable task of delineating know-how from trade secrets-related knowledge.[122] This view was further described by Rob Jackson as follows:

> This absence of judicial consideration as to what constitutes know-how is commonplace among all of the State and Commonwealth courts. Employee know-how as a concept in its own right is worthy of serious academic and judicial consideration, not merely as an adjunct to the law regulating the operation of confidential information or post-employment restraint provisions.[123]

Even if the courts are able to define what know-how is, employers can still restrict the use of know-how through restrictive covenants. Dean posits that 'know-how will be protected, but only if that information has been made the subject of a restraint of trade clause'.[124] For instance, affirming the view adopted by Samuels JA in *Faccenda Chicken Ltd v Fowler*,[125] Roberts-Smith J held in *AIM Maintenance Ltd v Brunt* that 'I accordingly take the law to be that confidential information falling short of a "trade secret" may be protected after termination of employment, by an express restrictive covenant'.[126]

As opined by Brereton J in *Cactus Imaging Pty Ltd v Peters:*[127]

> An employer has an interest in its confidential information, which it may legitimately protect by a restraint of trade, even if the information is not in the nature of a trade secret such as to attract equitable protection in the absence of any contractual agreement.[128]

Furthermore, in *Nomad Modular Building Pty Ltd v Smith*,[129] the following view of Lord Denning[130] was endorsed by the Western Australian Supreme Court:

> It is thus established that an employer can stipulate for protection against having his confidential information passed on to a rival in trade. But experience has shown that it is not satisfactory to have simply a covenant against disclosing confidential information. *The reason is because it is so difficult to draw the line between information which is confidential and*

[122] See, eg, *Maggbury v Hafele* (n 49) [160].
[123] Rob Jackson, *Post-Employment Restraint of Trade* (1st ed, Federation Press, 2014) 99.
[124] Dean, *Employers, Ex-employers and Trade Secrets* (n 8) 4.
[125] [1984] ICR 589, 599.
[126] (2004) 28 WAR 357, [74]. See also *Wright v Gasweld Pty Ltd* (1991) 22 NSWLR 317; *Workpac Pty Ltd v Steel Cap Recruitment Pty Ltd* (2008) 176 IR 464, [34]; and *Smith v Nomad Modular Building Pty Ltd* [2007] WASCA 169, [35]–[36].
[127] (2006) 71 NSWLR 9.
[128] Ibid [12].
[129] [2007] WASCA 117, [35]–[36].
[130] *Littlewoods Organisation Ltd v Harris* [1977] 1 WLR 1472, 1479.

> *information which is not; and it is very difficult to prove a breach when the information is of such a character that a servant can carry it away in his head.* The difficulties are such that the *only practicable solution* is to *take a covenant from the servant by which he is not to go to work for a rival in trade.* Such a covenant may well be held to be reasonable if limited to a short period.

Master Sanderson, approving Lord Denning's view, stated that 'in my view, that is exactly this case'.[131] His Honour went on to say that even though there is no suggestion at present that the defendant will use information, know-how or the like gained during his employment with the plaintiff, there must be a risk that he will do so. Therefore, the Court held that 'the plaintiff has no way of knowing when and if that might happen. So to prevent the situation arising, a reasonable restraint clause was placed in the employment agreement. It should be allowed to operate as between the parties'.[132]

D *Non-Competes and Lower-Income Workers*

As noted, there is a growing use of NCCs in the Australian workforce, and that includes many low-wage employees who typically lack the bargaining power to negotiate or remove such clauses.[133] Legal consultations confirm that NCCs are increasingly applied beyond traditional high-level roles in law, finance, and business services [134] They now extend to outward-facing customer roles, such as childcare workers, yoga instructors, and IVF specialists.[135] Over time, NCCs have shifted from being an exception to a default inclusion in many employment contracts — something rarely seen 15 years ago.[136] Lower-income workers also face greater financial hardship when transitioning between jobs and have fewer resources to challenge restrictive agreements. Unlike high-level professionals with access to sensitive business information, many low-wage workers have no reasonable justification for being subject to NCCs.[137]

Litigation over NCCs and trade secret protections is heavily skewed in favour of employers. Employees, often 'one-shotters' in legal disputes, face significant

---

[131] Ibid [36].
[132] Ibid.
[133] See above n 1.
[134] Andrews and Jarvis (n 1) 2.
[135] Legal Aid NSW, *Submission to the Competition Review on Non-Compete Clauses* (Submission, 2023) <https://treasury.gov.au>.
[136] Andrews and Jarvis (n 1) 2.
[137] Omer Majeed et al, 'Non-competes: A Case of Missing Wages in Australia' (Working Paper, Australian Government Department of the Treasury, 12 November 2025) 7, 17.

financial and procedural barriers when challenging these clauses in court.[138] Many lack the resources to hire specialised legal representation or the knowledge to navigate complex intersections of employment and trade secrets law.[139] In contrast, employers — "repeat players" in litigation — have the means to secure expert legal counsel and strategically leverage legal uncertainty to their advantage.[140]

As noted above, NCCs suppress worker mobility, even though the common law adopts a stricter approach towards employee restraints. Many employees, deterred by the fear of legal action, choose not to pursue better job opportunities — even when NCCs are ultimately unenforceable in court — a phenomenon known as the *in terrorem* effect.[141] The psychological and financial burden of potential litigation discourages low-income workers from challenging their contracts, effectively trapping them in lower-paying jobs.[142] Given these systemic disadvantages, there is a strong case for legal reform to specifically protect low-income workers from the undue burden of NCCs, ensuring fairer labour market mobility and economic opportunity.[143]

E *Extending the Scope of Trade Secrecy to Include Mundane Information*

As Joellen Riley claims, in recent years Australian courts have attempted to include mundane or ephemeral information in the orbit of confidential information.[144] For

---

[138] Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9(1) *Law & Society Review* 95, 98.

[139] Katherine Fisk, 'Working Knowledge: Trade Secrets, Restrictive Covenants, and the Rise of Corporate Intellectual Property, 1800–1920' (2016) 52(2) *Saint Louis University Law Journal* 923, 929.

[140] Michael Selmi, 'Non-Compete Clauses and Economic Mobility' (2020) 105 *Cornell Law Review* 1205, 1212.

[141] Richard Posner, *Economic Analysis of Law* (Wolters Kluwer, 7th ed, 2007) 149; Competition Review, *Final Report on Employment Restraints* (Report, 2023).

[142] Alan Krueger and Orley Ashenfelter, 'Theory and Evidence on Non-Compete Agreements' (2021) *National Bureau of Economic Research Working Paper Series* No 29934, 25.

[143] Organisation for Economic Co-operation and Development, *The Role of Firms in Wage Inequality: Policy Lessons from a Large Scale Cross-Country Study* (OECD Publishing, 2021) 26, 81.

[144] Joellen Riley, *Commodifying Sheer Talent*: *Perverse Developments in the Law's Enforcement of Restrictive Covenants* in Christopher Arup and William Van Caenegem (eds), *Intellectual Property Policy Reform* (Edward Elgar, 2009) 267, 282. The same was observed by Katherine Stone in respect of the United States. She argues that 'firms value [and seek to protect] not merely specific technical knowledge, such as computer code or bio-technical discoveries, but also more mundane types of knowledge, such as how the business operates, how the goods are produced, how paperwork flows, and how files are organized.' She further points out even employees may be prohibited from using the knowledge relating to negative-trade secrets in subsequent employments. According to Stone, 'a negative-trade secret is the knowledge of products tested or systems tried that have proven to be unproductive': Katherine V W Stone, 'Knowledge at Work: Disputes over the Ownership of Human Capital in the Changing Workplace' (2002) 34 *Connecticut Law Review* 721, 737.

instance, in *Woolworths v Olsen*,[145] Mason P treated a system designed to transform Woolworths' product supply procedures as confidential information.[146] In *John Fairfax Publications Pty Limited v Birt* ('*Birt*'),[147] strategies and tactical plans for selling media advertising to real estate agents were identified as confidential information.[148] This information may have been generated by employees in the course of their employment. Riley remarks that 'in earlier times it is arguable that this kind of information would be regarded as just part of the industry know-how and creative ideas of the employees themselves'.[149]

Therefore, she challenges the judicial approach in which courts have considered information which is mundane as nevertheless being confidential information, or as employees' goodwill which can be protected via restrictive covenants.[150] One of the reasons behind this is that Australian law is concerned with the protection of confidential information in general, which is considerably broader than trade secrets.[151] Put differently, in Australia it is not essential to establish that particular information possesses commercial value.[152] Instead, showing that information is not in the public domain may be sufficient.[153] Therefore, the information that an employer is willing to protect may not necessarily be limited to trade secrets which carry a commercial value.

Explaining the ramification of this legal approach, Riley posits:

> The cases on confidential information demonstrate that the strategic planning skills, the general know-how and creative thinking of working people can now be treated as a resource under the control of the employing business enterprise, not only during employment but afterwards. While the former employer can still (mercifully) not enslave the former employee by requiring continued service, the employer can (with an appropriately drafted covenant in an employment contract) prevent the employee from taking that talent and exploiting it elsewhere for a time.[154]

---

145 [2004] NSWCA 372.
146 Ibid [6].
147 [2006] NSWSC 995 ('*Birt*').
148 Ibid [20].
149 Riley (n 144) 272.
150 Ibid.
151 Christopher Arup, 'What/Whose Knowledge? Restraints of Trade and Concepts of Knowledge' (2012) 36(2) *Melbourne University Law Review* 369, 383.
152 Van Caenegem, 'Employee Know-how' (n 121) 225.
153 Ibid.
154 Riley (n 144) 272.

F *Non-Existence of a Measure to Compensate Employees during the Restraint Period*

As seen, depending on the circumstances, when a trade secret or protectable legitimate interest arises, the court has generally upheld what it deems to be a reasonable restrictive period of employment. However, the law is silent on the issue of what an employee is supposed to do in this restrictive period. Indeed, there is no legal means to compensate an employee who is not entitled to undertake new employment relative to the employee's skill and experience, or to start his or her own business in that period. For instance, in *Birt,* Brereton J adopted the view that, despite the fact the employee had to face hardship during the three month restraint period (his wife was expecting their second child and their first child was only 16 months old), the Court should enforce the restraint.[155] The Court further held that 'to a significant extent, an employee who pursues such employment despite the terms of a restraint is the author of his or her own misfortune'.[156] Therefore, even if courts hold that the restraint of trade period is reasonable, employees may be still deprived of their right to employment or to earn a living in that period. In any case, as noted above, it cannot be argued that agreeing to a NCC in an employment contract is a voluntary act of an employee. In fact, this is not a situation where an employee is responsible for his or her own misfortune. Rather, circumstances at the time may have forced him or her to sign the contract.

Moreover, while there is no automatic enforcement of non-competes by the courts, even within a reasonable non-competition period, there is a risk that an employee may have to separate his or her labour from himself or herself by not working. It is accepted that the post-employment restraint period may be varied depending on the circumstances. However, in some cases, even three month restraints may be long enough to keep an employee out of productive work.[157] Moreover, when there is a longer period of restraint, there is a risk that the enthusiasm of a potential new employer to offer a job may be diminished.[158] Also, in cases such as *IceTV v Duncan Ross and Ors*,[159] it is evident that post-employment restraint can be held to be reasonable in circumstances where an employee is terminated by the employer. The overall ramification is that an employee is deprived of his or her right to earn a living.

Therefore, it can be submitted that the existence and application of restrictive covenants may hinder successful realisation of employees' rights, such as freedom

[155] *Birt* (n 105).
[156] Ibid [49].
[157] Riley (n 144) 282.
[158] Ibid.
[159] [2007] NSWSC 635.

of changing jobs. Given that employees may not be able to delineate what information or knowledge they can obtain and use in their subsequent employment, there is a risk that they may not change their employment or surrender to the contractual restraints and be effectively forced to remain with their current employer. In any case, employers may be able to restrain employees from using their know-how in their future employment or at least successfully pressure them not to do so. The fundamental problem may be that there is no limitation on the protectable interest under restrictive covenants. As such, employers may effectively compel employees to remain with them and cancel any plans to join a competitor. Moreover, the existence of restrictive covenants may lead employees to career detours or involuntary occupational change for the reason that employees may not engage in a competing profession or business for the restraint of trade period.[160] That is, even in the case of a reasonable restraint which merely prohibits employees from working in a particular sector for a limited period, a skilful and enthusiastic employee may be compelled to seek employment opportunities in other sectors which are not covered by the restraint. On other hand, based on the same rationale, one may argue that NCCs do not completely restrict the ability of employees to work. However, a question that arises in this regard is whether it is reasonable to expect a highly skilled employee in one sector to work in a completely different sector. As an illustration, we cannot expect a robotic technician to find work as a cleaner.

Moreover, restricting the right to choose and change employment through restrictive covenants may impede the right to dignity and self-esteem of an employee, at least for the period of restraint. In fact, employees may feel socially unworthy by not having the opportunities to work during the restraint period, or as a result of career detours in which they may have to work in a field in which they might not have expertise or which they are otherwise overqualified to perform. The core of the issue is metaphorically explained by Riley as follows:

> [In] Shakespeare's *Merchant of Venice,* Shylock was forbidden by the court from taking the pound of flesh for which he had contracted because to do so would rob his victim of vital blood, which was not the subject of the bargain. Our present law turns this on its head. The employee is made to surrender up their life-blood — the very liberty to work and use their own know-how, skills and talents to the full — in order to render to the employer a mere pound of so-called "confidential information".[161]

---

[160] Matt Marx, 'The Firm Strikes Back: Non-compete Agreements and the Mobility of Technical Professionals' (2011) 76(5) *American Sociological Review* 695, 702.
[161] Riley (n 144) 277.

Overall, restrictive covenants may prejudice an employee who is subjected to restraints depending on the circumstances. As such, employees may not be able to either use their own knowledge, skills and talents in their next employment or to glean and develop new knowledge through continuous employment and industry participation.

G *Economic Implications, Knowledge Spill-Over, and Endogenous Growth*

In today's knowledge-based economy, which is characterised by the production, dissemination, and utilisation of knowledge and information, economic growth is intrinsically linked to the expansion of knowledge.[162] The generation of new knowledge is widely recognised as a cumulative process that fundamentally relies on pre-existing intellectual resources. In this context, the broad dissemination of knowledge, or knowledge spill-overs, such as inter-firm information exchanges, serves as a critical driver of innovation and economic performance at both the industry and national levels.[163] Knowledge spill-overs contribute in at least two significant ways. First, they reduce unnecessary duplication of research efforts across firms, thereby enhancing overall research efficiency. Second, they facilitate follow-on innovation by improving access to the existing body of knowledge relevant to subsequent technological or conceptual advancements.

Legal-economic literature analyses this phenomenon through endogenous economic growth theory and suggests that there is a positive correlation between knowledge spill-over and economic development.[164] Endogenous growth theory establishes that economic growth may be a result of endogenous forces such as knowledge spill-overs, development of human capital, and innovation, rather than external economic forces.[165] In other words, it suggests that investment in human capital and the resultant circulation of knowledge endogenously generates

[162] J S Metcalfe, 'The Entrepreneur and the Style of Modern Economics' (2004) 14(2*) Journal of Evolutionary Economics* 157, 176.
[163] Ronald J Gilson, 'The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete' (1999) 74 *New York University Law Review* 575, 608–9; Effie Kesidou and Adam Szirmai, 'Local Knowledge Spillovers, Innovation and Economic Performance in Developing Countries: A Discussion of Alternative Specifications' (Working Paper No 2008–033, Maastricht Economic and Social Research and Training Centre on Innovation and Technology, United Nations University, 2008) 7.
[164] Luis A Rivera-Batiz and Paul M Romer, 'Economic Integration and Endogenous Growth' (1991) 106(2) *Quarterly Journal of Economics* 531, 550–1; Paul M Romer, 'Endogenous Technological Change' (1990) 98(5) *Journal of Political Economy* 72, 99.
[165] Rivera-Batiz and Romer (n 164) 550–1; Romer (n 164) 99.

economic growth.[166] As such, intra-sectoral and inter-sectoral knowledge diffusion may be regarded as a crucial factor of economic growth in this knowledge-based economy.[167]

Nonetheless, restrictive covenants may bring contrary results to a business or a country. That is because they may slow down the 'dissemination of ideas, process and methods' among firms by prohibiting employees' freedom to change their jobs.[168] This situation may be a reason for slow economic growth.[169] Researchers such as Alan Hyde explain the correlation between enforcement of non-competes, knowledge spill-overs, and endogenous economic growth using the example of the Silicon Valley's rise as a premier centre for innovation and economic growth.[170] According to Hyde, 'regions such as Silicon Valley … that experience growth as knowledge spreads beyond the boundaries of the firm, demonstrate the "endogenous growth" through generation and diffusion of non-rivalrous and non-exclusive information'.[171] The root cause for such a development may be the unenforceability of NCCs in California. Section 16600 of the *California Business and Professional Code* provides that 'every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void'.[172]

The application of this provision results in establishing a 'culture of mobility' leading to a 'high velocity labour market' and a high volume of 'knowledge spill-overs'.[173] According to Ronald Gilson, this legal approach is the main reason for the dominance of California in the high technology industry.[174] Hyde claims that 'unenforceability of non-competes encouraged a culture of start-ups, velocity of labour and information sharing'.[175] As such, he argues that the rapid technological and economic

---

[166] See Pontus Braunerhjelm, Zoltan J Acs, David B Audretsch and Bo Carlsson, 'The Missing Link: Knowledge Diffusion and Entrepreneurship in Endogenous Growth' (2010) 34(2) *Small Business Economics* 105, 105.
[167] According to Arrow, employee-mobility may be a major source of potential spill-overs: Kenneth Arrow, 'Economic Welfare and the Allocation of Resources for Invention' in Universities-National Bureau Committee for Economic Research, Committee on Economic Growth of the Social Science Research Council (ed), *The Rate and Direction of Inventive Activity: Economic and Social Factors* (Princeton University Press, 1962) 609, 614.
[168] Harlan M Blake, 'Employee Agreements Not to Compete' (1960) 73 *Harvard Law Review* 625, 627.
[169] Anna Kirsten Rawlings, *Trade Secrecy in a Knowledge-Based Economy* (Masters Thesis, University of Toronto, 2001) 11.
[170] Hyde and Menegatti (n 89) 196; Gilson (n 163) 608–9.
[171] Hyde and Menegatti (n 89) 196.
[172] *California Business and Professional Code* § 16600.
[173] Gilson (n 163) 608–9.
[174] Ibid.
[175] Alan Hyde, *Working in Silicon Valley: Economic and Legal Analysis of a High-Velocity Labor Market* (Routledge, 2nd ed, 2015) 167.

growth in Silicon Valley cannot be achieved unless there is high velocity of labour and resultant knowledge spill-overs among firms and sectors.[176] For instance, high labour mobility or velocity of labour was a decisive factor in forming the semiconductor and biotechnology industries of Silicon Valley.[177] According to Guido Buenstorf et al, these industries were developed through spin-off entrepreneurs –– new firms started by either leaving employees or those who work in the same or closely related industries.[178] Overall, enforcement of non-competes may prejudice knowledge spill-over, which may contribute to a lack of innovation, technological and economic growth. In fact, restrictions on working in the same country or region may contribute to brain-drain, since employees who are restricted by non-competes may be induced to relocate by seeking a suitable job.[179]

V A Way Forward

As discussed, the enforcement of NCCs has the effect of restricting employees' fundamental right to work. Arguably, a legislative response may offer a viable means of clearly defining and safeguarding employees' rights in this area. This broader statutory orientation is consistent with the earlier empirical work of Christopher Arup et al, who identified uncertainty, hard bargaining and litigation costs as reasons why restraint clauses may be over-observed by employees even where they are vulnerable to legal challenge.[180] In the context of the welfare state where legislative interventions are often employed to protect underprivileged or vulnerable workers,[181] it is contended that statutory regulation of NCCs is both appropriate and necessary to address a distinct form of economic vulnerability. Absent such legislative safeguards, underprivileged or vulnerable employees may be left exposed to the inequities of traditional contractual principles such as freedom of contract and the sanctity of contract. This concern is underscored by the 2025–2026 federal budget proposals, which recognise that vulnerability is most acutely experienced by workers at the entry level and in low-wage occupations, where the ability to negotiate fair contractual terms is markedly limited. However, an effective legislative

---

[176] Ibid.

[177] Laura G Pedraza-Farina, 'Spill Your (Trade) Secrets: Knowledge Networks as Innovation Drivers' (2017) 92(4) *Notre Dame Law Review* 1561, 1565.

[178] Guido Buenstorf et al, 'Non-compete Clauses, Employee Effort and Spin-off Entrepreneurship: A Laboratory Experiment' (2016) 45 *Research Policy* 2113, 2113.

[179] Matt Marx, Jasjit Singh and Lee Fleming, 'Regional Disadvantage? Employee Non-Compete Agreements and Brain Drain' (2015) 44 *Research Policy* 394.

[180] Arup et al (n 26) 25.

[181] See, eg, Australia: *Work Health and Safety Act 2011* (Qld); *Work Health and Safety Act 2011* (ACT); *Work Health and Safety Act 2011* (NSW); *Work Health and Safety (National Uniform Legislation) Act 2011* (NT); *Work Health and Safety Act 2012* (SA); *Work Health and Safety Act 2012* (Tas); and *Occupational Health and Safety Act 2004* (Vic).

framework must also account for legitimate business interests. While protecting employees from unfair restraints, the law must also allow employers to safeguard proprietary interests, particularly trade secrets, without which innovation and investment in commercially valuable information may be discouraged. This is especially important given the distinctive role trade secrets play within the broader framework of intellectual property ('IP') law, often covering subject matter that falls outside the scope of conventional IP protections. The sections that follow will first examine the current proposal for a limited ban on NCCs and then explore additional considerations that a legislative initiative should address beyond the banning of non-competes for low- and middle-income workers, in order to achieve a more balanced and equitable regulatory approach.

A *Selective or Limited Ban*

The recent federal government proposal to ban NCCs from 2027 for employees on less than AUD183,100 per year marks a transformative shift in employment law and trade secrets protection.[182] Presented in the budget as a cost-of-living measure, the Labor Government framed the reform as a way to enhance workers' job mobility, ultimately boosting their earning potential.[183] The proposed ban on NCCs forms a part of a broader legislative trajectory of reforms to the *Fair Work Act 2009* (Cth), particularly amendments made by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth), the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth), and the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth), which are all designed to produce wage growth and labour mobility.[184] Rather than being driven by a direct focus on workers' rights, the ban is primarily grounded in economic considerations. Budget Paper No 1 quoted research which suggests that removing these restrictions could increase annual gross domestic product by AUD5 billion once fully implemented.[185] As revealed, currently, around 3 million Australian workers are bound by NCCs, which are becoming increasingly prevalent even in lower-wage industries such as childcare.[186] The reform is expected to provide workers with greater freedom to pursue higher-paying opportunities and start their own businesses while enabling growing

[182] *Budget Paper No 1* (n 4); 'Non-Compete Clauses and Other Restraints', *Australian Government* (Web Page, 2023) <https://treasury.gov.au>.
[183] Australian Government, *Building Australia's Future: Budget 2025–26* (Budget Overview, March 2025) 15.
[184] See, eg, *Fair Work Act 2009* (Cth) ss 333B–D: pay secrecy, which was previously regarded as a common contractual term, imposing a prohibition on disclosing pay to others, is now unlawful. The restriction applies to any contractual term, not just pay.
[185] *Budget Paper No 1* (n 4) 25.
[186] Ibid.

companies to attract skilled employees. Overall, it is projected to lift wages by 2–4%, potentially increasing annual earnings by up to AUD2,500 for median-wage workers.[187]

This move is expected to reshape employer-employee relationships while prompting businesses to reconsider their strategies for safeguarding proprietary information. At its core, this reform seeks to address a longstanding issue, namely the unnecessary extension of NCCs to low-skilled workers, such as hairdressers, baristas, and retail staff, who pose little to no risk of misusing confidential business information.[188] The assumption underlying non-competes has always been that higher-ranking, highly paid employees are more likely to have access to trade secrets or sensitive business data. If enacted, this legislation would entirely prohibit NCCs for lower- and medium-income workers, directly remedying one of the most criticised aspects of current employment contract practices. While non-competes may no longer be enforceable against low-income employees, other legal safeguards, such as NDAs, will remain in place to prevent misuse of confidential information. This approach is expected to strike a fair balance between protecting employer interests and ensuring worker mobility. While the proposed ban on NCCs for low and medium-income workers is a positive step, it alone cannot address the systemic issues tied to employment restraints. This point also reflects Arup et al's earlier view that legislative reform should be considered not merely as a question of enforceability in individual cases, but as a response to the broader legal practice through which restraints operate.[189] To drive meaningful reform, policymakers must go beyond this narrow intervention and address the broader systemic issues underpinning employment restraints, such as ensuring robust legal protections for trade secrets, as the following sections will demonstrate.

B *Defining the Boundaries: Protectable vs Non-Protectable Interests in Restrictive Covenants*

As noted elsewhere, trade secrets which are proprietary information of a firm represents valuable intellectual assets of a company in this knowledge economy. They offer protection for early-stage ideas before they develop into formal IP such as patents or copyrights. Even when firms secure patents, they may choose to keep certain aspects, including know-how, as trade secrets. Additionally, because patenting is costly and requires registration, SMEs often prefer non-registrable

[187] Ibid.
[188] Omer Majeed et al, *Non-competes: A Case of Missing Wages in Australia — Wages and Productivity in Firms Using Non-compete Clauses* (Competition Review, Australian Government Department of the Treasury, 2025) 8–10.
[189] Arup et al (n 26) 25–6.

protections, ie trade secrets, especially when their products are difficult to reverse engineer. In Australia, where there is a large presence of SMEs, the role that trade secrets play is significant as there is a positive correlation between the firm's size and the reliance of trade secrets.[190] As such, while banning NCCs, a legislative framework should still explicitly recognise the employer's right to protect trade secrets through measures of contracts or otherwise. From the employers' perspective, a more viable approach may be to draft agreements that focus explicitly on the protection of an employer's confidential information, as this constitutes a legitimate business interest. Policymakers, on the other hand, should explicitly state in legislative instruments that the prohibition of NCCs does not preclude employers from protecting trade secrets or other legitimate business interests through alternative contractual mechanisms. Such an explicit recognition would provide valuable guidance for courts when adjudicating disputes concerning restrictive covenants. Similarly, this clarification would be essential when evaluating the validity or reasonableness of NCCs applicable to high-income earners.

Notwithstanding the prohibition of NCCs, employers can continue to safeguard their legitimate business interests by requiring employees to enter into robust confidentiality or NDAs. Such agreements serve to clearly define what constitutes confidential information and provide guidance to employees regarding their obligations to maintain its secrecy. Moreover, NDAs may be regarded as a reasonable and proportionate means of preserving secrecy which is an essential element of trade secrecy, as recognised in *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd*.[191] However, confidentiality obligations have their limits. In *Jackson Power Real Estate Pty Ltd v Jones,* the Court made clear that confidentiality provisions cannot be used as a substitute for a post-employment restraint.[192] If an employer seeks to prevent a former employee from competing, it must do so through an express and properly drafted restraint clause, rather than by expanding confidentiality obligations beyond their legitimate protective function.

This distinction is important for legislative reform. The continued availability of independent legal protections for employers was emphasised in *2nd Chapter Pty Ltd v Sealey (No 2)*,[193] where the Court treated the existence of alternative protections as a reason why the restraints in issue were unnecessary. In other words, employers are not left without recourse merely because NCCs are prohibited or restricted. They may still rely on statutory duties under ss 182–183 of the *Corporations Act 2001*

[190] See above Part II.
[191] [1967] VR 37, 49–50.
[192] [2024] NSWSC 1665, [37]–[39].
[193] (2024) 336 IR 1.

(Cth), which prohibit the improper use of position or information. Separately, an employer may seek protection through the equitable action for breach of confidence.[194]

In the context of legal actions based on breach of confidence, the existence of an NDA can also assist in establishing that the information was confidential and was disclosed in circumstances that impose an obligation of confidence. Therefore, it is important that policymakers explicitly acknowledge the continued right of employers to rely on NDAs as a legitimate mechanism for protecting proprietary and commercially sensitive information. However, policymakers must also remain vigilant to the potential for NDAs to impose obligations that functionally resemble those of NCCs, particularly where they restrict former employees from engaging in post-employment activities that may lead to competitive harm. The use of NDAs as de facto NCCs raises significant policy concerns, as such practices may undermine the legislative intent behind the prohibition of non-competes. Accordingly, it is recommended that policymakers consider extending the scope of regulatory reform to prohibit any contractual provision that, in effect, operates as a non-compete regardless of its formal classification.[195]

Another critical issue that policymakers should address is the potential prohibition of extending restrictive covenants, whether in the form of NDAs for low-income earners or NCCs for high-income earners, beyond the protection of employers' legitimate business interests or trade secrets. While restrictive covenants are intended to safeguard proprietary information, which may encompass more than trade secrets, there is currently no clear limitation on the scope of interests that may be protected through such agreements. Instead, the determination of what constitutes a protectable interest is largely left to the contracting parties' discretion. This lack of regulatory guidance creates the risk of overly broad or unjustified restrictions that could unduly limit employees' economic opportunities. Therefore, policymakers should consider implementing clear legal parameters to ensure that restrictive covenants are confined strictly to protecting legitimate business

---

[194] The elements of that equitable action were recently restated in *Pennytel Australia Pty Ltd v Engelke* [2025] FCA 1384, [18].

[195] Australian authorities illustrate that a reform confined to NCCs may leave employees exposed to other post-employment restraints. In *Ecolab Pty Ltd v Garland* (2011) 216 IR 410, the Court refused to enforce a non-compete restraint but restrained the former employee from breaching a non-solicitation covenant. Moreover, "solicitation" may be fact-sensitive and does not necessarily depend on who initiated contact: *Hellmann Insurance Brokers v Peterson* [2003] NSWSC 242; *Entello Pty Ltd v Firooztash* [2016] QDC 50. However, the broader regulation of non-solicitation clauses falls beyond the scope of this article.

interests.[196] This has been approved by Pembroke J in *Seven Network (Operations) Ltd v James Warburton (No 2)*, where his Honour opined that

> the categories of case in which covenants in restraint of trade are enforceable are neither rigid nor exclusive. They included … any case where the covenantee has a legitimate interest of whatever kind to protect and where the covenant is no wider than necessary to protect that interest.[197]

The repercussion of this scenario is that there is a possibility of extending the scope of restrictive covenants to cover employee know-how or general stock of knowledge acquired through their prolonged employment. This may result in impeding employees' rights to successfully utilise employment-related knowledge in subsequent employment. Therefore, Van Caenegem highlights the need to define the 'scope and extent of the categories of protectable interests'.[198]

To remedy this, the protectable interest of restrictive covenants should be defined through a legislative provision. However, introducing an overarching limitation on the protectable interest may hinder the employers' ability to contract and protect their legitimate business interests, such as trade secrets. Therefore, in balancing the interests of both employers and employees, policymakers may consider including a provision such as the following:

> An employer has a protectable interest when [and only when] the employee (i) has access trade secrets of the employer or (ii) has access to competitively sensitive confidential information that otherwise would not qualify as a trade secret, including product development plans, product launch plans, marketing plans and sales plans.[199]

At the same time, legislation may introduce a list of exclusions or information that cannot be protected by restrictive covenants. Such a list may include general skill, knowledge and general job training acquired by an employee during his or her tenure. Such a provision may strengthen the position of employees in two ways. First, it may establish that employers can prove that they have possessed a protectable interest under a restrictive covenant only if an employee has access to trade secrets or other related confidential and sensitive information. Second, employees may be able to successfully utilise their skills, knowledge and general

---

[196] A similar concern underpins Arup et al's reform proposal that employers should be required to identify with precision the position from which the employee is restrained, the interest worthy of protection, and the temporal and territorial limits of the restraint. See Arup et al (n 26) 25.
[197] (2011) 206 IR 450, 470 [68].
[198] Van Caenegem, *Trade Secrets and Intellectual Property* (n 9) 218–20.
[199] See *Non Competition Agreements*, *2017 ORS 653.295,* Oregon Revised Statutes 2017.

training in subsequent employment. This may lead to empowering employees by ensuring that the application of restrictive covenants may not circumscribe their ability to successful realisation of their right to work.

C *Demarcating Employee Know-How from Trade Secrets: Embracing the Memory Rule*

As stated, there is a risk that trade secrets law may catch within its ambit the information that is in the memory of the employees. For instance, in the Australian context, where there are no clear rules to demarcate trade secrets from employee know-how, there is a possibility that the law may embrace information that is purely in the memory of the employee.[200] The consequence may be that employees may not be able to successfully engage in their subsequent employment. As stated in the Massachusetts case of *Marcam Corp v Orchard*:

> [An ex-employee] does not go with a *tabula rasa* with respect to … significant business information of [the former employer]. It is difficult to conceive how all this information stored in [the ex-employee's] memory can be set aside as he [or she] applied himself [or herself] to a competitor's business and its products.[201]

The solution that was suggested to resolve this issue by the United States courts was to apply the 'inevitable disclosure' doctrine.[202] The inevitable disclosure doctrine proposes that an employee 'may be enjoined by demonstrating that the employee's new job duties will inevitably cause the employee to rely upon knowledge of the former employer's trade secrets'.[203] In other words, this doctrine is based on the proposition that it may be inevitable that an employee reveals trade secrets of an ex-employer to a new employer since an employee might not be able to compartmentalise the information, knowledge and experience gleaned through the previous employment from their knowledge on the trade secrets of the ex-employer. The doctrine of inevitable disclosure seeks to protect trade secrets from threatened misappropriation, allowing courts to grant preliminary injunctions to forbid an

---

[200] Ibid.

[201] 885 F Supp 294 (D Mass 1995), 297. However, *Marcam* predates the Massachusetts Noncompetition Agreement Act, which now imposes additional limits on employee non-compete agreements entered into on or after 1 October 2018. It is therefore relied on here only for the broader point that information retained in an employee's memory may complicate the distinction between general skill and knowledge and protectable confidential information, not as a statement of current Massachusetts non-compete law.

[202] See *PepsiCo, Inc v Redmond* 54 F 3d 1262, 1272 (7th Cir, 1995).

[203] *Whyte v Schlage Lock Co,* 101 Cal App 4th 1443, 1446 (2002).

immediate threat.[204] However, this doctrine may prejudicially affect public interest in that employers should be free to hire whomever they please and employees should be free to work for whomever they please.[205] Consequently, this may affect the mobility of labour, the right to earn a living, as well as the dissemination of knowledge.

Even though there is no such doctrine in Australia, a similar result may follow the application of the current laws in Australia. That is, given the practical difficulty in demarcating employee know-how and trade secrets, there is a risk that courts may take an overly expansive interpretation of the protected information, thereby restricting the use of employee know-how in subsequent employment. This paper proposes that policymakers consider the 'memory rule' to resolve the problem of drawing lines between trade secrets and employee know-how. An 18th century English case, *Merryweather v Moore*, may provide a foundation for this argument. In this case, Kekewich J held that 'if he [an employee] can carry them in his head, no one can prevent his doing that and making use of them'.[206]

Yuval Feldman, building on this statement, argues that the judicial approach should be to enjoin merely the 'use of information that was copied down prior to the termination of the employment' but not the use of the knowledge carried out in the heads of departing employees.[207] This seemingly simple concept has been forgotten by the common law world,[208] but may be a way of successfully drawing a line between employers' protectable trade secrets and employees' know-how, which is allowed to be used in subsequent employment. Feldman, having empirically investigated this proposition, suggests that the tangibility of information is the most important determinant in a trade secrets misappropriation case.[209] In other words,

---

[204] Elizabeth A Rowe, 'When Trade Secrets Become Shackles: Fairness and the Inevitable Disclosure Doctrine' (2005) 7 *Tulane Journal of Technology and Intellectual Property* 167, 172–3.
[205] See *Bimbo Bakeries USA Inc v Botticella*, 613 F 3d 102 (3rd Cir, 2010).
[206] [1892] 2 Ch 518, 524.
[207] Yuval Feldman, 'The Behavioral Foundations of Trade Secrets: Tangibility, Authorship and Legality' (2006) 3(2) *Journal of Empirical Legal Studies* 197, 203. While Feldman did not mention the *Merryweather v Moore* case specifically, he attempted to rely on an analysis of Pooley, which did: see James H A Pooley, M A Lemley and Peter J Toren, 'Understanding the Economic Espionage Act of 1996' (1997) 5 *Texas Intellectual Property Law Journal* 177, 189–90. However, Pooley, Lemley and Toren did not deal with the memory rule per se.
[208] See Ronald McCallum and Andrew Stewart, 'The Duty of Loyalty: Employee Loyalty in Australia' (1999) 20 *Comparative Labour Law and Policy Journal* 155, 163. They argue that there is no fundamental difference between memorised and downloaded information in the Australian context.
[209] Feldman (n 207) 231. Feldman, based on the data collected from a non-random multi-sourced sample of 260 high-tech employees in Silicon Valley, suggests an alignment of 'law with people's [employees'] intuitions' or what people think is right or wrong. According to this view, social support is required for the long-term functionality, legitimacy and credibility of the law. He identified that the memory rule is such a legal principle that is supported by persons, ie, employees.

he asserts that while trade secret law should cover downloaded or deliberately collected information (which is employers' information) by a leaving employee, the law should not cover memorised information (which can be freely used by employees).[210] In summary, despite the fact that the information was confidential, if it had been absorbed by an employee during his or her employment, it should be recognised as a part of his or her general knowledge and expertise.

The central challenge in operationalising the memory rule lies in translating its intuitive logic into legally workable language. This article argues that the rule be given effect through a two-limbed test applicable in the employment context, distinguishing between: (i) information that has been passively absorbed and retained in the unaided memory of the employee in the ordinary course of performing their duties; and (ii) information that was deliberately recorded, copied, extracted, or memorised by the employee prior to or upon the cessation of employment.[211] Only the latter category would attract the protection of trade secrets law. Information falling within the first limb would be treated as forming part of the employee's general stock of knowledge and expertise, freely available for use in subsequent employment. To give this test legal efficacy, it is proposed that the memory rule be expressed in the following statutory terms:

> Information shall not constitute a trade secret, or be treated as confidential information protectable against use by a former employee, to the extent that such information has been retained solely in the unaided memory of that employee and was not deliberately recorded, copied, extracted, or memorised by the employee prior to or upon the cessation of the employment relationship.

This formulation has several features that make it legally operative. First, the requirement of 'unaided memory' confines the protection to information that the employee could not carry in their head without deliberate effort, thereby excluding passively absorbed know-how. Second, the qualifier 'deliberately recorded, copied, extracted, or memorised' imports a fault element that aligns with the equitable basis of trade secrets protection, which has always required some element of unconscionable conduct or breach of confidence.[212] Third, the formulation does not require the employee to prove a negative; rather, the burden of establishing deliberate extraction falls on the employer seeking to enforce the restriction,

---

[210] Ibid 224, 231.

[211] This two-limbed formulation draws on Feldman's empirical analysis (n 207) 197 and the foundational principle stated in *Merryweather v Moore* (n 206) 524.

[212] See, eg, *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203; *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41, 47–8 (Megarry J).

consistent with general principles governing the enforceability of post-employment restraints.[213]

Nonetheless, it might be argued that proposing the memory rule might be undermined in the rare case of an employee having an eidetic memory. As such, there may be a risk that an employee with an eidetic memory may carry trade secrets such as a recipe or a formula in his or her mind when leaving an employer. However, at least, the memory rule can be regarded as a practical measure that may resolve the problem of uncertainty of demarcating employee know-how from trade secrets by providing that protected information does not extend to the general stock of knowledge of an employee with normal memory. In simple terms, then, if information cannot be deleted from the head of the employee, so far as the employee does not make any additional effort to store particular information relating to trade secrets in their head, it may be fair to consider that this knowledge is theirs.

D *Advocating for Garden Leave as a Mandatory Compensation Mechanism for Restricted Employees*

As explained, restrictive covenants are a common tactic used by employers to protect their trade secrets, requiring (ex-)employees not to compete with them by using their trade secrets. In practice, this measure restricts the employees' rights to change their employment and ultimately the right to earn a living.[214] Also, this may be regarded as a unilateral measure that forces employees to bear the primary burden (of protecting trade secrets) without receiving anything in exchange. In other words, one of the major deficiencies of non-competes may be that they do not provide provisions for making a payment to an employee who is restricted to working for a certain (reasonable) time period.

Alternatively, the 'garden leave' or 'gardening leave' doctrine can be regarded as a fairer mechanism than non-competes, and may serve the same purpose. Garden leave can be defined as 'an employer insisting an employee, who has given notice, stay away from work for the duration of the notice period, whilst continuing to receive the employee's remuneration'.[215] Thus, rather than immediately beginning work for a competing enterprise after leaving the previous employment, the employee is paid to remain at home and, at least metaphorically, work only in the

[213] This is consistent with the general principle that the party seeking to enforce a post-employment restraint bears the onus of establishing its reasonableness. See *Lindner v Murdock's Garage* (1950) 83 CLR 628.
[214] See above Part IV.
[215] *Bearingpoint Australia Pty Ltd v Hillard* [2008] VSC 115, [84] (Habersberger J).

garden.[216] From an employer's perspective, garden leave may be a measure to protect them against the misappropriations of trade secrets and competition from leaving employees. From an employee's perspective, while the doctrine of garden leave still restricts the mobility of an employee, it nevertheless compensates him or her for the period of the restraint. Employers may not attempt to restrict leaving employees routinely since they have an immediate and tangible cost in enforcing a garden leave agreement. As such, they may be cautious to apply gardening leave only to the employees plausibly exposed to trade secrets. Therefore, garden leave may be considered as striking a fair balance between employers and employees.[217] This compensation-based rationale has also been recognised by Arup et al, who note both the practical use of gardening leave and the possibility of requiring payment during the restraint period as a means of reducing the burden on employees.[218]

Implementing garden leave, rather than relying on a remunerated post-employment restraint, may offer important doctrinal and practical advantages in the employment context. Its main doctrinal advantage is that the employment contract remains on foot during the notice period. The employee, therefore, continues to owe duties of fidelity, loyalty and exclusive service, while the employer may lawfully remove the employee from access to confidential information, strategic developments and client connections.[219] This distinction was illustrated in *Harden v Willis Australia Group Services Pty Ltd*,[220] where Sackar J treated the employment contract as continuing during the notice period, with the result that the employee remained subject to continuing contractual obligations, including the duty of fidelity and an implied duty of good faith. The case usefully confirms that garden leave derives its force from the subsisting employment relationship, whereas, once that relationship has ended, the employer must instead rely on an enforceable post-employment restraint.[221] This is what distinguishes garden leave from a post-termination non-compete, which can only operate once the employment relationship, and with it the ordinary duty of fidelity, has come to an end.[222] As Rajiv Passi observes, the appeal of garden leave

[216] Norman D Bishara and Michelle Westermann-Behaylo, 'The Law and Ethics of Restrictions on an Employee's Post-Employment Mobility' (2012) 49 *American Business Law Journal* 1, 26.
[217] *Tullett Prebon (Australia) Pty Ltd v Purcell* (2008) 175 IR 414, [65]–[66]; *Grace Worldwide (Australia) Pty Ltd v Alves* [2017] NSWSC 1296, [39], [48]–[69].
[218] Arup et al (n 26) 11, 26–7.
[219] See *Robb v Green* [1895] 2 QB 315, 316–7; *Faccenda Chicken Ltd v Fowler* [1987] Ch 117, 136–7.
[220] [2021] NSWSC 939.
[221] Ibid [510]–[514].
[222] See *Faccenda Chicken Ltd v Fowler* [1987] Ch 117, 136.

lies precisely here: it shields the employer from competitive harm while leaving the employee's pay and contractual status intact during the period of exclusion.[223]

What makes garden leave especially attractive is that the reform discussed above leaves it untouched.[224] The proposed prohibition applies only to restraints that operate after the employment relationship has ended. It says nothing about how an employer may lawfully direct an employee who remains under contract. Garden leave does its work while the contract is still on foot, during the notice period, when the employee continues to be paid and continues to owe the duties of fidelity and exclusive service examined above.[225] It is therefore not a post-employment restraint at all, and falls outside the class of clauses the announced ban is designed to strike down.[226] The practical consequence is significant. As the prohibition removes the non-compete from the employer's toolkit for the great majority of workers, garden leave stands among the few protective mechanisms left intact.

This conclusion should not be overstated, however. Garden leave is not a freestanding entitlement; its protective force depends on the contract conferring an express power to withhold work. That qualification matters, because for skilled employees, whose professional standing and marketability depend on actually doing the job, the courts have recognised an implied obligation on the employer to provide work unless the contract clearly states otherwise.[227] Even where such a clause is in place, the protection holds only so far as it is properly drafted and confined to what is reasonably necessary, as the authorities canvassed above insist,[228] and it withstands only the reform as announced, not necessarily any future one, since the consultation has expressly canvassed restraints operating during employment.[229] What can be said in its favour is that a well-drafted clause draws its strength from the continuing employment relationship rather than from a more fragile post-employment covenant, the very function the English Court of Appeal acknowledged long ago in *Provident Financial Group plc v Hayward* when it treated garden leave as

---

[223] Rajiv Passi, 'Garden Leave Clauses: A Growing Trend in Employment Contracts' (2001) 13(3) *Bond Law Review* 371, 374–6.
[224] See above Part V(A).
[225] See Amanda Coulthard, 'Garden Leave, the Right to Work and Restraints on Trade' (2009) 22(1) *Australian Journal of Labour Law* 87, 88; Greg McCarry, 'Termination of Employment, Payment in Lieu of Notice, Garden Leave and the Right to Work' (1999) 12 *Australian Journal of Labour Law* 1.
[226] Coulthard (n 225) 88.
[227] *BearingPoint Australia Pty Ltd v Hillard* [2008] VSC 115, [88]; *Wesoky v Village Cinemas International Pty Ltd* [2001] FCA 32, [17]. See also Coulthard (n 225) 89–90.
[228] *Seven Network (Operations) Ltd v Warburton (No 2)* (2011) 206 IR 450, 470–73 [68]–[77]; *Tullett Prebon (Australia) Pty Ltd v Purcell* (2008) 175 IR 414, 425–28 [37]–[46]; *William Hill Organisation Ltd v Tucker* [1999] ICR 291, 298–9; *Evening Standard Co Ltd v Henderson* [1987] ICR 588, 593–4.
[229] Treasury (Cth), *Reform to Non-Compete Clauses and Other Restraints on Workers* (Consultation Paper, July 2025).

a powerful tool available to employers during the notice period.[230] Garden leave is best understood, then, not as a settled safe harbour, but as the more durable and defensible of the available mechanisms on the current state of the law. [231]

E *Legislative Provisions and Guarantees Not to Be Excluded by Contracts*

Policymakers may consider including a provision to eliminate the possibility that an employer may exclude the application of legislative provisions through contractual measures. Such a guarantee may be important to protect employees who may be otherwise vulnerable to employers who have stronger bargaining power. Therefore, legislation may introduce a provision stating:

> A term of a contract is void to the extent that the term(s) purports to exclude, restrict or modify or has the effect of excluding, restricting or modifying (a) the application of all or any of the provisions of this legislation and (b) the exercise of a right conferred by the provisions of this legislation.[232]

The purpose of such a provision is to prohibit the possibility of contracting out of the progressive statutory measures introduced to establish a balanced approach concerned with the rights of employers and employees. Employees may be protected by the legislative provisions irrespective of the fact they were compelled by an employer to sign an 'opt out contract'.

VI Conclusion

Restrictive covenants such as NCCs have become increasingly prevalent across Australian industries, driven by the desire to protect employers' legitimate business interests in a competitive market. However, the growing use of NCCs, often imposed indiscriminately and without regard to income level or actual business risk, has raised serious concerns about their adverse effects on employee mobility, economic fairness, and innovation. Recognising the wide-ranging implications of NCCs, the federal Government has announced a plan to implement a prospective ban on NCCs for the majority of Australian workers, particularly those earning below the high-income threshold, with the reform expected to take effect from 2027. While this marks a positive shift towards promoting fairness and productivity, this article argues that a blanket prohibition, though well-intentioned, may be insufficient on its own to resolve the deeper systemic challenges posed by restrictive employment practices. A more effective and equitable approach requires policymakers to engage

---

[230] *Provident Financial Group plc v Hayward* [1989] ICR 160, 164–5.
[231] See Coulthard (n 225) 89–90.
[232] Cf *Competition and Consumer Act 2010* (Cth) s 64.

with the nuanced legal and practical realities that underpin the use of NCCs. In particular, the reform agenda should include clearly defining and limiting the scope of protectable employer interests in NCCs, ensuring that only legitimate commercial concerns such as trade secrets and confidential information warrant restriction. It should also involve drawing a principled and practical distinction between an employee's general know-how and an employer's proprietary trade secrets, potentially through the adoption of the 'memory rule' as a guiding test for enforceability. Furthermore, the introduction of garden leave provisions as a mandatory compensatory mechanism for employees subject to post-employment restraints would help to mitigate the economic harm caused by such clauses while ensuring proportionality and fairness.

By offering these targeted reforms, this article provides a roadmap for constructing a more balanced legal regime: one that safeguards commercial confidentiality without unduly compromising employee rights and economic mobility. Ultimately, rethinking non-competes through a comprehensive and principled lens presents an opportunity not just to improve individual working conditions, but also to enhance national productivity and strengthen trust in the employment law system.

THE LIMITS OF CELEBRITY REPUTATION IN AUSTRALIAN TRADE MARK LAW: *TAYLOR V KILLER QUEEN*

NYSSA BULL*

This case note examines the High Court of Australia's decision in Taylor v Killer Queen LLC (2026) 100 ALJR 335, which resolved a long-running dispute concerning the cancellation of a registered trade mark based on celebrity reputation. The note outlines the factual and procedural background to the litigation and analyses the Court's treatment of reputation-based cancellation under ss 60, 88 and 89 of the Trade Marks Act 1995 (Cth). Particular attention is given to the Court's approach to reputation, evidentiary requirements for likely confusion, and the circumstances in which rectification of the trade marks register may occur.

I Introduction 152

II Background 152

III Statutory Framework 153

A *Section 88(2)(a)* *153*

B *Section 88(2)(c)* *154*

C *Section 89* *155*

IV Earlier Decisions 155

A *Federal Court Decision* *155*

* Associate Lecturer, UWA Law School, The University of Western Australia.

B *Full Court Decision* *156*
V The High Court's Findings and Reasoning 157
A *Rectification of the Designer's Mark under ss 60 and 88(2)(a)* *158*
B *Rectification of the Designer's Mark under s 88(2)(c)* *159*
C *Discretion Not to Cancel Designer's Mark under s 89* *160*
VI Significance of the Case 161
VII Conclusion 163

I Introduction

On 11 March 2026, in a landmark 3:2 majority decision, the High Court of Australia ('High Court') handed down *Taylor v Killer Queen LLC* ('*Taylor v Killer Queen*').[1] The case involved a 17-year-long trade mark dispute between global pop star Katy Perry and Australian fashion designer Katie Taylor, trading under the name "Katie Perry". It concerned whether the designer's registered trade mark "Katie Perry", registered for clothing, was liable for cancellation under the *Trade Marks Act 1995* (Cth) ('*Trade Marks Act*') because of the celebrity reputation of the pop star. The majority of the High Court overturned the decision of the Full Court of the Federal Court of Australia ('Full Court') to cancel the registration of the designer's trade mark. As a result, the designer's trade mark remains registered.

The case provides important guidance on the operation of ss 60, 88 and 89 of the *Trade Marks Act*. In particular, it clarifies the nature and scope of what is meant by 'reputation' under s 60, the role of notional normal and fair use in assessing likely deception or confusion under s 88(2)(c), and the circumstances in which a court may decide against granting an application for rectification under s 89.

II Background

Australian fashion designer Katie Taylor (the appellant, 'Ms Taylor') was named "Katie Perry" at birth and went by that name until she married Matthew Taylor in 2015. From 2007, she also used the name "Katie Perry" for her fashion brand. In September 2007, she applied to register a stylised logo featuring the name "Katie

[1] (2026) 100 ALJR 335 ('*Taylor v Killer Queen*').

Perry" in relation to clothing and fashion designing in Class 42 which was accepted on the trade marks register ('Register') but then expired in July 2008. On 29 September 2008 (the 'Priority Date'), Ms Taylor applied to register "Katie Perry" as a word mark for clothing, and this was entered on the Register on 21 July 2009 ('Designer's Mark'). Katheryn Elizabeth Hudson (the second respondent, 'Ms Hudson') has performed under the stage name "Katy Perry" since 2002. By the time Ms Taylor applied for the Designer's Mark, she was aware that "Katy Perry" was a famous pop star. She also 'likely knew that music artists sold clothing bearing their names … at music concerts',[2] and that this was a 'commonly accepted practice'.[3]

By the Priority Date, Ms Hudson had achieved significant fame in Australia, including a number-one single and an album reaching Gold certification. On 26 June 2009, Ms Hudson applied to register the word mark "Katy Perry" in relation to music-related goods and services in Classes 9 and 41 ('Singer's Mark'), as well as various kinds of clothing in Class 25. The singer subsequently deleted Class 25 from her application after it was objected to on the basis of Ms Taylor's earlier trade mark registration. For over a decade, both the Designer's Mark and the Singer's Mark coexisted.

III Statutory Framework

Under s 20 of the *Trade Marks Act*, registration confers exclusive rights to use a trade mark in relation to specified goods or services. Cancellation (or 'rectification') of a trade mark from the Register is permitted only in certain circumstances, which are set out in s 88. The two relevant subsections of this provision that were relied on in *Taylor v Killer Queen* were ss 88(2)(a) and (c). Even where one of these grounds is established, the court retains a discretion under s 89 to refuse to rectify the Register. The proper construction and application of these provisions were the focus of the High Court decision and are set out in further detail below.

A *Section 88(2)(a)*

Section 88(2)(a) allows for the cancellation of a trade mark using any ground that could have been relied upon to oppose its initial registration. One of those grounds is s 60, which allows the registration of a mark to be opposed if it is likely to cause confusion due to the established reputation of another mark.

[2] Ibid 351 [63] (Gordon ACJ and Beech-Jones J).
[3] Ibid 352 [71].

The application of s 60 involves a two-step inquiry.[4] First, it must be shown that another trade mark had, before the relevant priority date, acquired a reputation in Australia.[5] Reputation in this context refers to the 'recognition of the … mark by the public generally' as a signifier of the source of goods or services.[6]

Second, it must be established that, 'because of that reputation, the use of the [challenged] mark would be likely to deceive or cause confusion'.[7] These are distinct legal concepts. To 'deceive' involves creating an incorrect mental impression or belief, whereas to 'cause confusion' may merely involve 'perplexing or mixing up the minds' of potential customers.[8] For this ground to be established, there must be a 'real, tangible danger' of deception or confusion occurring; a mere possibility is insufficient.[9]

A critical element of this inquiry is the comparison between the actual use of the prior mark and the 'notional normal and fair use' of the challenged mark.[10] The concept of what constitutes 'notional normal and fair use' is a hypothetical test that considers all legitimate, typical ways the mark could be used in a hypothetical market.[11]

B *Section 88(2)(c)*

Section 88(2)(c) provides a further ground for rectification where, because of circumstances applying at the time the rectification application is filed, notional use of the registered mark would be likely to deceive or cause confusion. Section 88(2)(c) provides a broader basis for rectification than s 88(2)(a) when read with s 60. Unlike s 60, which requires proving that the likelihood of deception or confusion arises specifically 'because of' the reputation of another trade mark, s 88(2)(c) does not limit the source of the confusion to another mark's reputation. Instead, s 88(2)(c) allows the court to examine any 'circumstances applying' at the

[4] *Self Care IP Holdings Pty Ltd v Allergan Australia Pty Ltd* (2023) 277 CLR 186, 202–3 [13] ('*Self Care*').
[5] Ibid.
[6] *McCormick & Co Inc v McCormick* (2000) 51 IPR 102, 127 [81].
[7] *Self Care* (n 4) 202–3 [13].
[8] *Coca-Cola Co v All-Fect Distributors Ltd* (1999) 96 FCR 107, 122 [39], quoting *Pioneer Hi-Bred Corn Co v Hy-Line Chicks Pty Ltd* [1979] RPC 410, 423.
[9] *Southern Cross Refrigerating Co v Toowoomba Foundry Pty Ltd* (1953) 91 CLR 592, 595.
[10] *Taylor v Killer Queen* (n 1) 349–50 [55] (Gordon ACJ and Beech-Jones J), citing *Vivo International Corporation Pty Ltd v Tivo Inc* (2012) 294 ALR 661, 681 [113]–[114] ('*Vivo*').
[11] *Taylor v Killer Queen* (n 1) 349–50 [55] (Gordon ACJ and Beech-Jones J), citing *Vivo* (n 10) 681 [114] and the authorities cited therein.

time the rectification application is filed that might render the registered mark's use deceptive or confusing.[12]

C *Section 89*

Section 89 allows the court to refuse an application for rectification once a ground for cancellation has been established. For this provision, the burden of proof shifts to the registered owner, who must convince the court that the reasons for cancelling their mark 'ha[ve] not arisen through any act or fault' by them.[13] Australian courts have recognised that the phrase 'any act or fault' is a composite expression that captures a broad range of conduct, including both positive actions and omissions.[14] The mere fact of applying for and obtaining registration does not itself constitute an 'act or fault', although other circumstances surrounding the application, such as the applicant's state of mind, may do so.[15] Furthermore, by using the term 'arisen through', the statute implies that a registered owner's conduct does not need to be the primary or only reason for confusion. Instead, the discretion under s 89 is lost as long as the owner's act or fault substantially contributed to the grounds for cancellation, even if it was not the 'proximate' cause.[16] In exercising this discretion, the court is legally required to consider prescribed matters, such as the public interest, the extent to which the mark remains distinctive, and whether any adequate alternative remedies exist.[17]

IV EARLIER DECISIONS

A *Federal Court Decision*

Ms Taylor initiated legal proceedings against Ms Hudson and three of her companies. In the initial hearing, Justice Markovic ruled that while Ms Hudson's company, Kitty Purry Inc, had infringed on the Designer's Mark, Ms Hudson avoided personal liability.[18] The judge noted that even though Ms Hudson's social media activity would have normally constituted infringement, she was able to rely on the "own name"

---

[12] *Taylor v Killer Queen* (n 1).
[13] Ibid 357 [96] (Gordon ACJ and Beech-Jones J).
[14] *XYZ v Commonwealth* (2006) 227 CLR 532, 543–4 [19]; *Sea Shepherd Australia Ltd v Federal Commissioner of Taxation* (2013) 212 FCR 252, 261 [34].
[15] *Taylor v Killer Queen* (n 1) 382 [248] (Jagot J).
[16] *Government Insurance Office of NSW v R J Green & Lloyd Pty Ltd* (1966) 114 CLR 437, 443, 445, 447; *Dickinson v Motor Vehicle Insurance Trust* (1987) 163 CLR 500, 505.
[17] *Trade Mark Regulations 1995* (Cth) reg 8.2.
[18] *Taylor v Killer Queen, LLC and Others (No 5)* (2023) 172 IPR 1 ('*Taylor v Killer Queen* FCA').

defence found in s 122(1)(a)(i) of the *Trade Marks Act*.[19] This provision applies where a person uses their own name in good faith, even if that name is similar to a registered trade mark.

Ms Hudson's attempt to have the Designer's Mark cancelled was unsuccessful. Regarding s 88(2)(a), the judge found that while the singer was certainly famous for music and entertainment, that reputation did not extend to clothing at the time.[20] Because the "Katy Perry" brand had not acquired a reputation in relation to clothing in Australia, the judge concluded there was no real likelihood of consumers being deceived or confused. In relation to s 88(2)(c), the judge also pointed to the fact that the two brands had coexisted for a decade without a single documented instance of actual confusion.[21] Furthermore, her Honour reasoned that the singer's massive "star power" by 2019 actually made it easier for consumers to distinguish between the two, as they would recognise the absence of a connection after a 'moment's reflection'.[22] Because the grounds for cancellation were never met, the judge declined to consider the s 89 discretion.

Ms Hudson and two of her companies appealed the infringement and rectification findings to the Full Court. Ms Taylor cross-appealed to broaden the scope of liability for the singer's other companies.

B *Full Court Decision*

The Full Court overturned the primary judge's decision, ruling that Ms Taylor's trade mark should be cancelled on both grounds for rectification.[23] Regarding the cancellation ground under s 88(2)(a) (evaluated at the Priority Date), the Court found the original judge's view was too narrow and should have recognised that a pop star's stage name naturally functions as a trade mark.[24] The Court also held that the primary judge failed to account for the 'common practice' of musicians selling clothing at concerts and launching fashion labels, which made consumer confusion a real risk.[25] Because the names were nearly identical, the Full Court concluded that consumers would likely wonder if a trade connection existed.

---

[19] Ibid 160 [626], 161 [633], 162 [639], 163–4 [648], 169 [667], 177 [705].
[20] Ibid 188 [742].
[21] Ibid 199 [790].
[22] Ibid 200 [794].
[23] *Killer Queen, LLC v Taylor* (2024) 306 FCR 199.
[24] Ibid 260 [289]–[290].
[25] Ibid 260–1 [291], 262–3 [302].

Regarding s 88(2)(c), the Full Court decided that the risk of confusion had actually increased alongside the singer's international fame.[26] Crucially, the Court held that this risk must be assessed by reference to the notional normal and fair use of the "Katie Perry" mark rather than being limited only to Ms Taylor's actual modest use of the brand.[27] They reasoned that when marks are so similar, a stronger reputation makes it more likely that people will assume the singer is behind both brands.

The Full Court also refused to exercise its discretion to save the mark under s 89, finding that the ground for cancellation arose through Ms Taylor's own 'act or fault'. This was based not just on the act of registration, but also the fact that she applied for the mark with full knowledge of the singer's fame and the common practice of music merchandising.[28]

In the same proceeding, Ms Taylor cross-appealed regarding the liability of the singer's other companies and whether Ms Hudson was personally liable as a joint tortfeasor. The Court dismissed the cross-appeal regarding the other companies, finding that they acted only as licensor and played no active role in the commission of the tort.[29] However, the Full Court allowed the cross-appeal regarding Ms Hudson, finding she should have been found to be a joint tortfeasor with her companies.[30]

Ms Taylor then appealed these findings to the High Court. She argued that the Full Court had wrongly conflated the singer's celebrity status with a specific reputation for selling clothes and contended that the absence of actual confusion over 10 years should have been the most important factor.[31] She also challenged the interpretation of s 89, arguing that the mere act of registering a mark with knowledge of another's reputation should not be enough to block the court's discretion.[32]

V THE HIGH COURT'S FINDINGS AND REASONING

By a 3:2 majority, the High Court allowed the appeal. The reasoning differed substantially between the majority judges, comprising Gleeson, Steward and Jagot JJ, and the dissenting judgment of Gordon ACJ and Beech-Jones J. There were three main issues raised in the High Court appeal, each set out below.

---

[26] Ibid 268 [339].
[27] Ibid 262–3 [302].
[28] Ibid 265 [317].
[29] Ibid 232 [120].
[30] Ibid 232 [119], 270 [355].
[31] *Taylor v Killer Queen* (n 1) 348 [47].
[32] Ibid 348 [49].

A *Rectification of the Designer's Mark under ss 60 and 88(2)(a)*

The first issue raised by the Court was whether, under ss 88(2)(a) and 60, use of the Designer's Mark at the Priority Date was likely to deceive or cause confusion because of the singer's reputation. In other words, did the pop star's fame in music automatically translate to a reputation in clothing that would make the Designer's Mark likely to cause confusion?

The majority held that the cancellation ground in s 88(2)(a) (read with s 60) was not established. Justice Jagot accepted that the Singer's Mark had acquired a substantial reputation in Australia. However, that reputation was primarily associated with music and entertainment rather than clothing, and there was insufficient evidence that use of the Designer's Mark in relation to clothing would give rise to a real and tangible risk of deception or confusion.[33] While an ordinary person might momentarily wonder whether there was a connection between the marks, the majority held that any such confusion did not pose a real or tangible risk.[34] Their Honours held that the Full Court had erred in relying on the 'common practice' of pop stars selling merchandise to extend the reputation of their trade mark beyond its use.[35] Specifically, there was no evidence that "Katy Perry" branded clothing had been sold in Australia before the priority date.[36]

Acting Chief Justice Gordon and Beech-Jones J dissented, finding that the s 60 ground was established. Their Honours concluded that, even though the Singer's Mark had acquired a reputation in music and entertainment, rather than clothing, the common practice of pop stars selling merchandise apparel meant that notional use of the Designer's Mark on clothing would nonetheless present a real risk of confusion.[37] They stated that the lack of evidence of actual confusion was not determinative, given the limited use of the Designer's Mark.[38]

33 Ibid 384–6 [271]–[283] (Jagot J). Justice Steward generally agreed with the reasons of Jagot J for finding that ss 88(2)(a) and 60 were not satisfied: at 359 [114]. Justice Gleeson decided similarly: at 373–4 [197]–[201].
34 Ibid 374 [200] (Gleeson J), 387 [285] (Jagot J, Steward J agreeing at 362–3 [134]).
35 Ibid 373 [195] (Gleeson J), 384 [270]–[271] (Jagot J).
36 Ibid 375 [209] (Gleeson J), 386 [282] (Jagot J).
37 Ibid 352–3 [71]–[72] (Gordon ACJ and Beech-Jones J).
38 Ibid 353 [73]–[74] (Gordon ACJ and Beech-Jones J).

B *Rectification of the Designer's Mark under s 88(2)(c)*

The second issue for the Court concerned s 88(2)(c), which allows for the cancellation or amendment of a registered trade mark if, due to circumstances existing at the time of the rectification application, its use is likely to deceive or cause confusion. The issue was whether, given the circumstances at the time of the rectification application (20 December 2019), the use of the Designer's Mark was likely to deceive or cause confusion. The question was whether the pop star's massive subsequent fame made the continued registration of the Designer's Mark deceptive by 2019.

The majority affirmed that this ground is to be assessed by reference to the notional normal and fair use of the registered trade mark, rather than by reference solely to its actual use at the time the rectification application was filed.[39] Applying this test, the majority found that the cancellation ground in s 88 (2)(c) was not established. Justice Jagot stated:

> [T]en years is a long time for two deceptively similar trade marks to be on the market in Australia with no evidence of any confusion, despite the attempts by [Ms Hudson] to find such evidence by way of discovery. That period was sufficiently long to support an inference from the absence of evidence of confusion that in fact it was not likely that people had been or would be deceived or confused.[40]

Justice Steward delivered a separate judgment which provided a different basis for reaching the same conclusion. His Honour's concern was to avoid permitting an 'assiduous infringer' to take advantage of their own wrongdoing to secure cancellation of the very mark being infringed.[41] He noted that Ms Hudson had continually sold "Katy Perry" branded clothing in Australia despite the existence of the Designer's Mark and suggested that it would be an 'extraordinary result' if confusion arising from this type of conduct could justify the removal of the Designer's Mark from the Register.[42]

His Honour held that s 88(2)(c) should be interpreted in light of the maxim '"*nullus commodum capere potest de injuria sua propria*" — no man can take advantage of his own wrong', in line with several High Court decisions decided under s 28(a) of

[39] Ibid 375 [206] (Gleeson J), 376 [218], 379–80 [241]–[243] (Jagot J).
[40] Ibid 388 [294] (Jagot J).
[41] Ibid 360 [117], 363–6 [135]–[155] (Steward J).
[42] Ibid 367 [157] (Steward J), quoting *Riv-Oland Marble Co (Vic) Pty Ltd v Settef SpA* (1988) 19 FCR 569, 599 (Lockhart J).

the *Trade Marks Act,* highlighting that the respondents' persistent infringing conduct over many years should not be rewarded.[43] His Honour held that whilst s 88(2)(c) refers to ‘circumstances applying at the time when the application for rectification is filed’, the provision should be ‘construed in a restricted or “strained” way so that it does not include such deception or confusion which has occurred because of the infringing conduct of an applicant for rectification’.[44]

The dissenting judges found the s 88(2)(c) ground was even stronger by 2019 in light of Ms Hudson's heightened fame and increase in merchandising.[45] Their Honours said the threshold question for s 88(2)(c) was whether it should be assessed by reference to the Designer's actual use or to notional use.[46] The relevant use ‘is necessarily the notional normal and fair use’, and the inquiry is not confined to actual use.[47] This ‘properly reflects that the proprietor enjoys a statutory monopoly across the full range of goods or services to which the registration extends’ and would avoid permitting

> the registered owner of a trade mark to resist rectification on the basis of its narrow use of the trade mark with a broad specification, even while there would be a real, tangible danger of deception or confusion if the mark was used beyond that narrow use.[48]

C *Discretion Not to Cancel Designer’s Mark under s 89*

The third issue arose only if one or both of the rectification grounds under s 88 were established. In that event, the issue was whether the Court should exercise its discretion not to rectify the Register under s 89, where the registered owner, Ms Taylor, could demonstrate that the relevant ground for rectification had not arisen through any act or fault of her own. In other words, if confusion was found, should the Designer’s Mark be cancelled even if Ms Taylor was not legally responsible for the confusion?

The majority held the discretion under s 89 did not arise since no ground for rectification under ss 88(2)(a) or (c) was established.[49] However, Jagot J agreed with

---

[43] *Taylor v Killer Queen* (n 1) 363–7 [135]–[156] (Steward J).
[44] Ibid 367 [157] (Steward J), quoting *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, 113.
[45] *Taylor v Killer Queen* (n 1) 355–6 [87]–[93] (Gordon ACJ and Beech-Jones J).
[46] Ibid 354 [81] (Gordon ACJ and Beech-Jones J).
[47] Ibid 355 [85] (Gordon ACJ and Beech-Jones J).
[48] Ibid 355 [86] (Gordon ACJ and Beech-Jones J).
[49] Ibid 375–6 [210] (Gleeson J), 368 [164] (Steward J), 389 [296]–[299] (Jagot J).

the Full Court that the relevant 'act or fault' of Ms Taylor under s 89(1) would not have been merely applying to register her trade mark.[50] Instead, the circumstances in which the application was made, including the applicant's state of mind, could constitute the relevant 'act or fault'.[51]

The dissenting judges found that the discretion not to cancel the registration under s 89 was not enlivened, for several reasons. First, the designer was aware of the reputation of the Singer's Mark and the common practice of musicians marketing clothing at the time of filing her trade mark application.[52] Second, the designer had encouraged an association between herself and the singer, including through social media references intended to promote her.[53] Third, the designer took no steps to enforce her trade mark rights for 10 years.[54]

VI Significance of the Case

The case provides important clarification of the operation of reputation-based cancellation under the *Trade Marks Act*, particularly in relation to ss 60, 88 and 89.

The Court's clearest contribution is its reaffirmation that, for the purposes of s 60, a trade mark's reputation must be in the mark itself and must also be in respect of particular goods or services, not just general fame.[55] This clarification indicates that courts will be cautious about extending a celebrity's reputation into new product categories without evidence tied to those goods.

Equally significant is the Court's treatment of evidence, and the absence of evidence of actual confusion. By restoring the primary judge's findings, the majority endorsed the proposition that prolonged coexistence without evidence of confusion may constitute a powerful factor against cancellation, even where the marks are deceptively similar.[56] This approach does not lower the standard of proof in claims based on likely confusion. It makes clear that confusion has to be a real and tangible risk rather than just a possibility. It also warns courts not to ignore the lack of confusion just because one business is smaller than the other.

---

[50] Ibid 380 [248], 389 [298] (Jagot J).
[51] Ibid 380 [248].
[52] Ibid 358 [103]–[104], 359 [107]–[108] (Gordon ACJ and Beech-Jones J).
[53] Ibid 359 [109] (Gordon ACJ and Beech-Jones J).
[54] Ibid 359 [110]–[111] (Gordon ACJ and Beech-Jones J).
[55] Ibid 379 [239] (Jagot J).
[56] Ibid 373 [193] (Gleeson J), 388–9 [294] (Jagot J).

The Court's construction of s 89 confirms that the choice not to rectify a trade mark is made only if the owner of the registered mark shows that the rectification ground has not arisen through their act or fault.[57] In addition, the mere act of applying for registration is not enough to enliven the provision. The decision highlights that registered rights still matter and reinforces the Register as a stable source of proprietary entitlement, rather than a mechanism for retrospectively reallocating rights based on evolving fame.

This decision also confirms that courts will not look kindly on an 'assiduous infringer'.[58] Although said in obiter, Steward J's warning that the *Trade Marks Act* should not be construed to enable a party to profit from confusion generated by its own infringing conduct is important. It highlights the risks for those who enter the market second and then knowingly continue to use a trade mark despite an existing registration.

The narrow 3:2 decision in *Taylor v Killer Queen* highlights the continuing uncertainty regarding the operation of ss 88 and 89 of the *Trade Marks Act* and the need for potential legislative reform. For example, Justice Steward's 'assiduous infringer' reasoning could be codified within s 88 to explicitly prevent a party from being able to rely on confusion they generated through their own infringing conduct as a basis for cancelling a valid trade mark registration. In addition, the uncertainty surrounding the meaning of 'act or fault' in s 89 also needs clarifying. Reform could require some form of blameworthy conduct, rather than the mere filing of a trade mark application with knowledge of another's reputation. Ultimately, as Burrell and Handler suggest, the 'simplest solution' to the current statutory instability may be to repeal the specific discretionary ground contained in s 89(1)(b) entirely.[59]

The case is likely to resonate with small business owners and independent creators because it confirms that trade mark protection does not depend on the relative size, wealth or fame of the parties. Despite Ms Hudson's global reputation, the High Court upheld the Designer's Mark and confirmed that an earlier registration will not readily be displaced by a later reputation-based challenge. For small businesses and creators, the decision reinforces the value of securing trade mark protection early and the security that registration is intended to provide.

---

[57] Ibid 380 [248] (Jagot J).

[58] Ibid 360 [117], 363–7 [135]–[157] (Steward J).

[59] Robert Burrell and Michael Handler, 'Reputation, Confusion and Discretion in Australian Trade Mark Law: "Taylor v Killer Queen LLC"' (2025) 47 *Sydney Law Review* 1, 14.

VII Conclusion

Taylor v Killer Queen clarifies the limits of reputation-based cancellation under the *Trade Marks Act*. The decision confirms that trade mark rights are to be assessed by reference to use, evidence, and statutory function rather than notoriety alone. In doing so, the Court has made clear the limits of challenging validly registered trade marks using reputation alone, especially where similar trade marks have coexisted for a long period without causing any confusion.

MAPPING RELIGION IN WESTERN AUSTRALIAN LEGISLATION: AN EMPIRICAL ANALYSIS OF RELIGIOUS TERMS IN STATE STATUTES

RENAE BARKER*

Scholarship on freedom of religion and belief ('FoRB') and state-religion relations in Australia has largely focused on federal law, often treating state legislation as a homogeneous adjunct to Commonwealth arrangements. This paper addresses that gap through an empirical analysis of religious terms in Western Australian legislation. Building on methodology developed by Ambrose and Barker for federal legislation, it examines the occurrence, frequency and legislative context of religious terminology across public Acts of Parliament in Western Australia. Religious terms are classified as confessional, deconfessionalised or neutral, enabling comparison with patterns identified at the federal level. The findings reveal that neutral religious terminology overwhelmingly dominates, while confessional and deconfessionalised terms, predominantly of Christian origin, persist in specific legislative contexts. The paper argues that these linguistic patterns reflect both convergence with Commonwealth legislative practice and the continued embedding of Christian privilege in state law. Framed as a scoping study, the analysis contributes to emerging state-level scholarship on religion, legislation and Australian federalism and points to areas for future comparative research.

I Introduction 165

II Methodology 169

A *Dictionary of Religious Terms* *170*

* Senior Lecturer and Deputy Head Teaching and Learning, UWA Law School, The University of Western Australia; Honorary Research Fellow, Centre Muslim States and Societies. Generative AI was used in the drafting and editing of this paper. The author remains responsible for all aspects of the research and writing.

B *Search of Religious Terms* 171
C *Classification of Legislation and Religious Terms* 172
D *Limitations* 178
III Findings 179
A *Western Australia* 180
B *Comparison with Federal Legislation* 182
IV Discussion and Analysis 186
A *Christian Privilege* 187
B *Spiritual versus Religious* 192
C *State-Religion Relationship* 196
V Conclusion 198
Appendix A: Dictionary of Religious Terms 200
Appendix B: List of Western Australian Public Acts of Parliament Found in this Study 201

I Introduction

Scholarship on freedom of religion and belief ('FoRB') in Australia has been dominated by accounts emphasising its limited protection and fragmented legal sources. Scholars inevitably begin by noting that there is limited legal protection for FoRB, going on to describe what has been referred to as a 'patchwork'[1] or 'ethos'[2] of protection for FoRB. Central to these analyses is a discussion of s 116 of the *Australian Constitution*, state-based human rights instruments and the role of exemption clauses, sometimes referred to as 'balancing clauses',[3] in various federal

[1] See Elenie Poulos, 'Three Discourses of Religious Freedom: How and Why Political Talk about Religious Freedom in Australia Has Changed' (2023) 14(5) *Religions* 669, 672; Renae Barker and Tania Pagotto, 'Modelling the Anchor and Range of State-Religion Relationships in Australia and Italy: Towards a New Understanding of State-Religion Typologies' (2025) 6 *Australian Journal of Law and Religion* 1, 5.
[2] See Paul T Babie, 'The Ethos of Protection for Freedom of Religion or Belief in Australian Law' (2010) 47(1) *University of Western Australia Law Review* 64 ('The Ethos of Protection').
[3] See Neil Foster, 'Freedom of Religion and Balancing Clauses in Discrimination Legislation' (2016) 5(3) *Oxford Journal of Law and Religion* 385.

and state anti-discrimination laws.[4] Reference may also be made to other legislative carve-outs, privileges and exemptions for religion in, for example, education or weapons legislation, as well as to the possible existence of FoRB at common law.[5] Similarly, analysis of the state-religion relationship in Australia either deals exclusively with the interaction at the federal level or, where it does engage with state-based laws, treats them as parts of a whole making up a single melded relationship spanning the entirety of the continent.[6] The difficulty with this approach for both FoRB and state-religion analysis is that it fails to recognise the complexity introduced by Australia's federal nature and the division of legislative competence between the Commonwealth and state legislatures.

The *Constitution* limits federal legislative competence to enumerated heads of legislative power, primarily to heads of power found in ss 51 and 52. Remaining areas of legislative competence, referred to as residual powers, are the exclusive province of state legislatures. The effect of this division of legislative power is that significant areas of legislative competence — which are historically important for FoRB and state-religion relations such as health, education and crime — are within the residual power and, therefore, within the exclusive legislative competence of the states. Further, federal legislative competence is divided into either exclusive or concurrent powers, with the latter being shared with the states and any conflict being resolved in favour of the Commonwealth.[7] This expands greatly the scope of state competence to legislate on matters related to religion. For example, until the passage of the *Marriage Act 1961* (Cth), under the marriage power in s 51(xxi), states had their own marriage laws which, inter alia, included the regulation of religious

[4] For a recent example, see Alex Deagon, *A Principled Framework for the Autonomy of Religious Communities*: *Reconciling Freedom and Discrimination* (Hart Publishing, 2023) 39–69. For an early example of the same approach, see Carolyn Maree Evans, *Legal Protection of Religious Freedom in Australia* (Federation Press, 2012). See also Nicholas Aroney and Paul Taylor, 'The Politics of Freedom of Religion in Australia: Can International Human Rights Standards Point the Way Forward?' (2020) 47(1) *University of Western Australia Law Review* 42, 44–9; Paul T Babie, 'State Aid for Australian Non-Government Religious Schools' in Charles Russo (ed), *State Funding for Teaching about Religion: International Perspectives on State Aid for Schools with a Religious Character* (Routledge, 1st ed, 2025) 9, 11–19. ('State Aid for Religious Schools'); Neil Foster, 'Religious Freedom and the Law in Australia' in JR Nethercote (ed), *Upholding the Australian Constitution: Proceedings of the Samuel Griffiths Society* (The Samuel Griffith Society, 2015) vol 27, 39; Renae Barker, 'No Jab – No Pay, No Jab – No Play, No Exceptions: The Removal of Conscientious and Religious Exemptions from Australia's Childhood Vaccination Policies' (2017) 20(2) *Quaderni di diritto e politica ecclesiastica* 513, 519–21.
[5] In relation to the common law, see, eg, Babie, 'State Aid for Religious Schools' (n 4) 19; Foster (n 4) 56–9. As regards the existence or otherwise of a common law right to FoRB, reference is usually made to *Grace Bible Church Inc v Reedman* (1984) 36 SASR 376.
[6] See, eg, Barker and Pagotto (n 1) 11–12, 15–19; Deagon (n 4) 153–82; J Christopher Soper, Kevin R Den Dulk and Stephen V Monsma, *The Challenge of Pluralism: Church and State in Six Democracies* (Rowman & Littlefield, 3rd ed, 2017) 121–55.
[7] *Australian Constitution* s 109.

marriages.[8] Federal legislative influence generally and in relation to religion specifically, has expanded greatly as a result of federal legislation covering the field in relation to concurrent legislative powers and expanded interpretation of specific heads of power, such as the foreign affairs power. However, significant scope remains for state legislatures to have a real impact on both FoRB and state-religion relations.

The scope and role of the states in influencing FoRB and state-religion relations is further strengthened via the operation of s 116 of the *Constitutio*n. Section 116 is found in Part V of the *Constitution*, titled *The States*.[9] However, the provision, on its face, says nothing about state rights, limitations on state legislative power or the interactions between the states or between a state and the Commonwealth. Instead, it is couched as a limitation on federal legislative competence, preventing the Commonwealth from prohibiting FoRB, establishing a state church, imposing any religious observance or requiring a religious test for public office.[10] It is well settled that these limitations do not apply to state legislatures.[11]

As to the location of s 116 in Part V, one hypothesis is that as the early version of the provision presented at the Constitutional Conventions referred to the states, it was simply left where it was when passed. This is the 'lazy drafting' hypothesis. This hypothesis rests upon a view that Sir Edmund Barton was 'fed up' with the provision, which he felt was unnecessary.[12] However Barton was just one of three members of the drafting committee, the other two being Andrew Inglis Clark and Charles Kingston.[13] Further, the drafting committee made substantive amendments to the text of what has now become s 116. Some of these revisions have subsequently become important in the interpretation of the provision.[14] A more compelling explanation is that, even though the states are not referred to explicitly in s 116, the provision was understood as a mechanism to divide legislative competence between

[8] For a history of marriage law in Australia, see Garfield Barwick, 'The Commonwealth Marriage Act 1961' (1962) 3(3) *Melbourne University Law Review* 277.
[9] Part V contains ss 106–22 inclusive.
[10] For a discussion of the meaning, breadth, history and associated case law involving s 116, see Luke Beck, *Religious Freedom and the Australian Constitution: Origins and Future* (Routledge, 2018). See also Renae Barker, *State and Religion: The Australian Story* (Routledge, 2019) 68–99.
[11] Although there is more debate about whether it applies to the territories: see HT Gibbs, 'Section 116 of the Constitution and the Territories of the Commonwealth' (1947) 20 *The Australian Law Journal* 374. See also *Kruger v The Commonwealth* (1997) 190 CLR 1.
[12] See JA Le Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 229. As to Barton's views regarding s 116, see Tony Blackshield, 'Religion and Australian Constitutional Law' in Peter Radan, Denise Meyerson and Rosalind F Croucher (eds), *Law and Religion: God, the State and the Common Law* (Routledge, 2005) 75, 81, 83–4, 89. See also *Official Record of the Proceedings and Debates of the Australasian Federal Convention*, Melbourne, 2 March 1898, 1771–2 (Edmund Barton); *Krygger v Williams* (1912) 15 CLR 366, 371–3 (Barton J).
[13] Blackshield (n 12).
[14] Beck (n 10) 96–7.

the state and federal legislatures. This is the 'states' rights' hypothesis.[15] This hypothesis is supported by the arguments in favour of the provision's inclusion from one of its proponents, Henry Bournes Higgins:

> [T]he powers which the states individually have of making such laws as they like with regard to religion shall remain undisturbed and unbroken … there is no intention whatever to give to the Federal Parliament the power to interfere in these matters …[16]

Section 116's role, therefore, is to restrict federal legislative competence in matters of religion, leaving the states to determine such things according to local custom and need.[17]

Regardless of which hypothesis is correct, the practical effect is that legislative competence in relation to religion lies firmly with the states via the operation of residual powers, concurrent powers and s 116. This is not to say that the Commonwealth has not had a significant influence on FoRB and state-religion relations. As discussed above, there is indeed significant scope for the Commonwealth to legislate in ways that directly impact both FoRB and state-religion relations. For example, central to most accounts of Australia's state-religion relationship is federal funding of non-government, predominantly religious, schools in a non-discriminatory and pluralistic way.[18]

While state legislation concerning religion often shares notable similarities, there are also numerous differences in both substance and form. For example, in the 1960s, Victoria, Western Australia and South Australia passed legislation attempting to ban the Church of Scientology.[19] Other states did not follow suit. Another more contemporary example of divergence is state-based bills or charters of rights which include FoRB. The Australian Capital Territory,[20] Victoria[21] and Queensland[22] all have legislative bills or charters of rights, while Tasmania[23] has a FoRB provision in

---

[15] See *Kruger v The Commonwealth* (1997) 190 CLR 1, 60 (Dawson J).
[16] *Official Record of the Proceedings and Debates of the Australasian Federal Convention*, Melbourne, 2 March 1898, 1769 (Henry Higgins).
[17] Debate during the Constitutional Convention centred around Sunday observance laws: see, eg, *Official Record of the Proceedings and Debates of the Australasian Federal Convention*, Melbourne, 7 February 1898, 656 (Henry Higgins).
[18] See Soper, Den Dulk and Monsma (n 6) 121–55; Babie, 'State Aid for Religious Schools' (n 4) 11–19. For the constitutional basis of this funding, see *Attorney-General (Vic) (ex rel Black) v Commonwealth* (1981) 146 CLR 559.
[19] See *Psychological Practices Act 1965* (Vic) ss 30–2; *Scientology Act 1968* (WA); *Scientology (Prohibition) Act 1968* (SA).
[20] *Human Rights Act 2004* (ACT).
[21] *Charter of Human Rights and Responsibilities Act 2006* (Vic).
[22] *Human Rights Act 2019* (Qld).
[23] *Constitution Act 1934* (Tas) s 46.

its constitution. The remaining states and territories have no equivalent legislative or constitutional provisions. At a more technical level, all states and territories provide some form of exemption from generally applicable weapons legislation for Sikhs, who wear the kirpan as part of their religious obligations. However, the exact mechanisms vary. For example, the *Police Offences Act 1935* (Tas) contains a specific religious exemption in relation to carrying a dangerous article, including a knife.[24] By contrast, in Western Australia, Sikhs must rely on the generic exemption, which allows the carrying of a knife where the person carrying it has a 'lawful excuse'. However, religious beliefs or practices are not listed specifically as a lawful excuse.[25]

Despite the wide competence of states to legislate in respect of religion and the divergent approaches taken by states, both historically and in more recent debates and legislative reforms, little research has focused on either state-based FoRB or state-religion relations. It is beyond the scope of this article to conduct a full analysis of the differing interactions and protections or abrogation of FoRB at the state and territory level. This article, however, takes a small step towards remedying the gap by examining the use of religious terms in legislation in just one state: Western Australia. It is intended as a scoping study for future comparative analysis of legislation regulating religion, both within Australia and internationally.

This article proceeds as follows. Part Two outlines the methodology used to identify and classify religious terminology in Western Australian legislation. Part Three then outlines the key findings, including the distribution and frequency of religious terms, with a limited comparison to Commonwealth legislation. Part Four examines what these patterns reveal about Christian privilege, legal linguistic deconfessionalisation and the Western Australian state-religion relationship. The article concludes by identifying the limits of the current study and directions for future research.

II METHODOLOGY

In their 2025 study, Ambrose and Barker (the present author) noted that the most frequent religious terms found in Australian federal legislation were *Religion* and *Religious*, observing that these were 'relatively speaking, neutral in that they are not typically associated with a particular belief system, religion, denomination or sect'.[26] Their study also identified the use of religious terms such as *Bible* and *Bishop,* which are confessional terms, in that they are typically associated with a specific religion, in this case Christianity. They also noted that some terms, such as *Faith*, were used

---

[24] See *Police Offences Act 1935* (Tas) s 15C(4)(e).
[25] See *Weapons Act 1999* (WA) s 5A. See also s 10.
[26] Maria Ambrose and Renae Barker, 'Mapping Religion in Australian Federal Legislation: An Empirical Analysis of 288 Federal Statutes' (2025) 14(6) *Laws* 90, 96.

in the legislation in a religiously neutral way. Those terms are 'typically associated with Abrahamic religions'[27] and 'most typically associated with Christianity',[28] respectively. Such terms have undergone legal linguistic deconfessionalisation. Their usage has transitioned from an association with a particular religion to a more generalised or neutral association, at least in their usage within federal legislation.

This analysis takes the observations of Ambrose and Barker further, considering the use of religious terms in Western Australian legislation and classifying them into the three categories identified above: confessional, deconfessionalised and neutral. The religious terms identified in Western Australian legislation, as well as the terms' frequency, are then compared to Ambrose and Barker's findings for federal legislation.

A *Dictionary of Religious Terms*

The first stage of the analysis was to identify a dictionary of religious terms that could form the foundation of searches to be conducted in the Western Australian legislative database.[29] Ambrose and Barker's dictionary of terms, found in Appendix A of their study, was initially adopted to facilitate a comparative analysis. This was updated throughout the search process outlined below, adding additional religious terms found in close proximity to religious terms already in the dictionary. These new religious terms were then further analysed and, where appropriate, their analogues, synonyms or other connected terms were also added to the dictionary. The need to add new terms to the dictionary was anticipated due to the differing legislative power of federal and state legislatures under the *Constitution*. Further, as anticipated by Ambrose and Barker, 'while every effort was made to ensure a comprehensive dictionary of religious terms, … it is likely that some terms that indicate an interaction between religion and the federal legislature may have been overlooked'.[30] Therefore, new terms were added to the dictionary of religious terms to mitigate this limitation of the original study.

However, despite the expanded dictionary used in this analysis, it is still likely that religious terms may have been overlooked. One significant religious term identified during the data collection phase of this analysis, which was absent in Ambrose and Barker's study, is *God*. While perhaps an obvious inclusion in hindsight, it was one of the last terms added to the dictionary of terms used for this analysis. Its

[27] Ibid.
[28] Ibid.
[29] Government of Western Australia, *Western Australian Legislation* (Web Page, 2026) <www.legislation.wa.gov.au>.
[30] Ambrose and Barker (n 26) 96.

identification at this late stage, and absence from Ambrose and Barker's analysis, highlights the need to identify and acknowledge limitations in studies of this type. If a term is inadvertently excluded, its absence can influence the findings and conclusions. As will be highlighted below, the exclusion of *God* from the previous Ambrose and Barker study may be attributed to the way the term is most frequently used in legislation, such that *God* has become linguistically secular. Further, views on whether a term should be considered religious are likely to differ. For example, as will be discussed below, the term *Pastoral Care* could be argued to be both religious and secular, depending on the legislative context. Indeed, some terms have arguably undergone such extensive deconfessionalisation that their original religious context has been entirely lost.

As will be discussed below, the analysis identified a significant number of private Acts of Parliament.[31] Where a religious term was found exclusively in private Acts of Parliament, it was excluded from the findings. These terms remained in the dictionary, along with terms not found during the search process, to enable future comparative analysis with other jurisdictions where these terms may be found. The full list of terms included in the search dictionary can be found in Appendix A.

B *Search of Religious Terms*

The Western Australian legislative database was searched using the identified dictionary of terms between October 2025 and January 2026. This time period was initially selected to coincide with the annual summer Parliamentary recess and, therefore, to minimise the chance that new legislation and amendments to existing Acts would impact the data collection phase.[32] Consistently with Ambrose and Barker's study, the search was restricted to 'Acts in force', using the 'exact phrase' search box and including 'document text'. For each religious term in the search dictionary, searches were conducted for each term along with its word variants (eg, plural and other morphological variants). For example, searches were conducted for both *Religion* and *Religions*. Similarly, searches were conducted for *Worship*, *Worships*, *Worshiper* and *Worshipers*. Results for word variants were grouped together in the results. In line with this approach, *Roman Catholic* and *Catholic* were

[31] See Ivor Richardson, 'Private Acts of Parliament' (2010) 41(4) *Victoria University of Wellington Law Review* 653, 653–4.

[32] Seven Acts were passed during this time: *Petroleum Retailers Rights and Liabilities Repeal Act 2025* (WA); *Terrorism Legislation Amendment (Extension of Expiry) Act 2025* (WA); *Charitable Collections Amendment Act 2025* (WA); *Assisted Reproductive Technology and Surrogacy Act 2025* (WA); *Liquor Control Amendment Act 2025* (WA); *State Development Act 2025* (WA); *Help to Buy (Commonwealth Powers) Act 2025* (WA).

separately searched for, along with their morphological variants, but grouped together in the results.

Ambrose and Barker's dictionary of religious terms included several phrases such as *Religious Practitioner*, *Religious Institution* and *Minister of Religion*. However, all these phrases contain one or more religious terms that were separately included in the dictionary. To avoid duplication of the initial search, this study focuses solely on individual religious terms.

C *Classification of Legislation and Religious Terms*

Acts of Parliament can be classified as either public or private. The default position is that all Acts passed by Parliament are public,[33] in that they are 'worded generally and … applicable to the public at large'.[34] As Dennis Pearce and Robert Geddes note, '[it] is unusual for a public Act to refer specifically to any individual person or body corporate'.[35] By contrast, a private Act 'is one concerned with a club, a company an organisation or so on'.[36] Acts creating and regulating trusts for the control of church property are a common type of private Act.[37] The search process identified a significant number of private Acts of Parliament, such as the *Anglican Church of Australia (Diocesan Trustees) Act 1888* (WA), *University of Western Australia Act 1911* (WA) and *Churches of Christ, Scientist, Incorporation Act 1961* (WA). Such Acts contain numerous confessional terms given their nature and purpose. Inclusion of these Acts in the analysis would therefore have significantly inflated the number of confessional terms identified, as well as their frequency. As a result, as outlined above, private Acts of Parliament and religious terms appearing exclusively in private Acts of Parliament have been excluded.[38]

The final stage of the analysis was to classify the religious terms found in public Acts of Parliament into the three categories identified above: confessional, deconfessionalised and neutral. In considering which classification to apply to a

[33] *Interpretation Act 1984* (WA) s 28 ('*Interpretation Act*').
[34] Dennis C Pearce and Robert S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 25.
[35] Ibid.
[36] Ibid.
[37] Ibid.
[38] The role of private Acts of Parliament and in particular private Acts creating and regulating trusts for the control of church property in Australia has not been specifically considered in the existing literature and should be the subject of future research. For a discussion of church-specific legislation affecting the Australian Anglican, Presbyterian and Uniting Churches and the implications of that legislation for the Australian state-religion relationship, see Benjamin B Saunders, 'Defining the Boundaries of Church and State: Legal Establishment of Churches in Australia' (2026) *Oxford Journal of Law and Religion* 1. For a discussion of private Acts in the New Zealand context, including in relation to religious organisations, see Richardson (n 31).

particular term, both its ordinary meaning, having regard to the *Oxford English Dictionary*, as well as its legislative context were considered. While some religious terms — such as the name of a particular religion, denomination or sect (for example, *Anglican* or *Roman Catholic*) — are clearly confessional, other classifications are less clear, requiring careful consideration of both their ordinary meaning and legislative context. For example, both the terms *Church/es* and *Chapel/s* were found in Western Australian legislation. However, analogous confessional terms such as *Synagogue*, *Mosque* and *Temple* were not. Both *Church* and *Chapel* are traditionally associated with Christianity. For example, the *Oxford English Dictionary* defines *Church* as:

> A building for public Christian worship or rites such as baptism, marriage, etc, traditionally cruciform in shape and typically having a tower, dome, or spire; distinguished originally from an *oratory* or place of private prayer.[39]

Similarly, *Chapel* is defined, inter alia, as:

> [A]ny place for Christian worship other than a church or cathedral; an oratory.[40]

Or, as:

> A private place for Christian prayer or worship.[41]

However, chapel can also include:

> Any other place of religious worship, esp. a small temple, shrine, or sanctuary with an altar to a god,[42]

suggesting a more neutral and pluralistic meaning.

Church was found in seven Acts,[43] while *Chapel* was found in two.[44] In both instances where it appears, its legislative context suggests that *Chapel* is deconfessionalised. It is being used to refer not only to a Christian religious building, but also to religious

[39] *Oxford English Dictionary* (online at 4 February 2026) 'church' (def I.1.a).
[40] *Oxford English Dictionary* (online at 10 September 2026) 'chapel' (def I.1).
[41] Ibid 'chapel' (def I.2).
[42] Ibid 'chapel' (def I.3).
[43] *Auction Sales Act 1973* (WA); *Commercial Arbitration Act 2012* (WA); *Evidence Act 1906* (WA) ('*Evidence Act 1906*'); *Heritage Act 2018* (WA) ('*Heritage Act*'); *Land Tax Assessment Act 2002* (WA) ('*Land Tax Assessment Act*'); *Sale of Land Act 1970* (WA); *School Education Act 1999* (WA) ('*School Education Act*').
[44] *Cemeteries Act 1986* (WA) ('*Cemeteries Act*'); *Land Tax Assessment Act* (n 43).

buildings used by other religions in a similar way to a Christian chapel. For example, in the *Cemeteries Act 1986* (WA) it appears in:

> **34 Permission for denominational chapel**
>
> If the members of a religious denomination desire, at their own expense, to build and maintain a *chapel* in a cemetery and the plans and specifications of the proposed chapel are approved by the Board, the Board may permit the chapel to be built in such part of the cemetery as the Board may determine.[45]

In a multi-cultural and multi-faith secular democracy it would, arguably, create an absurdity for this use of religious term *Chapel* to be confined to Christian denominations.[46] As a result, *Chapel* was classified as deconfessionalised. The religious term *Church*, by contrast, is more complex. Examination of its legislative context reveals both confessional and deconfessionalised usage. For example, in the *Auction Sales Act 1973* (WA), *Church* appears in s 5, where its interpretation as applying exclusively in a Christian context would produce the same absurdity as outlined above for *Chapel* in relation to the *Cemeteries Act 1986* (WA).[47] By contrast, in the *Evidence Act 1906* (WA), the relevant legislative provision refers to the priest-penitent privilege,[48] an originally common law evidentiary concept applicable only to Christian denominations which have a ritualistic form of private confession:

> **Application of protection provisions**
>
> …
>
> (5) The protection provisions (PCR) do not affect the law relating to evidence of a confession made by a person to a member of the clergy in the member's professional capacity according to the ritual of the *church* or religious denomination concerned.[49]

An argument could be advanced that, historically, the concept of a priest-penitent privilege could be applied in a multi-faith context to any religious tradition with an analogous form of ritualised confession, such as auditing in Scientology. However, such an application is doubtful. As a result, *Church*, when understood in its legislative

---

[45] *Cemeteries Act* (n 44) s 34 (emphasis added).
[46] Although I note the term *Denomination* is similarly linguistically challenging to categorise given it is permanently used in connection with Christianity, with sub-groupings within other faiths more commonly being referred to as *sects*.
[47] The relevant portion of s 5 reads: '(1) Nothing in this Act applies to – (g) any bazaar or sale of gifts where the whole of the proceeds are devoted for charitable, educational or church purposes; or … '.
[48] See Renae Mabey, 'The Priest-Penitent Privilege in Australia and Its Consequences' (2006) 13(2) *Murdoch University Electronic Journal of Law* 51; Mark Hill and A Keith Thompson (eds), *Religious Confession and Evidentiary Privilege in the 21st Century* (Shepherd Street Press, 2021).
[49] *Evidence Act 1906* (n 43) s 20B(5) (emphasis added).

context, appears in both confessional and deconfessionalised contexts. The predominant usage of *Church* in Western Australian legislation was in deconfessionalised contexts and, as a result, the term has been classified as deconfessionalised. Other religious terms that were difficult to classify were *Altar*, *Denomination/s/al*, *God*, *Pastoral Care* and *Sect*.

Altar was found only once, in sch 2 of the *Parliamentary Commissioner Act 1971* (WA). The *Oxford English Dictionary* contains both religious neutral and confessional definitions of *Altar*. For example, it is defined as both:

> A block, table, stand, or other raised structure with a flat top used as the focus for a religious ritual, especially for making sacrifices or offerings to a god or gods.

And, inter alia:

> In the Roman Catholic and Orthodox churches: the raised flat-topped structure or table, typically placed at the eastern end of the church in the sanctuary, on which the Eucharist is celebrated as a sacrifice during Mass.

In sch 2 of the *Parliamentary Commissioner Act 1971* (WA), it appears in the phrase *Altar Serving,* which is included in a list of examples of 'activities, facilities or services' offered by religious bodies that 'provide a means for adults to have contact with children'. Included within this list are activities such as art groups, sports teams and tutoring services, which are generally secular in nature. Also included are activities which, while described as religious in nature, are couched in neutral terminology, such as '*Faith-based Children's* and *Youth Groups*', '*Multi-faith Networks*' and '*Religious Festivals* and *Celebrations*'. However, '*Altar Serving*' and '*Bible Study Groups*', which are also included on the list, are different in that both are typically associated with Christianity. *Torah Study Groups*, *Quran Study Groups* or *Religious Text Study Groups* are not included, although the phrase 'Saturday schools, Sunday schools and after school religious education' is. Despite this close association with Christianity in its legislative context, *Altar Serving* appears to be used in a deconfessionalised way, taking advantage of both the confessional and neutral definitions of the term to be both inclusive and exclusive. As a result, altar was classified as deconfessionalised.

The religious term *Denomination/s/al* was found in five Acts,[50] with the majority of the references in the *Cemeteries Act 1986* (WA). As the *Oxford English Dictionary* definition confirms, while the term *Denomination* is most typically applied to

---

[50] *Cemeteries Act* (n 44); *Evidence Act 1906* (n 43); *Heritage Act* (n 43); *Parliamentary Commissioner Act 1971* (WA); *School Education Act* (n 43).

Christianity, it can also be applied to any 'collection of individuals classed together under the same name'.[51] Legislative usage confirms this with the term being most often used in such a way as to be applicable to all religions and not just Christianity. *Sect* is similarly defined by the *Oxford English Dictionary*, but without the association with Christianity.[52] It was found in just two Acts: the *School Education Act 1999* (WA) and *Cremation Act 1929* (WA). In the *School Education Act 1999* (WA), *Sect* appears alongside the word *Denomination* in s 68:

> (1) The curriculum and teaching in government schools is not to promote —
>
> (a) any particular religious practice, *denomination* or *sect*; … [emphasis added]

In the *Cremation Act 1929* (WA), by contrast, it appears in the phrase 'peculiar to any race or sect or community'.[53] In both instances, the usage appears to be intended to broaden the application of the relevant provision. *Sect* was, therefore, classified as neutral, while *Denomination/s/al* was classified as deconfessionalised due to its association with Christianity.

Pastoral Care was found in the *Children and Community Services Act 2004* (WA) and *Education Service Providers (Full Fee Overseas Students) Registration Act 1991* (WA). It was not included in Ambrose and Barker's analysis and, arguably, may not always be considered a religious term depending on context. For example, in relation to the National School Chaplaincy and Student Welfare Programme ('NSCSWP'), secular pastoral care workers were introduced as an alternative to chaplains, suggesting a secular, as opposed to religious, meaning. However, when initially describing the National School Chaplaincy Programme ('NSCP'), which preceded the NSCSWP, then Prime Minister John Howard described the role of chaplains as 'providing greater pastoral care and supporting the spiritual wellbeing of their students',[54] suggesting that pastoral care is a function of chaplains — a term that has been classified as deconfessionalised in this study. In the *Children and Community Services Act 2004* (WA), pastoral care is one of the functions of a school counsellor,[55] while in the *Education Service Providers (Full Fee Overseas Students) Registration Act 1991* (WA),

[51] *Oxford English Dictionary* (online at 4 February 2026) 'denomination' (def 5).
[52] Ibid 'sect' (def I.1.a).
[53] *Cremation Act 1929* (WA) s 17(1)(d).
[54] John Howard, 'National School Chaplaincy Programme' (Media Release, Department of the Prime Minister and Cabinet, 29 October 2006). In relation to the religious aspects of both the NSCP and NSCSWP, see Renae Barker, 'A Critical Analysis of Religious Aspects of the Australian Chaplaincy Cases' (2015) 4 *Oxford Journal of Law and Religion* 26.
[55] *Children and Community Services Act 2004* (WA) s 124A.

it is one of the services that applicants are required to provide.[56] Both of these are secular usages. However, the term was retained as a religious term within the study due to the religious connotations as identified by Howard and was classified as neutral.

Finally, God would appear, on its face, to be a confessional term as the name of a deity. However, as highlighted by the Malaysian case *Menteri Dalam Negeri & Ors v Titular Roman Catholic Archbishop of Kuala Lumpur*,[57] the use of the name of God is not always so simple. In that case, the Titular Roman Catholic Archbishop of Kuala Lumpur argued that the word Allah simply meant God. Accordingly, it could be used by non-Muslims, in this case Roman Catholics, as the word for God. After a protracted legal battle, the Malaysian Court of Appeal ruled that only Muslims could use Allah to refer to God.[58] References to God found in Western Australian legislation were in oaths,[59] the phrase Act of God[60] or as part of the styles and titles of the monarch.[61] God was not included in the dictionary of religious terms in Ambrose and Barker's analysis, although a search of Commonwealth legislation conducted in January 2025 identified 26 federal acts containing God. In all of these instances, as with the Western Australian legislation, God is contained in an oath, the phrase Act of God or as part of the styles and titles of the monarch. In the case of oaths, the term is being used in a neutral sense, without connection to a specific religion or faith, while in the case of styles and titles of the monarch, it has a confessional meaning due to the monarch's position as the head of the Church of England. The phrase Act of God is perhaps the most interesting usage. As with pastoral care, it is arguably not a religious term given the secular meaning of the phrase as a term of art, meaning 'an event or occurrence due to natural causes which occurs independently of human intervention and either could not be foreseen or, if foreseen, could not be reasonably guarded against'.[62] While the phrase is now a legal term of art with no overt religious connotation, apart from the word God, it cannot really be understood unless you

---

[56] *Education Service Providers (Full Fee Overseas Students) Registration Act 1991* (WA) s 13(1)(g).
[57] [2013] 6 MLJ 468 (Court of Appeal). Leave to appeal was subsequently refused by the Malaysian Federal Court in *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors* [2014] 4 MLJ 765 (Federal Court of Malaysia).
[58] See Joshua Neoh, 'Titular Roman Catholic Archbishop of Kuala Lumpur v Home Minister: What Is the Name of God?' in Renae Barker, Paul T Babie and Neil Foster (eds), *Law and Religion in the Commonwealth: The Evolution of Case Law* (Hart Publishing, 2022) 33.
[59] *Transfer of Land Act 1893* (WA) s 13; *Public Notaries Act 1979* (WA) s 13; *Oaths, Affidavits and Statutory Declarations Act 2005* (WA) s 4(1)(a) ('*Oaths, Affidavits and Statutory Declarations Act*'); *Constitution Act 1889* (WA) s 54.
[60] *Port Authorities Act 1999* (WA) s 114E(1)(a); *Sea-Carriage of Goods Act 1909* (WA) s 7(2)(c); *Strata Titles Act 1985* (WA) sch 1 bl 1(1)(b).
[61] *Royal Styles and Titles Act 1947* (WA) sch.
[62] See Ray Finkelstein et al (eds), *LexisNexis Concise Australian Legal Dictionary* (Lexis Nexis, 7th ed, 2026) 14. See also *Commissioner of Railways (WA) v Stewart* (1936) 56 CLR 520.

conceive of God as having control over natural phenomenon, such as the weather or earthquakes. Therefore, some understanding of God or a type of God, is needed. So, while in this context God has been secularised, the term God retains religious meaning even within this very secular legislative context. God was, therefore, classified as neutral given its neutral usage within oaths and secular usage in Act of God.

D *Limitations*

As with any empirical, text-based legislative analysis, the methodology employed in this study has several inherent limitations.

First, this study is confined to Western Australian public Acts of Parliament, with comparison to Commonwealth legislation used only to contextualise the findings. The analysis does not extend to other Australian states or territories. While this allows for a focused examination of one jurisdiction, it necessarily limits the generalisability of the findings. As with Ambrose and Barker's federal-level study, the results of this study should, therefore, be understood as jurisdiction-specific and preliminary, providing a foundation for future comparative state-level research rather than a comprehensive account of the use of religious terms in Australian legislation.

Second, the analysis examines the presence, classification and frequency of religious terms, not the broader regulatory themes, purposes or effects of the legislation in which those terms appear. As a result, the conclusions that can be drawn are necessarily limited to legislative language rather than legislative substance. While the contextual usage of individual terms is examined in some detail, this study — unlike Ambrose and Barker's study of federal legislation — does not attempt a thematic analysis of how religion is regulated across policy domains such as education, anti-discrimination, criminal law or health. More substantive conclusions about the Western Australian state-religion relationship would require close doctrinal and thematic analysis of key legislative schemes.

Third and relatedly, this approach does not capture the regulation of religious belief or practice where such regulation is framed in neutral or secular language. Legislative regimes that have significant implications for religious practice but do not employ explicitly religious terminology fall outside the scope of this study. Examples include weapons legislation affecting the wearing of the kirpan by Sikhs, police search and identification powers intersecting with face coverings (such as the niqab) and medical law governing blood transfusions relevant to Jehovah's Witnesses. As a result, the interaction between Western Australian law and religion is almost certainly broader than that captured by analysis of religious terminology alone.

Fourth, the analysis is limited to primary legislation. Delegated legislation was excluded, as were judicial decisions, both of which are significant loci of state-religion interaction in a common law system. Important dimensions of religious accommodation, restriction and recognition may therefore be located in regulations, by-laws, policies or case law rather than in Acts of Parliament themselves. Addressing these sources would substantially expand the scope of inquiry and is best left to future research.

Fifth, while the timing of the searches was deliberately selected to minimise the impact of legislative change, the findings are necessarily time-limited. Amendments to existing Acts or the enactment of new legislation after the search period may affect both the frequency and distribution of religious terms. As with Ambrose and Barker's study, the results represent a snapshot of legislative usage at a particular point in time rather than a static or exhaustive account.

Finally, despite efforts to develop and iteratively refine a comprehensive dictionary of religious terms, it remains possible that relevant terms were overlooked or excluded, as already discussed in relation to the late inclusion of *God*. Decisions concerning term selection and classification inevitably involve interpretive judgement, particularly where concepts have undergone legal linguistic deconfessionalisation or extensive secularisation. These classificatory choices may affect both term counts and categorisation outcomes.

Taken together, these limitations suggest that the interaction between Western Australian legislation and religion is likely to be more extensive than reflected in this analysis. Nonetheless, the methods employed are sufficient to capture prevailing patterns of religious terminology in public Acts and to support the study's core claim: that Western Australian legislation exhibits a predominantly neutral linguistic approach to religion, alongside the continued, contextual persistence of Christian-derived terminology. As a scoping study, this article is intended to map terrain rather than to offer definitive conclusions and to identify avenues for more detailed doctrinal and comparative research.

III FINDINGS

The analysis of Western Australian legislation identified 30 religious terms across 80 public Acts of Parliament, including five imperial statutes. A full list of these Acts can be found in Appendix B. A further 94 private Acts, being a mix of Acts related to religious organisation, educational organisations, mining and industry, were also identified. A full analysis of these private Acts is beyond the scope of this study and accordingly, as outlined above, they have been excluded. This compares with 24 religious terms across 288 statutes in Ambrose and Barker's original study.

A *Western Australia*

As shown in Table 1, of the 30 religious terms found in Western Australian public Acts, 14 (46%) were classified as confessional, 7 (23%) as deconfessionalised and 9 (30%) as neutral.[63]

Table 1: Classification of religious terms in Western Australian public Acts

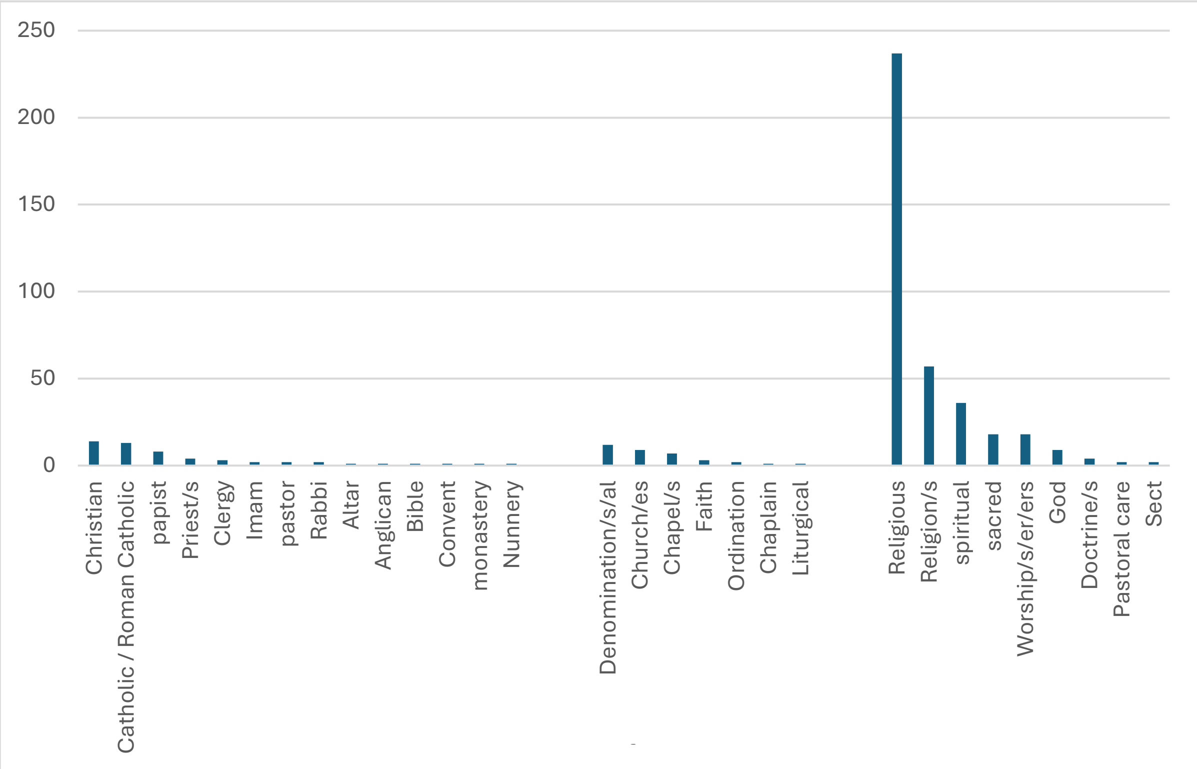
Confessional	**Deconfessionalised**	**Neutral**
Altar	Chapel/s	Doctrine/s
Anglican	Chaplain	God
Bible	Church/es	Pastoral Care
Catholic / Roman Catholic	Denomination/s/al	Religion/s
Christian	Faith	Religious
Clergy	Liturgical	Sacred
Convent	Ordination	Sect
Imam		Spiritual
Monastery		Worship/s/er/ers
Nunnery		
Papist		
Pastor		
Priest/s		
Rabbi		

Most of the confessional terms (11) relate to Christianity, while only two, *Rabbi* and *Imam*, are connected to other religions, specifically Judaism and Islam. Similarly, all of the deconfessionalised terms have confessional origins associated with Christianity. However, the above classifications do not account for the frequency of the occurrence of each of the religious terms. As shown below in Figure 1, the five

[63] Percentages have been rounded to the nearest whole number.

most frequent religious terms were neutral: *Religious* (237), *Religion/s* (57), *Spiritual* (36), *Worship/s/er/ers* (18) and *Sacred* (18).[64]

Figure 1: Frequency of religious terms in Western Australian public Acts



The most common confessional term was *Christian* (14), with the majority of references occurring in the *Business Names Act 1962* (WA) (13). All 13 references to *Christian* in the *Business Names Act 1962* (WA) are to the phrase *Christian name*.[65] As will be discussed below, the use of *Christian name*, as opposed to a more neutral term such as forename, speaks to the underlying Christian assumptions in Western Australian legislation. The second most common confessional term was *Catholic / Roman Catholic* (13) with the majority of occurrences in the *Succession to the Crown Act 2015* (WA) in reference to the disqualification of Roman Catholics from succession to the Crown. The remaining references occur in the *School Curriculum and Standards Authority Act 1997* (WA) and *School Education Act 1999* (WA) in relation to education. As shown in Figure 1, the frequency of confessional terms is low when compared to the frequency of neutral terms. The frequency of

[64] This includes references in headings as well as in the text of legislative provisions.
[65] The remaining reference is in the *Constitution Act 1889* (WA).

deconfessionalised terms is also comparatively low. The most frequent deconfessionalised term was *Denomination/s/al* (12).

B *Comparison with Federal Legislation*

While this analysis draws upon the foundational research undertaken by Ambrose and Barker the current study utilises a more comprehensive and systematically refined dictionary to identify relevant terminology. Consequently, the methodological enhancements implemented in this article render direct comparison with the findings of Ambrose and Barker more complex.

For example, Ambrose and Barker separated instances of the term *Religion* from *Minister of Religion* as well as *Religious* from *Religious Institution* and *Religious Practitioner*. Similarly, Ambrose and Barker treated *Catholic* and *Roman Catholic* as separate religious terms, while in this analysis they have been grouped together.

Despite these differences in approach to developing and refining the dictionary of religious terms, similarities can be seen between Ambrose and Barker's findings and those set out above for Western Australia. As shown in Table 2, 16 religious terms were found in both studies with a further seven found only in Ambrose and Barker's study and 18 found only in this study. For the purposes of clarity, Ambrose and Barker's dictionary has been used in Table 2.

Table 2: Comparison of religious terms identified in Ambrose and Barker's Commonwealth legislation analysis and this Western Australian analysis

Both analyses	**Ambrose and Barker only**	**This analysis only**
Bible	Bishop	Altar
Catholic[66]	Devotion	Anglican
Chaplain	Jewish	Chapel/s
Christian	Religious Practitioner[67]	Chaplain
Church	Synagogue	Convent
Clergy	Temple	Denomination/s/al
Doctrine	Theology	God

[66] In this analysis, *Catholic* and *Roman Catholic* have been combined. The terms appeared as separate phrases in Ambrose and Barker's analysis.

[67] *Religious Practitioner* was not separately identified as a religious term and is instead captured by the term *Religious*. See the discussion of words as opposed to phrases in Part II above.

Faith		Imam
Minister of Religion[68]		Liturgical
Papist		Monastery
Religion		Nunnery
Roman Catholic[69]		Ordination
Religious		Pastor
Religious Institution[70]		Pastoral Care
Secular		Priest/s
Worship		Rabbi
		Sacred
		Sect

Noting the already identified absence of some terms, such as *God*, from Ambrose and Barker's dictionary of terms, a further search was conducted of Commonwealth legislation on 2 January 2026 to confirm the presence or absence of terms identified as only present in this study in Commonwealth legislation. This identified a further five religious terms as found in both Commonwealth and Western Australian legislation: *Convent*, *Denomination/s/al*, *God*, *Ordination*, *Pastoral Care* and *Sacred*. Phrases were also collapsed to their essential religious term, consistently with this analysis. *Catholics* and *Roman Catholics* were also combined into a single religious term using the dictionary of terms from this analysis. As shown in Table 3, this led to a final list of 36 religious terms found across Western Australian and Commonwealth legislation, with 19 found in both Commonwealth and Western Australian legislation, five found only in Commonwealth legislation and 11 found only in Western Australian legislation.

[68] *Minister of Religion* was not separately identified as a religious term and is instead captured by the term *Religion*. See the discussion of words as opposed to phrases in Part II above.
[69] As noted above (n 66), *Catholic* and *Roman Catholic* have been combined. The terms appeared as separate phrases in Ambrose and Barker's analysis.
[70] *Religious Institution* was not separately identified as a religious term and is instead captured by the term *Religious*. See the discussion of words as opposed to phrases in Part II above.

Table 3: Religious terms identified in Commonwealth and Western Australian legislation

Both Cth and WA	**Cth only**	**WA only**
Bible	Bishop	Altar
Catholic / Roman Catholic	Devotion	Anglican
Convent	Jewish	Chapel/s
Chaplain	Synagogue	Imam
Christian	Temple	Liturgical
Church	Theology	Monastery
Clergy		Nunnery
Denomination/s/al		Pastor
Doctrine		Priest/s
Faith		Rabbi
God		Sect[71]
Ordination		
Papist		
Pastoral Care		
Religion		
Religious		
Sacred		
Secular		
Worship		

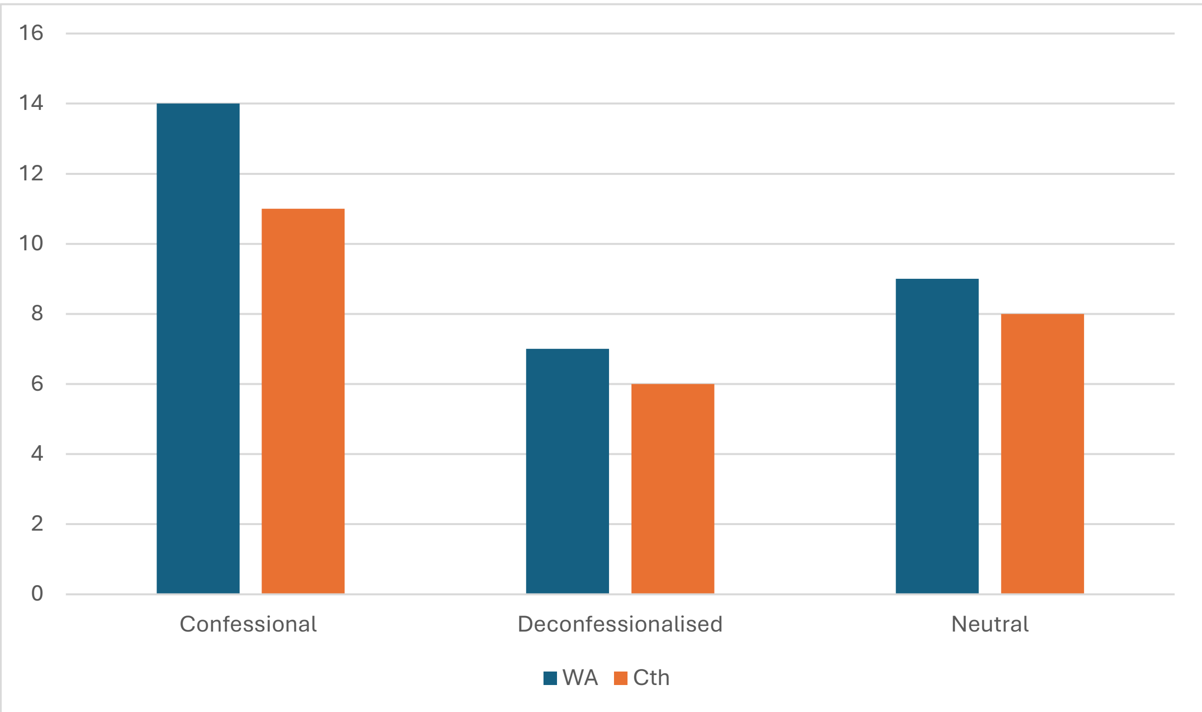
When the tripartite classification outlined above is applied to the 25 religious terms found in Commonwealth legislation, a similar divide to that seen in Western Australian legislation emerges. As shown in Table 4 and Figure 2 below, of the 25 religious terms found in Commonwealth legislation, 11 (44%) are confessional, 6 (24%) are deconfessionalised and 8 (32%) are neutral.

[71] While the word 'sect' does appear in Commonwealth legislation, this is as an abbreviation for 'section', rather than as a religious term.

Table 4: Classification of religious terms in Commonwealth legislation

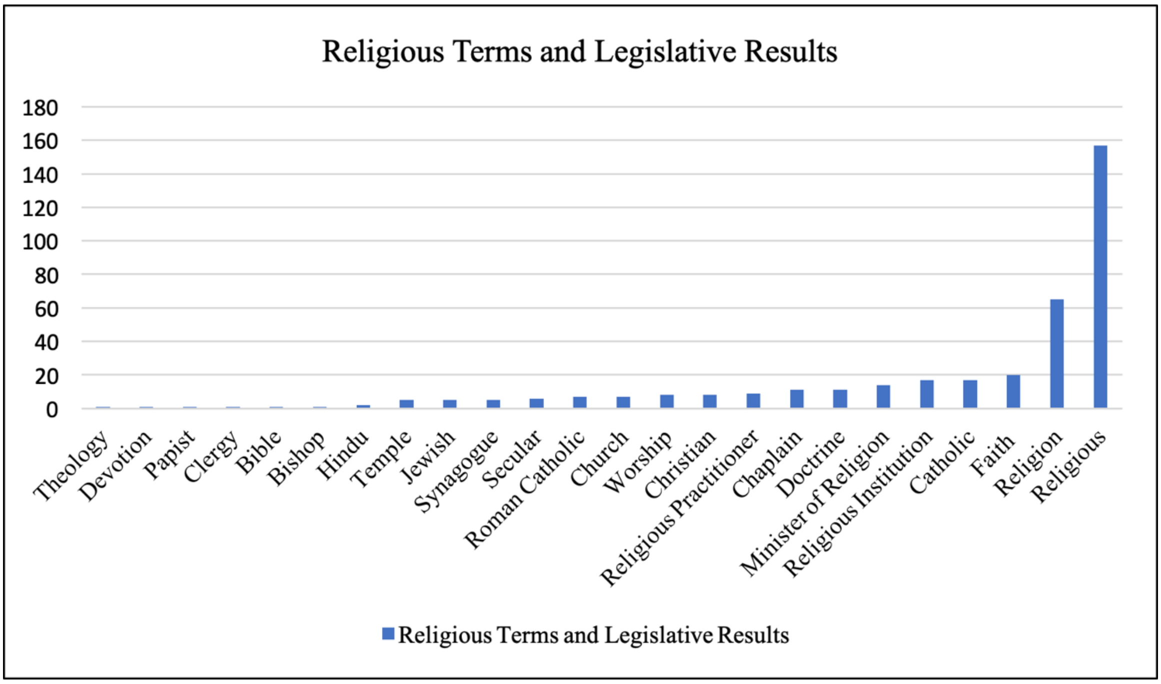
Confessional	**Deconfessionalised**	**Neutral**
Bible	Chaplain	Doctrine
Bishop	Church	God
Catholic / Roman Catholic	Denomination/s/al	Pastoral Care
Christian	Devotion	Religion
Clergy	Faith	Religious
Convent	Ordination	Sacred
Jewish		Secular
Papist		Worship
Synagogue		
Temple		
Theology		

Figure 2: Number of religious terms found in Western Australian and Commonwealth legislation



An analysis of the frequency of religious terms in Commonwealth legislation is beyond the scope of this study. However, as shown in Figure 3, in their analysis Ambrose and Barker found that *Religion* and *Religious* were the most frequent religious terms in Commonwealth legislation.[72] This is consistent with the finding for Western Australian legislation outlined above.

Figure 3: Religious terms and legislative results from Ambrose and Barker



IV DISCUSSION AND ANALYSIS

Analysis of legislative terminology at both the Commonwealth and Western Australian levels reveals that, while the raw number of confessional and deconfessionalised terms may exceed neutral terms, the frequency and prominence of neutral terms such as *Religion* and *Religious* far surpasses that of their confessional and deconfessionalised counterparts. This finding is consistent with Ambrose and Barker's results at the federal level and reflects an alignment with the principles of secularism, pluralism and inclusivity within the legal framing of state-religion relationships. The prevalence of neutral terminology suggests a deliberate effort to construct legislative language that does not privilege any particular religion

[72] Ambrose and Barker (n 26) 96.

and instead facilitate a legal environment that accommodates Australia's diverse and multi-faith society.

Nonetheless, it is important to acknowledge that, despite the widespread use of neutral terms, confessional terms remain present in the legislative landscape. Many of these confessional terms appear as part of inclusive lists, which attempt to recognise a range of religious traditions and thereby promote pluralism. For example, terms such as *Rabbi* and *Imam* are incorporated alongside Christian titles in the statutory definitions of *Minister of Religion*, reflecting a broader, more inclusive approach. However, the overwhelming majority of confessional terms retain a distinctly Christian character. The retention of these terms, particularly where neutral options are available, is a reminder of a less inclusive Christian heritage, the fingerprints of which can still be seen in Western Australian legislation. For example, while the term *Roman Catholic* appears in highly specific contexts (one of which is not directly relevant to the Australian state-religion relationship), it nonetheless gestures to the unique constitutional position of the King as both Australia's Head of State and, among other titles, the Head of the Church of England and Defender of the Faith.

As identified above, the residual confessional terms found in legislation are almost exclusively Christian and their presence warrants examination within their specific legislative contexts. Moreover, all identified deconfessionalised terms are either Christian or, at minimum, Abrahamic in origin. While these terms are frequently employed in a religiously neutral manner, their etymological roots and historical associations with Christianity persist, shaping the shared cultural understanding necessary for their interpretation. This enduring connection underscores the historical legacy of Christian privilege in the Australian legal system.

A *Christian Privilege*

As Douglas Ezzy and co-authors explain, 'Christian privilege is institutionally embedded in the law'.[73] As a result, 'the primary basis from which religion is imagined institutionally and against which the citizen self-assesses is a universal Christianity that is expressive of shared values'.[74] This privilege can be seen in the use of Christian confessional and deconfessionalised terms in Western Australian legislation. Twelve of the 14 confessional terms and all seven of the

[73] Douglas Ezzy, Rebecca Banham and Lori Beaman, 'Religious Diversity, Legislation, and Christian Privilege' (2023) 59(1) *Journal of Sociology* 70, 72.
[74] Lori G Beaman, 'The Will to Religion: Obligatory Religious Citizenship' (2013) 1(2) *Critical Research on Religion* 141, 145, cited in ibid 72.

deconfessionalised terms identified are Christian in origin, reflecting a Christian heritage[75] and ongoing privileging within Western Australian law.

This ongoing privileging of Christianity is highlighted by the usage of the confessional term *Christian* in the *Business Names Act 1962* (WA). As outlined above, 13 of the 14 occurrences of *Christian* occur in this Act. In all 13 instances, the word *Christian* appears in the phrase *Christian name*.[76] Rather than using the neutral term forename, the legislature instead opted to define *Christian name* as '[including] any forename'.[77] While the age of the Act arguably explains the choice to use *Christian name* rather than forename, it is notable that the Act has not been amended to adopt the more neutral and secular term, even though forename appears elsewhere in the legislation. This continued use of *Christian name* highlights an underlying Christian privilege. Those from a Christin background understand this phrase to refer to a person's first or fore name as opposed to their family or surname. However, those from non-Christian backgrounds, via necessity, are required to also gain this understanding, they do so via exposure to the predominate underlying Christin culture which gives rise to Christian privilege in the linguistic legislative drafting choices.

A similar argument could be advanced in relation to the phrase *Act of God.* While the word *God* was classified as neutral, due to its legislative context, it is not a truly neutral term. It is inherently religious and its transition from a religious word to a legal term of art in a similar way to the phrase *Christian name* highlights the inherent embedding of religious ideas within law and legislation. This religious underpinning persists even where they have been shorn, through long usage, of their religious connotations.

Embedded Christian privilege can also be seen in the use of the confessional terms *Convent*, *Monastery* and *Nunnery*, all of which occur exclusively in the *Local Government Act 1995* (WA). Section 6.26(d) of that Act provides an exemption from rates for

> land used or held exclusively by a religious body as a place of public worship or in relation to that worship, a place of residence of a minister

---

[75] Deagon (n 4) 168. For a comprehensive discussion of the Christian foundations of the common law, see Augusto Zimmermann, *Christian Foundations of the Common Law* (Connor Court Publishing, 2018) vol 3.

[76] The single occurrence of *Christian* outside of the *Business Names Act 1962* (WA) is in the *Constitution Act 1889* (WA), where the term *Christian* is also used in the context of the concept of a Christian name: at s 41.

[77] See *Business Names Act 1962* (WA) s 4(1).

> of religion, a *convent*, *nunnery* or *monastery*, or occupied exclusively by a religious brotherhood or sisterhood. [emphasis added]

While the provision includes religiously neutral phrases, such as *Religious Body* and *Public Worship,* it also uses the deconfessionalised phrase *Minister of Religion* and the confessional terms *Convent*, *Nunnery* and *Monastery*. While the terms *Brotherhood* and *Sisterhood* were not included in this dictionary of religious terms for this analysis, with the contextual modifier *Religious,* these terms are arguably also confessional or deconfessionalised. In a western context *Convent*, *Nunnery* and *Monastery* are all, almost exclusively, associated with Christianity. While there are, for example, Buddhist monasteries and nunneries even this non-Christian usage is an example of Christian privilege. These are not the terms originally used for such institutions and represent a mapping of English language Christian concepts onto pre-existing Buddhist concepts in order to make them comprehensible in that context. This can be contrasted with the use of confessional terms in the definition of *Minister of Religion,* where a much more inclusive, but not necessarily unproblematic, picture emerges.

The only non-Christian confessional terms, *Rabbi* and *Imam*, both appear twice in Western Australian legislation, appearing together in the *Evidence Act 2025* (WA) and *Children and Community Services Act 2004* (WA) as part of a list provided of examples of roles included in the definition of *Minister of Religion*.[78] The relevant provisions, which are identical, are extracted below:

> minister of religion —
>
> (a) means a person who is recognised in accordance with the practices of a faith or religion as a person who is authorised to conduct services or ceremonies in accordance with the tenets of the faith or religion; and
>
> (b) includes such a person regardless of how the person's position or title is described (for example, *member of the clergy, priest, minister, imam, rabbi or pastor*). [emphasis added]

The definition of *Minister of Religion* was inserted into the *Children and Community Services Act 2004* (WA) in 2021[79] as part of reforms following the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse.[80] The *Evidence Act 2025* (WA) has adopted this definition. The definition is drafted to be

---

[78] *Evidence Act 2025* (WA) s 3; *Children and Community Services Act* s 124A.
[79] See *Children and Community Services Amendment Act 2021* (WA) s 52(3).
[80] Western Australia, *Parliamentary Debates*, Legislative Assembly, 2 June 2021, 1164 (Simone McGurk, Minister for Child Protection).

inclusive rather than exclusive or exhaustive and relies for its meaning and effect on the neutral term *Religion* and the deconfessionalised term *Faith*. Here, unlike in the *Local Government Act 1995* (WA) discussed above, confessional terms are included not to delineate further categories of exemption and privilege, but to ensure an inclusive understanding of *Minister of Religion* includes not only Christian religious leaders (clergy, priest, minister or pastor), but also Islamic (imam) and Jewish (rabbi) leaders.

The phrase *Minister of Religion* is also found in six other Western Australian Acts.[81] However, it is only defined in one other Act. In the *Oaths, Affidavits and Statutory Declarations Act 2005* (WA), *Minister of Religion* is defined by reference to the definition of *Minister of Religion* in the *Marriage Act 1961* (Cth).[82] The *Marriage Act 1961* (Cth) defines *Minister of Religion* as:

> (a) a person recognised by a religious body or a religious organisation as having authority to solemnise marriages in accordance with the rites or customs of the body or organisation; or
>
> (b) in relation to a religious body or a religious organisation in respect of which paragraph (a) is not applicable, a person nominated by:
>
> (i) the head, or the governing authority, in a State or Territory, of that body or organisation; or
>
> (ii) such other person or authority acting on behalf of that body or organisation as is prescribed;
>
> to be an authorised celebrant for the purposes of this Act.

As with the Western Australian definition, that found in the *Marriage Act 1961* (Cth) relies on neutral terms, in this instance, *Religious Body* and *Religious Organisation*. However, the confessional terms listing specific religious leadership positions as exemplars are absent. On the one hand, their absence in the Commonwealth definition makes the definition more religiously neutral. Conversely, the Western Australian definition arguably makes the diversity of Australia's religious community more visible and explicit. The confessional terms make visible the pluralistic nature of both Australia's multi-faith, multi-cultural community and state-religion relationship, while the Commonwealth's definition obscures it. The obfuscation is enhanced by the phrase *Minister of Religion* itself. While in both

---

[81] See *Cemeteries Act* (n 44); *Community Protection (Offender Reporting) Act 2004* (WA); *Local Government Act 1995* (WA); *Working with Children (Screening) Act 2004* (WA); *Oaths, Affidavits and Statutory Declarations Act* (n 59); *Parliamentary Commissioner Act 1971* (WA) ('*Parliamentary Commissioner Act*').

[82] See *Oaths, Affidavits and Statutory Declarations Act* (n 59) sch 2 item 26.

instances the phrase *Minister of Religion* is defined using neutral and deconfessionalised terms, the use of *Ministe*r to describe a religious leader is more typically associated with Christianity, often in reference to the term *Priest* in Protestant denominations. This said, the *Oxford English Dictionary* also defines *Minister of Religion* as including '[a]n official of a non-Christian religion … the spiritual leader of a Jewish congregation'.[83]

While the use of confessional terms in the Western Australian definition of *Minister of Religion* encompasses Islam and Judaism, by using these two religions as exemplars, the meaning of *Minister of Religion* is triangulated around the three Abrahamic faiths. This further focuses attention on the Christian understanding of the term *Priest*, which can also have non-Christian applications. It excludes other non-Abrahamic confessional terms for religious leaders, such as *Priestess*, *Lama*, *Sensei*, *Guru*, *Swami*, *Elder* or *Daoshi*, to name just a few. So in drawing attention to diversity, on the one hand, other manifestations of that diversity are supressed. If examples were drafted based on religious demographics at the last census, terms for Hindu and Buddhist religious leaders would be included ahead of Jewish ones.[84] This suggests that the choice of exemplars was not based on objective criteria but rather on the privileging of the Abrahamic faiths.

It is worth noting that the *Parliamentary Commissioner Act 1971* (WA), while not defining *Minister of Religion*, also uses the neutral phrase *Religious Leader*, including both within the concept of officer or employee of a religious body.[85] The phrase *Religious Leader* does not occur in any other Western Australian Act and is not defined in the *Parliamentary Commissioner Act 1971* (WA).[86] Instead, the *Prisons Act 1981* (WA) and *Terrorism (Preventative Detention) Act 2006* (WA) use the phrase *Religious and Spiritual Advisor*. As with *Religious Leader*, these terms are not defined. However, a *Religious and Spiritual Advisor* would appear to be wider than *Minister of Religion* which requires, as discussed above, some form of recognition by the

[83] *Oxford English Dictionary* (online at 4 February 2026) 'minister' (def 2.d).

[84] Australian Bureau of Statistics, *Religious Affiliation in Australia: Exploration of the Changes in Reported Religion in the 2021 Census* (Article, 4 July 2022) ('*Religious Affiliation in Australia*').

[85] *Parliamentary Commissioner Act* (n 81) s 19D(2). The reference to both officer and employee is a recognition of the ongoing legal question as to the status of religious leaders: see Ilija Vickovich, 'Towards a Responsive Law Paradigm for Faith Workers' (2009) 9 *Macquarie Law Journal* 93.

[86] The phrase *Religious Leader* does not appear in Commonwealth legislation. Other phrases used to describe those performing leadership functions in religious bodies or organisations in Commonwealth legislation include *Religious Practitioner*, *Religious Official* and S*piritual Leader*. While beyond the scope of this study, further analysis needs to be conducted on the practical and symbolic differences in these terms for religious leaders. See, eg, *Taxation Laws Amendment Act (No 5) 2001* (Cth); *Combatting Antisemitism, Hate and Extremism (Criminal and Migration Laws) Act 2026* (Cth).

relevant religion or faith. Spiritual advisor may be so wide as to include an advisor on, for example, ethical veganism, which would ordinarily fall outside the realm of the religious.[87]

What the foregoing demonstrates is the complexity of crafting a definition that is comprehensive and encompassing of the various forms and styles of religious leadership in Australia given the increasingly diverse religious landscape.[88] While using exclusively religiously neutral terms is, arguably, a more secular approach, it obscures the diversity and pluralism which the use of confessional terms highlights. However, in the context of the phrase *Minister of Religion* specifically, the inclusion of non-Christian confessional terms also highlights the inherent dissonance in using a term typically associated with Christianity to encompass religious leaders from a range of different religious traditions.

B *Spiritual versus Religious*

An important principle of statutory interpretation is that words are used consistently. This principle incorporates two interrelated concepts. First, that 'where a word is used consistently in legislation it should be given the same meaning consistently' and, second, 'where legislation could have used the same word but chose to use a different word, the intention was to change the meaning'.[89] As identified above, multiple terms which could be considered analogous to *Religion* such as *Faith*, *Spiritual*, *Sect* and *Denomination* were identified in Western Australian legislation. While they occur with much less frequency than the terms *Religion* and *Religious*, noting the above principle of statutory interpretation, they must be given some meaning beyond being an alternative word choice to *Religion* in legislative drafting. However, doing so is complicated by the wide definition given to the term *Religion* in Australian law.

In *Adelaide Company of Jehovah' s Witnesses Inc v Commonwealth*,[90] Latham CJ opined that 'it would be difficult, if not impossible, to devise a definition of religion which would satisfy the adherents of all the many and various religions which exist, or have existed in the world'.[91] However, in *The Church of the New Faith v Commissioner of Pay-roll Tax (Vic)*[92] ('*Scientology Case*'), the High Court of Australia was called upon

---

[87] See Kate Offer and Renae Barker, 'Should Ethical Vegans Have a Beef with the Definition of Religion?' (2019) 9(1) *Victoria University Law and Justice Journal* 17.
[88] *Religious Affiliation in Australia* (n 84).
[89] Pearce and Geddes (n 34) 150–1.
[90] (1943) 67 CLR 116.
[91] Ibid 123.
[92] (1983) 154 CLR 120 ('*Church of the New Faith*').

to 'ponder the imponderable and define the indefinable'.[93] In doing so, the Court delivered three judgments, each proffering their own unique definition of *Religion*. However, all three were broad enough in scope to encompass the beliefs and practices of Scientology.[94] The definitions have since been applied to the Radha Soami Satsang Beas,[95] finding that the group was a religion, and to the Church of the Flying Spaghetti Monster Australia,[96] finding that it was not. Justice Kirby has also speculated that the definition of religion articulated in the *Scientology Case* may be wide enough to encompass Indigenous spirituality.[97]

Of the three definitions of religion found in the *Scientology Case,* Mason ACJ and Brennan J's substantive[98] definition is arguably the narrowest.[99] They distilled religion down to two essential elements: first, the '… belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief'.[100] The definition is neutral and inclusive, covering monotheistic, polytheistic and non-theistic belief systems without imposing moral or ethical value judgments on the nature of the 'canons of conduct' beyond the need for these to 'give effect' to the 'belief in the supernatural Being, Thing or Principle'. While the term supernatural has been criticised 'because it is a loaded word which can carry a variety of connotations',[101] it does not necessarily overly narrow the definition nor exclude concepts such as *Spiritual*, *Faith*, *Denomination* or *Sect*. The High Court of Australia has not had the opportunity to revisit the definition of *Religion* since the *Scientology Case,* which was decided in 1983. However, in a more recent decision from the United Kingdom Supreme Court, *Religion* was defined as

> a spiritual or non-secular belief system, held by a group of adherents, which claims to explain mankind's place in the universe and relationship with the infinite, and to teach its adherents how they are to live their lives in conformity with the spiritual understanding associated with the belief system.[102]

---

[93] *Jacques v Hilton*, 569 F Supp 730, 731 (D NJ 1983) (Sarokin J).
[94] See Renae Barker, 'Church of the New Faith v Commissioner of Pay-Roll Tax: Defining Religion for the World?' in Renae Barker, Paul Babie and Neil Foster (eds), *Law and Religion in the Commonwealth: The Evolution of Case Law* (Hart Publishing, 2022) 11.
[95] *RSSB Australia Pty Ltd v Ross* (2017) 224 LGERA 224.
[96] W*atkins and Commissioner for Corporate Affairs* [2021] SACAT 10.
[97] *Western Australia v Ward and Others* (2002) 213 CLR 1, 249 [586].
[98] Also referred to as 'essentialist': see, eg, Caroline Scheffalitzky de Muckadell, 'On Essentialism and Real Definitions of Religion' (2014) 82(20 *Journal of the American Academy of Religion* 945
[99] Barker (n 4) 20.
[100] *Church of the New Faith* (n 92) 136 (Mason ACJ and Brennan J).
[101] *R (Hodkin) v Registrar General of Births, Deaths and Marriages* [2014] AC 610, 627 [57].
[102] Ibid.

This formulation arguably broadens the definition further through explicit incorporation of the concept of spiritual understanding within religion.

As discussed above, the definition of *Minister of Religion* in the *Evidence Act 2025* (WA) and *Children and Community Services Act 2004* (WA) includes both the neutral religious term *Religion* and the deconfessionalised term *Faith,* with the two being offered as alternatives to one another. Here, *Faith* is being used to indicate a collective belief system rather than an individual one. In a similar way, the *Prisons Act 1981* (WA) lists *Spiritual* as an alternative to *Religion* in the phrases 'practice of religion or spiritual beliefs', 'prisoner's religious or spiritual beliefs', 'religious or spiritual guidance' and 'religious or spiritual adviser'.[103] The *Terrorism (Preventative Detention) Act 2006* (WA) takes the same approach, using *Spiritual* as an alternative to *Religious* in the phrase 'religious or spiritual adviser'.[104] In the *School Education Act 1999* (WA), the term *Spiritual* appears as an alternative to both *Religion* and *Morals* in the phrase 'religious, spiritual or moral values'.[105] However, in other contexts within the *School Education Act 1999* (WA), the terms *Religion* and *Religious* are used alone[106] or as an alternative to *Denomination* and *Sect.*[107]

The statutory interpretation principle of consistent word use suggests that including alternatives to *Religion,* such as *Spiritual* and *Faith,* is intended to widen the application of those provisions beyond the already wide definition of *Religion*. However, as these terms have not been defined, their precise scope is uncertain.

Religious terms used to describe collective belief systems do not always appear in the alternative to *Religion*. For example, the word *Spiritual* also appears in s 8 of the *Children and Community Services Act 2004* (WA) as a factor that must be considered in determining a child's best interests:

> (1) In determining what is in the best interests of a child, the following matters must be taken into account —
>
> …
>
> (k) the child's physical, emotional, intellectual, *spiritual* and developmental needs.
>
> … [emphasis added]

---

[103] *Prisons Act 1981* (WA) s 95E.
[104] See, eg, *Terrorism (Preventative Detention) Act 2006* (WA) s 43A.
[105] *School Education Act* (n 43) s 68(2)(b).
[106] See, eg, 'special religious instruction': ibid s 71.
[107] See ibid s 68(1)(a) in relation to its prohibition on curriculum and teaching, that promotes 'any particular religious practice, denomination or sect'.

Spiritual also appears in the *Disability Services Act 1993* (WA) in a similar context. In that Act, it sets out the rights of people with disability to participate in the community and realise their own capacities.[108] In the *Heritage Act 2018* (WA), *Spiritual* is used as an alternative to *Social* and *Cultural* in determining whether a place has cultural heritage significance ('social, cultural or spiritual associations')[109] and as an alternative to *Scientific* and *Social* in the definition of *Cultural Heritage Significance* ('scientific, social or spiritual').[110] Here *Spiritual* appears to be being used as an alternative and arguably broader and more inclusive, term than *Religion*.

Spiritual is also used in a much more specific context in the *Mental Health Act 2014* (WA), where it is used as part of the definition of 'traditional healer' as a 'person of Aboriginal or Torres Strait islander descent' who, inter alia, 'uses traditional (including *spiritual*) methods of healing'.[111] It is also used, in relation to children, in a similar way to the *Children and Community Services Act 2004* (WA) and *Disability Services Act 1993* (WA)[112] and as an aspect of diversity in the Charter of Mental Health Care Principles.[113]

These terms, which in some instances appear to be used as an alternative to *Religion*, rather than in addition to it, must be given their own meaning. Without an equivalent to the *Scientology Case,* meaning must rest on the ordinary meaning of the word, context and purpose of the relevant provisions.[114]

While, as has been discussed above, the neutral terms *Religion* and *Religious* dominate the occurrences of religious terms in Western Australian legislation, one usage is notably absent. The phrase *Thought, Conscience and Religion*, which is the cornerstone of international FoRB provisions,[115] is conspicuously absent from the Western Australian statutory corpus. The phrase *Thought, Conscience and Religion* arguably includes within it concepts such as *Spiritual* and *Faith*. Its breadth has meant that very little international jurisprudence has expressly defined *Religion* as

[108] *Disability Services Act 1993* (WA) sch 1 cl 3.
[109] *Heritage Act* (n 43) s 38(1)(e).
[110] Ibid s 5(1).
[111] *Mental Health Act 2014* (WA) s 4 (emphasis added).
[112] Ibid s 303(2)(a).
[113] Ibid sch 1.
[114] *Interpretation Act* (n 33) s 18.
[115] See eg International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18; Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/RES/217A(III) (10 December 1948) art 18; European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 9.

the breadth of the phrase has made doing so redundant.[116] However, use of this phrase, or morphological variants of it, would arguably solve many of the problems created by the usage of alternatives to *Religion* within Western Australian legislation. Its absence also speaks to the lack of influence of international law on the development of Australian legislation related to religion.

C *State-Religion Relationship*

The Australian state-religion relationship has variously been described as non-sectarian Christianity,[117] formal establishment (symbolic),[118] pragmatic pluralism,[119] cooperation,[120] accommodation,[121] non-establishment pluralism,[122]non-establishment,[123] neutral separation/neutrality,[124] and flexible separation.[125] However, as discussed above, these categorisations are either based on a holistic examination of the Australian state-religion relationship (including both federal and state and territory laws) or dominated by analysis of federal laws.[126] Given that there is no constitutional prohibition on a state establishing a church, insisting on religious observances, imposing religious tests or restricting FoRB, it is at least conceivable that states could have a very different state-religion relationship both from each other and the federal government.

This study does not seek to classify the Western Australian state-religion relationship within existing typologies. Any conclusion about the nature of the

---

[116] Pauline Ridge, 'Not-for-Profit Law and Freedom of Religion' in Matthew Harding (ed), *Research Handbook on Not-for-Profit Law* (Edward Elgar, 2018) 284, 294. See also European Court of Human Rights, *Guide to Article 9: Freedom of Thought, Conscience and Religion*, 30 April 2019, 8 [14].

[117] Stephen A Chavura, John Gascoigne and Ian Tregenza, *Reason, Religion and the Australian Polity: A Secular State?* (Routledge, 2019) 254, 255–7. See also Deagon (n 4) 155.

[118] Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2nd ed, 2013) 104.

[119] Soper, Den Dulk and Monsma (n 6) 121; Deagon (n 4) 154–5.

[120] W Cole Durham Jr and Brett G Scharffs, *Law and Religion: National, International, and Comparative Perspectives* (Wolters Kluwer, 2nd ed, 2019) 124, 126–7, 145–6.

[121] Jonathan Fox, *Political Secularism, Religion, and the State: A Time Series Analysis of Worldwide Data* (Cambridge University Press, 2015) 45.

[122] Renae Barker, 'Pluralism versus Separation: Tension in the Australian Church-State Relationship' (2021) 16(1) *Religion and Human Rights* 1.

[123] Jeroen Temperman, *State-Religion Relationships and Human Rights Law: Towards a Right to Religiously Neutral Governance* (Brill, 2010) 118–9.

[124] Shimon Shetreet, 'The Model of State and Church Relations and Its Impact on the Protection of Freedom of Conscience and Religion: A Comparative Analysis and a Case Study of Israel' in Winfried Brugger and Michael Karayanni (eds), *Religion in the Public Sphere: A Comparative Analysis of German, Israeli, American and International Law* (Springer, 2007) 87, 90.

[125] Paul Babie et al, *Religion and Law in Australia* (Kluwer Law International, 2nd ed, 2019) 52–6; Stephen McLeish, 'Making Sense of Religion and the Constitution: A Fresh Start for Section 116' (1992) 18(2) *Monash University Law Review* 221–2.

[126] See, eg, Deagon (n 4).

Western Australian state-religion relationship must, due to the nature of the current study, be preliminary. Further analysis is needed of the themes that emerge from the legislative context of religious terms identified in this study, along with examination of key Acts such as the *Equal Opportunity Act 1984* (WA). However, despite the potential for great divergence from federal legislation, the results of the comparison between the use of religious terms as identified by Ambrose and Barker and their use in Western Australian legislation indicate a significant degree of convergence between the Western Australian state-religion relationship and that which exists at the federal level.

In both studies, the neutral terms *Religion* and *Religious* emerged as the most dominant with significantly higher frequency than any other religious term. In Western Australia, these terms combined accounted for 58% of religious terms identified. That is not to say that in practice Christianity may not be privileged in the application and effect of legislative provisions couched in neutral terms. What it does indicate is that the state-religion interaction is consistent with neutrality, at least at the legislative linguistic level. Literature on state neutrality divides this classification into two sub-categories: formal and substantive neutrality.[127] While acknowledging that no state-religion relationship is truly neutral,[128] the predominant use of neutral religious terms is consistent with formal neutrality. While religion is treated differently than other equivalent secular entities in that the state 'sees' the religiosity of religious entities, it is still formally neutral as between different religions. This might be described as religious plural neutrality, consistent with observations of Australia's state-religion relationship as pragmatic pluralism.[129] However, pragmatic pluralism as applied to Australia is usually grounded in non-discriminatory federal funding of predominantly religious non-government education.[130] Similarly, analysis of the Australian state-religion relationship as non-establishment pluralism[131] is grounded in an analysis of the effect and practical application of s 116 of the *Constitution*. As such, further analysis would be needed to determine how such a relationship might be grounded at a state level.

The ongoing use of confessional terms and deconfessionalised terms with Christian origins must also be accounted for in the state-religion relationship. While some of these usages are highly contextualised, as discussed above, they indicate an underlying Christian privilege inherent in the vocabulary of Western Australian

[127] See, eg, Ahdar and Leigh (n 118) 112–9.
[128] Darryn Jensen, 'Classifying Church-State Arrangements' in Nadirsyah Hosen and Richard Mohr (eds), *Law and Religion in Public Life: The Contemporary Debate* (Routledge, 4th ed, 2011) 15, 19.
[129] Soper, Den Dulk and Monsma (n 6) 121 and Deagon (n 4) 154–5.
[130] Soper, Den Dulk and Monsma (n 6) 121–55.
[131] Barker (n 122).

legislation. This is arguably consistent with Alex Deagon's mild Christian establishment.[132] However, unlike Deagon, it can be argued that rather than it being desirable to move towards this form of state-religion relationship, the use of confessional and deconfessionalised terms indicates a historical legacy. Whether the state-religion relationship in Western Australia specifically or Australia generally is shifting is beyond the scope of this study. What is clear, however, is that the state-religion relationship in Western Australia as expressed in linguistic choices in Western Australian legislation is not purely either neutral or pluralist.

V CONCLUSION

This article has mapped the presence, distribution and classification of religious terminology in Western Australian public Acts of Parliament, demonstrating that, at a legislative linguistic level, neutral religious terminology overwhelmingly dominates. Terms such as *Religion* and *Religious* appear with far greater frequency than confessional or deconfessionalised terms, mirroring patterns identified in Commonwealth legislation[133] and suggesting a high degree of convergence between state and federal legislative practice. This predominance of neutral language is consistent with formal religious neutrality and reflects an attempt to accommodate religious diversity through inclusive, non-sectarian drafting.

However, the analysis also reveals the continued presence of confessional and deconfessionalised terms, almost exclusively of Christian origin. While many of these terms operate in deconfessionalised or secularised ways, their Christian origins persist. The prevalence of Christian-derived vocabulary, including terms such as *Christian name* and *Act of God* and Christian institutional forms, illustrates the enduring embedding of Christian privilege within legislative language. Even where such terms are used neutrally or inclusively, they rely on shared assumptions shaped by a Christian cultural heritage.

The article further demonstrates that variation in legislative word choice, particularly between *Religion*, *Spiritual*, *Faith*, *Sect* and *Denomination*, creates interpretive complexity. These terms are not interchangeable and must be given distinct meaning, yet they remain largely undefined. Their usage both expands and obscures the scope of protection and regulation, highlighting tensions inherent in legislative attempts to reflect pluralism while maintaining coherence.

Taken together, the findings show that Western Australian legislation constructs a state-religion relationship that is formally neutral but linguistically shaped by

[132] Deagon (n 4) 165–82.
[133] Ambrose and Barker (n 26).

historical Christian norms. As a scoping study, this analysis maps the terrain of religious language in state legislation and provides a foundation for further doctrinal, comparative and thematic examination of how religion is recognised, regulated and normalised in Australian law.

Appendix A: Dictionary of Religious Terms

Agnostic

Allahims

Altar

Anglican

Archdeacon

Atheism

Bible

Bishop / Archbishop / Bishopric

Brahmin / Brahmanism

Buddhism

Catholic / Roman Catholic

Chapel

Chaplain

Christ

Christian

Christianity

Church / Churches

Church of England

Clergy / Clergyman

Cleric

Consecration

Convent

Deacon/s

Denomination/s / Denominational

Devotion

Diocese

Doctrine/s

Episcopalian

Evangelical

Faith

Faithless

God

Godless

Hare Krishna

Hindu / Hinduism

Holy

Imam

Islam / Islamic

Jesus

Jewish

Jihad

Liturgical

Mohammed

Mohammedan

Monastery

Mosque

Muslim

Nunnery

Ordination

Papist

Parish

Pastor

Pastoral Care

Pentecostal

Priest/s

Quran

Rabbi

Religion/s

Religious

Sacred

Sanctity

Sect

Secular

Soul / Cure of Souls

Spiritual

Synagogue

Synod

Temple

Theology

Worship/s / Worshiper/s

Appendix B: List of Western Australian Public Acts of Parliament Found in this Study

Factors (1842) (Imp)
Judgments Act 1839 (Imp)
Judgments Act 1855 (Imp)
Mercantile Law Amendment Act 1856 (Imp)
Royal Styles and Titles Act 1947
Aboriginal Heritage Act 1972
Adoption Act 1994
Anatomy Act 1930
Associations Incorporation Act 2015
Auction Sales Act 1973
Australia Acts (Request) Act 1985
Bail Act 1982
Business Names Act 1962
Cemeteries Act 1986
Children and Community Services Act 2004
Commercial Arbitration Act 2012
Community Protection (Offender Reporting) Act 2004
Competition Policy Reform (Western Australia) Act 1996
Constitution Act 1889
Co-operatives Act 2009
Cremation Act 1929
Criminal Code Act Compilation Act 1913
Declared Places (Mental Impairment) Act 2015
Defamation Act 2005
Disability Services Act 1993
Duties Act 2008
Education and Care Services National Law (WA) Act 2012
Education Service Providers (Full Fee Overseas Students) Registration Act 1991
Electoral Act 1907

Emergency Management Act 2005

Equal Opportunity Act 1984

Evidence Act 1906

Evidence Act 2025

Family Court Act 1997

Fire Brigades Act 1942

Gaming and Wagering Commission Act 1987

Guardianship and Administration Act 1990

Health (Miscellaneous Provisions) Act 1911

Heritage Act 2018

Housing Act 1980

Land Tax Assessment Act 2002

Liquor Control Act 1988

Local Government Act 1995

Mental Health Act 2014

Misuse of Drugs Act 1981

Oaths, Affidavits and Statutory Declarations Act 2005

Parliamentary Commissioner Act 1971

Pay-roll Tax Assessment Act 2002

Planning and Development Act 2005

Police Act 1892

Port Authorities Act 1999

Prescription Act 1832 (Imp)

Prisons Act

Privacy and Responsible Information Sharing Act 2024

Private Hospitals and Health Services Act 1927

Public Notaries Act 1979

Public Order in Streets Act 1984

Redemption of Annuities Act 1909

Restraining Orders Act 1997

Retail Trading Hours Act 1987

Road Traffic Act 1974

Sale of Land Act 1970

School Curriculum and Standards Authority Act 1997

School Education Act 1999

Sea-Carriage of Goods Act 1909

Sentence Administration Act 2003

Spent Convictions Act 1988

Strata Titles Act 1985

Succession to the Crown Act 2015

Terrorism (Commonwealth Powers) Act 2002

Terrorism (Extraordinary Powers) Act 2005

Terrorism (Preventative Detention) Act 2006

Transfer of Land Act 1893

Transport (Road Passenger Services) Act 2018

Voluntary Assisted Dying Act 2019

Volunteers and Food and Other Donors (Protection from Liability) Act 2002

Western Australian Treasury Corporation Act 1986

Workers Compensation and Injury Management Act 2023

Working with Children (Screening) Act 2004

Young Offenders Act 1994

CAN WE FINALLY SAY 'SO LONG' TO LONGMAN?: DELAY, CREDIBILITY WARNINGS, AND THE CASE FOR EVIDENCE LAW REFORM IN WESTERN AUSTRALIA

SARA M SMYTH*

For more than three decades, the High Court's decision in Longman v The Queen has shaped the law governing delayed complaint directions in Australian sexual offence trials. Although intended to protect accused persons from the forensic disadvantage caused by delay, Longman warnings have frequently operated to reinforce outdated assumptions that delayed disclosure reflects adversely on a complainant's credibility. This article argues that the resulting jurisprudence has become conceptually unstable, requiring trial judges to deliver contradictory directions that simultaneously reject and invite delay-based credibility reasoning. Through a comparative analysis of Australian and Canadian jurisprudence, the article demonstrates how Canadian courts have disentangled forensic disadvantage from credibility assessment by rejecting myths and stereotypes surrounding delayed disclosure. It contends that Western Australia's new Evidence Act 2025 represents a significant doctrinal shift by abolishing mandatory Longman warnings and confining judicial comment on delay to demonstrable forensic disadvantage. These reforms do more than modernise Western Australia's evidence law — they dismantle a doctrinal framework that permitted discredited assumptions about delayed disclosure to persist under the guise of trial fairness.

I Introduction 205

II Delay, Complaint, and the Myth of the "Ideal Victim" 208

III The *Longman* Warning: From Fair-Trial Safeguard to Credibility Proxy 210

* BA, LLB, LLM, PhD. Associate Professor, Curtin University, Faculty of Business and Law. Member of the Law Society of British Columbia, Canada and the Supreme Court of Victoria, Australia.

IV Canada: Constitutional Elimination of Delay-Based Credibility Reasoning....... 220

V Western Australia and the *Evidence Act 2025* (WA): A Doctrinal Reset 224

VI Conclusion: Saying 'So Long' to *Longman* at Last.. 228

I Introduction

Alongside the development of the jury system, the common law established an intricate body of evidentiary rules to guide lay decision-makers through complex adjudicative processes.[1] Judges long feared that juries, comprised of ordinary citizens rather than legal specialists, might attach undue weight to particular kinds of evidence unless carefully directed by the bench.[2] As a result, the law of evidence came to play a central role in criminal trials, governing not only what information could be received by the trier of fact, but also the permissible inferences that might be drawn from it.[3]

Over time, statutory intervention supplemented and, in some instances, displaced these common law rules.[4] In Australia, as elsewhere, evidence law reform has been driven by growing recognition that evidentiary doctrines do not merely regulate trial mechanics; they reflect and reinforce social norms, including those relating to gender, power, and credibility.[5] Few areas of evidence law illustrate this more starkly than the treatment of sexual abuse offence complainants, who are mostly female.[6]

The way a legal system assesses the credibility of those who allege sexual violence is a critical indicator of substantive equality in modern society.[7] Yet, sexual assault typically occurs in private, leaving the complainant as the sole witness to the alleged offence. Historically, this absence of corroboration generated evidentiary principles concerned with protecting the accused from wrongful conviction, particularly where there has been a long delay in the victim's reporting of the crime. Sexual offence trials often turn on word against word, with contextual detail and credibility assuming

---

[1] Wouter de Vos, 'Jury Trials in Western Australia' (2017) *International Trade and Business Law Review* 335, 335.
[2] John H Langbein, *The Origins of Adversary Criminal Trial* (Oxford University Press, 2003) 45–7.
[3] Kathy Mack, 'An Australian Perspective on Feminism, Race and Evidence' (1999) 28 *Southwestern University Law Review* 367, 367.
[4] Colin Tapper, 'Evidence Law Reform in an International Context' (1992) 22(1) *University of Western Australia Law Review* 31, 35.
[5] Ibid 36.
[6] Constance Backhouse, 'Skewering the Credibility of Women: A Reappraisal of Corroboration in Australian Legal History' (2000) 29(1) *University of Western Australia Law Review* 79, 80.
[7] Ibid.

determinative significance.[8] Delay in reporting has thus come to occupy a duplicitous position in the law of evidence, vacillating between concern for trial fairness, on the one hand, and suspicions about complainant reliability, on the other.[9]

Although legislatures throughout Australia, and other common law jurisdictions, have sought to repudiate the assumption that delayed complaint necessarily indicates falsity, judicial doctrine has struggled to disentangle legitimate concerns for forensic disadvantage from impermissible reasoning grounded in myths and stereotypes about victim behaviour. In Australia, that tension has been most blatantly expressed through the use of the *Longman*[10] direction — requiring juries, in cases of substantial delay, to be warned of the danger of convicting on the uncorroborated evidence of the complainant.

Originally justified as a safeguard against forensic disadvantage to the accused, the *Longman* warning has, in practice, operated as a conduit through which long-discredited assumptions about particular kinds of complainants have continued to influence the trial process.[11] Its application has generated a complex and unstable body of jurisprudence, requiring trial judges to deliver a sequence of "balancing" directions that simultaneously caution juries against assuming falsity from delay, while inviting delay-based suspicion. That approach is not merely undesirable; it is logically unsound.

The treatment of delayed complaint further reveals a sharp divergence between common law jurisdictions. In Canada, as discussed below, delay-based credibility reasoning has long been rejected as a matter of constitutional principle. In particular, the equality provision in s 15 of the *Canadian Charter of Rights and Freedoms* provides a framework for considering, in the words of Sheilah Martin, Justice of the Supreme Court of Canada ('SCC'), the effects of 'disparity, disadvantage, disproportion, and domination' in the law because it 'forces us away from assumed norms, and asks us to consider how actions or choices will work on the ground for everyone', especially the disadvantaged.[12] Equality analysis thus requires decision-makers to turn their minds to the wider social, historical, and political effects of the law. Judicial reliance on myths and stereotypes is treated as legal error,

---

[8] *Robinson v The Queen* (1999) 197 CLR 162, 178–9.

[9] Note this article does not deny the reality of forensic disadvantage; rather, it challenges the presumption that delay, by itself, necessarily perpetuates that disadvantage.

[10] *Longman v The Queen* (1989) 168 CLR 79 ('*Longman*').

[11] *Kribs v The Queen* [1960] SCR 400, 405 ('*Kribs*').

[12] Sheilah L Martin, 'Equality Jurisprudence in Canada' (2019) 17(2) *New Zealand Journal of Public and International Law* 127, 147.

and delay is regarded as a neutral fact, unless linked to demonstrable forensic consequences.[13]

Until very recently, Western Australia ('WA') remained wedded to the *Longman* framework, notwithstanding various legislative attempts to neutralise its effects.[14] The long-awaited introduction of the *Evidence Act 2025* (WA)[15] (the 'new Act') is expected to mark a decisive shift. By abolishing the duty to give *Longman* warnings, and confining judicial comment on delay to demonstrable forensic disadvantage, the new Act represents a complete doctrinal reset.

The reforms were recently lauded by state government as 'the biggest overhaul of evidence law in 100 years'.[16] In announcing the legislation, the Attorney-General explained the reforms are part of a broader effort to improve the experiences of victims of family violence and sexual assault within the criminal justice system.[17] As the government acknowledged, victims of these offences are often the only witnesses to the alleged crimes and may be required to give deeply personal and distressing evidence at trial.[18] The new framework is intended to provide greater protections and support to such victims, while facilitating the introduction of relevant evidence in criminal proceedings.

More fundamentally, the reforms displace outdated myths and stereotypes about victim behaviour that have long pervaded the common law.[19] Questions such as, 'Why did the complainant not report sooner?', or, 'Why did she remain in the abusive relationship?' have historically been used to cast doubt on the credibility of complainants.[20] Contemporary social science research, however, demonstrates that

---

[13] *R v Seaboyer* [1991] 2 SCR 577 ('*Seaboyer*').

[14] Victorian Law Reform Commission, *Sexual Offences: Law and Procedure* (Final Report, August 2004) 105–8 [2.7]–[2.12].

[15] The new Act repealed the *Evidence Act 1906* (WA) and introduced significant reforms designed to align Western Australia with the Uniform Evidence Law adopted in other Australian jurisdictions, thereby improving consistency and accessibility in court proceedings.

[16] Tony Buti, 'Historic Revamp of Evidence Laws Gives Victims Greater Supports' (Media Statement, 29 April 2025) <www.wa.gov.au>.

[17] Ibid.

[18] Ibid.

[19] Explanatory memorandum, Evidence Bill 2025 (WA) 143–6 ('Explanatory memorandum').

[20] As discussed below, such questions were addressed by Wilson J (as her Honour then was) of the Supreme Court of Canada, in a case involving battered wife syndrome, in which she wrote:

> The average member of the public (or of the jury) can be forgiven for asking: Why would a woman put up with this kind of treatment? Why should she continue to live with such a man? How could she love a partner who beat her to the point of requiring hospitalization? We would expect the woman to pack her bags and go. Where is her self-respect? Why does she not cut loose and make a new life for herself? Such is the reaction of the average person confronted

the experience of victims — predominantly women and children — who endure sexual trauma frequently falls outside the realm of ordinary human expectations. Delayed disclosure, continued association with the offender, and fragmented memories are now widely recognised as common features of such cases.

This article maintains that, like Canada once did, the WA Parliament has finally reconsidered its approach to the assessment of credibility in sexual violence cases for important social and cultural reasons. Canadian courts have long been grappling with the inherent risks of importing dangerous myths and stereotypes into evidence-based credibility assessments. Such reform is not merely desirable, but necessary, and long overdue. It aligns WA with contemporary evidentiary law principles, restores coherence to jury directions, and removes a warning whose historical function has been to cast vulnerable complainants as inherently unreliable and untrustworthy.

This article proceeds in six parts. Part II traces the historical development of delay-based reasoning in sexual offence cases and its entanglement with myths and stereotypes. Part III examines the emergence and expansion of the *Longman* warning and the difficulties it has generated in Australian law. Part IV analyses Canada's rejection of delay-based credibility reasoning and explains why that approach has achieved doctrinal stability. Part V evaluates the new Act and argues that it adopts many sound elements of the Canadian approach. This article concludes, in Part VI, that once credibility and forensic disadvantage are properly disentangled, fairness to the accused can be preserved without perpetuating discredited assumptions about victim behaviour.

II Delay, Complaint, and the Myth of the "Ideal Victim"

Historically, in the common law, it was assumed that a victim of sexual assault would complain about it at the first reasonable opportunity, and a failure to do so was seen as evidence that any subsequent complaint was false.[21] Indeed, female sexual assault complainants have traditionally been viewed as so untrustworthy that their failure to make an immediate allegation was long considered a 'virtual self-contradiction of [their] story'.[22]

> with the so-called "battered wife syndrome". We need help to understand it and help is available from trained professionals.

R v Lavallee [1990] 1 SCR 852, 871 ('*Lavallee*').

[21] Elaine Craig, 'The Relevance of Delayed Disclosure to Complainant Credibility in Cases of Sexual Offence' (2011) 36 *Queen's Law Journal* 551, 554.

[22] *Kribs* (n 11) 405.

Authorities from as early as the 13th century show the common law contained an absolute requirement that victims of sexual violence raise an immediate "hue and cry" in order to be heard.[23] This once applied to all violent crimes; although it was ultimately rejected for other offences, it remained solely applicable to sexual assault, or rape, in the common law.[24]

Sir Matthew Hale, the English jurist, is often credited with formulating the doctrine of corroboration when he made his well-known statement in 1734,[25] that rape is 'an accusation easily to be made, and hard to be proved, and harder to be defended by the party accused, though never so innocent'.[26] By the end of the 18th century, this principle had evolved into a factual presumption. In Hawkins' *Pleas of the Crown*, the author states: 'It is a strong, but not a conclusive, presumption against a woman that she made no complaint in a reasonable time after the fact.'[27]

Consistent with the presumption that sexual assault must be reported swiftly to be taken seriously, legislation enacted in the same century prohibited a woman from seeking legal redress if 40 days had passed since the alleged offence.[28] While Hale's statement was made long before the jury took on its current fact-finding role in the criminal trial process, the presumption concerning delayed complaints was already well entrenched at common law.[29]

Those views were echoed by the judiciary into the 19th and 20th centuries. For example, in the now widely discredited SCC case of *Kribs v The Queen*, Fauteux J (as he then was) wrote:

> The principle is one of necessity. It is founded on factual presumptions which, in the normal course of events, naturally attach to the subsequent conduct of the prosecutrix shortly after the occurrence of the alleged acts of violence. One of these presumptions is that she is expected to complain upon the first reasonable opportunity, and the other, consequential

[23] Morrison Torrey, 'When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions' (1991) 24(4) *UC Davis Law Review* 1013, 1041. This was also said to encourage victims to alert the community to help apprehend an offender.
[24] Ibid.
[25] Backhouse (n 6) 86.
[26] Matthew Hale, *Historia Placitorum Coronae* (Nutt and Gosling, 1734) vol 1, 635–6.
[27] Williams Hawkins, *A Treatise of the Pleas of the Crown; or, A System of the Principal Matters relating to That Subject, Digested under Proper Heads* (Eliz. Nutt, 1st ed, 1721) bk 1, c 41, s 9, quoted in *R v Lillyman* [1896] 2 QB 167, 170–1 (Hawkins J).
[28] Matthew Hale, *History of the Pleas of the Crown* (1736) vol 1, 627.
[29] John Willis and Marilyn McMahon, 'Educating Juries or Telling Them What to Think? Credibility, Delay in Complaint, Judicial Directions and the Role of Juries' (2017) 41 *Criminal Law Journal* 27, 38.

> thereto, is that if she fails to do so, her silence may naturally be taken as a virtual self-contradiction of her story.[30]

Legal scholars have opined that underpinning this rule was the notion that the absence of an early complaint by a sexual assault victim reflected adversely on her claim, and credibility, simply because she was female, and thus more likely to be untrustworthy.[31] This framing of sexual violence informed not only substantive criminal law, but also the evolution of evidentiary rules that treated female complainants, like children, as inherently suspect and in need of corroboration.[32]

III The Longman Warning: From Fair-Trial Safeguard to Credibility Proxy

Up to the introduction of the *Acts Amendment (Sexual Assaults) Act 1985* (WA),[33] which inserted the former s 36BE into the *Evidence Act 1906* (WA), there was a rule that the trial judge was required to warn the jury that it was dangerous to convict on the uncorroborated evidence of the victim of a sexual offence.[34] Prior to this, victims of sexual violence were generally considered "suspect" witnesses; and although in Australia the rule was articulated in gender neutral terms, in practice, it primarily affected women and children.[35]

Longman v *The Queen*[36] held that the effect of s 36BE was to abolish the rule that victims of sexual offences were in a special category of suspect witnesses. However, the High Court also stated that a jury warning may still be required in cases where there has been a long delay between the alleged offence and the first complaint by the victim. Thus, the need for a warning remained tied to the reliability of the victim's evidence as to the sexual offence.[37]

---

[30] *Kribs* (n 11) 405. Note that the rationale in *Kribs* has since been subjected to criticism, is not followed, and has been overruled. The Parliament of Canada also chose to negate the authority of *Kribs* by statute: *Criminal Code*, RSC 1985, c C-46, s 275.

[31] D Fletcher Dawson, 'The Abrogation of Recent Complaint: Where Do We Stand Now' (1984) 27(1) *Criminal Law Quarterly* 57, 59. Note that although the offence of sexual assault (rape) was later broadened to include victims of either gender (see *R v Camelleri* [1922] 2 KB 122), it has been argued that the doctrine of recent complaint persisted due to societal misconceptions about women, including assumptions that they are untrustworthy and prone to falsify claims of sexual assault.

[32] Elizabeth A Sheehy, 'Judging Women: Gender, Feminism and the Law of Evidence' (1993) 6 *Canadian Journal of Women and the Law* 247, 250.

[33] *Acts Amendment (Sexual Assaults) Act 1985* (WA).

[34] *Anderson v Western Australia* (2014) 46 WAR 363, 370 [37] ('*Anderson*').

[35] Ibid 371 [38].

[36] *Longman* (n 10).

[37] *Anderson* (n 34) 371 [38].

In that case, the accused, John Henry Longman, was charged with indecent dealing with three girls under the age of 14. After severance of the counts, he was tried and convicted in October 1988 on two counts relating to his step-daughter. The alleged offences occurred while the complainant was asleep, when she was aged 6 and 10 respectively. At the time of trial, the complainant was 32 years old and had first reported the alleged conduct some 22 years after the later incident. The accused denied the charges, relying on evidence of good character, and there was no independent evidence corroborating the complainant's account.

Defence counsel sought a warning for the jury, relying on the length of the delayed complaint, the lack of explanation for non-disclosure to the complainant's mother, the accused's resulting inability to meet the allegations, and the absence of corroboration. The trial judge declined to give the warning. On appeal, the High Court of Australia quashed the convictions and ordered a new trial, holding the failure to warn the jury of the forensic disadvantage caused by the delay caused a miscarriage of justice.

For the plurality, the significant delay (over 20 years) in the accusations coming to the defendant's attention meant the victim's evidence could not be adequately tested.[38] The *Longman* warning articulated by Brennan, Dawson and Toohey JJ was that

> as the evidence of the complainant could not be adequately tested after the passage of more than twenty years, it would be dangerous to convict on that evidence alone unless the jury, scrutinizing the evidence with great care, considering the circumstances relevant to its evaluation and paying heed to the warning, were satisfied of its truth and accuracy.[39]

That is, the delay caused forensic disadvantage to the defendant — for example, loss of evidence or memory — linked with his inability to adequately test the evidence of the complainant relating to the commission of the sexual offences.[40] To avert a potential miscarriage of justice, the court ruled it was 'imperative' to warn jurors that 'it would be dangerous to convict on [the complainant's] evidence alone' after a long delay unless, after scrutinising the evidence with great care, they were satisfied of its truth and accuracy.[41]

The rationale was that ordinary jurors might not appreciate the inherent unfairness to the accused caused by faded memories, missing witnesses, or lost documents,

---

[38] *Longman* (n 10) 91.
[39] Ibid.
[40] Ibid.
[41] Ibid.

over time. Such a warning, in theory, serves to safeguard the presumption of innocence by reminding jurors that the passage of many years can undermine the reliability of testimony and the ability to mount a defence. This is particularly true in the case of an alibi defence.

The principles explained in *Longman* apply to all types of criminal cases, not just sexual offence cases.[42] However, the use of this warning is particularly common in sexual offence trials; and, as substantial delay in complaining is often a factor in child sexual abuse cases, *Longman* warnings are routinely given there as well.[43] The need for this warning is rooted in historic common law concerns, discussed above, about certain kinds of evidence (especially uncorroborated sexual assault allegations) being unreliable. The primary rationale is that a jury might fail to appreciate that, as a result of the delay between the occurrence of the alleged offence, and the accused being informed of the complaint, he will have suffered a forensic disadvantage by losing the opportunity to adequately test the complainant's evidence and marshal a defence.

It should be acknowledged that the WA Court of Appeal has repeatedly emphasised that the existence of forensic disadvantage must be assessed in light of the circumstances of the case, and that delay alone does not automatically establish such disadvantage. In several cases, the Court has concluded that no forensic prejudice was demonstrated.[44] These decisions suggest that the doctrinal rationale of *Longman* remains tied to trial fairness rather than delay itself. Nevertheless, as the cases below illustrate, the practical application of delay directions has often emphasised concerns about complainant reliability, rather than the forensic disadvantage suffered by the accused.

Statutory provisions (such as s 36BD of the *Evidence Act 1906* (WA)) were enacted to require judges to inform juries that absent, or delayed, complaints do not necessarily mean the allegation is false, and there may be good reasons for the

---

[42] *Eravelly v Western Australia* [2018] WASCA 139; *DWM v Western Australia (No 2)* [2019] WASCA 143.

[43] Australian Law Reform Commission, *Uniform Evidence Law* (Report No 102, 2005) 598 [18.26]–[18.28] ('ALRC Report No 102'), noting that *Longman* warnings are particularly common in sexual offence trials and are frequently given in child sexual abuse cases due to delay in complaint. See, eg, *SPB v Western Australia* [2012] WASCA 136, [51]; *RMD v Western Australia* (2017) 266 A Crim R 67, 95 [129], 109 [198]; *JEL v Western Australia* (2022) 58 WAR 295, 323–4 [164] ('*JEL*'); *TWR v Western Australia (No 2)* [2025] WASCA 5, [40].

[44] See, eg, *Liddington v Western Australia* (2005) 152 A Crim R 502; *Angliss v Western Australia* [2005] WASCA 162; *JEL* (n 43).

delay.[45] Although these provisions were intended to remove stereotypes as to the unreliability of evidence given by sexual assault complainants, their protective effects were subsequently undermined by the High Court in *Crofts v The Queen* ('*Crofts*').[46]

In *Crofts*, the complainant alleged she was sexually assaulted by a family friend over a period of 6 years, and reported the conduct 6 months after the final assault. The trial judge directed the jury, pursuant to s 61(1)(b) of the *Crimes Act 1958* (Vic), that delay in complaint does not necessarily indicate the allegation is false and there may be good reasons why a complainant delays in reporting sexual abuse. On appeal, however, the High Court held that even where such a statutory direction is given, the trial judge may also remind the jury that delay can be taken into account in assessing the complainant's credibility, provided this is done without invoking impermissible stereotypes.[47]

The result was a confusing "balancing" approach. As the Australian Law Reform Commission ('ALRC') later observed, the near-mandatory *Crofts* or *Kilby* direction tended to 'restore the balance' in favour of the accused to such an extent that it risked undermining the very purpose of the protective legislation designed to counter outdated assumptions about delayed reporting.[48] In practice, the interaction of *Longman* and *Crofts* has produced a tendency for trial judges to give delay warnings as a matter of caution, even where the specific forensic disadvantage suffered by the accused is limited or unclear.[49]

Crofts was subsequently analysed by the WA Court of Appeal in *FGC v Western Australia*.[50] Justice Wheeler, with whom the other judges concurred, explained that *Crofts* stands for the proposition that where there has been delay in complaining of sexual offences, the trial judge's directions must make it clear that the jury is permitted to consider whether that delay casts doubt on the complainant's credibility.[51] At the same time, the statutory direction required by s 36BD of the *Evidence Act 1906* (WA) must also be given.

---

[45] *Criminal Procedure Act 1986* (NSW) s 294; *Crimes Act 1958* (Vic) s 61(1)(b); *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4A(4); *Evidence Act 1906* (WA) s 36BD; *Criminal Code* (Tas) s 371A; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 71.
[46] *Crofts v The Queen* (1996) 186 CLR 427 ('*Crofts*').
[47] Ibid 444.
[48] Australian Law Reform Commission, *Family Violence: A National Legal Response* (Report No 114, 2010) 1325–6 [28.64]–[28.67]. See also *R v Kilby* (1973) 129 CLR 460, 473–4.
[49] Law Reform Commission of Western Australia, *Project No 113: Review of the Law of Evidence* (Final Report, 2022) 182 ('*Project No 113*').
[50] *FGC v Western Australia* (2008) 183 A Crim R 313.
[51] Ibid 335–6 [87]–[88].

However, simply cautioning juries against relying on stereotypical assumptions may create inconsistencies and knowledge gaps.[52] In practice, such gaps may easily be filled by the very same myths the legislation seeks to eliminate.[53] For example, where there has been a significant delay between the alleged offence and the complaint, jurors may infer that a "real victim" would have reported the offence at the first available opportunity, thereby drawing a negative inference about the complainant's credibility from her failure to disclose the abuse.

In WA, trial judges have also been required to deliver an extensive three-pronged "balancing" direction in sexual offence trials involving delayed complaint. The jury must be told, consistently with s 36BD, that delay does not necessarily indicate falsity and that there may be legitimate reasons for delayed complaint and reporting. At the same time, consistent with *Crofts*, jurors must also be told that delay may be taken into account in assessing the complainant's credibility. Finally, where applicable, a *Longman* warning must address any forensic disadvantage suffered by the accused as a result of the delay.

Trial judges are thus required to simultaneously warn jurors not to assume that delay indicates falsity, while also instructing them that delay may bear upon credibility. In this way, WA courts have been compelled to give directions that risk reimporting the very same prejudicial reasoning Parliament sought to exclude through the introduction of s 36BD. Such directions are not only conceptually strained, but may also be confusing for jurors.[54]

Recent case law further illustrates how easily such balancing directions can slide back into credibility-based suspicion, even while purporting to neutralise it. In *DLS v Western Australia*,[55] for example, the complainant alleged her step-father sexually assaulted her some 14 years earlier. The trial judge directed the jury on the significance of evidence suggesting a possible motive to fabricate, the complainant's disclosure to her mother four to five years after the alleged offences, and the significance of delayed complaint.[56]

Her Honour also delivered a *Longman* direction, instructing the jury to scrutinise the complainant's evidence with great care, and emphasising the following:

---

[52] Craig (n 21) 553.
[53] Ibid.
[54] *KRM v The Queen* (2001) 206 CLR 221, 234 [37]. As McHugh J observed: 'The more directions and warnings juries are given the more likely it is that they will forget or misinterpret some directions or warnings.'
[55] *DLS v Western Australia* (2021) 293 A Crim R 113.
[56] Ibid 122 [54].

> Human memory is fallible and honest witnesses can be wrong in their recollection. The longer the delay the more opportunity there is for error. And that's particularly so for events that occurred in childhood. And it's a matter of common experience that the longer you believe something to have happened, the more convinced you are that it has happened. So, this can be so even if you are mistaken in your recollection.[57]

The trial judge specifically referred to the complainant's age at the time of the alleged offending — nine years old — and to the 14-year delay between the alleged conduct and the first complaint to her mother. While her Honour also mentioned the forensic disadvantage suffered by the accused, noting the delay made it more difficult to test the evidence, the direction primarily told the jury to scrutinise the complainant's evidence 'with special care' because of the delay.[58]

Notably, the ALRC has cautioned against this approach, warning that the use of such language risks inviting jurors to treat the complainant's testimony as inherently suspicious simply because of the delay.[59] Directions framed in these terms may reinforce outdated assumptions about the reliability of complainants in sexual violence cases. In particular, they may suggest to the jury that delayed disclosure is necessarily a reason to doubt the credibility of the complainant, which is not supported by social science and empirical research on the dynamics of sexual violence.[60]

The ALRC also recognised that jurors are ordinarily expected to assess credibility by reference to their own experience and reasoning, noting that credibility assessment is fundamentally grounded in 'ordinary human experience' rather than specialised knowledge.[61] Yet, as discussed below, substantial research shows that individual responses to sexual abuse are often counterintuitive and may not accord with ordinary expectations. Delayed disclosure, fragmented accounts, and continued contact with the offender may all be wrongly interpreted by jurors as signs of fabrication or unreliability. As such, judicial directions framed around "common

---

[57] Ibid.
[58] The accused appealed his conviction primarily on the basis that a miscarriage of justice had occurred because the only evidence capable of supporting the conviction was subject to 'a perceptible risk of unreliability from [the complainant's] hypnosis', which the jury was not warned about. While that issue is beyond the scope of this article, it is noteworthy that the Court of Appeal dismissed the appeal and upheld the conviction. In doing so, they did not fault the *Longman* direction given to the jury by the trial judge, despite its heavy reliance upon credibility assessment.
[59] ALRC Report No 102 (n 43) 640–1 [18.169]–[18.172].
[60] Ibid.
[61] Ibid 597–8 [18.25]–[18.28].

sense" may actually reinforce, rather than dispel, myths and stereotypes about sexual abuse, as well as distorting the fact-finding process.

A similar pattern can be seen in *BW v Western Australia*,[62] where the appellant was convicted on 20 counts of sexual penetration, indecent dealing, and indecent recording involving his two child nieces. The trial judge directed the jury to pay careful attention to the long passages of time between the alleged offending and the first complaint, as well as the further delay before trial.[63]

Her Honour stated that, since the complainants, A and N, were the only witnesses to the alleged crimes, the members of the jury 'should scrutinise [their] evidence with care'.[64] She went on to state that, '[i]n assessing the truthfulness, reliability and accuracy of their evidence you also have to keep in mind that there has been a delay … [and] … clearly the longer the time interval between an incident and a complaint to the police and also between the incident and the actual trial, the greater the possibility of error by witnesses who try and recollect the incident'.[65] The focus is squarely on the effect of the delay on the credibility and reliability of the complainants, the only witnesses to the alleged events.

Her Honour went on to stress that human memory is fallible, and the longer the delay, the more opportunity there is for error, particularly for events occurring in childhood. Drawing on 'common experience', the jury was reminded that memories fade over time, and people may struggle to recall details accurately after many years.[66] She then stated, '[s]o that is a matter that you have to consider carefully when you are looking at and considering the truthfulness, reliability and accuracy of the evidence of [A] and [N]'.[67] Her Honour further told the jury that the longer a person believes something, the more convinced they are that it actually did happen; and this may be true even for 'honest witnesses', who are simply mistaken in their recollection of the events.[68]

Framed this way, the direction focuses on the fallibility of the complainants' recollections and the inherent unreliability of their testimony. Delay is presented primarily as a factor bearing on the credibility and reliability of the complainants, rather than as a circumstance that may create a forensic disadvantage for the accused. Although the direction briefly referred to the difficulties delay may pose for

---

[62] *BW v Western Australia* [2013] WASCA 212.
[63] Ibid [38].
[64] Ibid.
[65] Ibid.
[66] Ibid.
[67] Ibid.
[68] Ibid.

the defence — such as the accused's inability to recall events, locate witnesses, or test the allegations effectively — these remarks were limited and secondary to the substantial emphasis placed on scrutinising the complainants' evidence for the possibility of mistake or fabrication.

The appellant argued, on appeal, that the trial judge's *Longman* direction was inadequate and resulted in a miscarriage of justice.[69] He contended that her Honour failed to give a sufficiently firm direction, did not properly emphasise the forensic disadvantage caused by delay, and failed to identify specific disadvantages arising from the passage of time.[70] Justice Newnes rejected those arguments and held that no miscarriage of justice occurred.[71] His Honour concluded that the direction, read as a whole, adequately conveyed that the complainants were the sole witnesses to the alleged offences, and their evidence therefore required careful scrutiny.[72] The Court further accepted the trial judge's reasoning that delay may affect the accuracy and reliability of memory, particularly in relation to childhood events.[73]

A similar approach can be seen in *Headley v Western Australia*,[74] which involved delayed complaints of sexual offences committed against young boys. The trial judge directed the jury that the significant passage of time between the alleged offences and the complaint increased the risk of errors in memory.[75] Jurors were reminded that human recollection is fallible — particularly in relation to childhood events — and that even honest witnesses may be wrong.[76] The jury was instructed to carefully assess the 'truthfulness, reliability and accuracy' of the complainants' recollections and consider whether the delay affected the credibility of their evidence.[77]

On appeal, Mazza, Beech and Pritchard JJA held that the *Longman* warning given by the trial judge was adequate. The Court took no issue with the trial judge's reliance on assumptions about the fallibility of memory, thus affirming a line of reasoning that treats delay as a basis for questioning the reliability of complainants' recollections, rather than focusing on demonstrable forensic disadvantage to the accused.[78] When applied in sexual offence trials, this approach is uncomfortably

---

[69] Ibid [41].
[70] Ibid.
[71] Ibid [43]–[46].
[72] Ibid [46].
[73] Ibid.
[74] *Headley v Western Australia* [2019] WASCA 119.
[75] Ibid [50].
[76] Ibid.
[77] Ibid.
[78] Ibid [60]–[71].

reminiscent of the historical common law position that a delayed complaint is inherently suspicious and suggestive of fabrication.[79]

As noted above, empirical research undermines many assumptions underpinning these directions. For example, the Royal Commission into Institutional Responses to Child Sexual Abuse reviewed extensive research on disclosure patterns among survivors of child sexual abuse and made important findings regarding the timing, process, and circumstances of disclosure.[80] The Commission noted that international research consistently shows that only a minority of children disclose sexual abuse during childhood, which may be explained by trauma, fear, shame, or other legitimate psychological and social factors, which have little or nothing to do with credibility.[81]

Studies examining adult survivors of child sexual abuse — including abuse occurring within families and in institutional settings — estimate that only about one-third of victims disclose the abuse while they are still children.[82] This means that the vast majority of survivors do not disclose until later in life, often many years after the trauma occurred.[83] Moreover, even among those who disclose while still young, the disclosure frequently does not occur immediately after the abuse; instead, there may be significant delay between the abusive conduct and the first disclosure.[84] This is illustrated by the cases reviewed above.

Survivor accounts gathered in inquiries and research literature further reinforce that disclosure of child sexual abuse should not be understood as a single, discrete event, but as an evolving and gradual process that unfolds over time.[85] Consistent with this belief, the Commission observed that the process of disclosure is highly variable and complex.

The Commission further highlighted research indicating that the relationship between the victim and the perpetrator can significantly affect disclosure patterns. Studies suggest that the closer the relationship between the victim and the

---

[79] Other cases similarly illustrate the focus on credibility and reliability concerns rather than on the forensic disadvantage rationale underlying *Longman*. In *EDP v Western Australia* [2011] WASCA 264, for example, Mazza JA noted that the direction contained no reference to any actual forensic disadvantage suffered by the accused. See also *OKS v Western Australia* (2018) 52 WAR 482; *Western Australia v GT* [2020] WADC 65.
[80] *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, December 2017) vol 4, 33.
[81] Ibid.
[82] Ibid.
[83] Ibid 30.
[84] Ibid 34.
[85] Ibid 32.

perpetrator, the less likely the victim is to disclose the abuse, particularly during childhood.[86] In cases where the perpetrator is a family member, caregiver, or authority figure, children tend to delay disclosure for longer periods than victims of abuse perpetrated by those outside the family.[87]

Children may form attachments or traumatic bonds with perpetrators and may delay disclosure to protect family relationships or avoid disrupting the family unit.[88] Perpetrators also frequently use grooming tactics to instil a fear of disclosure in victims, including telling them they will not be believed.[89] This power dynamic can be present in cases of domestic violence, and ongoing sexual assault, perpetrated against both children and adults.[90]

Despite this, *Longman* warnings have become routine in cases involving delayed complaint, largely because of the perceived risk of a successful appeal on the basis of a miscarriage of justice if the direction is not given.[91] Yet, the reasoning behind these warnings rests on generalised "common sense" assumptions about human memory and behaviour, not on any empirical or evidentiary foundation. Allegations of sexual abuse frequently relate to events that lie outside the ordinary understanding of most people, meaning that assumptions about how they should be remembered, experienced, or disclosed cannot safely be drawn from jurors' everyday knowledge.

Along these lines, Canadian courts have accepted that delayed disclosure, and the fact of continuing to associate with an offender, by victims of sexual or family violence does not accord with "ordinary" human experience at all. The limits of relying on jurors' assumed knowledge of such behaviours were emphasised in *R v Lavallee*,[92] where the SCC considered the role of expert evidence in dispelling mistruths about why some family violence victims remain in abusive relationships.

Justice Wilson rejected the notion that jurors are 'thoroughly knowledgeable' about human nature, observing that the average person may lack sufficient knowledge or experience of human behaviour to draw appropriate inferences from the facts before

---

[86] Ibid 41.
[87] Ibid.
[88] Ibid.
[89] Ibid.
[90] NSW Health Department Child Protection and Violence Prevention Unit, Submission E 23 to Royal Commission into Institutional Responses to Child Sexual Abuse (21 February 2005), noting that there are many valid reasons why victims of sexual assault do not immediately report sexual assault to the authorities, including trauma, shame and embarrassment. See also ALRC Report No 102 (n 43) 613 [18.78].
[91] *Project No 113* (n 49) 182.
[92] *Lavallee* (n 20).

them.[93] Her Honour further underscored that family violence is 'subject to a large group of myths and stereotypes' that lie beyond the understanding of the ordinary juror.[94] According to Wilson J, the difficulty in imagining how a battered spouse might act arises largely because the "reasonable man" does not normally occupy such a position.[95] The concept of reasonableness must therefore 'be adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical "reasonable man"'.[96] The Canadian experience is instructive for WA because it demonstrates that fairness to the accused does not require warnings grounded in stereotypes or discredited assumptions about victim behaviour.

IV CANADA: CONSTITUTIONAL ELIMINATION OF DELAY-BASED CREDIBILITY REASONING

In Canada, the rejection of delay-based credibility reasoning is both doctrinally settled and constitutionally grounded.[97] The SCC has consistently held that reliance on assumptions about how a "genuine" sexual assault complainant would behave — particularly assumptions concerning prompt complaint — constitutes a legal error.[98] Delay in reporting, or the absence of complaint altogether, is treated as a neutral fact, incapable of supporting an adverse inference about truthfulness or credibility.[99]

The decisive shift in Canadian law occurred through the interaction of evidentiary reform and constitutional reasoning under the *Charter of Rights and Freedoms*, particularly the guarantees of equality and fundamental justice.[100] The SCC has recognised that credibility assessments grounded in stereotype do not merely misapprehend the evidence; they entrench structural inequality and distort the

[93] Ibid 871.
[94] Ibid 873.
[95] Ibid 874.
[96] Ibid. Similarly, in *R v Marquard* [1993] 4 SCR 223, 249, McLachlin J, on behalf of the majority, recognised that expert evidence may be admitted to explain why young victims of sexual abuse often delay making a complaint.
[97] *Canada Act 1982* (UK) c 11, sch B ('*Constitution Act 1982*'); *Seaboyer* (n 13) 604–10 (L'Heureux-Dubé J).
[98] *R v Ewanchuk* [1999] 1 SCR 330, 370–2 (L'Heureux-Dubé J) ('*Ewanchuk*').
[99] *Seaboyer* (n 13) 604–10 (L'Heureux-Dubé J).
[100] *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*) ss 7, 15. The right to equality is contained in s 15(1) of the *Charter*, which provides: 'Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.'

fact-finding process.[101] The Court has made it clear that assumptions about prompt complaint reflect gendered stereotypes, not logic, experience, or empirical reality.[102]

Importantly, those findings have been framed as equality-enhancing measures, reflecting an acknowledgment that evidentiary rules can either entrench or dismantle structural disadvantage.[103] The SCC has recognised that the right to equality rests on 'competing characterisations and larger social, political, historical, and economic contexts'.[104] Likewise, it is intimately tied to the need for social change, and redistributive justice, as the courts become 'more active supervisors of the distribution of benefits and burdens' in modern society.[105]

More than 30 years ago, a mere two years after *Longman* was decided in Australia, Canada's highest court took decisive steps to eliminate the stereotypical reasoning underpinning that approach. In the landmark case of *R v Seaboyer*,[106] then-Justice L'Heureux-Dube penned an often-cited judgment, partially in dissent, chronicling the dangerous beliefs about women's character and credibility that historically prevailed in legal discourse. These included the following: 'unchaste' women lie and consent indiscriminately; women are often categorised into binary, 'one-dimensional types', such that '[t]hey are good or they are bad … [t]hey are madonnas or they are whores'; women are known to be spiteful and malicious towards men; women are 'more emotional' than men, and are thus expected to act hysterically after being sexually assaulted;[107] and, if a woman is sexually assaulted, she will necessarily 'be so upset that she will report it'.[108] Justice L'Heureux-Dube systematically repudiated those beliefs as distortions of the fact-finding process, not merely unfair prejudices, which are incompatible with fair decision-making in sexual violence cases.

---

[101] *R v Find* [2001] SCR 863, 907–8 [103]–[105] ('*Find*').
[102] *Ewanchuk* (n 98) 370.
[103] *Andrews v Law Society of British Columbia* [1989] 1 SCR 143, 164–5; *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497, 507. See also Beverley McLachlin, 'Equality: The Most Difficult Right' (2001) 14 *Supreme Court Law Review* 17.
[104] Martin (n 12) 131.
[105] Ibid. See also Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (rev ed, Irwin Law, 2016).
[106] *Seaboyer* (n 13).
[107] Ibid 652–3. It is noteworthy that the Law Reform Commission of Western Australia also addressed these stereotypes, noting that research indicates that sexual violence complainants who appear calm and controlled in court may be perceived as less credible than those who appear distressed, despite evidence that emotional demeanour is not a reliable indicator of truthfulness: *Project No 113* (n 49) 185.
[108] *Seaboyer* (n 13) 653.

Subsequent cases in the SCC have affirmed that myth and stereotype have been widely used to discredit female complainants in sexual violence cases. For example, in *R v Find*,[109] the unanimous Court observed:

> These myths and stereotypes about child and adult complainants are particularly invidious because they comprise part of the fabric of social "common sense" in which we are daily immersed. Their pervasiveness, and the subtlety of their operation, create the risk that complainants of abuse will be blamed or unjustly discredited in the minds of both judges and jurors.[110]

Similarly, in *R v Mills*,[111] the majority of the SCC relied on equality concerns when interpreting (what were then) new criminal law provisions that placed conditions on the accused's access to records over which the complainant had a reasonable expectation of privacy. The relevant equality concerns included 'an appreciation of myths and stereotypes in the context of sexual violence'.[112] The Court held that accused persons cannot rely on their right to full answer and defence as a justification for reliance on myths and stereotypes that pertain to the complainant's consent and credibility.[113]

The Court stated that the failure to protect the complainant's confidential doctor/patient communications from automatic disclosure would perpetuate 'the disadvantage felt by victims of sexual assault, often women', as they may be reluctant to report or may become 'doubly victimised'.[114] That result, the Court held, would not provide the equal protection of the law to victims of sexual offences, especially when compared with victims of other types of offences.[115] The majority of the SCC observed:

> As has frequently been noted, speculative myths, stereotypes, and generalized assumptions about sexual assault complainants and classes of records have too often in the past hindered the search for truth and imposed harsh and irrelevant burdens on complainants in prosecutions of sexual offences … The myths that a woman's testimony is unreliable unless she made a complaint shortly after the event (recent

---

[109] *Find* (n 101) 907–8 [103]–[105].
[110] Ibid 906–7 [101]–[103].
[111] *R v Mills* [1999] 3 SCR 668.
[112] Ibid 727 [90].
[113] Ibid. Specifically, the Court stated that '[t]he reasons in *Seaboyer* make it clear that eliciting evidence from a complainant for the purpose of encouraging inferences pertaining to consent or the credibility of rape victims which are based on groundless myths and fantasized stereotypes is improper … The accused is not permitted to "whack the complainant" through the use of stereotypes regarding victims of sexual assault.'
[114] Ibid 727–8 [91].
[115] Ibid.

> complaint), or if she has had previous sexual relations, are but two of the more notorious examples of the speculation that in the past has passed for truth in this difficult area of human behaviour and the law.[116]

The case of *R v D(D)*[117] is arguably the clearest, most direct, example of the SCC's rejection of delay in disclosure as a means of assessing credibility. There, the complainant alleged that the accused, her mother's live-in partner, sexually assaulted her when she was between five and six years old. The complainant told no one about these events for two and a half years. At trial, defence counsel cross-examined the complainant, who was then 10 years old, on the delay in reporting the incidents, and suggested she fabricated the story. The 'fact in issue' before the SCC was whether the child's delay in reporting the sexual abuse suggested it did not occur, and the Court emphasised that the case against the accused turned on the credibility of the complainant.[118]

During a voir dire at trial, the Crown's psychologist gave evidence about the phenomenon of delayed disclosure in child sexual abuse cases, drawing on established scientific literature. He explained that the timing of a complaint is influenced by a wide range of psychological, social, and relational factors, and that delay in disclosure is common and well documented in the scientific literature.[119] According to the expert, a pertinent issue is the relationship between the child and the perpetrator, particularly where the offender occupies a position of trust or authority.[120] Such factors help explain why the disclosure of child sexual abuse is often delayed, fragmented, or gradual, rather than immediate.

Justice Major, writing for a majority of the Court, found the trial judge should have instructed the jury that 'there is no inviolable rule on how people who are the victims of trauma like a sexual assault will behave'.[121] Justice Major further underscored that, while some complainants disclose immediately, others delay, or never report the abuse, often due to factors such as fear, embarrassment, guilt, or lack of

[116] Ibid 741 [119].
[117] *R v D(D)* [2000] 2 SCR 275 ('*D(D)*').
[118] Ibid 286–8 [17]–[20].
[119] Ibid 281–3 [4]–[7]. As noted by the expert, in fact, most sexual abuse is never disclosed.
[120] Ibid. Dr Marshall further identified several factors that may discourage children from disclosing abuse at the time it occurs, including feelings of embarrassment or shame; fear of getting themselves or others into trouble; and manipulation by the perpetrator, such as through bribery, coercion, or threats.
[121] Ibid 305 [65].

understanding.[122] As such, '[a] delay in disclosure, standing alone, will never give rise to an adverse inference against the credibility of the complainant'.[123]

These cases provide a sound normative framework for why credibility assessments grounded in stereotypes and misconceptions are structurally flawed and constitutionally suspect. Yet, as the SCC has observed, such beliefs are so deeply entrenched in our social psyche, and so often mislabelled as "common sense", that they are difficult to identify and confront.[124] When judges and juries rely on them to determine the guilt or innocence of an accused, based on abstract notions of the "ordinary experience", the "goodness" or "badness" of the complainant, or the timeliness of her complaint, they become part of the law itself, and are all that much more difficult to identify and eradicate.[125]

The Canadian experience is instructive for WA because it demonstrates that fairness to the accused does not require the preservation of warnings grounded in discredited assumptions, and that forensic disadvantage can be addressed directly without treating delay as inherently suspicious. It also illustrates that attempting to "balance" stereotypes out of existence — by warning against them while simultaneously inviting credibility suspicion — serves only to perpetuate instability. Once stereotype-based reasoning is clearly removed, both equality and trial fairness are better served.

V WESTERN AUSTRALIA AND THE EVIDENCE ACT 2025 (WA): A DOCTRINAL RESET

The common law possesses an inherent flexibility that allows judges to modify legal principles as social norms evolve.[126] Through appellate review, for example, courts can identify errors in the way trial judges frame jury directions, and clarify the content and limits of those directions where earlier decisions have proved insufficient.[127] In this way, appellate review enables the law to develop incrementally in response to changing societal standards and practical experience in the trial courts.

However, reliance on incremental common law development alone is unlikely to achieve meaningful structural reform in this area. This is primarily because only a small proportion of criminal trials are ever subject to appellate scrutiny. While

[122] Ibid.
[123] Ibid.
[124] *Seaboyer* (n 13) 603–4.
[125] Ibid.
[126] *Project No 113* (n 49) 169.
[127] Ibid.

precise data on the number of jury trials, and the subset involving *Longman*-type directions, is limited, it is clear that only a fraction of criminal matters proceed to trial, and an even smaller proportion are appealed. Out of the tens of thousands of criminal matters lodged each year in WA, only a few hundred proceed to appellate review, many of which concern sentence rather than conviction.[128] Accordingly, the overwhelming majority of criminal proceedings are resolved without appellate oversight, limiting the capacity of appellate courts to perform an effective supervisory function.

Moreover, unlike appellate courts, juries do not provide written reasons, and there is no record of the deliberative process that led to the verdict. It is impossible to know which aspects of the judge's directions the jury relied upon, misunderstood, or ignored, including whether and how a *Longman* warning influenced their findings. If only a small number of cases are appealed, review courts have limited opportunity to perform their gatekeeping function of scrutinising the adequacy of these directions. In practice, this means that most warnings delivered to juries are never reviewed on appeal, leaving little judicial oversight of how these directions actually function in the trial process.

The decisions reviewed above suggest that trial judges in WA have continued to deliver expansive directions that emphasise the perceived unreliability of complainants, instead of the forensic disadvantage suffered by the accused. Rather than consistently correcting these approaches, or clearly circumscribing the circumstances in which such warnings should be given, the jurisprudence has continued to tolerate broad formulations of the direction. Accordingly, even though appellate authority appears to locate the core rationale underpinning *Longman* in forensic disadvantage, the language used by trial judges continues to reflect an approach that has been widely criticised for relying on outdated assumptions about memory and victim behaviour.

In this context, meaningful reform was unlikely to occur through incremental common law development alone, making legislative intervention both necessary and justified. This is not to suggest that the common law is incapable of doctrinal evolution. Indeed, as the Canadian experience demonstrates, courts can play a central role in dismantling stereotype-based reasoning. However, in WA, the combination of limited appellate oversight and the persistence of established legal

[128] Productivity Commission, *Report on Government Services 2026: Courts* (February 2026) <www.pc.gov.au>.

norms meant that incremental reform through case law was unlikely to produce consistent or systemic change.

There are several reasons why legislative intervention was particularly appropriate in these circumstances.[129] First, Parliament is uniquely positioned to require judges to dispel entrenched common law myths and stereotypes about sexual violence and victim behaviour, thereby reducing the risk that jury decisions are influenced by such misconceptions.[130] Second, legislation promotes greater clarity, consistency, and certainty in the directions given to juries, addressing the doctrinal instability that has characterised this area.[131] Finally, it enables jury directions to be modernised in light of contemporary social values and empirical research, rather than remaining tethered to principles developed in markedly different historical contexts.[132]

The *Evidence Act 2025* (WA), passed by the WA Parliament at the end of last year, adopts a modernised framework that brings the state into line with developments in other common law jurisdictions. It also sits comfortably alongside the approach taken in Canada, where courts have rejected credibility warnings, confined the relevance of delay to cases involving demonstrable forensic disadvantage, and discouraged reliance on stereotypical assumptions about the behaviour of victims of sexual violence.[133]

For example, s 319 of the new Act abolishes the common law requirement for a *Longman* warning in cases involving delayed complaint.[134] Instead, it allows a judge to give a direction about delay only where the accused demonstrates that the delay has caused a *significant* forensic disadvantage in the circumstances of the case. The judge must explain the nature of that disadvantage to the jury and direct them to take it into account when evaluating the evidence. However, the direction must be case-specific and cannot be framed as a warning that it is unsafe to convict or that the complainant's evidence should be treated with suspicion simply because of the delay. The section also clarifies that delay alone does not establish forensic disadvantage, thereby confining judicial directions about delay to situations where actual prejudice to the defence can be identified. Importantly, the direction must not

[129] *Project No 113* (n 49) 168.
[130] Ibid.
[131] Ibid.
[132] Ibid.
[133] *Seaboyer* (n 13) [603]–[604]; *D(D)* (n 117) 305 [65]–[68].
[134] Subclause (2) abolishes a rule of law or practice which requires a judge in a criminal proceeding to give a *Longman* warning.

imply that the complainant's evidence is inherently unreliable, or that it would be unsafe to convict the accused, merely because of the passage of time.

As a result, credibility assessment in WA has been reoriented toward rational, evidence-based decision-making. Delay is relevant only insofar as it produces demonstrable forensic consequences — such as the loss of evidence, faded memories, or the unavailability of witnesses — and even then, the issue is framed in neutral terms directed to trial fairness, rather than to complainant credibility.[135] This approach resembles the Canadian model, discussed above, and strikes an appropriate balance between protecting complainants from outdated myths and stereotypes about their credibility, while ensuring that real prejudice to the accused can be addressed so as to avoid a potential miscarriage of justice.

The explanatory memorandum and Parliamentary debates indicate that these reforms were intended to preserve fairness to the accused while eliminating a warning whose historical function has often been to cast complainants as inherently unreliable.[136] In other words, the new framework insists that any disadvantage be precisely articulated and grounded in evidence, rather than presumed from delay alone. In this respect, WA has joined other Australian jurisdictions — including Victoria and New South Wales — that have moved away from the *Longman* warning.[137]

The new Act also introduces a series of complementary provisions addressing family and domestic violence, as well as child complainants, further reflecting contemporary research on victim behaviour discussed above.[138] For example, s 321 requires a trial judge to give an educational direction to the jury in sexual offence and family violence trials where evidence suggests that the complainant delayed in making a complaint, or did not complain at all. The provision requires judges to direct juries that there is no typical or "normal" response to sexual or family violence. Victims may disclose abuse immediately, after a significant delay, or not at all, and delayed reporting is a common occurrence.

This direction reflects modern empirical research, discussed above, which demonstrates that responses to trauma vary widely and frequently include delayed or fragmented disclosure. In doing so, the provision departs from the specious logic underpinning *Longman*-type warnings, which traditionally framed delay as a factor casting doubt on the credibility or reliability of complainants. Instead, the direction

---

[135] *D(D)* (n 117) 305 [66].
[136] Explanatory memorandum (n 19).
[137] *Jury Directions Act 2015* (Vic) pt 4; *Criminal Procedure Act 1986* (NSW) s 294AA.
[138] Ibid ss 318–22.

recognises that delayed reporting is a common feature of such cases, and seeks to prevent, rather than explicitly encourage, juries relying on misconceptions about memory, victim behaviour, and credibility.[139]

Taken together, these reforms signal a wider shift in WA evidence law away from credibility warnings rooted in historical suspicion of complainants and toward a framework grounded in empirical research, procedural fairness, and rational fact-finding. Delay is no longer treated as a proxy for unreliability. Instead, it is considered only where it produces a demonstrable forensic disadvantage, and even then, it is addressed in neutral terms that focus on the fairness of the trial rather than on assumptions about credibility.

VI CONCLUSION: SAYING 'SO LONG' TO LONGMAN AT LAST

For more than three decades, the *Longman* warning has occupied an unstable position in Australian evidence law. Conceived as a mechanism to address forensic disadvantage arising from delay, it has instead operated — particularly in sexual violence cases — as a vehicle for importing suspicions about complainant credibility. Despite legislative efforts to neutralise outdated assumptions about delayed complaint, WA courts remained tethered to *Longman*'s logic through the language of "balancing directions". In using this language, they preserved the very reasoning Parliament has long been seeking to displace.

This article has illustrated why the *Longman* warning is not merely an anachronism, but a doctrinal distortion. Its continued use has depended on an unstable conflation of forensic disadvantage with credibility assessment, permitting trial judges to invite juries — however cautiously — to assume doubt from delay. The result has been a body of jurisprudence that is internally inconsistent, normatively problematic, and disconnected from contemporary understandings of sexual violence and trauma.

As discussed above, jurors have routinely been invited to accept, as a matter of "ordinary" human logic and experience, that memories inevitably fade with time and that complainants may become increasingly convinced of events that did not occur. These ideas are presented as intuitive normative truths, without reference to psychological research, or case-specific evidence, concerning the reliability of memory in such circumstances. Such presentations overlook the complex psychological, relational, and social barriers that victims often face in reporting abuse — particularly where the abuse occurs within families or involves individuals in positions of trust or authority.

---

[139] *Evidence Act 2025* (WA) s 144.

Empirical research has long confirmed that survivors of sexual abuse often exhibit distinct patterns of disclosure and behaviour. These factors may bear directly on the assessment of a complainant's credibility in sexual violence cases, yet they frequently fall outside the ordinary experience of most jurors. In such circumstances, where the assumed "common knowledge" of the jury is mistaken, jurors may rely on their own experiences and intuitions, leading them to incorrect conclusions grounded in popular, but widely discredited, myths and stereotypes.

Modern law reform has rejected these assumptions as reflecting misconceptions about victim behaviour rather than sound empirical evidence. In this sense, directions that invite jurors to doubt the reliability of delayed recollections on the basis of generalised "common sense" beliefs risk reproducing the same underlying scepticism toward complainants that earlier reforms sought to eliminate. This not only distorts the fact-finding process; it may also give rise to the risk of a fundamental miscarriage of justice.

The enactment of the new Act marks a decisive turning point. By abolishing *Longman* warnings and expressly prohibiting judicial directions that invite adverse inferences from delay, the new Act represents a conscious legislative rejection of *Longman*'s underlying misconceptions. This shift brings WA into closer alignment with Canadian constitutional jurisprudence, which has long recognised that credibility-based warnings grounded in delay are incompatible with equality, dignity, and the right to a fair trial. In this respect, the new Act moves beyond earlier, incomplete reforms that sought to neutralise *Longman* through a tenuous judicial balancing act, rather than dismantling it altogether.

IMPROVING ACCESS TO ARTIFICIAL REPRODUCTIVE TECHNOLOGY AND SURROGACY IN WESTERN AUSTRALIA: IMPENDING CHANGES AND MISSED OPPORTUNITIES FOR REFORM

AMY THOMASSON*

The Assisted Reproductive Technology and Surrogacy Act 2025 (WA) ('the ARTS Act') represents a significant overhaul of the laws that govern assisted reproductive technology ('ART') and surrogacy in Western Australia. Following years of consultation, independent review and legislative delay, the ARTS Act consolidates and replaces three existing statutes governing artificial conception, human reproductive technology and surrogacy. Its reforms are intended to simplify access to ART and modernise the legal framework in response to increasing reliance on treatments such as in-vitro fertilisation. This comment examines key reforms introduced by the ARTS Act and identifies unresolved issues and missed opportunities. It argues that, although the ARTS Act marks an important step towards a more contemporary and accessible regulatory framework, some issues — including parentage where a person or couple enters into an international surrogacy arrangement and informal family creation — were overlooked and require further legislative attention.

I Introduction 231

II What Has Changed? 232

A *Improving Access to ART* *232*

B *Posthumous Reproduction* *234*

III Missed Reform Opportunities 238

---

* Lecturer and member of the Centre for Health Law and Policy, UWA Law School, The University of Western Australia.

A *The Pathway to Parentage* ... *238*
B *Access to ART for Trans and Gender Diverse People* ... *240*
C *Regulating Informal Family Creation* ... *241*
IV Conclusion ... 243

I Introduction

The *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) ('*ARTS Act*') was a long time coming for advocates and their clients.[1] First promised in 2017 by former Premier Mark McGowan,[2] the reforms faced many roadblocks — including a nearly 24-hour successful filibuster[3] — and were the subject of two independent reports, one by Sonia Allan in 2019,[4] and another by a Ministerial Expert Panel ('MEP') in 2022.[5] The substantive provisions of the *ARTS Act* are expected to commence in mid-2027 after an 18-month implementation period.[6] The *ARTS Act* updates many of Western Australia's ('WA') antiquated and in some instances discriminatory[7] laws around artificial reproductive technology ('ART'). At the highest level, the *ARTS Act* implements the MEP's recommendation that three pieces of legislation — the *Artificial Conception Act 1985* (WA), *Human Reproductive Technology Act 1991* (WA) and *Surrogacy Act 2008* (WA) ('*Surrogacy Act*') — and the associated regulations be repealed and essentially combined into one statute.[8] It is hoped that this will simplify access to ART[9] in the face of increasing reliance on in-vitro fertilisation ('IVF') in particular.[10] This comment outlines some of the key changes made by the

---

[1] 'Yeah WA!', *Sarah Jefford* (Blog Post, 31 January 2026) <https://sarahjefford.com>.
[2] Courtney Withers and Daryna Zadvirna, 'WA's Surrogacy and IVF Laws Overhauled as Legislation Passes State Parliament', *ABC News* (online, 3 December 2025) <www.abc.net.au>.
[3] Jacob Kagi, 'WA Liberal MP Nick Goiran Succeeds in Surrogacy Bill Filibuster after a Nearly 24-Hour Speech', *ABC News* (online, 10 April 2019) <www.abc.net.au>.
[4] Sonia Allan, *The Review of the Western Australian Human Reproductive Technology Act 1991 and Surrogacy Act 2008* (Report: Part 2, January 2019).
[5] Government of Western Australia Department of Health, *Ministerial Expert Panel on Assisted Reproductive Technology and Surrogacy* (Report, 31 December 2022) ('*MEP Report*').
[6] 'New assisted reproductive technology and surrogacy Act for Western Australia from mid-2027', *Government of Western Australia Department of Health* (Web Page, 5 February 2026) <www.health.wa.gov.au>.
[7] *MEP Report* (n 5) 21; Allan (n 4) xxix, 54–62; *Dunn v WA Reproductive Technology Council* [2026] WASCA 65, [10] ('*Dunn*').
[8] *MEP Report* (n 5) ix.
[9] Western Australia, *Parliamentary Debates,* Legislative Assembly, 13 August 2025, 1978 (Meredith Hammat, Minister for Health).
[10] The Australian and New Zealand Assisted Reproduction Database estimates that 1 in 18 children are born from in-vitro fertilisation each year: 'Australian and New Zealand Assisted Reproduction

ARTS Act as well as identifying outstanding issues and missed opportunities for reform.[11]

II What Has Changed?

A *Improving Access to ART*

The *ARTS Act* has made several amendments aimed at improving access to ART, including removing discriminatory eligibility requirements and lowering the minimum age for surrogates. This Part considers each of these changes in turn.

1 *Removing Discriminatory Eligibility Requirements for Access to ART and Surrogacy*

Perhaps most significantly, the *ARTS Act* has no requirement to prove any particular need (for example, medical or social need)[12] to access ART or surrogacy, instead promoting self-determination, as long advocated by practitioners and scholars in the area.[13] WA is only the second Australian jurisdiction to open access to ART and surrogacy in this way.[14] Under the *ARTS Act*, a surrogacy arrangement is valid provided it is in writing and signed by the parties, each party to the arrangement is 18 years old, the arrangement is not for reward, the relevant consents are given and the formalities and requirements for implications counselling and independent legal advice are met before the surrogate becomes pregnant.[15] Access to surrogacy and ART in WA was historically limited to:

- an 'eligible person', defined as a woman who could not conceive due to medical reasons, would likely conceive a child affected by a genetic abnormality or disease OR was medically unable to give birth;[16] and

Database', *National Perinatal Epidemiology and Statistics Unit* (Web Page, September 2024) <www.unsw.edu.au>.

[11] Where specific sections are referred to, these reflect the Assisted Reproductive Technology and Surrogacy Bill 2025 (WA) as passed by the Legislative Assembly given the operative sections of the *ARTS Act* are not yet in force.

[12] Due to a person's sexual orientation or relationship status.

[13] See, eg, 'Social Surrogacy: Choosing How to Grow a Family', *Sarah Jefford* (Blog Post, 31 January 2026) <https://sarahjefford.com>; Neera Bhatia and Lily Porceddu, 'Donors and Dads Online: Emerging Trends and Legal Implications Involving the Internet in the Creation of Non-Traditional Families in Australia' (2022) 43(2) *Adelaide Law Review* 912, 918; Michael Gorton, *Helping Victorians Create Families with Assisted Reproductive Treatment: Interim Report of the Independent Review of Assisted Reproductive Treatment* (Report, October 2018) 1.

[14] The Australian Capital Territory being the first: Millie Dale and Taylor Macdonald, 'Regulating Surrogacy in Australia', *Human Rights Law Centre* (Web Page, 17 April 2015) <www.hrlc.org.au>.

[15] Assisted Reproductive Technology and Surrogacy Bill 2025 (WA) cl 108(1) ('ARTS Bill').

[16] *Surrogacy Act 2008* (WA) s 19(2) ('*Surrogacy Act*'); *Human Reproductive Technology Act 1991* (WA) s 23(1)(a) ('*HRT Act*').

- an 'eligible couple', defined as '2 people of opposite sexes' who were married or in a de facto relationship and could not conceive due to medical reasons OR would likely conceive a child affected by a genetic abnormality or a disease.[17]

In the surrogacy context, a person or couple had to meet the relevant eligibility requirement to apply to the Family Court of WA for a parentage order, which transferred legal parentage of the child from the birth parent (and their partner, if they had one) to the intended parent(s).[18] In the ART context, a person or couple had to meet the relevant eligibility requirement in order to have an IVF procedure carried out.[19]

Allan's review identified that these eligibility requirements conflicted with federal anti-discrimination law — namely s 22 of the *Sex Discrimination Act 1984* (Cth) ('*SD Act*') which prohibits discrimination in the provision of goods or services based on things including, relevantly, a person's sex, sexual orientation or relationship status[20] — and should be amended accordingly.[21] Section 19 of the *Surrogacy Act* was ultimately successfully challenged, with a majority of the WA Court of Appeal finding that it was inconsistent with s 22 of the *SD Act* and therefore invalid to the extent of the inconsistency in accordance with s 109 of the *Constitution*.[22] This finding was made on the basis that, in considering whether to make a parentage order under s 19, the Family Court of WA is a 'person' providing 'services' under the *SD Act*, and is therefore prohibited from discriminating against intended parent(s) on the basis of their sex or sexual orientation, as is currently required of it.[23] The lack of such eligibility requirements in the *ARTS Act* ensures consistency with anti-discrimination law and appropriately broadens access to both ART and surrogacy.

2 *Lowering the Minimum Age for Surrogates*

In an effort to improve the availability of surrogates, the *ARTS Act* lowers the age that a person can act as a surrogate from 25 to 18 years old.[24] This change was however

[17] *Surrogacy Act* (n 16) s 19(2); *HRT Act* (n 16) s 23(1)(a).
[18] *Surrogacy Act* (n 16) s 19(1)(b).
[19] *HRT Act* (n 16) s 23(1)(a).
[20] As the relevant statutes restricted access to ART and surrogacy to heterosexual couples and single women with medical need.
[21] Allan (n 4) 54–62.
[22] *Dunn* (n 7) [10].
[23] Ibid.
[24] ARTS Bill (n 15) cl 108(1); *Surrogacy Act* (n 16) s 17(a)(i).

subject to criticism both when debated in Parliament[25] and since by leading surrogacy expert and lawyer Sarah Jefford, who noted that '[s]urrogacy is the most complex of challenges, and a reasonable safeguard is that a surrogate be 25'.[26] There is limited research as to whether there is any medical reason to enforce a minimum age of over 18, although one study suggests 21 years old should be the minimum age.[27] It seems the concern is instead about a potential lack of maturity,[28] the risk of coercion,[29] and that women of this age 'have not yet had the life experience to fully understand the long-term implications of becoming a surrogate'.[30] However, as suggested by Jefford, these matters can be dealt with at the coal-face[31] — there remain requirements for both intended parents and surrogates to receive counselling 'about the arrangement and its social and psychological implications'[32] and to obtain independent legal advice.[33] These requirements will no doubt ensure that prospective surrogates who are not sufficiently 'mature' or who are at risk of being coerced (the latter of which the author notes is not a risk solely associated with the age of the surrogate) are identified and such arrangements do not proceed, or proceed with a different surrogate.

B *Posthumous Reproduction*

The *ARTS Act* also addresses a longstanding paradox in the regulation of posthumous reproduction in WA, where reproductive material could be retrieved posthumously 'with the consent of the deceased or, in the absence of this, with the consent of the deceased's senior available next of kin, provided the deceased had no known objection to removal',[34] but could not be used in WA.[35] The *ARTS Act* essentially

---

[25] Western Australia, *Parliamentary Debates*, Legislative Council, 16 September 2025, 3042 (Libby Mettam), 3046 (Shane Love), 3050–1 (Lachlan Hunter).
[26] Sarah Jefford OAM (LinkedIn, November 2025) <www.linkedin.com> ('LinkedIn Post').
[27] Although it does not provide any scientific reasoning for this conclusion and the article cited provides evidence only for an upper age limit: Mara Simopoulou et al, 'Risks in Surrogacy Considering the Embryo: From the Preimplantation to the Gestational and Neonatal Period' (2018) (1) *BioMed Research International* 10.1155/2018/6287507:1–9, 2.
[28] Western Australia, *Parliamentary Debates*, Legislative Council, 16 September 2025, 3046 (Shane Love).
[29] Ibid.
[30] Ibid 3051 (Lachlan Hunter).
[31] Jefford, LinkedIn Post (n 26).
[32] ARTS Bill (n 15) cl 108(1)(e)(i).
[33] Ibid cl 108(1)(e)(ii).
[34] Amy Thomasson and Marco Rizzi, 'Consent in Posthumous Reproduction: Giving the Deceased a Voice without Drowning Out the Living in Cases of Unexpected Death' (2021) 48(2) *University of Western Australia Law Review* 557, 560. See *Human Tissue and Transplant Act 1982* (WA) s 22(2)(a)–(b), (8) ('*HTT Act*').
[35] The prohibition was imposed by way of a licencing condition on practitioners undertaking

introduces a new regulatory regime for dealing with posthumous reproduction, including an express provision affording legal parentage to the deceased person,[36] as recommended by Allan and other scholars to avoid leaving the child's legal parentage in limbo.[37] Rather than treating reproductive material in the same way as other types of tissue as has historically been the case under the *Human Tissue and Transplant Act 1982* (WA) ('*HTT Act*'), where reproductive material was included in the broad definition of 'tissue',[38] a separate part is to be added to the *HTT Act* dealing with the removal of reproductive material after death.[39] Part 3A of the *HTT Act* will provide that a 'designated officer for the hospital may authorise the removal of reproductive material' from the deceased with the consent of either the spouse or de facto partner of the deceased, or if they are not available, the 'senior available next of kin'.[40] The inclusion of a specific part in the *HTT Act* acknowledges that the use of reproductive material, particularly when it is removed after death, has different consequences and involves mediating different interests (including the reproductive autonomy of the surviving partner) compared to other types of tissue.[41]

It then seems that material removed posthumously can be used by the surviving partner with the approval of the Assisted Reproductive Technology Advisory and Review Board ('the Board'),[42] which is yet to be established. Where the material was extracted or the embryo created before death, the *ARTS Act* requires either the deceased person's written consent[43] or approval of the Board for use.[44] Given the inclusion of a separate clause dealing with reproductive material removed after death, it appears the *ARTS Act* contemplates situations where a deceased person has not expressly consented to the posthumous use of their reproductive material before their death, although this will depend on how the interaction between the relevant sections is interpreted. In either case (ie, whether the reproductive material is extracted or embryo created before or after death), a deceased person's

---

reproductive technology procedures: Western Australia, *Gazette: Special*, No 201, 30 November 2004, 5435 [8.9].

[36] ARTS Bill (n 15) cl 34(2).

[37] Allan (n 4) xxiv; Thomasson and Rizzi (n 34) 569.

[38] *HTT Act* (n 34) s 3 (definition of 'tissue').

[39] ARTS Bill (n 15) cl 326.

[40] Ibid.

[41] Amy Thomasson, 'Embryos as Property in Family Law Proceedings: The Implications of and Questions arising from *Leena & Leena*' (2025) 36(3) *Australian Journal of Family Law* 256, 270.

[42] ARTS Bill (n 15) cl 75(2).

[43] In the form described in cl 50(2) and (3) of the ARTS Bill (n 15).

[44] Ibid cl 76(1).

reproductive material or embryos may only be used by the surviving partner for their reproductive purposes.[45]

Any application for the use of the reproductive material — defined as 'material taken from the human body for the purpose of being used to conceive or create an embryo',[46] including a gamete or tissue containing a gamete[47] — or embryo of a deceased person in an ART procedure must be made to the Board by an ART licensee with the consent of the deceased person's surviving partner.[48] In deciding the application, the Board is required to consider the 'explicit wishes' of the deceased person, 'the deceased person's intentions in relation to becoming a parent', and the best interests of the prospective child.[49] These factors are broadly consistent with those recommended by the MEP,[50] which themselves are based on the National Health and Medical Research Council's Ethical Guidelines on the use of ART.[51]

However, a distinction is made between when an *embryo* can be used after the death of a person who was an intended parent of the prospective child and when a person's *reproductive material* can be used contrary to their consent. The Board can only approve the use of an *embryo* after one of the intended parents dies contrary to their consent if:

- the deceased person consented to the embryo being donated, either before or after their death;
- the surviving partner withdraws their consent to the donation; and
- the surviving partner wishes to use the embryo for their reproductive purposes.[52]

The Board cannot approve the use of the embryo contrary to the consent of the deceased person if the above requirements are not met. In contrast, the Board cannot approve the use of the deceased person's *reproductive material*, where it was extracted before death, on *any* grounds if such use is contrary to their consent (ie, there is no equivalent carve-out for reproductive material).[53] Reading between the lines, given the distinction and carve-out are not referred to in the extrinsic materials

[45] Ibid cls 74(2)(a), 75(2)(a), 76(1).
[46] Ibid cl 9(1).
[47] Ibid cl 9(2).
[48] Ibid cl 83(1), (2).
[49] Ibid cl 83(3).
[50] *MEP Report* (n 5) 38.
[51] National Health and Medical Research Council, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research 2017* (Updated 2023) (Guidelines, 17 April 2023) 57–8.
[52] ARTS Bill (n 15) cls 76(2), 83(6)(a).
[53] Ibid cl 83(6)(b).

accompanying the *ARTS Act*, Parliament appears to have deliberately designed a very limited carve-out in order to accommodate situations where the surviving partner has contributed their genetic material to an embryo with the deceased. The carve-out does however directly contradict the note at s 76(1), which states:

> The Board cannot approve use of the deceased person's reproductive material or embryos for the use mentioned in subsection (1) if that use is contrary to the deceased person's consent. See section 83(6).

A more accurate way of framing this note would be to refer directly to the distinction between reproductive material and embryos for the purpose of posthumous use. The inclusion of a statutory prohibition on the use of a deceased person's reproductive material contrary to their consent — despite the fact that the Board is required to consider the 'explicit wishes of the deceased person'[54] in any application for posthumous use — appears to be an attempt by Parliament to balance the various ethical views about the appropriateness of posthumous reproduction more broadly.[55] It seems that Parliament wanted to expressly remove from the Board's discretion an ability to approve posthumous use of reproductive material where it was contrary to the deceased's express wishes.

There is no requirement in the *ARTS Act* that the surviving partner undergo implications counselling or a grief-focussed assessment of their decision-making capacity, as recommended by the MEP.[56] The author however finds the absence of a provision requiring counselling for all applications for posthumous use wholly appropriate, provided the Board is in some way expressly empowered to consider the presence or absence of counselling where relevant. This is because there may be situations where implications and grief counselling are not necessary or appropriate — depending for example on the circumstances of the deceased person's death — and accordingly, in the view of the author, this matter is best left to the discretion of the Board. While counselling should not be mandated in the *ARTS Act* (as a requirement for approval), it may be appropriate to prescribe it as a relevant consideration in the impending regulations.[57] This seems more appropriate to the author than, for example, considering the presence or absence of counselling in the assessment of the best interests of the prospective child under cl 83(3)(c).

---

[54] Ibid cl 83(3)(a).

[55] Western Australia, *Parliamentary Debates,* Legislative Assembly, 13 August 2025, 1981 (Meredith Hammat, Minister for Health). See generally Thomasson and Rizzi (n 34) 564–9.

[56] *MEP Report* (n 5) xv, 37.

[57] Either as a requirement for informed consent under cl 51(2)(c) or as a matter the Board must consider in deciding the outcome of an application for posthumous use under cl 83(3)(d).

III Missed Reform Opportunities

A *The Pathway to Parentage*

Parentage of children born through ART was historically dealt with under the *Artificial Conception Act 1985* (WA), which included certain presumptions.[58] These presumptions are now reflected in the *ARTS Act* with updated gender-inclusive language.[59] However, the *ARTS Act* is a missed opportunity to simplify the pathway to parentage for intended parents who enter into a legally compliant surrogacy arrangement in Australia, and consider the provision of a support payment to surrogates (in addition to reimbursing the surrogate's reasonable expenses, which is currently the only monetary amount they are permitted to receive).[60] The *ARTS Act* maintains the requirement that intended parents apply to the Family Court for a parentage order — which transfers parentage from the birth parent(s) to the intended parents — no earlier than 28 days after the child is born.[61] This is despite evidence as recently as 2022 that the post-birth transfer process can take up to six months and cost up to AUD6,000.[62]

The Australian Law Reform Commission ('ALRC') is currently undertaking a review of Australia's surrogacy laws.[63] It has proposed the introduction of an administrative pathway to parentage for approved surrogacy arrangements, which would see intended parents recognised as the child's legal parents from birth.[64] This inverts the current approach but retains safeguards by allowing a surrogate to apply for a declaration of parentage if for some reason the intended parents renege on the agreement.[65] This better gives effect to the intention of the parties and reduces the burden on intended parents, particularly given that issues with relinquishment by the surrogate or a change of mind on the part of intended parents appear to be

---

[58] For example, that the pregnant person is the birth parent of any child that results from the pregnancy, regardless of whether their own reproductive material or embryo was used: ARTS Bill (n 15) cl 32(1).

[59] Rather than referring to sex, gender or marital status, the ARTS Bill (n 15) simply uses 'person' throughout.

[60] ARTS Bill (n 15) cl 106.

[61] Ibid cl 119(1), (2)(a).

[62] Tyson Culhane-Smith, 'Australian Surrogacy Process Chart: A Complete Guide to Surrogacy', *Surrogacy Australia* (Web Page, December 2022) 12 <www.surrogacyaustralia.org>. See also Australian Law Reform Commission, *Review of Surrogacy Laws* (Discussion Paper 89, 16 October 2025) 57 ('*Review of Surrogacy Laws*').

[63] Review of Surrogacy Laws (n 62).

[64] Ibid 56.

[65] Ibid 56–8.

rare.[66] The WA government may simply be waiting to see what the ALRC ultimately recommends in this regard, but it does seem to the author to be a missed opportunity to reduce the administrative burden in an already complex system.

The *ARTS Act* also fails to address the legal parentage of children born pursuant to an international commercial surrogacy arrangement. The ALRC has again proposed for discussion a pathway to parentage for unapproved surrogacy arrangements (including overseas surrogacy arrangements) rather than leaving children in legal limbo as is currently the case.[67] The hope might be that the liberalisation of surrogacy in WA means that everyone will follow the 'approved' pathway — certainly, there is research indicating that 92% of Australian intended parents would choose to engage in domestic surrogacy rather than overseas surrogacy if that option were available.[68] However, this optimistic attitude risks overlooking the reality that people will still seek out surrogacy overseas for a variety of reasons, including an inability to find a local surrogate, egg donor or both, the perception that the process is 'quicker' overseas, and the desire to 'access surrogacy in their country of origin' if they were not born in Australia.[69]

The *ARTS Act* does not fill the 'legislative vacuum'[70] regarding the legal status of children who have already been born through international surrogacy and currently reside in WA. Other than formal adoption, there is no legal mechanism for parents of these children to be recognised as such on the child's birth certificate.[71] Parents who have already had children via international surrogacy are left without recourse to recognition as the legal parent of their child. There remains a conflict between the inability to confer legal parentage where a child is born via international surrogacy, on one hand,[72] and the Commonwealth Government allowing children born as a result of such arrangements to enter Australia and affording them citizenship or visas, on the other.[73] While it is no longer a criminal offence to enter into a surrogacy

---

[66] Although now over a decade old, a study by Pip Trowse in 2011 found only two reported cases in Australia of a surrogate refusing to relinquish the child: Pip Trowse, 'Surrogacy: Is it Harder to Relinquish Genes?' (2011) *Journal of Law and Medicine* 18(3) 614, 624–5. There has however been at least one case since Trowse's study: *Lamb and Anor & Shaw* [2017] FamCA 769.
[67] *Review of Surrogacy Laws* (n 62) 58–60.
[68] Ezra Kneebone et al, 'Australian Intended Parents' Decision-Making and Characteristics and Outcomes of Surrogacy Arrangements Completed in Australia and Overseas' (2023) 26(6) *Human Fertility* 1448, 1451.
[69] Stephen Page, 'Surrogacy in Australia: The "Failed Experiment"?' (2023) 174 *PrecedentAULA* 22.
[70] *Bernieres and Anor & Dhopal and Anor* [2017] FamCAFC 180, [62], quoting *Bernieres and Anor & Dhopal and Anor* [2015] FamCA 736, [121].
[71] Gay Dads WA, Submission No 74, *Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008* (16 March 2018) 49–52.
[72] *Farnell v Chanbua* [2016] FCWA 17 (Thackray J), [559], [561]–[572].
[73] Allan (n 4) 181–2.

arrangement for reward in WA,[74] and therefore it is not possible to be prosecuted for engaging in international commercial surrogacy,[75] the law should be coherent and align with the best interests of the child. This arguably dictates that a child be raised by their intended parents — and that they be recognised as the child's legal parents — in their country of residence. This should, in the view of the author, take precedence over supporting the public policy position taken against commercial surrogacy, which in any event may be shifting given that the ALRC is considering the provision of payments to surrogates beyond reimbursement.[76] Given the *ARTS Act* has made surrogacy so accessible, there will hopefully be fewer parents who engage in international surrogacy — either on a commercial or altruistic basis — because they are no longer precluded from accessing surrogacy in WA, and accordingly the inability to confer legal parentage in such circumstances will become less of an issue prospectively. However, the *ARTS Act* maintains the pretence that children born of international surrogacy arrangements do not exist by failing to provide for transfers of legal parentage.[77]

B *Access to ART for Trans and Gender Diverse People*

While the *ARTS Act* appropriately uses gender-inclusive language, this creates a potential inconsistency with s 19(2) of the *Prohibition of Human Cloning for Reproduction Act 2002* (Cth). Section 19(2) makes it an offence to place 'a human embryo in the body of a human other than in a woman's reproductive tract'. In circumstances where WA does not impose any requirement for medical treatment on those wanting to change their legal gender,[78] this could lead to a situation where

---

[74] Clause 111 of the ARTS Bill (n 15) merely 'prohibits' entering a surrogacy arrangement for reward, whereas s 8 of the *Surrogacy Act* (n 16) made it an offence to do so.

[75] Section 8 of the *Surrogacy Act* (n 16) has extraterritorial effect by virtue of s 12 of the *Criminal Code* (WA), although it has 'little practical effect' given some aspect of the offence must occur in WA: Reproductive Technology Council, Submission No 122, *Submission on the Review of the Western Australian Human Reproductive Technology Act 1991 (WA) and the Surrogacy Act 2008 (WA)* (16 March 2018) 15.

[76] See Question M, which asks whether an 'additional support payment' should be available 'to recognise the surrogate's time, effort, inconvenience and unique contribution to the surrogacy arrangement': *Review of Surrogacy Laws* (n 62) 51–3; Shannon Schubert and Jean Bell, 'Debate Grows over Australia's Surrogacy Laws as More Couples Look Overseas', *ABC News* (online, 28 June 2025) <www.abc.net.au>.

[77] Despite the fact that in 2024–25, 369 children born through surrogacy arrangements overseas acquired Australian citizenship by descent: Department of Home Affairs, 'The Administration of the Immigration and Citizenship Programs' (15th ed, October 2025) 43 [213]. According to surrogacy lawyer Stephen Page, more than 3,300 Australian children have been born to overseas surrogates: Janelle Miles and Kate McKenna, 'Australia's Complex Patchwork of Surrogacy Laws Is Leaving Some Children in Legal Limbo', *ABC News* (online, 2 May 2025) <www.abc.net.au>.

[78] Section 36J(1) of the *Births, Deaths and Marriages Registration Act 1998* (WA) permits self-declared changes of legal sex and gender.

a transgender man or non-binary person is refused access to ART — despite the *ARTS Act* permitting access — on the basis that it would be an offence for the provider to place a human embryo in their body (because they may not be a 'woman' at law and for the purpose of the *Prohibition of Human Cloning for Reproduction Act 2002* (Cth)). This issue was identified by Allan in her independent review of the *Human Reproductive Technology Act 1991* (WA), where she recommended that the WA government consult with the Commonwealth on the matter.[79] This is not the first instance of inconsistency between WA and Commonwealth legislation — the historic eligibility criteria for surrogacy being one example[80] — but it is perhaps novel that this time outdated Commonwealth legislation potentially conflicts with more progressive legislation at the state level. Priority should be given to resolving this inconsistency, preferably by amending the *Prohibition of Human Cloning for Reproduction Act 2002* (Cth), before the situation described above becomes reality. It would be a shame for genuinely progressive legislation at the state level to be kiboshed due to an incidental inconsistency with Commonwealth legislation, particularly given it would have the unintended consequence of again restricting access to ART for trans and gender diverse people, therein discriminating against them in a potentially prohibited way.[81]

C *Regulating Informal Family Creation*

The drafting of the *ARTS Act* also presented an opportunity to regulate informal sperm donation, a type of 'informal family creation' which is on the rise.[82] Informal family creation encapsulates both informal sperm donation (ie, sperm donation that does not occur through an ART provider) and the practice of people using the internet, in particular social media, to find co-parents, known as elective co-parenting.[83] Informal sperm donation in particular 'circumvents the use of regulated fertility clinics'[84] and is currently unregulated — a Netflix documentary released in 2024 titled 'The Man with 1,000 Kids' followed one prolific donor who travelled the world donating his sperm through online groups and lied to

[79] Allan (n 4) 60, 62.
[80] *Dunn* (n 7).
[81] Ibid [10].
[82] Bhatia and Porceddu (n 13); Deakin University, 'Law Must Catch Up with Growing Popularity of Informal Sperm Donation' (Media Release, 18 April 2023) <www.deakin.edu.au>; Neera Bhatia, 'Informal Sperm Donation Is on the Rise. So Are the Risks', *The Age* (Melbourne, 22 July 2025) 21; Henrietta Cook, 'Wild West of Sperm Donation Reviewed', *The Age* (Melbourne, 21 July 2025) 4.
[83] Bhatia and Porceddu (n 13) 912, 915.
[84] Ibid. The *ARTS Act* expressly excludes self-insemination from the definition of an ART procedure: ARTS Bill (n 15) cl 8(2).

prospective mothers about how many children he had fathered.[85] Beyond the lack of traditional safeguards, including limits on the number of children a donor can father, genetic screening, urine testing for sexually transmitted infections as well as blood tests for Hepatitis B and C among other viruses,[86] there are also concerns about coercion in the informal sperm donation space, with reports that some donors, having agreed to 'artificial insemination' in the first instance, have subsequently pressured prospective parents into 'natural insemination' (ie, penetrative sex).[87] The growing practice of informal family creation is seen as a response to sperm shortages, costly fees associated with accessing donor catalogues and ART procedures and consultations, as well as inhibitive access requirements in some jurisdictions.[88] While the *ARTS Act* has solved the latter issue by opening access to ART to anyone, there is also a desire from some to have a relationship with the person providing their sperm,[89] which formal pathways do not offer given a donor's identity is only released upon request by the child after they have turned 18 years old.[90]

A consideration for future reform is whether to introduce a register for informal sperm donors, although there are concerns that this will push the practice further underground.[91] This is increasingly a public health issue, one that requires in-depth consideration of why people are choosing to take an unregulated and arguably riskier path to parenthood, rather than engaging with registered ART clinics and services.[92] Some relevant options for reform were floated in the recent review of ART and IVF regulation and accreditation, including a targeted public education campaign and an expansion of the YourIVFSuccess website to 'enable more informed consumer choice and consent'.[93] Future research should explore whether the removal of eligibility requirements in the *ARTS Act* reduces the number of people choosing the informal pathway.

---

[85] Maani Truu, 'Inside the Facebook Group where Australian Women Subvert the System and Go Looking for Sperm', *ABC News* (online, 28 July 2024) <www.abc.net.au>.
[86] Ibid; Bhatia and Porceddu (n 13) 941–4; 'Donation Steps', *Sperm Donors Australia* (Web Page) <www.spermdonorsaustralia.com.au/>.
[87] Annika Blau and Tynan King, 'Inside Facebook's Sperm Marketplace', *ABC News* (online, 8 December 2024) <www.abc.net.au>; Bhatia and Porceddu (n 13) 942–3; Bhatia (n 82).
[88] Truu (n 85); Bhatia and Porceddu (n 13) 923–8.
[89] Truu (n 85); Bhatia and Porceddu (n 13) 923–8.
[90] 'Using a Sperm Donor', *IVF Australia* (Web Page) 4 <www.ivf.com.au>.
[91] Bhatia and Porceddu (n 13) 949.
[92] Bhatia (n 82).
[93] Euan M Wallace and Victorian Department of Health, 'Rapid Review of Assisted Reproductive Technology and In Vitro Fertilisation Regulation and Accreditation in Australia' (Report, 26 September 2025) 72.

IV CONCLUSION

While some of the matters overlooked by Parliament in drafting the *ARTS Act* are likely to be dealt with by the ALRC's review of surrogacy laws,[94] legislative reform — if WA's experience is anything to go by — could be years if not decades away and would require a complex negotiation with states and territories.[95] As well as outlining the ways in which the law has changed in WA, this comment has synthesised some of the missed opportunities for reform in the hope that they will not fade entirely from the public consciousness — meaningful reform is still required in the parentage space surrounding surrogacy as well as in relation to informal sperm donation. That said, legislative reform is rarely if ever perfect. It must be acknowledged that the passage of the *ARTS Act* is a feat in itself. The *ARTS Act* is a well-intentioned piece of legislation that makes necessary amendments to a suite of laws dealing with ART. It is important that the relevant regulations are drafted in the same spirit and with the same intent as the *ARTS Act* — to make it easier for people to access ART — rather than being unnecessarily prescriptive and burdensome for those trying to start a family.

[94] Review of Surrogacy Laws (n 62) 11, 48–53.
[95] Ibid 14–17.

LIM AFTER *NZYQ*: DELIMITING CONSTITUTIONAL CONSTRAINTS ON STATE POWER TO PUNISH NON-CITIZENS

REBECCA ANANIAN-WELSH* AND PETER BILLINGS**

For more than three decades the High Court's decision in Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1 was frequently invoked (though without success) to challenge the legality of immigration detention powers serving to constrain the liberty of non-citizens for long and indefinite periods. In the period from 2020 to 2025, however, the 'Lim principle' has been revitalised, with its full implications progressively revealed in a series of cases about severe executive action. This article explores the constitutional scope of administrative power to constrain the liberty of non-citizens, and identifies gaps, rifts and trends in recent Lim case law. The article critically examines the jurisprudential development of key notions on which the Lim principle rests: 'punitive' measures and 'legitimate' purposes, and the analysis of 'means and ends'. Three arguments are advanced across the article which, together, we advocate as a coherent and preferred approach to understanding the Lim principle in its contemporary applications. Specifically, we argue for a values-centred and substantive approach to the Lim principle, which acknowledges 'proportionality' as the relevant standard for assessing the relevant 'means and ends' relationship. The article concludes with a Postscript summarising the case of EGH19 v Commonwealth [2026] HCA 7 and outlining its impacts on our central arguments.

I Introduction 245

II Migration Detention and the Stream of Authority from Lim to YBFZ 249

A *From Lim to Al-Kateb* *250*

* Associate Professor of Law, TC Beirne School of Law, University of Queensland ('UQ').

** Professor of Law, TC Beirne School of Law, UQ. The authors are grateful to Heidi Willis for her research assistance.

B *Al-Kateb Overturned: NZYQ* *252*

C *Capacity, Cooperation and Unachievable Removal: AZC20, ASF17 and CZA19* *253*

D *Lim Extended: YBFZ* *255*

III Constitutional Foundations and Values 258

IV (Mis)Understanding Punishment 267

A *Punitive and Non-Punitive Measures: A Binary or Spectrum?* *267*

B *Non-Punitive Purposes: The Legitimate and Non-Punitive Ends of Migration Measures* *272*

C *Illegitimate or Incidental Purposes: Segregation, Protection and Deterrence* *274*

V Means and Ends 276

A *A Stream of Authority Flowing from Lim?* *276*

B *Falzon and AJL20: Islands in the Stream?* *279*

C *The Contemporary Means-Ends Connection* *282*

D *Proportionality Embraced: The Approach of Edelman J* *285*

VI An Alternative Role for Proportionality: The Scope of s 51(xix) 287

VII Conclusion 288

VIII Postscript: *EGH19 v Commonwealth* 290

I Introduction

The *Lim* principle, 'if it may still be called the *Lim* principle',[1] underwent a period of rapid jurisprudential evolution (if not *re*volution) in the early 2020s. In light of these developments, this article undertakes a doctrinal analysis of this challenging body of case law to examine the principle's evolution, contemporary scope, broader application, and implications, with a specific focus on administrative power to constrain the liberty of non-citizens. In doing so, our aims are threefold. Firstly, we

[1] *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1, 46 [183] (Steward J) ('*YBFZ*'). Steward J is firmly of the view that the *Lim* principle is not being correctly applied by a majority of the current High Court.

articulate the present constitutional scope of this form of administrative power. Secondly, we identify gaps and rifts (as well as consistencies) in the recent conceptualisation and application of *Lim*. Thirdly, we advocate a cohesive approach to *Lim* which centres constitutional values (including liberty) in the analysis, adopts a substantive conceptualisation of 'punishment', and explicitly adopts a 'proportionality' frame to articulate and assess the relationship between 'means and ends' on which validity rests.

The need to revisit the *Lim* principle arises from rapid jurisprudential developments between, particularly, 2021 and 2025. As originally conceived in the 1992 case of *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* ('*Lim*'),[2] the principle holds that federal separation of judicial power gives rise to an immunity from imprisonment except pursuant to a court order following a criminal trial. Specifically,

> the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.[3]

Of course, exceptions to this principle were accepted at the time; categories included administrative detention in cases of mental illness or infectious disease and imprisonment on remand pending trial.[4] Equally, detention for the purposes of deportation or enabling an entry application to be made or considered has been accepted as aligning with ch III of the *Constitution*.[5] This immigration-focused exception to the *Lim* principle supported mandatory immigration detention for unlawful non-citizens, often for years at a time.[6] Critically, in the 2004 case of *Al-Kateb v Godwin* ('*Al-Kateb*'),[7] the High Court affirmed the constitutional validity of the administrative detention of visa-less non-citizens even where their deportation

---

[2] (1992) 176 CLR 1 ('*Lim*'). Alternatively known as the *Cambodian 'Boat People' Case*.

[3] Ibid 27 (Brennan, Deane and Dawson JJ). In *Lim*, Brennan, Deane and Dawson JJ wrote a joint judgment with which Mason CJ agreed. The views of those four members of the Court reflect the principles for which the case stands as authority. For a useful charting of key cases between *Lim* and *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137 ('*NZYQ*'), see Raynor Thwaites, 'Australian Immigration Detention: Institutional Allocation of Power as Rights Protection?' in Kevin Cope, Stella Burch Elias and Jill Goldenziel (eds), *Oxford Handbook of Comparative Immigration Law* (Oxford University Press, forthcoming).

[4] *Lim* (n 2) 28 (Brennan, Deane and Dawson JJ).

[5] Ibid 33.

[6] This remains a well-documented problem. See, eg, Department of Home Affairs (Cth), *Immigration Detention and Community Statistics Summary* (Report, 31 May 2025). This report notes at 12 that '[a]t 31 May 2025, the average period of time for people held in detention facilities was 443 days'.

[7] *Al-Kateb v Godwin* (2004) 219 CLR 562 ('*Al-Kateb*').

or admission into the Australian community was unlikely; that is, it gave constitutional legitimacy to administrative detention without foreseeable end.

This changed with the 2023 case of *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* ('*NZYQ*'),[8] wherein a unanimous High Court overturned the constitutional ruling in *Al-Kateb*.[9] Specifically, the Court held that administrative detention was prima facie (ie, by default) punitive and, as such, must be 'reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose. In other words, detention is penal or punitive unless justified as otherwise.'[10] This standard was said to express the principle articulated in *Lim* and was grounded in *Lim*'s application in the 2021 and 2023 cases of *Minister for Home Affairs v Benbrika* ('*Benbrika [No 1]*') and *Jones v Commonwealth* ('*Jones*') respectively.[11]

Then, in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* ('*YBFZ*') in 2024,[12] the Court significantly extended the *Lim* principle, declaring that interferences with individual liberty other than by executive detention in custody (namely, by electronic monitoring and nighttime curfews, which had been imposed on the now-released '*NZYQ* cohort' of migrants) were captured by the *Lim* principle. These intrusions upon liberty were, in the circumstances, also characterised as prima facie punitive by the High Court and (in the absence of justification as *reasonably necessary* for a legitimate purpose) amounted to constitutionally impermissible instances of administrative punishment. Since *YBFZ*, the High Court has continued to grapple with the metes and bounds of *Lim* as the doctrine's resurgence continues.

Our analysis of these developments proceeds in five Parts. Part II sets the jurisprudential context for the constitutional limits upon the regulation of non-deportable non-citizens. It updates and complements the existing body of scholarship discussing *Lim* case law (1994 to 2022),[13] as well as the few publications

---

[8] *NZYQ* (n 3).
[9] For valuable extra-curial reflections on the overturning of *Al-Kateb* in *NZYQ*, see James Edelman, 'Overturning *Al-Kateb v Godwin*: Unanswered Questions about the Rules Of Precedent' (Sir Harry Gibbs Memorial Oration, The Samuel Griffith Society, 25 May 2024) <www.hcourt.gov.au>.
[10] *NZYQ* (n 3) 157 [39] (The Court).
[11] See, eg, *Lim* (n 2) 10 (Mason CJ), 33 (Brennan, Deane and Dawson JJ), 58 (Gaudron J), 65–6, 71 (McHugh J); *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 ('*Benbrika [No 1]*'); *Jones v Commonwealth* (2023) 280 CLR 62 ('*Jones*').
[12] *YBFZ* (n 1).
[13] See, eg, Jeffrey Gordon, 'Imprisonment and the Separation of Judicial Power' (2013) 36 *Melbourne University Law Review* 41; Flyn Wells, 'Does *Lim* Truly Have "Nothing to Say" about the Commonwealth's Regional Processing Arrangements? Habeas Corpus as a Vehicle for Testing the Constitutional Validity of Offshore Detention' (2022) 45(2) *Melbourne University Law Review* 779; Michael Kirby, 'Municipal Courts and the International Interpretive Principle: *Al-Kateb v Godwin*' (2020) 43(3) *UNSW Law Journal* 930; AJ Brown, 'When Liberty Divides: Judicial Cleavages and their

grappling with the principle's dynamic status since then.[14] As Thwaites observes, 'the arc of the [*Lim*] jurisprudence has been long';[15] rather than revisit that well-trodden terrain, this article focuses more closely on developments in the first half of the 2020s. More practically, Part II sets out the relevant facts and findings in, not only the seminal cases of *Lim*, *Al-Kateb*, and *NZYQ*, but the cases following *NZYQ*, namely *AZC20 v Secretary, Department of Home Affairs (No 2)* ('*AZC20*'),[16] *ASF17 v Commonwealth* ('*ASF17*'),[17] *CZA19 v Commonwealth; DBD24 v Minister for Immigration and Multicultural Affairs* ('*CZA19*'),[18] and *YBFZ*. This provides insights into the legislative and particular individual contexts in which *Lim* issues arise for visa-less migrants. Moreover, the case summaries allow the remainder of the article to focus more closely on doctrinal developments across this rapidly evolving suite of case law.

The article progresses to explore discreet aspects of the contemporary *Lim* principle to (1) map its roots and recent evolution, (2) identify unresolved aspects of its interpretation and relevant divisions of opinion on the High Court, and (3) advance our views on the preferable resolution of these judicial interpretive rifts. Thus, Part III begins with the constitutional foundations for *Lim* through lenses of formalism, functionalism, values, and history. Part III culminates in an argument for a multifactorial but values-centred approach to *Lim*. The discussion in this Part also reveals the foundations for *NZYQ* in earlier cases — particularly *Benbrika [No 1]* and *Alexander v Minister for Home Affairs* ('*Alexander*'),[19] in which questions of liberty squarely arose outside the immigration context.

In Part IV, we turn to the place of punishment in the *Lim* framework. The identification of (1) measures, and (2) their purposes, as 'punitive' or 'non-punitive' is critical to *Lim*; however, the nature of punishment itself remains hotly contested. In this Part, we argue for a broad(er) and substantive (albeit binary) approach to

---

Consequences in *Al-Kateb v Godwin* (2004)' in Andrew Lynch (ed), *Great Australian Dissents* (Cambridge University Press, 2016) 311.

[14] Thwaites (n 3); Zachary Gomes, Aryan Mohseni and Charlie Ward, 'Going out on a *Lim*: Reconceptualising the Constitutional Limit on Preventative Detention' (2025) 99 *Australian Law Journal* 550. We note that Thwaites's publication (as available on SSRN, which remains forthcoming) does not cover *YBFZ*, whereas Gomes, Mohseni and Ward do so in a brief 'postscript'. We, however, centre this case as one of the most critical cases in the field (a reflection of how quickly that field has moved).

[15] Thwaites (n 3) 1.

[16] [2023] FCA 1497 ('*AZC20*').

[17] (2024) 98 ALJR 782 ('*ASF17*').

[18] (2025) 99 ALJR 650 ('*CZA19*').

[19] (2022) 276 CLR 336 ('*Alexander*').

punishment in this constitutional context and reflect on the distinction between 'legitimate' and 'illegitimate' purposes.

Part V turns to the next step, and arguably the vaguest aspect, of the *Lim* framework: the relationship between 'means and ends'. This Part traces the waning and waxing of this element of the *Lim* principle, revealing a consistent stream of reasoning despite contrary approaches in some cases (including *Al-Kateb*). Building on this analysis and our foundational arguments for a values-centred, substantive approach to *Lim*, we conclude Part V by advocating for the explicit acknowledgment of 'proportionality' as the relevant standard for assessing the relevant relationship between means and statutory ends under *Lim*. We close, in Part VI, by reflecting on how recent jurisprudence has both reaffirmed and reshaped the *Lim* principle and by summarising the cohesive interpretative approach advocated through the article.

II Migration Detention and the Stream of Authority from Lim to YBFZ

The system of executive detention, introduced by the *Migration Reform Act 1992* (Cth), applies to those non-citizens without a valid visa and has permitted the prolonged and indefinite deprivation of people's liberty. Notoriously, the scheme of mandatory detention does not address the circumstances of individual detainees,[20] has 'no fixed chronological end point',[21] and infringes some of the most basic human rights and freedoms known to the common law,[22] with social harms reverberating beyond those detained.[23]

There can be no deprivation of individual liberty by mere executive action absent valid statutory authority or judicial mandate.[24] That no person shall be imprisoned except pursuant to lawful authority is a 'fundamental and long-established principle'.[25] Moreover, involuntary detention must not infringe the *Constitution*, including the strict separation of federal judicial power derived from ch III.[26] Necessarily, immigration detention must be subject to judicial oversight. This is

[20] *Al-Kateb* (n 7) 562 [12] (Gleeson CJ).
[21] *WKMZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 285 FCR 463, 495 [123] (Kenny and Mortimer JJ).
[22] See, eg, *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333, 359 [94]–[95] (Nettle J) ('*Falzon*').
[23] M Peterie (ed), *Immigration Detention and Social Harm: The Collateral Impacts of Migrant Incarceration* (Routledge, 2024).
[24] *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 528 (Deane J); *Lim* (n 2) 19 (Brennan, Deane and Dawson JJ).
[25] *NZYQ* (n 3) 153 [27] (The Court).
[26] This strict separation is grounded in the 'two limbs of *Boilermakers*', referring to the Court's decision in *R v Kirby; Ex parte Boilermakers' Society of Australia (Boilermakers Case)* (1956) 94 CLR 254 ('*Boilermakers*').

required in order to enforce express and implied constitutional limits and also, for administrative law purposes, to ensure that executive action adheres to legislative criteria — criteria that cannot be so vaguely formulated as to avoid judicial scrutiny.[27]

The power of the federal Parliament to authorise or require the executive government to detain a non-citizen (absent a judicial order) is granted by the naturalisation and aliens power in s 51(xix) of the *Constitution*.[28] Crucially, 'the amplitude of the legislative power conferred by s 51(xix) is qualified by the implications of ch III of the *Constitution*,'[29] including the *Lim* principle.

A *From Lim to Al-Kateb*

In *Lim*, the High Court was asked to decide whether laws authorising the mandatory detention of two designated groups of asylum seekers (all Cambodians arriving by boat) were invalid for infringing the separation of powers. The impugned law provided for detention in custody — for a period capped at 273 days after making an entry application — until the unlawful non-citizens had been removed from Australia or granted an entry permit. The Court upheld the provisions but, in doing so, formulated the broad 'immunity'[30] from involuntary detention by the state outlined above.

Essentially, a majority of the Court asserted that immigration detention is one of a few exceptions to a general constitutional principle that detention is punitive in character and, therefore, only within judicial power to impose. Detaining an alien in custody must, however, be limited to a period that is reasonably capable of being seen as necessary for limited non-punitive purposes.[31]

---

[27] *Commonwealth of Australia v AJL20* (2021) 273 CLR 43 ('*AJL20*').
[28] *Lim* (n 2) 10 (Mason CJ), 32 (Brennan, Deane and Dawson JJ). See also, eg, *CZA19* (n 18) 660–1 [40]–[43] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), 668 [75] (Gordon J), 670 [86] (Edelman J).
[29] *AJL20* (n 27) 63 [22] (Kiefel CJ, Gageler, Keane and Steward JJ).
[30] *Lim* (n 2) 28 (Brennan, Deane and Dawson JJ).
[31] Thus, the connection between the non-punitive purpose and length of detention was highly relevant to the Court's ruling about the validity of laws extant at the time, as McHugh J explained in *Re Woolley; Ex parte Applicants M276/2003 by their next friend GS* (2004) 225 CLR 1, 36 [88] ('*Re Woolley*'). The presence of restraints on detention, including statutory terms fixing time limits on the period of detention (273 days) after making an entry application, and a legislative requirement to remove a designated person 'as soon as practicable' after the refusal of an entry application and finalisation of appeals, were important factors in *Lim* that ensured detention powers were 'reasonably necessary' for non-punitive purposes: *Lim* (n 2) 10 (Mason CJ), 33 (Brennan, Deane and Dawson JJ), 46 (Toohey J). See also *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 332, 369–70 [139]–[140] (Crennan, Bell and Gageler JJ) ('*Plaintiff M76*'), cited with approval in *NZYQ* (n 3) 155 [33] (The Court).

The strength of the Court's ruling in *Lim* (and the status of the *Lim* principle itself) was undermined by successive unsuccessful attempts to invoke its protection.[32] Arguably the most important case in this respect came a decade after *Lim*, in the 2004 case of *Al-Kateb*.

In *Al-Kateb*, a majority of the High Court determined that it was — as a matter of statutory construction and constitutional interpretation — lawful for a stateless Palestinian man to be detained indefinitely if there were even a faint possibility that his removal might become practicable in the future. The primary focus of the Court's inquiry was on the purpose of the detention, which was deemed to be non-punitive.[33] Ultimately, immigration detention appeared to be prima facie valid unless it could be said to have an identifiably punitive purpose. Neither the length of detention itself nor its impacts on the detainee appeared to be sufficient to render it punitive or to set it outside the bounds of valid executive power.

The effect of *Al-Kateb* was harsh, described as 'segregation by incarceration … for an indefinite period, perhaps for life'.[34] That legal position endured for twenty years, during which time the High Court found it unnecessary, or declined, to revisit *Al-Kateb* on three occasions.[35] For the purposes of this article, we turn directly to

[32] See, eg, *Kruger v The Commonwealth* (1997) 190 CLR 1, 109–10 (Gaudron J); *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486, 498–9 (Gleeson CJ) ('*Behrooz*'); *Al-Kateb* (n 7) 648–9 [257]–[258] (Hayne J); *Benbrika [No 1]* (n 11) 94–5 [25]–[27] (Kiefel CJ, Bell, Keane and Steward JJ).

[33] See, eg, *Al-Kateb* (n 7) 584 [44]–[45] (McHugh J).

[34] M Head, 'Detention without Trial: A Threat to Democratic Rights' (2005) 9 *University of Western Sydney Law Review* 33, 34.

[35] *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1 ('*M47/2012*'); *Plaintiff M76* (n 31); and *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285 ('*M47/2018*'). Indefinite immigration detention, *Al-Kateb*, and its aftermath prompted far-reaching critique and commentary. See, eg, Justice AM North and Peace Decle, 'Courts and Immigration Detention: The Australian Experience' (2002) 10 *Australian Journal of Administrative Law* 5; Jane McAdam, 'Asylum Seekers: Australia and Europe: Worlds Apart' (2003) 28(4) *Alternative Law Journa*l 193; Matthew Groves, 'Immigration Detention vs Imprisonment: Differences Explored' (2004) 29(5) *Alternative Law Journal* 228; Eloise Dias, 'Punishment by Another Name? Detention of Non-Citizens and the Separation of Powers' (2004) 15 *Public Law Review* 17; James Allan, '"Do the Right Thing" Judging: The High Court of Australia in *Al-Kateb*' (2005) 24(1) *University of Queensland Law Journal* 1; Stephen McDonald, 'Involuntary Detention and the Separation of Judicial Power' (2007) 35(1) *Federal Law Review* 25. Justice McHugh, who was in the majority in *Al-Kateb*, even harnessed the case to highlight 'the continuing failure of this country to have a Bill of Rights' and to highlight the importance of public agitation for greater rights protection: Michael McHugh, 'The Need for Agitators: The Risk of Stagnation' (Speech, Sydney University Law Society Public Forum, 12 October 2005) <www.hcourt.gov.au>.

NZYQ, in which the High Court finally re-opened and overturned the constitutional ruling in *Al-Kateb*.[36]

B *Al-Kateb Overturned: NZYQ*

NZYQ concerned a stateless Rohingya man who had his visa revoked on adverse character grounds.[37] In the absence of a third country willing to accept him he remained liable to executive detention for an unlimited period. In a single judgment, the High Court held that executive detention must be for a 'legitimate and non-punitive purpose' and be 'reasonably capable of being seen as necessary for' that purpose.[38] Thus, where there was, in fact, no real prospect of achieving the removal of a detainee or granting them a visa in the foreseeable future, it could not be said that the purpose of their detention was related to the (legitimate and non-punitive) purposes of removal or entry.[39] This placed the continued detention of NZYQ beyond executive power.

In *NZYQ*, the Court described *Al-Kateb* as having 'come increasingly to appear as an outlier in the stream of authority which has flowed from *Lim*'. Overruling *Al-Kateb* formed a critical step in the Court's reasoning.[40] *Al-Kateb* may have been a *jurisprudential* outlier (as will become apparent as this article progresses),[41] but it had formed the basis of successive governments' immigration detention policies, responsible for the continued incarceration of hundreds of non-citizens with no foreseeable prospect of release.[42]

The jurisprudential importance of *NZYQ* is heightened by the Court's delivery of a single judgment — in contrast to the split decisions and contrasting approaches which tended to characterise preceding *Lim* cases.[43] Unusually, however, that single

---

[36] The High Court agreed (*NZYQ* (n 3) [19]–[23]) with the majority's reasoning in *Al-Kateb* on the statutory construction issue, citing cumulative considerations that pointed away from re-opening that matter: (i) legislative reliance and implicit legislative endorsement of *Al-Kateb* since 2004; and (ii) the recent case of *AJL20* (n 27) 150–2 [33]–[34], where a majority endorsed *Al-Kateb* on the statutory construction point. For further discussion, see Edelman (n 9).

[37] A stateless refugee, NZYQ was found to be a danger to the community and had his protection visa refused under s 36(1C) of the *Migration Act 1958* (Cth) because of his conviction and sentence for child sexual offences.

[38] *NZYQ* (n 3) 157 [39] (The Court).

[39] Slightly different reasoning was adopted by Edelman J on this point. See ibid 160–2 [51]–[54] and discussion below in Part IV.

[40] Ibid 156 [35].

[41] See discussion below in Part V.

[42] Peter Billings, 'Causing a Stir: Unwanted Aliens and the Cauldron of Crimmigration Controls Post-NZYQ' (2025) 44(3) *University of Queensland Law Journal* 1.

[43] See, eg, *Al-Kateb* (n 7); *Falzon* (n 22); *AJL20* (n 27); *Benbrika [No 1]* (n 11).

judgment contained four paragraphs explaining '[t]he approach of Edelman J'.[44] Although Edelman J agreed with the core findings and orders, his Honour based invalidity on the *disproportionality* between the law's legitimate non-punitive object and its continuation without foreseeable end.[45] The importance of this distinction is elaborated upon in Part V.

Ultimately, what had been the lawful detention of NZYQ since 2018 was re-characterised as 'punitive' for constitutional purposes — infringing the separation of powers — triggering the immediate release of NZYQ and others. The Court justified this as restoring the authority of constitutional principles authored in *Lim*.

C *Capacity, Cooperation and Unachievable Removal: AZC20, ASF17 and CZA19*

NZYQ was unable to be removed from Australia because he was stateless. But what of circumstances where removal is impractical on other bases — such as ill-health or where a long-term detainee deliberately frustrates attempts to bring about their removal? After *NZYQ* two cases quickly came before the Federal Court of Australia ('FCA'). Both cases dealt with the thorny question of whether the constitutional limit on detention is reached when a detainee is 'un-cooperative' with officials with respect to making their removal practicable. This was distinguishable from the factual underpinnings of *NZYQ.*[46] In the 2023 case of *AZC20* the FCA considered the case of an Iranian who, without any criminal conviction or character concerns, had been detained for ten years.[47] The applicant had been refused protection but was profoundly opposed to returning home because he believed he would be persecuted. On this basis, he would not meet with Iranian officials. Thus, as involuntary returnees are rejected by Iran, the FCA found that there was no real prospect of removal to Iran becoming practicable in the reasonably foreseeable future.[48]

Kennett J reasoned that AZC20 had not embarked on a deliberate strategy to frustrate removal from Australia. Rather, he resisted removal to Iran because he strongly believed that he would face persecution in Iran.[49] Moreover, he had

---

[44] See further Stephen McDonald, '*NZYQ*: A New Style of Unanimous Judgment for the High Court of Australia', *AUSPUBLAW* (Blog Post, 31 January 2024) <www.auspublaw.org>.
[45] *NZYQ* (n 3) 158 [44]. See discussion below in Part IV.
[46] Ibid 164 [62].
[47] *AZC20* (n 16).
[48] Ibid [66].
[49] Ibid [65(b)–(c)]. Cf *M47/2018* (n 35), a case in which the High Court found that a detainee had been deliberately uncooperative with officials in progressing their removal without good reason for that posture: at [32] (Kiefel CJ, Keane, Nettle and Edelman JJ). A 'good reason' includes medical explanations for non-cooperation: at 297 [30], 301–2 [47].

developed mental health problems during his lengthy period of detention, so realistically it was not 'within his power to change his approach to one of cooperation with removal to Iran'.[50] With removal not in prospect in the reasonably foreseeable future, the constitutional line between punitive and non-punitive detention had been crossed. The applicant was duly released pursuant to the writ of habeas corpus.

AZC20 was then distinguished in the 2024 High Court case of *ASF17*,[51] a matter involving an Iranian man who had been held in detention for almost ten years pending the outcome of administrative and judicial proceedings about his status in Australia. He was uncooperative with officials with respect to removal to Iran due to a declared fear of persecution based on bisexuality.[52] Moreover, no third country removal was in prospect. ASF17 argued that the fact of his resolute non-cooperation negated his removal prospects and, consequently, the constitutional limit on detention was reached.

The High Court disagreed, finding that a person in the position of ASF17, who was neither stateless nor officially declared a refugee by the government, but who was deliberately uncooperative with administrative officials and stymied removal processes, may be kept in detention indefinitely. In a joint judgment, six members of the Court rejected the arguments that (1) the bare fact of a detainee's non-cooperation with authorities was sufficient to refute the existence of the non-punitive purpose of the detention (ie, removal), and (2) a genuine subjective fear of harm could amount to a 'good reason' for a person being uncooperative in the reasonably foreseeable future. The 'short point' was that 'conformably with the *Lim* principle, continuing detention for a non-punitive purpose that is occurring because of a voluntary decision of the detainee cannot be characterised as penal or punitive'.[53]

---

[50] *AZC20* (n 16) [65(d)]. He had also attempted suicide many times while in detention.

[51] *ASF17* (n 17).

[52] He had been refused a visa by the government due to the provision of a bogus document. Subsequently, in the detention proceedings, ASF17 deposed that he feared persecution in Iran based on his bisexuality, a claim not previously raised in his visa application. The Federal Court of Australia ('FCA') considered this new 'collateral' claim, but the judge disbelieved ASF17 due to the inconsistent accounts about his subjective fears given to officials and in later court proceedings: *ASF17* (n 17) 807 [126]–[127] (Edelman J).

[53] *ASF17* (n 17) 791 [42] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ). See also 792 [48] where their Honours conclude: 'ASF17 could be removed to Iran if he cooperated in the process of obtaining the requisite travel documents from Iranian authorities. He has decided not to cooperate. He has the capacity to change his mind. He chooses not to do so.' In *Lim* (n 2), the ability of the detainee to bring about an end to their detention by requesting removal was one factor (statutory time limits on detention being another) that ensured detention powers were 'reasonably necessary' for non-punitive purposes: at 34 (Brennan, Deane and Dawson JJ), 10 (Mason CJ, agreeing).

In brief, a detainee who, for health reasons, lacks capacity to engage and cooperate with their involuntary removal process is on firm ground to invoke ch III and secure release from detention; whereas indefinite detention will remain 'non-punitive' where a detainee has the capacity to cooperate with the removal process but decides not to.[54]

In 2025, *CZA19* confirmed that detaining two confirmed refugees, for whom there was no real prospect of removal from Australia, *could* nonetheless constitute valid administrative detention for the legitimate non-punitive purpose of visa processing.[55] The process of considering and determining a visa application during a period of detention may well take a long time (months and even years) but the High Court emphasised that the detention remained justified by reason of its 'visa processing' aim. This is because detention: makes an unlawful non-citizen available for investigations into their identity, criminal history, security profile and health; allows suitable visa conditions to be imposed on the non-citizen before they enter the community; and reduces the risk of the non-citizen absconding before their visa application is determined.[56] The fact that very little had been done to actually process the detainee's visas during their detention was answered by the availability of the writ of mandamus, to compel performance of the implied statutory requirement to complete processing within a reasonable time, rather than engaging questions of constitutional validity.[57]

D *Lim Extended: YBFZ*

In contrast to this suite of cases which clarified the application of *NZYQ*, *YBFZ* took the *Lim* principle into wholly new terrain — the scope of which, at the time of writing, was being litigated in the High Court, and which is now addressed in the Postscript (see Part VIII below).[58]

The legislative background to *YBFZ* begins with the *Migration Amendment (Bridging Visa Conditions) Act 2023* (Cth), enacted within a fortnight of orders being made in *NZYQ*, to amend the *Migration Regulations 1994* (Cth). This was part of a broader

[54] There are older FCA cases dealing with statutory interpretation that held the lawful limits on detention were not reached in cases where a person frustrated their own removal: eg. *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54 [137].
[55] *CZA19* (n 18) 664 [59].
[56] Ibid 661–2 [46] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ); 668 [75] (Gordon J).
[57] Ibid 662 [49], 663 [53], 664 [57]–[59] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ); 675 [116] (Steward J). Cf Gordon J at 665 [79]. See P Billings, 'Immunised and Indifferent to Incarceration: The Corrosive Effect of Immigration Detention Laws on Officialdom' in M Peterie (ed), *Immigration Detention and Social Harm: The Collateral Impacts of Migrant Incarceration* (Routledge, 2024) 175 for a discussion of the application of mandamus to promote timely and lawful visa processing.
[58] *EGH19 v Commonwealth* [2026] HCA 7 ('*EGH19*').

suite of reforms in response to the High Court's decision and was supplemented by further changes to the regulations following the delivery of the Court's reasons for judgment.[59] The new reg 2.25AA conferred a power on the Minister to grant a particular bridging visa to non-citizens for whom there was no real prospect of removal becoming practicable in the reasonably foreseeable future. In this way, the new visa powers specifically targeted the '*NZYQ* cohort': then, a group of 153 non-deportable and (thanks to *NZYQ*) non-detainable migrants (though that figure has risen over time). All but four of this group had prior criminal convictions,[60] and, despite prior criminality not being a necessary factor for the impugned conditions, the measures were politically justified by reference to the risks presented by releasing these individuals into the community.[61]

The new regulations provided that certain conditions 'must' be imposed '*unless* the Minister is satisfied that it is not reasonably necessary to impose that condition *for the protection of any part of the Australian community*'.[62] This included condition 8620 which imposed a curfew between 10 pm and 6 am (or another period, up to eight hours, specified by the Minister),[63] and condition 8621 which required the visa-holder to wear an electronic monitoring device at all times.[64] Practically speaking, that device was an ankle bracelet that was 'neither small nor discreet' and which required charging from a mains power supply for two 90-minute sessions per day.[65] Both conditions were subject to a 12-month limit, though subsequent visas could be issued on similar terms.[66] Non-compliance with the conditions was a criminal offence attracting a minimum sentence of one year and maximum of five years' imprisonment.[67]

The curfew and monitoring conditions were imposed on the man known as YBFZ, a stateless Eritrean who had arrived in Australia in 2002, aged 14, under a refugee visa. That visa was cancelled following YBFZ's convictions for offences for which he served prison sentences. Like Al-Kateb and NZYQ, YBFZ's statelessness effectively

---

[59] See *YBFZ* (n 1) 15–6 [33]–[36] (Gageler CJ, Gordon, Gleeson and Jagot JJ).
[60] This tally is as agreed in the special case for *YBFZ,* see ibid 47–8 [193] (Steward J).
[61] See, eg, Andrew Giles and Clare O'Neil, 'Government Action in Response to NZYQ High Court Decision' (Media Release, 14 November 2023); Billings (n 42).
[62] *Migration Regulations 1994* (Cth) sch 2 cl 070.612A(1), as amended by the *Migration Amendment (Bridging Visa Conditions) Act 2023* (Cth) (emphasis added).
[63] Ibid sch 2 cl 070.612A(1)(a). Justice Edelman rejected the phrase 'curfew condition' as 'an inapt euphemism', stating the condition exceeded a mere curfew and was 'more appropriately described as "home detention"': *YBFZ* (n 1) 27–8 [104] (Edelman J). Cf Steward JA: at 52 [216].
[64] *Migration Regulations 1994* (Cth) sch 2 cl 070.612A(1)(d).
[65] *YBFZ* (n 1) 19 [58]–[59] (Gageler CJ, Gordon, Gleeson and Jagot JJ), 68 [300] (Beech-Jones J).
[66] *Migration Regulations 1994* (Cth) reg 2.25AE.
[67] *Migration Act 1958* (Cth) ss 76C, 76D, 76DA.

removed any real prospect of his removal from Australia. He had been either in immigration detention or hospitalised for mental health treatment since he left prison in 2018.[68] At the time of his High Court hearing, YBFZ faced a total of six charges for failing to comply with either the monitoring or curfew conditions.[69]

In *YBFZ* the High Court (Steward J and Beech-Jones J dissenting) held that the monitoring and curfew conditions constituted administrative punishment in violation of the *Lim* principle. Accordingly, for the first time, *Lim* was applied to impositions on liberty less severe than executive detention. (The application of *Lim* to citizenship-stripping is discussed below.)

For the plurality (Gageler CJ, Gordon, Gleeson and Jagot JJ), scrutiny of both the curfew and monitoring conditions revealed them to be prima facie punitive in substance and effect, notwithstanding they stopped short of imposing full-time detention in a state facility. Critically, both measures imposed 'material and relatively long-term' encroachments on liberty and bodily integrity.[70] This prima facie punitive character was not displaced by a legitimate and non-punitive purpose. Specifically, their Honours interpreted the statute to 'mean precisely what it says, that its object is the "protection of any part of the Australian community" in the broad sense',[71] rather than narrower alternative purposes such as guarding against future offending or protecting the community from harm.[72] This broad purpose was described as 'unparticularised' and 'indeterminate'[73] and, thus, failed the 'legitimate and non-punitive purpose' test established in *NZYQ*.

Edelman J also held that the conditions were administrative punishment in contravention of *Lim* but applied his own conceptualisation of 'punishment' to do so (explored below in Part IV). This allowed his Honour to favour a narrower harm-preventive purpose which was nonetheless classified as 'punitive'.[74] In separate dissenting opinions, Steward J and Beech-Jones J interpreted the provisions as having one or more *purely* non-punitive purposes. Moreover, whilst satisfied that the curfew condition was prima facie punitive, Beech-Jones J rejected this categorisation of the monitoring condition.[75]

---

[68] *YBFZ* (n 1) 26 [96] (Edelman J).
[69] Ibid 17 [45] (Gageler CJ, Gordon, Gleeson and Jagot JJ).
[70] Ibid 18 [52], 19 [60].
[71] Ibid 20 [76].
[72] Ibid 20–2 [66]–[76].
[73] Ibid 22 [76].
[74] Ibid 24–5 [91]. See also 42–3 [162]–[168] (Edelman J).
[75] Ibid 68–70 [303]–[310] (Beech-Jones J).

The important cases summarised above provide the edifice for understanding the present constitutional boundaries of administrative powers to regulate non-deportable non-citizens. From that jurisprudence, what emerges is that administrative detention (and certain other liberty-restrictive measures) will be invalid if not reasonably capable of being seen as necessary for a legitimate and non-punitive purpose, a purpose that is particularised and practically capable of fulfilment. The scope of *Lim* is, however, far from settled; as much is clear from the submissions in *EGH19 v Commonwealth*,[76] a *Lim* challenge to curfew and monitoring visa conditions similar to those struck down in *YBFZ* but amended to account for that decision (most prominently to make their imposition contingent upon a risk assessment rather than the individual's likelihood of deportation). We return to *EGH19* in the Postscript (see Part VIII).

In what follows, we closely examine different aspects of the *Lim* test: charting how each developed through previous case law, looking forward to consider unresolved aspects and future developments, and advocating for a particular (substantive and values-driven) interpretive approach. We begin with *Lim*'s principled and historical foundations.

III CONSTITUTIONAL FOUNDATIONS AND VALUES

Lim has its roots in the strict separation of federal judicial power enunciated in *R v Kirby; Ex parte Boilermakers' Society of Australia (Boilermakers Case)* ('*Boilermakers*').[77] This doctrine restricts federal courts to 'judicial power' (and non-judicial powers which are ancillary or incidental to the court's judicial functions).[78] It also withholds federal judicial power from non-courts. Thus, strict demarcations between courts and non-courts, and between (federal) judicial and non-judicial powers, are constitutionally required. This may be doctrinally clear, but in practice the *Boilermakers* doctrine has attracted considerable controversy and critique,[79] centring on the difficulty in drawing bright-line distinctions between judicial and non-judicial powers. This is compounded by the (often uncertain but

---

[76] *EGH19* (n 58).
[77] *Boilermakers* (n 26).
[78] Ibid.
[79] See, eg, Gabrielle Appleby, 'Imperfection and Inconvenience: *Boilermakers'* and the Separation of Judicial Power in Australia' (2012) 31(2) *University of Queensland Law Journal* 265; James Stellios, 'Reconceiving the Separation of Judicial Power' (2011) 22 *Public Law Review* 113; Sir Anthony Mason, 'A New Perspective on Separation of Powers' (1996) 82 *Canberra Bulletin of Public Administration* 1; *R v Joske; Ex parte Australian Building Construction Employees and Builders Labourers Federation* (1974) 130 CLR 87, 90 (Barwick CJ).

potentially determinative) influence of history and values on the interpretation of ch III.[80]

The *Boilermakers* doctrine is "formalist" in the sense that its starting point is the strict separation of governmental functions based on their identification as judicial, legislative or executive in nature. Conversely, "functionalist" approaches to interpretation are 'more flexible and therefore more difficult to define at large'.[81] Functionalism tends to place definitions to one side and focus instead on some other standard, such as the purpose of the separation or, relatedly, constitutional values.[82] As will be seen, however, there is scope for constitutional doctrine and method to embody both formalist and functionalist elements.[83] Sitting alongside these approaches is the vexed question of the role of history in constitutional interpretation.[84] As will be seen, history can be harnessed to inform definitional scope in a formalist approach or, for instance, the nature and application of constitutional values in a functionalist approach.

The identification of punitive detention as an *exclusively judicial* function in *Lim* rests on the formalistic approach set out in *Boilermakers*. Specifically, it involves the identification of 'the adjudgment and *punishment* of criminal guilt' in a criminal trial as a paradigmatic example of exclusively judicial power. However, the separation of *powers* between courts and non-courts, by reference to their categorisation as judicial or non-judicial, is not an end in itself. Powers are categorised and separated for reasons. These can be rooted in the values underlying the constitutional compact (eg, the rule of law, or the independent and impartial administration of justice), as

[80] See, eg, Brendan Lim, 'Attributes and Attribution of State Courts: Federalism and the *Kable* Principle' (2012) 40 *Federal Law Review* 31.
[81] Rebecca Welsh, 'A Path to Purposive Formalism: Interpreting Chapter III for Judicial Independence and Impartiality' (2013) 39 *Monash University Law Review* 66, 69. See also Peter Gerangelos, 'Interpretational Methodology in Separation of Powers Jurisprudence: The Formalist/Functionalist Debate' (2005) 8 *Constitutional Law and Policy Review* 1; Martin H Redish, 'Separation of Powers, Judicial Authority, and the Scope of Article III: The Troubling Cases of *Morrison* and *Mistretta*' (1989) 39 *DePaul Law Review* 299.
[82] On the latter in particular, see Rosalind Dixon, 'Functionalism and Australian Constitutional Values' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart, 2018) 3.
[83] See, eg, the approach advanced in Welsh (n 81).
[84] See Caitlin Goss, 'The Use of History in Constitutional Law Litigation' in Jelena Gligorijević, John Griffiths and James Stellios (eds), *Issues in Australian Constitutional Law: Volume 3* (Federation Press, forthcoming 2026); Reva Siegel, 'The "Levels of Generality" Game' (2024) 47(3) *Harvard Journal of Law and Public Policy* 563; Emily Bazelon, 'How "History and Tradition" Rulings Are Changing American Law' *New York Times Magazine* (online, 29 April 2024) <www.nytimes.com>. Specifically with respect to the interpretation of ch III, see Rebecca Ananian-Welsh, 'CATs, Courts and the Constitution: The Place of Super-Tribunals in the National Judicial System' (2020) 43(3) *Melbourne University Law Review* 852, 873–4.

well as in history (eg, a power long exercised by courts indicates its judicial nature, or the classification of a power as 'judicial' recognises an historical fact).[85]

Both values and history shaped the progress of the *Lim* principle but would become pivotal themes in *YBFZ*, in which an arguably functionalist and decidedly values-driven approach won the day over Steward J's more formalistic historically-centred reasons.[86] The *Lim* cases of the 2020s laid the groundwork for this more recent extension of the principle by emphasising the *liberty*-protective role of the separation of judicial power, a more substantive approach to ch III, and the default characterisation of detention as punitive. This Part explores that jurisprudential journey and argues that the present focus on values ought to prevail over the apparently contrary approach of historical primacy — albeit recognising some place for history in both avenues.

In *Lim*, Brennan, Deane and Dawson JJ supported their identification of an 'immunity' from executive detention on the basis of Dicey's fêted statement that every citizen is 'ruled by the law, and by the law alone' and 'may with us be punished for a breach of the law, but he can be punished for nothing else',[87] and Blackstone's observation that '[t]he confinement of the person, in any wise, is an imprisonment' requiring court order or warrant.[88] As outlined in Part II, this focus on detention as inherently punitive was absent from *Al-Kateb*.[89] That case, and those which swiftly followed, adopted a narrower, less substantive mode of analysis which allowed the Court to hold that *immigration* detention would *not* be punitive, despite its impacts, even where it was imposed: indefinitely;[90] on children as well as adults;[91] despite non-compliance with Australia's international obligations;[92] and involving harsh or inhumane conditions.[93]

In the lead-up to *NZYQ*, however, the constitutional underpinnings of the *Lim* principle were unpacked in ways that ran counter to this jurisprudence. These cases

---

[85] See Rosalind Dixon (ed), *Australian Constitutional Values* (Hart, 2018), and particularly for present purposes Dixon (n 82); Sarah Murray, 'Impartial Justice' 121; James Stellios, 'Liberty as a Constitutional Value: The Difficulty of Differing Conceptions of "The Relationship of the Individual to the State"' 177. On the role of history in constitutional interpretation see, eg, Goss (n 84).
[86] See Rebecca Ananian-Welsh, 'History and Values in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs*' (2025) 36(1) *Public Law Review* 3 ('History and Values in *YBFZ*').
[87] *Benbrika v Minister for Home Affairs* (2023) 280 CLR 1, 16 [36] (Kiefel CJ, Gageler, Gleeson and Jagot JJ) ('*Benbrika [No 2]*'), citing *Lim* (n 2) 27–8, in turn quoting AV Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, 1959) 202.
[88] *Lim* (n 2) 27.
[89] See, eg, *Re Woolley* (n 31) 32 [77] (McHugh J).
[90] Ibid.
[91] Ibid.
[92] *Behrooz* (n 32).
[93] Ibid.

emphasised both the punitive *nature* of detention and the *liberty*-protective role of *Lim*. Ultimately, these cases lent contemporary weight to the 'authoritative'[94] statements in *Lim* which had been undermined by *Al-Kateb*. They achieved this by affirming that the separation of judicial power (and specifically the *Lim* principle) not only serves a liberty-protective function but should be interpreted in that light, and that detention is prima facie punitive.[95]

The emergence of these themes is most notable in two *Lim* cases not concerning immigration detention. Acknowledging this reveals *NZYQ* as a continuation of previous authority, just as the Court claimed in *NZYQ*,[96] despite its outward appearance as a radical jurisprudential turning point.

In the 2021 case of *Benbrika [No 1]*, a majority of the Court upheld a scheme which provided for the involuntary post-sentence detention of terrorist offenders on the basis of a judicial assessment that they posed an 'unacceptable risk' of committing a serious (ie, terrorism-related) offence, under pt 5.3 of the *Criminal Code 1995* (Cth), if released into the community.[97] Gageler and Gordon JJ each dissented in that case, their Honours focussing on the (lack of) connection between some of the conduct captured by pt 5.3 offending and potential 'harm' to the community.[98] Despite being in dissent, their Honours' views on the *Lim* principle proved influential in *NZYQ*.[99]

In *Benbrika [No 1]* Gageler J situated Brennan, Deane and Dawson JJ's 'canonical observation'[100] in *Lim* in historical context to emphasise the value of separated institutions and practices in safeguarding liberty. For Gageler J, this informed modern understandings of judicial power by revealing the independent judiciary's important, and distinctive, function in proceedings where the life or liberty of the individual is in jeopardy.[101]

The constitutional assignment of the exclusive function of adjudging and punishing criminal guilt to the judicial power of the state was *protective of liberty*, Gageler J explained, 'by preventing detention in custody at the initiative of the executive other

[94] *NZYQ* (n 3) 153 [26] (The Court).
[95] On the Court's treatment of liberty as a constitutional value, see Stellios (n 85).
[96] *NZYQ* (n 3) 156 [35].
[97] *Criminal Code 1995* (Cth) s 105A.7(1). Specifically, a pt 5.3 offence punishable by seven years or more: s 105A.2.
[98] *Benbrika [No 1]* (n 11) 119 [95] (Gageler J).
[99] *YBFZ* (n 1) 44 [176] (Steward J).
[100] *Benbrika [No 1]* (n 11) 108 [65] (Gageler J).
[101] Ibid 108–11 [66]–[71].

than through an independent and impartial tribunal'[102] affording procedural fairness. His Honour continued:

> Default characterisation of detention in custody as penal or punitive, and therefore as capable of imposition only through judicial pronouncement of a sentence that gives effect to the prescribed penal consequence for a liability determined to have arisen from the operation of positive law on past events or conduct, underpins the protection of liberty by demanding constitutional justification for any detention in custody to be constitutionally permitted outside that paradigm. …
>
> The requirement for detention in custody to be justified as exceptional to escape characterisation as penal or punitive operates as a check on legislative and executive power against tendencies long recognised that have been borne out by experience.[103]

Likewise, Gordon J observed that the default characterisation of detention as punitive was the 'central principle derived from *Lim,* as reflected in subsequent decisions of this Court'.[104]

Gageler and Gordon JJ's shared understanding of the role of the *Lim* principle in protecting liberty was embraced in *Alexander*.[105] In *Alexander*, the High Court extended the *Lim* principle to invalidate executive action authorising denationalisation (or 'citizenship stripping') of dual nationals on security grounds under s 36B of the *Citizenship Act 2007* (Cth). This was supported by an emphasis on 'the fundamental value accorded to the liberty of the individual' as

> the rationale for the strict insistence in the authorities that the liberty of the individual may be forfeited for misconduct by that person only in accordance with the safeguards against injustice that accompany the exercise of the judicial power of the Commonwealth.[106]

On this basis, the Court again emphasised that '[a]s was said in *Lim*, whether a law provides for the adjudication and punishment of criminal conduct is a matter of substance, not form'.[107] In this vein, the Court held that s 36B effected executive punishment contrary to *Lim*. This rested on the substantive determination that denationalisation was punitive because of its practical effect on the right to liberty

---

[102] Ibid 111 [72].
[103] Ibid 111 [73]–[74], 131 [136] (Gordon J). See also *Benbrika [No 2]* (n 87) 27 [67] (Gordon J), 33 [86] (Edelman J).
[104] *Benbrika [No 1]* (n 11) 131 [134] (Gordon J).
[105] *Alexander* (n 19).
[106] Ibid 368 [73] (Kiefel CJ, Keane and Gleeson JJ).
[107] Ibid 368 [73], 370 [79].

in Australia as conferred by citizenship.[108] This was in addition to the more orthodox path of reasoning focused on statutory interpretation of s 36B; that is, a majority of the Court held that s 36B was punitive because its purpose was retribution.[109]

In the 2023 sequel to *Alexander*, the Court (Steward J dissenting again and on similar terms)[110] in *Benbrika v Minster for Home Affairs ('Benbrika [No 2]')* held that conviction-based denationalisation powers constituted executive punishment in violation of the *Lim* principle. In doing so, their Honours sustained their substantive approach to the *Lim* principle and re-affirmed the centrality of liberty and judicial independence to the interpretation and application of that principle.[111]

These cases, among others, laid the groundwork for overturning *Al-Kateb* in *NZYQ*. If the separation of powers has a role in *protecting liberty*, and if detention is prima facie punitive, then it follows that executive detention threatens the separation of powers if the achievement of a legitimate and non-punitive purpose is not a practical possibility within a reasonable period. However, the liberty-protective, substantive interpretation of *Lim* was applied in novel ways by the plurality in *YBFZ* and questioned by Steward J.

For Gageler CJ, Gordon, Gleeson and Jagot JJ in *YBFZ*, *NZYQ* emanated from

> a broader stream of common law and constitutional principle based on the pre-eminent value the law of this country gives to the protection of human life (from arbitrary capital punishment), limb, now called bodily integrity (from arbitrary corporal punishment), and liberty (from arbitrary detention). This reflects the common law's acceptance of the inherent and irreducible status of each human being in the compact between the individual and the state, a compact which this country inherited and within which the Constitution was enacted.[112]

Having thus emphasised the *Constitution*'s role in protecting life, liberty and bodily integrity, the plurality pointed to the independent judiciary as a 'bulwark of liberty'

---

[108] Ibid 579 [71]–[79], 583 [95]–[96] (Kiefel CJ, Keane and Gleeson JJ), 583 [98] (Gageler J), 597 [166] (Gordon J), 613 [248] (Edelman J).

[109] Ibid 367 [75], 371 [82], 375 [95] (Kiefel CJ, Keane and Gleeson JJ), 398 [163]– 164] (Gordon J). For Gageler J, the legislative purpose was 'denunciation and exclusion from membership of Australia', and that was a reason for deeming s 36B as punitive: at 383 [120]. Steward J dissented by interpreting the purpose of denationalisation as aligning with that stipulated in the Explanatory Memorandum, namely, to 'recognise a person's repudiation of her or his allegiance to Australia and to prescribe a consequence for this repudiation, namely denationalisation': at 460 [337]–[338].

[110] See, eg, *Benbrika [No 2]* (n 87) 60 [163] (Steward J).

[111] See, eg, ibid 16 [36] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), citing *Lim* (n 2) 27–8, in turn quoting Dicey (n 82) 202.

[112] *YBFZ* (n 1) 11 [12] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

and protector of 'basic rights'.[113] Then, from this values-centred position, their Honours assessed the curfew and monitoring measures to be 'prima facie punitive' and subject to the *Lim* limit on administrative punishment.

Beech-Jones J acknowledged that '[c]h III enhances the protection of the right to liberty' but emphasised that the core constitutional concern was with 'preserving the courts' exclusive function of adjudging and punishing criminal guilt'.[114] Thus, his Honour was content to apply *Lim* to lesser deprivations of liberty (than incarceration in a state facility), but held that the monitoring condition was not prima facie punitive.

Steward J reacted adversely, warning that the plurality's approach had the potential 'to introduce incrementally into our Constitution a judge-made form of a Bill of Rights whenever a law of the Commonwealth in some way relevantly harms, or infringes upon, the liberty of a person'.[115] His Honour added that a 'real danger' arose from 'reasoning from highly generalised, undefined and abstract concepts, or perhaps aspirations, which will inevitably mean very different things to very different people and judges'.[116] Instead, Steward J stressed that the key constitutional concern was the contours of exclusively judicial power. These contours were effectively *historical*. While judicial power is not 'frozen in time', the *Lim* principle's existence was justified by 'legal heritage',[117] such that its application must be 'anchored in' that heritage, the importance of which 'cannot be overstated'.[118] For Steward J, the problem with the direction in which *Lim* had developed (subject to his Honour's dissenting voice in, eg, *Alexander* and *Benbrika [No 2]*) was that:

> From preserving to a court, and only to a court, a function which is clearly and exclusively judicial, the principle has, with respect, been used to strike down laws passed validly by Parliament concerning matters which

[113] Eg *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1, 11 (Jacobs J), quoted in ibid [13] (Gageler CJ, Gordon, Gleeson and Jagot JJ). See also *Vella v Commissioner of Police* (2019) 269 CLR 219, 276 [141].

[114] *YBFZ* (n 1) 70 [312] (Beech-Jones J).

[115] Ibid 46 [183] (Steward J). For an analysis contrasting *Lim* to codified constitutional rights protection, see Thwaites (n 3), who concludes that the 'dynamics' of *Lim* case law 'share a structural similarity, though not an equivalence, with rights reasoning': at 18. It must be noted that Thwaites was writing prior to the extension of *Lim* in *YBFZ* — though it is unclear whether that case would impact his overall conclusion (based on the distinction between structural and rights-based limits on governmental powers).

[116] *YBFZ* (n 1) 46 [184]. See also 47 [188]–[189] (Steward J).

[117] Ibid 45 [181].

[118] Ibid 46–7 [187].

> have not ever, historically or otherwise, been the exclusive preserve of the courts.[119]

Thus, looking first to history, Steward J found no basis to find that the impugned powers were of a kind that was or, relatedly, ever had been exclusively judicial.[120]

History played a more minor role in the other judgments. For instance, Edelman J pointed to 'historical treatment until, and at, the time of Federation, of the power to be exercised' as relevant to characterisation of functions 'at the periphery between judicial and executive power'.[121] However, Edelman J's analysis remained multifactorial.

Similarly, Beech-Jones J saw history as one of a range of relevant factors that could be usefully drawn upon to determine whether a measure was relevantly punitive in difficult (or 'peripheral') cases.[122] Applying this approach, Beech-Jones J used historical analogy to conclude that detriments will not necessarily be punitive because they cause shame or stigma.[123]

Drawing history and values together, the plurality said:

> It is the evolution of the common law's repeated rejection of arbitrary punishment of the individual, and its expression in the doctrine of the separation of powers, which is of fundamental importance. In this evolution, the question whether courts alone historically exercised a power to order punishment by an interference with human life, bodily integrity, or liberty is relevant to but has never been determinative of the boundaries of exclusively judicial power for the purpose of [c]h III.[124]

Ultimately, four judges of the High Court have embraced an overtly values-centred approach to *Lim* (raising questions of how much further through ch III or indeed the *Constitution* this may extend). The *Lim* principle is founded on a veritable swathe of constitutional values. Arising from ch III, it reflects the values of judicial independence and impartial justice, with their associated roots in the rule of law. Being based on punishment of citizens by the state, the principle is undoubtedly

---

[119] Ibid 44 [176].

[120] Support was found in Kitto J's statement that determining the scope of exclusively judicial power involved 'considering how similar or comparable powers were in fact treated in this country at the time when the Constitution was prepared': *R v Davison* (1954) 90 CLR 353, 382, quoted in ibid 46–7 [187] (Steward J).

[121] *YBFZ* (n 1) 35 [135] (Edelman J).

[122] Justice Beech-Jones identified those factors as the nature and severity of the detriment, whether it was of a kind historically imposed as punishment or commonly imposed by courts, and whether it was imposed selectively on an individual or on a broader section of society: ibid 57 [242]–[244].

[123] Ibid 69 [307]–[308] (Beech-Jones J).

[124] Ibid 11 [14] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

founded on respect for liberty and bodily integrity, effecting, as it does, strict limits on the state's capacity to intrude on either without a criminal trial.[125] Rarely (in Australia) has the articulation of this relationship carried such authority and clarity as in the plurality judgment in *YBFZ*.

Lim too is founded in historical fact and experience since, at least, federation. Punishment under law and detention are the traditional purview of courts associated with criminal justice. However, history alone cannot provide a full view of the scope of judicial or administrative powers. As Mohseni, Gomes and Ward articulate:

> To treat history as decisive is to pull oneself up by one's bootstraps, by reference to a constitutional system that had no separation of powers and would overlook that, upon Federation, 'everything adjusted'.[126]

Moreover, while history is a compelling indicator that a power is administrative or otherwise, it does not suggest that governmental powers are divided for division's own sake. *Why* a power is historically exercised by courts, or not, matters. Here, values and principles have a crucial role.

Therefore, the future of *Lim* seems to look to certain values (as well as to history) to support the frequently complex task of categorising public powers. All judges in *YBFZ* were multifactorial in their approaches; the stark interpretive divisions were at the level of which factor (values, history, or otherwise) should be given greatest weight in the analysis. As Steward J warns, the plurality's values-centred approach takes the Court into vague territory. However, history can be just as unclear.[127]

We submit that a values-centred approach has three clear advantages over a historical one. First, it is well-suited to testing novel legislative and administrative schemes without risking the ratchetting effect of progressive analogies.[128] Second, it maintains a contemporary grounding and avoids (or lessens) the problems which historically-based reasoning encounters in constitutionally important distinctions across time and context.[129] Third, it complements and balances the formalist, definitions-based, *Boilermakers* framework within which *Lim* operates; that is, it

[125] See Gomes, Mohseni and Ward (n 14) for insightful discussion of the role of United States case law in the *Lim* decision.
[126] Ibid 9, quoting *Burns v Corbett* (2018) 265 CLR 304, 347–8 [72] Gageler J. For similar conclusions on the problems associated with historically-focussed reasoning in another ch III context, see Rebecca Ananian-Welsh, 'Fair Process in Courts' in Jelena Gligorijević, John Griffiths and James Stellios (eds), *Issues in Australian Constitutional Law: Volume 3* (Federation Press, forthcoming 2026).
[127] See, eg, Goss (n 84).
[128] See, eg, criticisms of the Court's employment of 'imperfect' analogies to support a finding of constitutional validity in *Thomas v Mowbray* (2007) 233 CLR 307: Welsh (n 81).
[129] See Goss (n 84).

uses principles not as a freestanding test but as a means to resolve ambiguities within the rigid formalist identification of whether a relevant function is 'judicial' or not.[130]

These advantages operate in addition to the wider arguments in favour of functionalist reasoning,[131] and embrace a definite — though neither primary nor determinative — role for history in applying *Lim* within the formalist *and* functionalist positions it simultaneously occupies. As will be seen, this opens the door to acknowledging the punitive impacts and experiences of measures other than involuntary detention in a state facility, to which we now turn.

IV (MIS)UNDERSTANDING PUNISHMENT

A *Punitive and Non-Punitive Measures: A Binary or Spectrum?*

The *Lim* principle initially rested on the point that detention is prima facie punitive in nature, and this has received renewed emphasis since *NZYQ*. Moreover, a punitive measure can escape characterisation as punitive if it is justified: that is, reasonably capable of being seen as necessary to effect a legitimate and non-punitive purpose. So, what *is* punishment? And how does one distinguish punitive from non-punitive measures or purposes?

For the most part, a dichotomous notion of punishment emerges from the *Lim* case law,[132] whereby measures and their purposes are capable of classification as *either* punitive or non-punitive. This is evident in *Al-Kateb* and other cases from that period, where the severe impacts of detention did nothing to detract from a measure's classification as 'non-punitive' by reference to statutory purpose. However, in *NZYQ* the High Court reasoned that the prima facie punitive characterisation of detention can be altered if a law is 'reasonably capable of being seen as necessary for a legitimate and non-punitive purpose'. This approach was adopted and extended-upon in *YBFZ*, where the majority's analysis began by considering whether home detention (by curfew) and electronic monitoring were 'prima facie punitive' in nature and then, if so, whether that characterisation was displaced by a legitimate *and non-punitive* purpose. Evidently, all these approaches presume a sharp distinction between punitive and non-punitive measures and purposes.

---

[130] See, broadly, the kind of approach to ch III argued for in Welsh (n 81).
[131] See Dixon (n 82) 3.
[132] Although the dichotomous view of executive detention was challenged by Gummow J in *Al-Kateb* (n 7), who stated that 'there is often no clear line between purely punitive and purely non-punitive detention': at 611 [135].

In *YBFZ* the plurality eschewed a definition of punishment per se. However, in assessing whether the curfew or monitoring conditions were prima facie punitive, their Honours focused upon the law's operation, and on the substance and effect of the conditions on people: specifically, the degree and duration of those measures' effects on liberty and bodily integrity (operationalising the values-centred approach). The measures' prima facie punitive nature was established, therefore, by the fact that their impacts on liberty and bodily integrity were 'material and relatively long-term'.[133]

This approach was rejected by both Edelman J and Steward J. For Steward J, the plurality had adopted a broad concept of punishment detached from the more confined traditional understanding, that is, the judicial infliction of measures taken, in accordance with applicable sentencing principles, to exact just retribution on those who have offended against societal laws. For Steward J, the plurality's approach to *Lim* encompassed measures which impose any punishment or harm, *simpliciter*.[134]

Elucidating the bounds of exclusively judicial punishment required recourse to history which, Steward J argued, demonstrated no constitutional guarantee against executive detention and,[135] certainly, no constitutional limit on administratively imposed visa conditions which infringe non-citizens' liberty or bodily integrity.[136] The closest Steward J came to providing a definition of punishment was to observe that '[t]he State is not seeking further *retribution against the plaintiff for the crimes he committed in the past*.'[137]

Edelman J considered that the determination of whether something harsh or unpleasant constitutes 'punishment' should be made by reference to: 'the standard or core case of punishment' (being 'the power of adjudication and punishment of criminal guilt' or a consequence for the purpose of 'retribution and general or specific deterrence'); analogy with those standard or core cases of punishment;[138] and the harshness of the consequence itself.[139] Beyond this Edelman J's approach to the foundational issue of 'punishment' was unique. Rather than argue that the

[133] *YBFZ* (n 1) 18 [52], 19–20 [60]–[62] (Gageler CJ, Gordon, Gleeson and Jagot JJ).
[134] Ibid 45 [182] (Steward J).
[135] Ibid 51–2 [208]–[214].
[136] Ibid 53 [220].
[137] Ibid 53 [221] (emphasis added). Similarly, Beech-Jones J hinted at his own core conceptualisation of punishment by saying that a power exercised for *retribution* or *denouncement* of past conduct would be punitive: at 66 [283]–[286].
[138] Ibid 35 [134]–[136].
[139] Ibid 36–7 [140].

plurality was departing from *Lim*, as Steward J reasoned, Edelman J took issue with *Lim* itself, saying that in that case

> this Court extended the constitutional concept of punishment, beyond any meaning that the concept is capable of bearing, to circumstances where legislation providing for detention in order to deport aliens had the effect that some aliens were detained for a period that was longer than was reasonably capable of being seen as necessary for their deportation. In other words, legislation that employed means to achieve its purposes in a disproportionate fashion was said to be 'punitive' in its disproportionate application to particular individuals. I have previously adopted and applied this use of the language of 'punishment', although noting that it involves the use of 'punishment' in a sense that is 'novel' or 'deemed' and 'loose'. Transparency requires explicit recognition that this distorted extension of the concept of punishment in *Lim* is a fiction.[140]

This '*Lim* punishment fiction' was compounded by the '*NZYQ* purpose fiction': 'that a legitimate general purpose will be deemed not to be Parliament's purpose in particular cases where it is not practically achievable in the reasonably foreseeable future in those particular cases'.[141] (We return to this below in Part V.)

Having rejected the conceptualisations of punishment adopted in *Lim* and by the rest of the Court in *YBFZ*, Edelman J went on to apply his own distinct concept. Critically, his Honour rejected the blunt distinction between punitive and protective measures as a 'category error'[142] and, drawing on the scholarship of HLA Hart and Lucia Zedner, applied a notion of 'protective punishment'.[143] Edelman J had first proposed this notion in *Benbrika [No 1]*, where he rejected 'narrow definitions of criminal punishment in traditional terms confined to primarily backwards-looking orders of State retribution upon the adjudication of offences'.[144] His Honour explained that 'punishment' is not a binary but exists on a spectrum:

> At one end of the spectrum are orders that are distant from traditional notions of criminal punishment. There, the orders can be characterised as purely protective. An example is orders confining in detention those who, by reason of extreme mental illness, pose a danger to the public …
>
> At the other end of the spectrum are orders that are much closer to traditional notions of criminal punishment. These orders might be

[140] Ibid 25 [92].
[141] Ibid 25 [93].
[142] Ibid 34 [130]; *Benbrika [No 1]* (n 11) 149 [183] (Edelman J).
[143] *YBFZ* (n 1) 32–4 [124]–[130] (Edelman J).
[144] *Benbrika [No 1]* (n 11) 154–5 [196] (Edelman J).

> described as 'protective punishment' to recognise both the contrasts and commonalities with traditional criminal punishment.[145]

On this basis, Edelman J maintained that the post-sentence detention orders challenged in *Benbrika [No 1]* were an instance of 'protective punishment' — punitive in nature but with a non-punitive (protective) purpose. The curfew and monitoring conditions in *YBFZ* were also conceived of as protective punishment, as the 'commission of past offending, and the nature of that offending, is central to the exercise that the Minister is required to perform'.[146]

Having reasoned like this since 2021, Edelman J has faced the challenge of fitting this nuanced categorisation of punishment into the *Lim* principle (founded, as it is, on sharp punitive/non-punitive distinctions and a notion of punishment that his Honour dismisses as a 'fiction'). His Honour has achieved this by reading *Lim* as encompassing a 'broad understanding of punishment',[147] such that detention for 'protective-punitive' purposes requires an exercise of judicial power in a judicial way.[148] Therefore, the impugned post-sentence detention orders in *Benbrika [No 1]* were constitutionally *valid* because they were *judicially* authorised; whereas the curfew and monitoring conditions in *YBFZ* were *invalid* instances of *executive* protective punishment.

Hence, while both Steward J and Edelman J have expressed strong misgivings about the notion of punishment underlying the prevailing interpretation of *Lim* (ie, one focused on a measure's substantive impacts on liberty and bodily integrity), Steward J would *narrow* this by (primary) reference to the historic scope of judicial and administrative powers. Edelman J, however, would *broaden* it to include protective punishment, a notion his Honour develops primarily by reference to scholarship. Neither variation seems poised to win the day, yet neither Justice shows any indication of adopting the approach favoured by a majority of the current High Court.

It remains to be seen how the substantive, impacts-focused, notion of punishment favoured by at least four members of the Court will play out in respect of different measures outside the detention and denationalisation contexts. *YBFZ* has opened a doorway to many other impositions on liberty and bodily integrity by the federal executive government being queried for *Lim* validity. The advantage of this approach is a truly substantive, rather than formal, assessment of punishment, one that no

---

[145] Ibid 155 [197]–[198].
[146] *YBFZ* (n 1) 24–5 [91], 32 [123]. See also 42–3 [162]–[168] (Edelman J).
[147] *Benbrika [No 1]* (n 11) 162–3 [214].
[148] Ibid 167–8 [222].

longer allows statutory language to trump the true nature or effects of administrative intrusions on liberty and bodily integrity. However, this is new terrain; the test to determine whether a measure is 'prima facie punitive' is presently underdeveloped, as is the exact place of the punitive/non-punitive binary in the plurality's substantive, essentially functionalist, approach.

Acknowledging the difficulties surrounding the punitive/non-punitive distinction prior to *YBFZ*, Mohseni, Gomes and Ward have argued for excluding 'punishment' as a relevant factor from the *Lim* immunity. They focus instead on *Lim*'s recognition that the imposition of involuntary detention is a judicial function which the federal Parliament may only confer outside ch III courts in exceptional cases (ie, those justified by reference to history or principle developed by reference to historical analogues).[149] While this focus on the *Boilermakers* foundations for the *Lim* principle, and an emphasis on historical reasoning, resonates with Steward J's approach, it appears to have been scuttled by the majority finding in *YBFZ*. In that case, the curfew condition may well have amounted to detention,[150] but the monitoring condition was not. It follows, incontrovertibly, that *Lim* now extends to some interferences with liberty and bodily integrity which are both *lesser than* detention and *not* traditionally within the exclusive purview of judicial power.[151]

It seems inevitable that *Lim* jurisprudence will continue to focus on whether executive measures short of detention significantly interfere with liberty and bodily integrity and are 'punitive' in nature. Clearly, greater clarity is needed around the type and degree of interference with liberty or bodily integrity required to bring a measure within the scope of *Lim*'s limits on executive power. The sheer breadth of executive power to intrude on people's life, liberty and bodily integrity — both now and historically — means that a vague standard (whereby, eg, punishment means any significant imposition on liberty) could create problematic degrees of constitutional uncertainty and unnecessary litigation. Clarification will come, with further challenges to immigration measures on foot, and it would seem a constrained approach which limits punishment to clear cases and severe impositions on liberty or bodily integrity is most appropriate.

[149] Gomes, Mohseni and Ward (n 14) 551, 556–7.
[150] See *YBFZ* (n 1) 27–8 [104] (Edelman J): 'There is a distinction between a "curfew" and "home detention". A curfew only prevents movement after nightfall. Condition 8620 goes further and confines the subject to a particular place and empowers the Minister to impose the eight hours of detention over a period that could include daytime. Condition 8620 is more appropriately described as "home detention".'
[151] Ibid 11–12 [15] (Gageler CJ, Gordon, Gleeson, Jagot JJ).

B *Non-Punitive Purposes: The Legitimate and Non-Punitive Ends of Migration Measures*

Having reaffirmed that detention is, by default, punitive in character, a majority of the Court in *Benbrika [No 1]* (and the cases which followed) drew on *Lim* for the next step in their analysis, namely, whether the law in question is 'reasonably capable of being seen as necessary' to achieve a legitimate and non-punitive purpose.[152] If non-citizens are to suffer detention without judicial order or warrant, detention laws must be justified — capable of being seen to be necessary for *a legitimate and non-punitive* purpose — as a critical step to being constitutionally compliant. It is this test that was given the full force of the Court's single judgment in *NZYQ* and applied in subsequent cases.[153]

'Legitimate and non-punitive' purposes, capable of displacing default characterisation as punitive, are 'exceptional'.[154] Exceptional purposes include, but are not limited to: detention in cases of infectious disease to protect public health; detention in cases of mental illness to promote individual welfare or community safety; committal to custody to secure a person awaiting a trial for an offence; and immigration detention for the regulation of certain aliens.[155] In these instances courts have recognised that the purpose of detention is not punishment in the classical sense of the term. Moreover, to qualify as 'legitimate', a non-punitive purpose must be capable of achievement in the reasonably foreseeable future and not be vague or ill-defined.[156]

In the context of a constitutional inquiry into a law's true purpose, the legislated text is the start of the identification of purpose but not the end. As Gageler J explained in *Alexander*, a legislature of limited powers

> cannot, merely by including a statement of purpose in legislated text, require a court to identify the purpose of a law as something that it is not. Not unknown in our constitutional history is for a law which purports to

---

[152] *Lim* (n 2) 33, quoted in *Benbrika [No 1]* (n 11) 113 [78] (Gageler J). See also 119 [95] (Gageler J); 168–9 [210], [225] (Edelman J). This test was also applied in the denationalisation cases of *Alexander* (n 19) and *Jones* (n 11), and aligns with the joint judgment's observation in *Falzon* (n 22) that the 'detention of a person by the executive without more is likely to permit an inference to be drawn that, for some reason, the legislature wishes to punish the person': at 342 [24] (Kiefel CJ, Bell, Keane and Edelman JJ).
[153] *NZYQ* (n 3).
[154] Ibid 157 [40] (The Court), citing *Lim* (n 2) 27–8.
[155] See, eg, *Lim* (n 2) 55 (Gaudron J), 71 (McHugh J); *Benbrika [No 1]* (n 11) 131 [134] (Gordon J). Two exceptional cases of *punitive* detention by *non-judicial* bodies are the powers of Parliament to punish for contempt and of military tribunals to punish for breach of military discipline: *Benbrika [No 2]* (n 87) 23–4 [58] (Gordon J)).
[156] *NZYQ* (n 3) 157 [40] (The Court); *YBFZ* (n 1) 22 [76] (Gageler CJ, Gordon, Gleeson, Jagot JJ).

> be designed to achieve a constitutionally permissible purpose to be found on close inspection 'in truth' to pursue a constitutionally impermissible purpose.[157]

Indeed, *Alexander* and *Benbrika [No 2]* are cases in which the stated non-punitive objects of the impugned denationalisation provisions were held to not be their *true* purposes (by all Justices bar Steward J).[158] Nonetheless, a political (eg, statutory) statement as to why a law is enacted is treated as presumptively accurate.[159]

The general object of the *Migration Act 1958* (Cth) is to regulate, in the national interest, the coming into and presence within Australia of non-citizens,[160] as well as the removal or deportation of those non-citizens whose presence is not permitted by the Act.[161] As the High Court explained in *Plaintiff S4/2014 v Minister for Immigration and Border Protection* ('*Plaintiff S4*'):

> More particularly, the Act gives the Executive power to detain non-citizens in the context, and for the purposes, of the Executive's statutory power to remove from Australia an alien who is an unlawful non-citizen. … The detention which the Act authorises in respect of an alien who is an unlawful non-citizen can be described most generally as detention under and for the purposes of the Act. *Detention under the Act is not an end in itself*. It is not detention in execution of any conviction.[162]

According to a majority of the High Court in *Lim*, laws authorising detention are valid if they are capable of being seen as reasonably necessary to effect purposes relating to entry and removal. Put differently, detention is legally justified by the need 'to support and facilitate the exercise of executive power' over entry and removal.[163] These powers extend to the supervision and control of non-citizens pending the determination of their entry claims, and the expulsion of those whose claims are

[157] *Alexander* (n 19) 382 [117] (Gageler J).
[158] Ibid 375–6 [96] (Kiefel CJ, Keane and Gleeson JJ); *Benbrika [No 2]* (n 87) 17–8 [41] (Kiefel CJ, Gageler, Gleeson and Jagot JJ). Justice Steward dissented in both cases: ibid 463 [344]–[345]; *Benbrika [No 2]* (n 87) 57 [157].
[159] *Alexander* (n 19) 383 [119] (Gageler J).
[160] *Migration Act 1958* (Cth) s 4(1).
[161] Ibid ss 4(4), 198.
[162] *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219, 230–231 [23]–[24] (The Court) (emphasis added) ('*Plaintiff S4*').
[163] *Falzon* (n 22) 342 [24] (Kiefel CJ, Bell, Keane and Edelman JJ). See also *CZA19*, in which the Court particularised how detention is capable of being seen as reasonably necessary for the purpose of entry (or visa processing) with reference to making an unlawful non-citizen *available for investigations* (into health, character, security profile etc) and promoting the *integrity of the visa process* (which would be undermined by unlawful non-citizens absconding into the community before applications were determined) and the *integrity of visa conditions* that might be imposed: (n 18) 661–2 [46] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), 669 [84], 674 [108] (Edelman J).

rejected (requiring those non-citizens to be available for removal).[164] These legitimate and non-punitive purposes can equally justify administrative constraints on liberty short of detention, even where those measures are prima facie punitive (as in *YBFZ)*.[165]

C *Illegitimate or Incidental Purposes: Segregation, Protection and Deterrence*

In *NZYQ*, the Court rejected the possibility that segregation from the community — that is, separation of an alien from the community by means of detention — was a legitimate independent purpose for detention:

> The principle in *Lim* necessitates that the purpose of detention, in order to be legitimate, must be something distinct from detention itself. … If 'separation from the Australian community' is equated with separation from the Australian community by means of detention, as was necessarily implicit in the defendants' formulation, then the postulated purpose impermissibly conflates detention with the purpose of detention and renders any inquiry into whether a law authorising the detention is reasonably capable of being seen to be necessary for the identified purpose circular and self-fulfilling.[166]

In short, 'detention is the thing to be justified by a legitimate purpose. Detention is not the purpose itself.'[167]

A further potential purpose for detention and other constraints on liberty and bodily integrity is community protection. *NZYQ* offered no support for the view, articulated by a minority of judges in *Al-Kateb* and later in *Plaintiff M47/2012 v D-G of Security*,[168] that community protection could be a *stand-alone*, legitimate, purpose for immigration detention. While community protection would come to dominate the political aftermath of *NZYQ*, this justification did not feature in argument or the Court's resolution of that case.[169] That said, the Court explained in *CZA19* that purposes related to mitigating risks to community health and safety can be *incidental* to the legitimate independent purpose of visa processing.[170]

---

[164] *Falzon* (n 22) 360 [97], 361 [98] (Nettle J).
[165] *YBFZ* (n 1).
[166] *NZYQ* (n 3) 159–60 [49].
[167] *ASF17* (n 17) 795 [67] (Edelman J). See also *CZA19* (n 18) 668 [75]–[76] (Gordon J).
[168] *M47/2018* (n 35).
[169] *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCATrans 154 (8 November 2023). Community protection is, perhaps, a legitimate non-punitive purpose that is incidental to the limited legitimate purposes (entry and removal) identified in *Lim* and affirmed in *NZYQ*.
[170] *CZA19* (n 18) 661–2 [46] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), 669 [84], 674 [108] (Edelman J).

Overlapping community safety and migration purposes are evident where non-citizens' liberties are constrained because of prior criminality — as was politically, though not legally, the case in *YBFZ*, and as is raised more directly in *EGH19* (see Part VIII). In *YBFZ* community protection — whether generally, or from harm, or specifically from criminal offending was unclear— was the stated purpose of the impugned provisions.[171] As discussed above, this 'unparticularised' and 'indeterminate' purpose failed the legitimate and non-punitive purpose test.[172] Moreover, their Honours reasoned that a narrower construction of the provisions' purpose would not save the law from invalidity. Protection *from harm*, even from harm relating to *criminal offending*, remained too vague to pass the relevant test.[173] Even if that threshold had been satisfied, the conditions were not reasonably capable of being seen as necessary, appropriate and adapted to effect those purposes.[174] Ultimately, community protection *can* justify detention and other incursions on liberty outside a criminal trial context[175] — but the Court has sent clear signals that the purpose must be carefully calibrated and targeted in a migration setting .

Another purpose of immigration detention, identified politically if not in legislation, is deterrence.[176] The object of deterrence has a punitive character,[177] but with respect to detention this object appears to be incidental to the administrative regulation of non-citizens for the twin purposes cited in *Lim* and affirmed in *NZYQ*. As McHugh J observed in *Re Woolley; Ex parte Applicants M276/2003 by their next friend GS* ('*Re Woolley*'), detention laws 'will not be characterised as punitive in nature unless deterrence is one of the principal objects of the law and the detention

---

[171] See Ananian-Welsh, 'History and Values in *YBFZ*' (n 86).
[172] *YBFZ* (n 1) 22 [76] (Gageler CJ, Gordon, Gleeson and Jagot JJ).
[173] Ibid 23 [82].
[174] Ibid 12 [18], 23 [84].
[175] See, eg, *Benbrika [No 1]* (n 11); ibid 58 [248] (Beech-Jones J). Protective detention and constraints on liberty have also been the subject of ch III challenges in the states, invoking the *Kable* doctrine. The relationship between *Lim* and *Kable* is a topic of some disagreement on the Court and is beyond the scope of this paper. For discussion, see Rebecca Ananian-Welsh et al, *Blackshield and Williams Australian Constitutional Law and Theory: Commentary and Materials* (8th ed, Federation Press, 2024) 696–8.
[176] See Commonwealth, *Parliamentary Debates*, House of Representatives, 5 May 1992, 2372 (Gerry Hand, Minister for Immigration, Local Government and Ethnic Affairs): 'I believe it is crucial that all persons who come to Australia without prior authorisation not be released into the community… *The Government is determined that a clear signal be sent* that migration to Australia may not be achieved by simply arriving in this country and expecting to be allowed into the community' (emphasis added). The threat and consequence of long-term detention '*offshore*' has been used since September 2001 to discourage and police unauthorised maritime arrivals: see S Pickering and L Weber, 'New Deterrence Scripts in Australia's Rejuvenated Offshore Detention Regime for Asylum Seekers' (2014) 39(4) *Law and Social Inquiry* 1006.
[177] See, eg, *YBFZ* (n 1) 35 [136] (Edelman J).

can be regarded as punishment to deter others'.[178] Linking deterrence to community protection, Beech-Jones J observed in *YBFZ*:

> Ultimately, the question of whether a particular statutory regime that expressly or impliedly promotes the 'protection' of the community through deterrence in fact pursues a 'non-punitive purpose' turns on how the scheme seeks to effect that protection.[179]

In summary, the case law reveals a strictly limited set of legitimate objects served by immigration detention laws and, it seems, lesser constraints on liberty (though this is yet to be fully explored in the jurisprudence). This legal understanding is not, however, reflected in popular and political opinions about immigration detention (as serving objects traditionally associated with criminal law and punishment), as displayed in Parliament and the media post *NZYQ*.

V MEANS AND ENDS

NZYQ made clear that the existence of a legitimate and non-punitive purpose is insufficient to render a scheme of executive detention constitutionally valid. For the whole Court:

> The application of the principle in *Lim*, although ultimately directed to a single question of characterisation (whether the power is properly characterised as punitive), requires an assessment of both means and ends, and the relationship between the two.[180]

In this Part, we trace the development of this aspect of the *Lim* test in order to: firstly, reveal that *Al-Kateb* was indeed an outlier in the stream of authority; secondly, sketch the present means/ends element of *Lim*; and thirdly, argue that the language of proportionality is appropriate in this context.

A *A Stream of Authority Flowing from Lim?*

The *Lim* test for assessing the validity of detention laws requires, firstly, the identification of a legitimate non-punitive purpose and, secondly, an assessment of

---

[178] *Re Woolley* (n 31) 26 [61]. See also *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 131 [263] (Keane J): 'A deterrent effect [on the movement of asylum seekers] may be an intended consequence of the operation of regional processing arrangements, but the immediate purpose of s 198AHA [*Migration Act*] is the facilitation of the removal of unauthorised maritime arrivals from Australia.' In that case, a majority of the Court (French CJ, Kiefel, Keane and Nettle JJ) found that the *Lim* principle had no application to the detention of an alien by another State under its own laws. *Lim* was said to be limited to the detention of an alien in the custody of Australia (cf Bell and Gageler JJ).

[179] *YBFZ* (n 1) 58 [249].

[180] *NZYQ* (n 3) 158 [44] (The Court).

whether the law is 'reasonably necessary' to achieve that purpose. If the purpose of a law is deemed to be legitimate and non-punitive but the law fails the 'reasonable necessity' test, it is unconstitutional.

None of the majority Justices in *Al-Kateb* fully applied the *Lim* principle as determinative of whether immigration detention was punitive. Essentially, the majority focussed on the existence of a continuing relevant purpose for detention, holding that '[a] law that authorises detention will not offend the separation of powers doctrine *as long as its purpose is non-punitive*'.[181] As the primary purpose (or 'end') of detention in *Al-Kateb* was to make the alien available for removal, detention was deemed to be non-punitive and, thus, constitutionally valid. The extended duration of detention and unlikelihood of removal occurring were not factors that altered the constitutional character of the detention.

Consequently, the authority and effect of *Lim* were somewhat weakened, with McHugh J expressing confidence that '[n]othing in the reasoning or the decision in *Lim* assists Mr Al-Kateb'.[182] Discussing the application of *Lim* to indefinite detention, Hayne J said that 'the purpose of detention for removal would not be spent until it had become reasonably practicable to remove the non-citizen concerned.'[183] Indeed, his Honour considered that the 'reasonable necessity test' was only suitable for addressing the question of whether a law was connected to a particular head of legislative power, and unsuited to the separate ch III question.[184]

In the 19-year period between *Al-Kateb* and *NZYQ*, several cases pointed to the relevance and constitutional importance of considerations related to the achievement of statutory purpose. These cases progressively revealed *Al-Kateb* as an outlier.[185] For instance, there were indications of shifting judicial opinion about the constitutional limits on detention in *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* ('*Plaintiff M76*'),[186] a matter involving a refugee with an adverse security assessment. Although Kiefel and Keane JJ thought that the reasoning in *Al-Kateb* was correct, and Hayne J was against re-opening it,[187] other Justices were less certain — though they did not reconsider the matter because it

[181] *Re Woolley* (n 31) 32 [77] (McHugh J) (emphasis added).
[182] *Al-Kateb* (n 7) 586 [49].
[183] Ibid 633 [251].
[184] Ibid 635 [256]. See further below Part VI.
[185] *NZYQ* (n 3) 158 [44] (The Court). For discussion of *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (n 57) in this respect, see Thwaites (n 3) 5–6.
[186] *Plaintiff M76* (n 31).
[187] Ibid 345 [35]–[36], 365–6 [124]–[125], 366–7 [128]–[129] (Hayne J), 383 [199] (Kiefel and Keane JJ).

was unwarranted on the facts.[188] In a joint judgment, Crennan, Bell and Gageler JJ explained the 'constitutional holding' in *Lim* in terms of the temporal limits and limited purposes being *connected*, such that the power to detain was not unconstrained:

> The constitutional holding in *Lim* was therefore that conferring limited legal authority to detain a non-citizen in custody as an incident of the statutory conferral on the executive of powers to consider and grant permission to remain in Australia, and to deport or remove if permission is not granted, is consistent with ch III if, but only if, the detention in custody is limited to such period of time as is reasonably capable of being seen as necessary for the completion of administrative processes directed to those purposes.[189]

Another influential development in *Plaintiff M76* is seen in the reasoning of Hayne J. His Honour underlined that there would be detention at the unconstrained discretion of the executive if the Minister were able, at any time, to refuse to conclude, or stop, administrative steps. This was because the non-citizen had been detained for the very purpose of the Minister making administrative 'entry' inquiries.[190] Hayne J identified certain limits on detention and necessity of judicial supervision over its lawfulness:

> [D]etention is authorised only if the detention is under and for the purposes of the Act. The bounds of that further detention must be ascertainable, and enforceable, at all times during its continuance. The lawfulness of the detention (as to both its purpose and its duration) must be capable of being fixed, and be fixed, by a criterion or criteria determined at the start of the detention.[191]

This passage was then embraced by the High Court in *Plaintiff S4*,[192] another case involving the lengthy detention of a protection visa applicant pending a decision. The Court stated that because

> [detention] is an incident of the execution of particular powers of the Executive, it must serve the purposes of the Act and its duration must be

---

188 Ibid 334–5 [4] (French CJ), 368–9 [136], [145]–[149] (Crennan, Bell and Gageler JJ). Administrative processes had not been exhausted, nor was it possible for the Court to infer that there was no realistic prospect of removal in the reasonably foreseeable future.

189 Ibid 369 [140]. Cited with approval in *NZYQ* (n 3) 155 [33] (The Court).

190 See further J Chia, 'Back to the Constitution: The Implications of Plaintiff S4/2014 for Immigration Detention' (2015) 38(2) *University of New South Wales Law Journal* 628.

191 *Plaintiff M76* (n 31) 359 [99].

192 *Plaintiff S4* (n 162).

> fixed by reference to what is both necessary and incidental to the execution of those powers and the fulfilment of those purposes.[193]

Relying upon these cases, Crennan J affirmed the connection between the temporal bounds and limited purposes of detention in *CPCF v Minister for Immigration and Border Protection* ('*CPCF*').[194] Importantly, her Honour affirmed the judiciary's capability to judge whether the achievement of statutory purposes was*, in fact*, a practical possibility.[195] In separate reasons in *CPCF*, Gageler J accepted the proposition that ch III requires that a federal statute authorising detention must limit the duration of detention to what is reasonably capable of being seen as necessary to effectuate an identified statutory purpose which is capable of being achieved.[196] Similar statements were made by his Honour in *Plaintiff M68/2015 v Minster for Immigration and Border Protection*.[197]

This unequivocal understanding of the temporal constraints on laws authorising executive detention — the linking of the permissible period of detention with the accomplishment of statutory ends — marked a clear departure from the majority reasoning in *Al-Kateb* by the judge who would become Australia's 14th Chief Justice just two days before the delivery of orders in *NZYQ*.[198] Seen through this lens, *Al-Kateb* was indeed, as the High Court stated, an outlier in a stream of authority since *Lim*.

B *Falzon and AJL20: Islands in the Stream?*

NZYQ may have overruled *Al-Kateb*, but it did not disturb the authority of cases which apply a similar reasoning process, such as *Falzon v Minister of Immigration* ('*Falzon*')[199] and *Commonwealth Government v AJL20* ('*AJL20*').[200] Notably, the joint judgment of Kiefel CJ, Bell, Keane and Edelman JJ in *Falzon* indicated that the *Lim* enquiry was really directed to identifying the *true purpose* of a law authorising detention. Although the joint judgment maintained that if a statutory power 'goes

---

[193] Ibid 232 [29] (The Court).
[194] *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514.
[195] Ibid 585 [218].
[196] Ibid 625 [374].
[197] (2016) 257 CLR 42, 111–12 [184]. See also *Plaintiff M96A v Commonwealth of Australia* (2017) 261 CLR 582, 600 [44]–[45] (Gageler J).
[198] In an unusual step, orders were delivered in *NZYQ* following a brief recess at the end of the hearing in Canberra: *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCATrans 154 (8 November 2023). Justice Gageler had been sworn in as Chief Justice of the High Court in a special ceremonial sitting on 6 November 2023: Ceremonial Sitting on the Occasion of the Swearing-in of the Chief Justice the Honourable Stephen John Gageler AC [2023] HCATrans 151 (6 November 2023).
[199] *Falzon* (n 22).
[200] *AJL20* (n 27).

further than to achieve the limited purpose [of removal or deportation] it may be inferred that it has a purpose to effect punishment',[201] their Honours swiftly distinguished that form of enquiry from 'proportionality' testing, stating:

> Whether a legislative power of detention is necessary in the [c]h III sense is an enquiry as to the true purpose of the law authorising detention, it is not an enquiry as to whether that law is necessary to the achievement of a relevant legislative purpose.[202]

Indeed, the joint judgment went further, echoing McHugh J's statement in *Re Woolley* that 'questions of proportionality cannot arise' under ch III.[203] Edelman J subsequently, and repeatedly, recanted this statement, beginning in the case of *Jones* (a point we return to below).[204]

By a majority, the High Court in *AJL20* ruled that where the executive failed to comply with its statutory duty to remove a non-citizen as soon as reasonably practicable, the appropriate remedy to enforce this restraint on detention (what the Court termed a 'hedging' duty) was mandamus.[205] The majority held that a writ of habeas corpus would be inapt because it would undermine the intended effect of the wider statutory scheme that separates lawful from unlawful non-citizens:

> [A] non-citizen can be lawfully within the Australian community only if he or she has been granted a visa. Otherwise, an unlawful non-citizen must be detained until such time as he or she departs Australia .... [206]

In so deciding, the majority endorsed key aspects of the majority ruling in *Al-Kateb* and certain parts of *Plaintiff M76*,[207] which identified that the binary scheme of the *Migration Act 1958* (Cth) meant the release of an unlawful (visa-less) non-citizen into the community was barred. Thus, detention laws seemingly required the segregation of unlawful non-citizens because the 'evident intention of the Act is that an unlawful non-citizen may not, in any circumstances, be at liberty in the Australian community'.[208]

[201] *Falzon* (n 22) 343–4 [29] (Kiefel CJ, Bell, Keane and Edelman JJ).
[202] Ibid 344 [31]; *Re Woolley* (n 31) 34 [80].
[203] *Falzon* (n 22) 344 [30]–[32] (Kiefel CJ, Bell, Keane and Edelman JJ).
[204] *Jones* (n 11). See also, eg, *YBFZ* (n 1) 38 [147] (Edelman J).
[205] *AJL20* (n 27). Mandamus has no utility to enforce the statutory duty to remove when removal is impracticable, eg due to a person's statelessness, refugee status, or an uncooperative 'home' country.
[206] Ibid 66–74 [35] (Kiefel CJ, Gageler, Keane and Steward JJ).
[207] *Plaintiff M76* (n 31) 380 [183]–[184] (Kiefel and Keane JJ) addressed an 'alien's right to be at liberty' as a matter of statutory construction. Their Honours opined that the *Migration Act 1958* (Cth) did not support the view that an unlawful non-citizen may be lawfully at liberty within Australia.
[208] *AJL20* (n 27).

Before the High Court delivered judgment in *NZYQ*, the Minister relied upon parts of the majority's reasoning in *AJL20*, including the following passage:

> The detention authorised by ss 189(1) and 196(1) of the Act is reasonably capable of being seen as necessary for the legitimate non-punitive purposes of segregation pending investigation and determination of any visa application or removal. This is because the authority and obligation of the Executive to detain unlawful non-citizens is hedged about by enforceable duties, such as that in s 198(6), that give effect to legitimate non-punitive purposes. Upon performance of these duties, the detention is brought to an end.
>
> … [Sections] 189(1) and 196(1) are valid. There is no need to read them down to save their validity. *They are valid in all their potential applications*.[209]

This reasoning encouraged the government's belief that the detention laws were constitutionally valid in *all* their possible applications, including the harsh and intractable removal cases that could take years to resolve.

The High Court was free to reject this argument in *NZYQ* because the majority in *AJL20* had explicitly stated that the 'correctness of the constitutional holding in *Al-Kateb* … [did] not arise for consideration in the present case'.[210] Accordingly, 'none of the passages' in *AJL20* were 'directed to the constitutional issue' arising in *NZYQ*.[211] Indeed, rather than assisting the government's case the majority ruling in *AJL20* undermined it. As the Court explained, the 'hedging duties' sourced in s 198, which limit the duration of detention and are enforceable by the writ of mandamus,

> would be futile if there were no real prospect of removal becoming practicable in the reasonably foreseeable future and understandably that remedy has not been sought by the plaintiff in the proceeding.[212]

That reasoning is constitutionally important because the existence of the hedging duties, and their judicial enforcement from time to time, is the means of bringing detention to an end. Thus, executive detention can be seen to be within Parliament's power under s 51(xix) of the *Constitution* as limited by the implications of ch III. If the hedging duties cannot be properly enforced by the judiciary, because a statutory duty is practically incapable of achievement, then the hedging duties are written in sand and detention is, temporally, unlimited and unconstitutional.

[209] Ibid 70–1 [44]–[45] (Kiefel CJ, Gageler, Keane and Steward JJ) (emphasis added).
[210] Ibid 64 [26].
[211] *NZYQ* (n 3) 159 [47] (The Court).
[212] Ibid 148–9 [13].

C *The Contemporary Means-Ends Connection*

The *Lim* principle's broader application in cases involving legislative responses to terrorism further exposed *Al-Kateb*'s status as an outlier by emphasising the necessary connection between means and ends. While the 'reasonably capable of being seen as necessary' test originates from *Lim*, its problematisation in the years that followed,[213] and later clarification in the 2020s, meant that during argument in *NZYQ* it was instead framed by counsel for the detainee as the '*Benbrika/Jones* framework'.[214]

As discussed in Part II, in *Benbrika [No 1]* Kiefel CJ, Bell, Keane and Steward JJ, jointly, upheld the validity of post-sentence detention provisions (under div 105A of the *Criminal Code*) aimed at protecting the community from terrorism offending.[215] In reaching this conclusion, their Honours emphasised the 'singular threat to civil society' presented by terrorism,[216] concluding: 'Detention in prison is prima facie penal or punitive; however, that characterisation may be displaced by an evident non-punitive purpose. Division 105A has an evident non-punitive, protective purpose.'[217]

In separate judgments, Gordon and Gageler JJ dissented, based on a *disconnection* between the non-punitive purpose and the scope of relevant terrorism-related offences. Essentially, some of those offences involved relatively innocuous conduct — the possession of certain things, for instance — which had no directly harmful consequences.[218] For Gordon J and Gageler J, the lack of careful calibration between statutory ends and means spelt constitutional invalidity (in whole, for Gordon J; in part, for Gageler J).[219] This involved the application of a test phrased in terms that are now familiar:

> The difficulty in determining whether Div 105A is *reasonably capable of being seen as necessary for a legitimate non-punitive objective* lies in the lack of close correspondence between the ultimate non-punitive objective of protecting against terrorist acts and the immediate statutory object of preventing serious Pt 5.3 offences. [220]

---

[213] Such that Gordon (n 13) described the case law by 2012 as 'near-chaotic': at 43.
[214] This was the term used in argument for the plaintiff, NZYQ, by Craig Lenehan SC: see, eg, *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCATrans 153 (7 November 2023) line 3391.
[215] *Benbrika [No 1]* (n 11) 97 [34]–[36].
[216] Ibid.
[217] Ibid 99–100 [40].
[218] Ibid 106 [57]–[58] (Gageler J), 145–6 [169]–[175] (Gordon J).
[219] See, eg, ibid 119 [95] (Gageler J).
[220] Ibid (emphasis added).

Notably, Gageler J also emphasised that, 'in constitutional law, the legitimacy of legislative objective falls to be determined by reference to what the impugned law is designed to achieve in fact … *the concern is with substance and not mere form*'.[221] This approach was reiterated in the case of *Jones,*[222] one week before orders were given in *NZYQ.* A key point indicated by these cases — that legitimacy of statutory purpose is tied to its capacity for practical accomplishment in individual cases — featured prominently in *NZYQ*.

With reference to the meaning of the 'reasonable necessity' test in *Lim*, the joint judgment in *Jones* explained that 'necessary' meant reasonably appropriate and adapted,[223] but rejected 'structured proportionality' as a means to apply the reasonable necessity criterion.[224] Gordon J agreed, observing:

> The application of the *Lim* doctrine therefore requires an assessment of the relationship between means and ends. Labels such as 'proportionality' are misleading to the extent that they import notions of structured proportionality.[225]

Prior to 2023 it was clear that a punitive purpose would render executive detention constitutionally invalid. However, it was difficult to discern a clear position on whether and how a relationship between a non-punitive purpose and the *means* engaged to achieve a particular non-punitive *end* might be relevant to assessing validity. Only in *Jones* (and the companion case of *Benbrika [No 2]*) did a dominant approach emerge with strong High Court authority.

Any lingering uncertainty was put to rest in *NZYQ*. That case applied the *Benbrika/Jones* framework and, thereby, advanced a renewed focus on the 'means and ends' aspect of *Lim*. For six Justices, an objectively unachievable purpose fails the 'legitimate and non-punitive purpose' aspect of *Lim*.[226] Thus, the validity of administrative measures which are 'prima facie punitive' depends on the relationship between their aims and how they achieve them, that is, means and ends.

---

[221] Ibid 113 [78] (emphasis added).
[222] *Jones* (n 11) 79 [34], 80–1 [38]–[39] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), 103–4 [106]–[107] (Edelman J), 130–1 [188] (Steward J).
[223] Ibid 81–2 [42] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), citing *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 [39].
[224] The problems of adopting structured proportionality in the ch III context are discussed in Gomes, Mohseni and Ward (n 14) 557–8.
[225] *Jones* (n 11) 93 [78]. Cf Edelman J, who did not regard the 'reasonable necessity' test expressed in *Lim* as fundamentally different from the staged approach under a structured proportionality enquiry: at 119 [151].
[226] *NZYQ* (n 3) 158 [44] (The Court).

The language of proportionality is not used by most of the High Court (Edelman J aside, see below) with respect to the means and ends assessment.[227] However, the similarities to a proportionality analysis are apparent. The High Court accepts, unequivocally, that a legislative aim must be clearly identified, and then the means for achieving that aim must be assessed for suitable calibration. The standard employed is 'reasonably capable of being seen as necessary', in which inhere notions of necessity and objective reasonableness related to proportionality.[228] The risk of a structured proportionality test finding its way into ch III jurisprudence seems to be implicitly recognised as something to be avoided. This is understandable considering some Justices' long-standing aversion to that approach. For now, the adoption of structured proportionality in a ch III context would be highly unlikely in light of the 2025 rejection of structured proportionality as a necessary test by the Court in its once-accepted terrain of the implied freedom of political communication.[229] Nonetheless, one does have to wonder whether judicial reluctance to label the reasonable necessity assessment as a form of 'proportionality' analysis is cogent, and whether that hesitancy will persist.

Certainly, the means/ends analyses undertaken in *ASF17* and *YBFZ* was also framed around the purpose of the relevant measures. In *ASF17*, the Court was satisfied that detention remained reasonably capable of being seen as necessary for the purpose of removal, as the prospective removal was deemed to be practicable. In *YBFZ*, only Beech-Jones J resolved the matter at the means/ends stage.[230] His Honour held that the curfew condition (but not the monitoring condition) was punitive, but was reasonably capable of being seen as necessary to protect the community from the risk of criminal offending and, moreover, to protect the integrity of the immigration system from certain conduct of the visa holder.[231] Ultimately, then, *YBFZ* reveals a scenario familiar in contexts which employ proportionality to test constitutional validity: that is, the construction of statutory purpose and the degree to which a measure burdens the relevant constitutional right or principle will be critical to resolving the proportionality question.

---

[227] See discussion by Edelman J in *YBFZ* (n 1) 37–8 [144], 38 [148].
[228] See discussion in Gomes, Mohseni and Ward (n 14).
[229] See, eg, *Babet v Commonwealth* (2025) 99 ALJR 883: 'The flexible application of all or any of the steps of structured proportionality is to be understood as a "tool of analysis", express or ritual invocation of which is by no means necessary in every case': at 896–7 [49] (Gageler CJ and Jagot J, Gordon J agreeing at 900–1 [72], Beech-Jones J agreeing at 936 [242]).
[230] The plurality and Edelman J found the visa conditions lacked a legitimate and non-punitive purpose; Steward J held the measures were not punitive in the first place.
[231] *YBFZ* (n 1) 73 [325], 70 [310].

D *Proportionality Embraced: The Approach of Edelman J*

Edelman J has criticised the rest of the Court as introducing the '*NZYQ* purpose fiction', namely, 'that a legitimate general purpose will be deemed not to be Parliament's purpose in particular cases where it is not practically achievable in the reasonably foreseeable future in those particular cases'.[232] This 'fiction' has been criticised more broadly, with Mohseni, Gomes and Ward calling it 'awkward at best, logically incoherent at worst'.[233] Recanting his earlier statement in *Falzon* to the effect that proportionality had no place in ch III allowed Edelman J to adopt his particular approach to *Lim* in *NZYQ*, which focused more explicitly on proportionality than the rest of the Court.[234] For Edelman J, the 'reasonably capable of being seen as necessary' requirement in *Lim* and structured proportionality testing[235] are different expressions of the same principle, with the *Lim* principle formulated at a comparatively higher level of generality.[236]

Edelman J did not consider the general legislative purpose of detention to be 'refuted' simply because it was impracticable to remove a person in their circumstances.[237] His Honour stated that the problem with the majority decision in *Al-Kateb* was not the recognition of the continuing legitimacy of the purpose of detention (to ensure an unlawful non-citizen will be available for removal) but rather that the Court in that case 'either ignored or paid insufficient attention to the proportionality requirement in *Lim*'.[238] Accordingly, Edelman J treated mandatory immigration detention as punitive, and thus contrary to ch III, because the legislative provisions supplied *means* that exceeded what was reasonably necessary for securing a legitimate *end* (removal), when, on the agreed facts, removal was impracticable in the foreseeable future:

> This proportionality limit on Parliament's ability to create executive power to detain reflects the jealous treatment of individual liberty as generally the province of the judiciary and, at a high level of generality, informs the constitutional separation of powers.[239]

In *ASF17*, Edelman J thought that the application of immigration detention to a person — such as AZC20, discussed earlier — who was incapable of consenting to

---

[232] Ibid 25 [93]. See also 38 [145]–[146].
[233] Gomes, Mohseni and Ward (n 14).
[234] See, eg, *YBFZ* (n 1) 39 [152].
[235] See, eg, *McCloy v New South Wales* (2015) 257 CLR 178, 217 (French CJ, Kiefel, Bell and Keane JJ).
[236] *Jones* (n 11) 119–20 [150]–[154].
[237] *NZYQ* (n 3) 161 [53] (The Court). Justice Edelman reiterated this point in *ASF17* (n 17) 801–2 [101].
[238] *NZYQ* (n 3) 161–2 [54] (The Court).
[239] *ASF17* (n 17) 802 [104] (Edelman J).

their removal, due to medical issues or psychiatric illness, was not reasonably capable of being seen as necessary and was, therefore, punitive.[240] However, his Honour viewed the detention provisions as 'necessary for the purpose of removal of aliens who might refuse, without any incapacity … or protection finding under the *Migration Act*, to provide the necessary assistance in the removal process'.[241] For the class of aliens — such as ASF17 — who are capable of consenting but refuse to be removed to a country that requires voluntary removal, detention is reasonably necessary

> for their removal from Australia because there is a real prospect that aliens in that class (perhaps with counselling, advice and relocation assistance) will consent to be removed from Australia in the reasonably foreseeable future.[242]

On this approach, there is no 'legal fiction' that treats removal as practicable when it is not.[243] But Edelman J's approach is grounded upon the questionable assumption that, with appropriate supports, a detainee may in the reasonably foreseeable future consent to removal to avoid the tragedy of indefinite detention. For ASF17 and others similarly placed, whose steadfast refusal to consent to expulsion to certain countries is borne of genuine (though unsubstantiated) fear of persecution, indefinite detention may be regarded as the lesser of two evils notwithstanding any assistance or guidance offered.

There is much to commend Edelman J's explicit 'proportionality approach' to *Lim*. It carries logic in describing a test focused on means, ends and the relationship between the two. It suits the substantive, values-centred approach adopted by the plurality. However, it should be approached with caution and not allowed to overrun conventional ch III reasoning, focussed necessarily on the appropriate allocation of branch powers. For instance, Mohseni, Gomes and Ward warn that viewing all exceptions to *Lim* through the lens of proportionality (rather than, eg, history)

> has all the folly of one 'Very big idea'. It is not fit for purpose. The exceptions are better treated as particular instances sanctioned by continued history and custom, which may be developed bottom-up, incrementally, by analogy, rather than by reasoning downward from a broad conception of what the exceptions illustrate. To do otherwise would allow the tropical growth of exceptions by a process which

---

[240] Ibid 793 [59].
[241] Ibid 794 [62].
[242] Ibid 803 [108].
[243] Ibid 797 [75], 799 [88]: The removal of an alien is "practicable" only by a legal fiction which deems that they will or should "cooperate".

> Gageler J stigmatised as a 'domino method of constitutional adjudication'.[244]

VI An Alternative Role for Proportionality: The Scope of s 51(xix)

As outlined above, Edelman J's criticisms of the recent development of the *Lim* principle rest largely on what his Honour terms the '*Lim* punishment fiction' and '*NZYQ* purpose fiction'. Like Steward J, Edelman J rejects the premise that administrative detention for a period of time which is reasonably capable of being seen as necessary for visa processing or removal can be valid, but that the same detention can, subsequently, assume a punitive character and so become 'exclusively judicial'. In *YBFZ* Edelman J derided this as not reflecting 'rational constitutional design' and concluded that '[i]t borders on the absurd to describe the latter as an exclusively judicial power. It is not judicial at all.'[245]

While applying his own version of the *Lim* principle to resolve the challenge in *YBFZ* (discussed above), in obiter dicta Edelman J advanced a more radical solution to these perceived problems. This involved 'reconceptualising' *Lim* in a way that retained the limit on state power and Edelman J's favoured 'proportionality' approach but centred the inquiry on whether the law was 'with respect to' a constitutional head of power, rather than on ch III. His Honour offered this summary:

> The relevant role for proportionality that may reflect the true basis for the Lim punishment fiction may be as follows: a law that effects a large imposition or constraint, at least upon a person's bodily integrity or liberty, such as a serious violation of their liberty by custodial detention, may not be a law with respect to the relevant head of power to the extent that the imposition or constraint is not reasonably capable of being seen as necessary for the purpose of the law. Expressed in these terms, the issue is one of the scope or boundaries of a head of power. Every head of power has boundaries.[246]

Edelman J found support for this approach in Hayne J's judgment in *Al-Kateb*, as well as Gaudron J's sceptical approach to the *Lim* principle in *Kruger v Commonwealth*.[247] His Honour also sought support in *Lim* itself, arguing that the case rested on a 'hidden premise' that 'the serious interference with fundamental rights of aliens as

---

[244] Gomes, Mohseni and Ward (n 14) 558, quoting *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560, 598 [80] (Gageler J) and *Garlett v Western Australia* (2022) 277 CLR 1, 55 [154] (Kiefel CJ, Keane and Steward JJ), respectively.
[245] *YBFZ* (n 1) 41–2 [161].
[246] Ibid 39 [150].
[247] Ibid, citing *Al-Kateb* (n 7) 647 [253] and *Kruger v Commonwealth* (1997) 190 CLR 1, 110–11.

part of the core of the law requires proportionate treatment of aliens in the same way that it would if aliens were only an incidental subject matter of the law'.[248]

Although Edelman J's framing of these issues employs a novel identification of layered 'fictions', the arguments are not wholly new. That said, there is a long way to go before they have significant (let alone majority) support within the High Court. Today, *Lim* has a solid precedential basis as a limit on state power derived from ch III, and that basis has strengthened considerably since the Court's unanimous decision in *NZYQ*. Conversely, there is scant authority to support a proportionality approach to determining the scope of the aliens power,[249] let alone to link *Lim*'s liberty-focused constraint on power to s 51(xix). Ultimately, Edelman J's proposed reconceptualisation remains the obiter dicta of one Justice and contains several debateable assertions. It remains to be seen whether Edelman J's views in *YBFZ* might gain traction — in whole or in part — as the doctrine continues to develop in coming years.

VII Conclusion

This article has focused on the development of the *Lim* principle in the 2020 to 2025 period. The principle first emerged in 1992 as a necessary limit on the government's power to, essentially, punish people via executive detention. Until *Alexander* in 2022, unsuccessful attempts to invoke *Lim* undermined the principle and prompted judges to suggest its reformulation into a weaker, more limited, principle.[250] In this respect, the 2004 case of *Al-Kateb* highlighted the largely unconstrained nature and bounds of immigration detention laws — especially with respect to the fulfilment of purposes only faintly realisable. The overturning of *Al-Kateb* in *NZYQ* not only clarified and reaffirmed the original *Lim* test but emphasised the centrality of liberty as a constitutional value, and of punishment as being, typically, an exclusively judicial power. The test laid down in *NZYQ* carries a greater authority than any preceding articulation of *Lim*; while it built directly on cases such as *Benbrika [No 1]* and *Alexander*, its unanimity played an important role in clearing up decades of debate and division around the scope, nature and even existence of this constitutional limit on administrative detention power.

NZYQ brought an end to immigration detention for a relatively small number of intractable cases, if not an end to *prolonged* detention for non-citizens awaiting an

---

[248] *YBFZ* (n 1) 41 [158].

[249] See, eg, *Plaintiff S156/2013 v Minister for Immigration* (2014) 254 CLR 28; although Edelman J mounted a contrary argument by reference to certain opinions in *Cunliffe v Commonwealth* (1994) 182 CLR 272. See also ibid 40–1 [154]–[157].

[250] See, eg, *Benbrika [No 1]* (n 11) 94–5 [25]–[27] (Kiefel CJ, Bell, Keane and Steward JJ).

entry decision, nor an end to detention for uncooperative detainees. As Williams adroitly observes, '*NZYQ* was never going to be the end of the High Court's involvement in these [detention] issues', and the constitutional principle laid down will be 'scrutinised and refined across a succession of cases over the coming years'.[251] *ASF17* clarified that a temporal limit on immigration detention is important for constitutional validity, but also that the reasons why detention has no reasonably foreseeable end are relevant. Most radically, *YBFZ* extended the *Lim* principle to all 'prima facie punitive' measures, including those which do not impose detention in a state facility but, rather, interfere with liberty or bodily integrity in a sustained and severe way. Inevitably, further legal challenges to immigration detention will arise with distinctive factual scenarios. Moreover, as the High Court has now adopted a substantive approach to *Lim*, further constitutional questions will ensue requiring analysis of how the principle applies to other measures with profound effects on people's liberty.

The Gageler Court is significantly evolving the *Lim* principle. Firstly, this reflects a functionalist, values-focused turn in constitutional interpretation, which aligns more with *Lim* than later cases, but which has also supported an extension of the *Lim* principle beyond its previous scope. Secondly, the operative focus of this shift has been on conceptualising the relationship between regulatory means and ends, though it has also impacted the Court's approaches to constitutional interpretation (focussing on values) and statutory interpretation (focussing on the substantive experience of constraints on liberty). Thirdly, without downplaying the importance of *NZYQ*, that case aligned with selected judicial reasoning in a stream of case law, whereas a grander shift is seen in *YBFZ*. The true ramifications of that shift will be worked out through further litigation.

With these and future developments in mind, this paper has advanced three arguments which together present a coherent conceptualisation of *Lim*.

First, we acknowledge that any consideration of *Lim's* application will, and should, be multifactorial — considering, history, values, principles and, as relevant, select scholarship. However, we advocate giving values the primary role of resolving ambiguities in the allocation and administration of public powers by the executive and judicial branches — as reflected in the plurality judgment in *YBFZ*.

---

[251] George Williams, 'Perilous Legal Path through Migrant Detention Quagmire', *The Australian* (19 April 2024). See also Rhiannon Down, 'Judges on Deck: Panel Called in as More Immigration Chaos Looms', *The Australian* (7 July 2024), reporting that a high volume of legal challenges was engulfing the FCA.

Second, and relatedly, we argue for a substantive approach to 'punishment', capable of recognising the severe (and punitive) nature and impacts of state-imposed measures other than imprisonment and involuntary administrative detention. That approach can help to offset some of the potentially deleterious (and frankly illogical) consequences of the binary approach to 'punishment' which underpins *Lim*. There is much attraction to, and rationality in, Edelman J's insistence that punishment is a spectrum rather than a binary; however, incorporating that conceptual shift into *Lim* would involve rewriting the principle from the ground up, which seems unlikely given the High Court's current composition and, ultimately, jurisprudentially inadvisable.

Finally, we argue for a frank acknowledgment that the *Lim* principle incorporates a form of proportionality analysis, albeit one distinct from that which characterises, for example, the constitutional implied freedom of political communication.

VIII POSTSCRIPT: *EGH19 V COMMONWEALTH*

The opening lines of this article observe the 'rapid jurisprudential evolution' of the *Lim* principle in recent years. That trend has continued such that, on 18 March 2026 (as this article was going to press), the High Court delivered judgment in *EGH19 v Commonwealth* ('*EGH19*').[252] This case deserves, and no doubt will receive, detailed commentary and consideration. For present purposes, this Postscript notes the critical findings in *EGH19* and their impacts on this article's three central arguments.

Recall that, in *YBFZ*, constitutional invalidity centred on the curfew and monitoring provisions' prima facie punitive nature; their imprecisely-framed purpose (ie, 'for the protection of any part of the Australian community');[253] and their blanket operation in respect of the *NZYQ* cohort (ie, *unless* the Minister was satisfied, in individual cases, that the conditions were not reasonably necessary to achieve their protective purpose). In response to *YBFZ*, the government amended the provisions such that the Minister would *only* impose the conditions if satisfied, on balance, that: firstly, 'the [visa] holder poses a substantial risk of seriously harming any part of the Australian community *by committing a serious offence*'; and secondly, that the relevant condition was reasonably necessary and reasonably appropriate and adapted 'for the purpose of protecting any part of the Australian community *from serious harm by addressing that substantial risk*'.[254] 'Serious offence' was, in turn, defined to include crimes involving, inter alia, loss of life, personal harm, sexual

[252] [2026] HCA 7 ('*EGH19*').
[253] *Migration Regulations 1994* (Cth) sch 2 cl 070.612A(1).
[254] Ibid sch 2 cl 070.612A(2)(b)–(c) (emphasis added).

assault, domestic and family violence, people smuggling, and 'threatening or inciting violence towards a person or group of persons' on the ground of a particular attribute of the person or group.[255] Otherwise, the provisions were effectively identical to those struck down in *YBFZ*.[256]

Responding to what Edelman J described as the Commonwealth's 'failure to see the wood for the trees',[257] a majority of the Court held that these amendments did not effectively address the constitutional vices identified in *YBFZ*.[258] Indeed, the Court split along the same lines in both cases. Justices Steward and Beech-Jones again dissented, finding that the provisions were (if anything, more) reasonably capable of being seen as necessary for a legitimate protective purpose. Justice Edelman again applied his notion of 'protective punishment' to find the provisions remained punitive in both purpose and effect. The joint judgment of Gageler CJ and Gleeson J and the judgments of Gordon J and Jagot J emphasised similar but distinct legislative and procedural characteristics as demonstrating constitutional invalidity.

Chief Justice Gageler and Gleeson J based invalidity on the 'means and ends' analysis, and were particularly concerned by the conditions' fixed 12-month duration and the absence of natural justice in the initial issuing process.[259] Justice Gordon rested more on the concept of 'legitimacy' (which we comment on below), and went on to list a combination of eight factors — including the duration and procedural fairness factors relied on by Gageler CJ and Gleeson J — to find the provisions were for an illegitimate purpose and *also* failed the 'means and ends' stage of the test.[260] Justice Jagot applied the test most directly as a 'single question of characterisation', identifying five primary elements (among others) which rendered the provisions *both* prima facie punitive and unjustified.[261] Justice Jagot's five elements were that the provisions: effectively amount to a deprivation of liberty (ie, detention); were not inherently constrained by the context of an exercise of judicial power or judicial process; were enforceable by criminal sanction with no scope for judicial discretion as to the materiality of the contravention; had no rational connection to membership of the relevant group to which they apply (ie, the '*NZYQ* cohort'); and excluded natural justice.[262]

[255] Ibid sch 2 cl 070.111.
[256] See *EGH19* (n 252) [8], [36] (Gageler CJ and Gleeson J).
[257] Ibid [199] (Edelman J).
[258] Both the majority and dissenting Justices adopted largely similar reasoning across these two cases. See, eg, ibid [50]–[53] (Gageler CJ and Gleeson J), [350] (Beech Jones J).
[259] Ibid [50]–[55].
[260] Ibid [124]–[125], [132], [137]–[151].
[261] Ibid [332].
[262] Ibid [333]–[343].

At its core, *EGH19* reaffirms that the presence of a non-punitive statutory purpose may *not* suffice to save administrative punishment from invalidity, even where (1) that purpose is precisely stated and confined (unlike in *YBFZ*), and (2) similar purposes have supported valid *judicial* orders imposing detention (or other impositions on liberty) outside the criminal trial context.[263] The clarification of the law's purpose also allowed a majority of the Court to focus on the impacts of the scheme's procedural elements and to explain when and how certain factors, such as a denial of natural justice or lack of constraint on the sources on which a decision may rest, can support constitutional invalidity.[264]

Our first argument in this article was in support of a values-centred approach to *Lim*. In a variety of ways, *EGH19* reinforces that approach (as adopted by the *YBFZ* plurality). Not only were liberty and bodily integrity central to the reasoning in *EGH19*,[265] but the rule of law (and Dicey's observation, quoted in *Lim*, that the individual is 'ruled by the law, and by the law alone' and may 'be punished for a breach of law, but … for nothing else') featured in the judgments of Gageler CJ and Gleeson J, Gordon J and Jagot J.[266] Moreover, their Honours variously explored and unpacked the relationship between the *Constitution*, separation of powers, and foundational values such as liberty and the rule of law. In these ways, a majority of the Court has further entrenched an approach to *Lim* which builds upon the separation of powers' role in protecting individuals from arbitrary state intrusion. This effectively prioritises the protection of liberty and bodily integrity in interpreting the scope of branch power.[267] That majority is slender however, with Beech-Jones J, Edelman J and Steward J each persisting in their own distinct interpretive focus and path.[268]

EGH19 also maintained the substantive approach to punishment advocated for in this article. Generally, speaking, their Honours maintained their respective *YBFZ* conceptualisations of 'punishment', with Steward J dedicating a significant portion

[263] See in particular *Thomas v Mowbray* (n 128) and *Benbrika [No 1]* (n 11), discussed, eg, in ibid [24]–[27] (Gageler CJ and Gleeson J).
[264] See, eg, *EGH19* (n 252) [50]–[56] (Gageler CJ and Gleeson J).
[265] See, eg, ibid [62], [67]–[80] (Gordon J), [279], [291]–[292] (Jagot J).
[266] Ibid [18] (Gageler CJ and Gleeson J), [77] (Gordon J), [285] (Jagot J).
[267] See, eg, [279], [292] (Jagot J).
[268] Justice Steward has maintained his strident criticism of the majority's approach. History played a less obvious role in his Honour's decision compared to *YBFZ* (though see [225], and a useful discussion of the role of historical reasoning in ch III per Jagot J at [325]). On the other hand, Steward J emphasised 'allegiance to the rule of law' in *EGH19*, but to a different end to the other judges, saying the rule of law 'ultimately demand[s] faithful adherence and loyalty to those laws passed by the people's representatives, and to the legislative choices embedded in them, subject only then to the *Constitution*': at [271].

of his judgment in *EGH19* to unpacking and explaining his own, albeit unique, definition.[269] Thus, 'punishment' remains a topic keenly debated in *EGH19*, with Edelman and Steward JJ giving more detailed consideration to its meaning than the remainder of the Court.

The third key argument advanced in this article concerned the 'means and ends' stage of analysis. *EGH19* shows no indication that the Court (bar Edelman J)[270] is prepared to acknowledge a role for proportionality in *Lim* (despite Gordon J accepting that '"[n]ecessary" means "reasonably appropriate and adapted"').[271] On the contrary, Beech-Jones J invoked the debatable statement in *Falzon* that '[q]uestions of proportionality cannot arise under [c]h III'[272] and criticised what he saw as the plaintiff's attempts to 'introduce a form of proportionality' by pointing to the existence of a less-intrusive available option that would achieve the same statutory aims.[273]

Finally, an aspect of the *Lim* test which received welcome attention in *EGH19* was the 'legitimacy' of non-punitive purposes. In *EGH19*, Gageler CJ, Gleeson J and Gordon J cited *NZYQ* to emphasise that constitutional 'legitimacy' means compatibility 'with the constitutionally prescribed system of government'.[274] Chief Justice Gageler and Gleeson J then introduced notions of a 'constitutional baseline' and 'constitutional paradigm' to extend this idea. For their Honours: 'An aspect of compatibility with the constitutionally prescribed system of government is compatibility with the constitutional paradigm.'[275] This paradigm, in turn, 'posits the imposition of a penal or punitive detriment only: (1) by a court; (2) in the exercise of judicial power; and (3) in the performance of the exclusively judicial function of adjudging and punishing criminal guilt'.[276] Each of these three 'cumulative' elements was further unpacked to encompass, inter alia, the separation of powers, judicial independence and impartiality, the imposition of detriments by judicial process, and procedural fairness.[277] 'Legitimacy', for Gageler CJ and Gleeson J, appears to provide a doorway through which a host of foundational constitutional principles and values may enter the analysis. A 'legitimate and non-punitive purpose' seems to be one which aligns with the underlying constitutional framework, broadly understood.

---

[269] Ibid [227]–[242].
[270] See, eg, ibid [187] (Edelman J).
[271] Ibid [138] (Gordon J).
[272] *Falzon* (n 22) 344 [31]–[32].
[273] *EGH19* (n 252) [387] (Beech-Jones J).
[274] Ibid [20] (Gageler CJ and Gleeson), [84] (Gordon J), all quoting *NZYQ* (n 3) 157 [40].
[275] *EGH19* (n 252) [20].
[276] Ibid [16].
[277] Ibid [17].

By contrast, Gordon J focused on 'legitimacy' encapsulating the *exceptional* nature of valid protective purposes (much as discussed in Part IV above). Justice Gordon said that:

> Where the purpose of depriving a person of their liberty or interfering with their bodily integrity is the protection of the community from harm, the relevant harm must be both 'grave and specific' for that purpose to be legitimate.[278]

Thus, her Honour harnesses 'legitimacy' to support a high threshold for harm-preventive purposes capable of supporting prima facie punitive administrative action.

These approaches to 'legitimacy' are different sides of the same coin. Both arise from the central point made in *Lim* that, generally, prima facie punitive measures will be ordered by courts following a finding of guilt in a criminal trial. Indeed, Jagot J harnesses both these approaches in her opinion, which focuses primarily on the contours of the separation of powers arising from the text, structure and interpretation of the *Constitution* over time.[279] What is clear from *EGH19* is that the 'legitimate purpose' aspect of the *Lim* test has the potential to carry a significant constitutional load. What is also clear is that the scope and application of *Lim* will attract yet more debate, analysis and jurisprudential evolution in the future.

[278] Ibid [85] (Gordon J). Cf [238] (Steward J).
[279] Ibid [285]–[286].

AUTISTIC ADULTS AND SUPPORTED DECISION-MAKING: RETHINKING AUSTRALIA'S GUARDIANSHIP FRAMEWORKS

SYLVIA VILLIOS* AND ABIGAIL ISABELLA DOUGLAS**

Australian guardianship law increasingly recognises that decision-making ability, often described in domestic law as capacity, is functional, contextual and decision-specific. For autistic adults, however, recognition of capacity does not necessarily secure the communicative, sensory, temporal and relational conditions through which legal agency can be exercised. This article argues that the central defect in Australian guardianship frameworks is not the absence of decision-specific capacity doctrine, but the absence of formal and autism-responsive support pathways that operate before substitute decision-making is considered. It distinguishes common law capacity doctrine, guardianship legislation and tribunal practice; examines art 12 of the Convention on the Rights of Persons with Disabilities; evaluates Australian statutory and tribunal developments; and draws design insights from selected Canadian regimes. It proposes a tribunal-adapted model of voluntary supporter authorisations, structured support orders and, only where domestic law retains them, tightly confined representative orders. The aim is to move from capacity recognition to capacity access, so that autistic adults are neither abandoned as too capable for formal support nor unnecessarily restrained because no less-restrictive, legally recognised support pathway exists.

I Introduction 296

II Autistic Adults and the Conditions for Exercising Legal Capacity 300

III The Legal Baseline: Article 12 and Decision-Specific Capacity in Australian Law 307

---

* Associate Professor, School of Law, Adelaide University.
** BCom (Acc) (Adel), LLB (Adel). The authors thank the anonymous reviewers and editors for their thoughtful and constructive comments. Any errors or omissions remain the authors' own.

IV Australian Guardianship Law in Principle and Practice 313

V Operationalising Decision-Specific Capacity across the Spectrum of Support Need 321

VI Canadian Design Insights 323

VII A Tribunal-Adapted Australian Reform Model for Autistic Adults 327

VIII Conclusion 331

I Introduction

For autistic adults, decision-making support can be essential to autonomy, dignity, legal capacity and participation.[1] The need for support is not captured by asking, in the abstract, whether a person is "capable" or "incapable". An autistic adult may understand a financial, health, housing or service decision, know the outcome they prefer and still be unable to demonstrate that decision in the conditions ordinarily created by law, administration or institutional practice.[2] Information may be delivered orally, quickly or under pressure. Meetings may take place in noisy, brightly lit, unfamiliar or adversarial settings. Documents may be complex, fragmented or poorly sequenced. The adult may need written information in advance, time to process options, augmentative or alternative communication, a low-sensory setting, assistance organising material or a trusted person to help compare options and communicate a decision.[3]

The need for support does not mean that an autistic adult lacks capacity. In many cases, support is the means by which capacity is exercised, communicated and

[1] *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) arts 3(a), 3(c), 12(2)–(3) ('*CRPD*'); Committee on the Rights of Persons with Disabilities, *General Comment No 1*: *Article 12: Equal Recognition before the Law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014) 3 [13], 4–5 [16]–[17] ('*General Comment No 1*'); Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Report No 124, August 2014) 67–8 [3.18]–[3.24], 11–12 rec 3–2 ('ALRC Report 124').

[2] See generally *General Comment No 1* (n 1) 3–4 [13]–[15]; ALRC Report 124 (n 1) 12 rec 3–2(2), 71–4 [3.36]–[3.47]; Rachael Stacey and Eilidh Cage, '"Simultaneously Vague and Oddly Specific": Understanding Autistic People's Experiences of Decision Making and Research Questionnaires' (2023) 5(3) *Autism in Adulthood* 263, 263–4; Lydia Vella et al, 'Understanding Self-Reported Difficulties in Decision-Making by People with Autism Spectrum Disorders' (2018) 22(5) *Autism* 549.

[3] National Institute for Health and Care Excellence, *Autism Spectrum Disorder in Adults: Diagnosis and Management* (Clinical Guideline No CG142, 27 June 2012, updated 14 June 2021) 13 rec 1.1.8, 16 rec 1.2.1, 23–4 recs 1.3.1–1.3.3, 31 rec 1.6.3, 34 rec 1.8.9 <www.ncbi.nlm.nih.gov> ('*Autism Spectrum Disorder in Adults*'); Stacey and Cage (n 2) 263–4; David Trembath et al, 'Augmentative and Alternative Communication Supports for Adults with Autism Spectrum Disorders' (2014) 18(8) *Autism* 891; ALRC Report 124 (n 1) 11 rec 3–2(1)(c), 68 [3.24], 71 [3.33]–[3.35].

recognised.[4] Nor does autism imply a need for formal support in every case; many autistic adults will require little or none.[5] The legal difficulty arises when legal and administrative systems treat communication difference, anxiety, sensory distress, executive-function demands, delayed processing or reliance on support as evidence of impaired decision-making ability. In those circumstances, support may be withheld because the person is assumed to be capable without it, or capacity may be denied because the environment in which the decision is assessed has made that capacity difficult to demonstrate.[6]

This article uses the terminology of capacity carefully. Legal capacity encompasses legal standing as a holder of rights and duties and legal agency: the authority to act on those rights and have decisions recognised as legally effective.[7] Mental capacity, by contrast, refers to a person's functional decision-making abilities. Domestic capacity tests may ask whether a person can understand, retain, use or weigh relevant information and communicate a decision, assessed by reference to the particular decision and circumstances.[8] Article 12 of the *Convention on the Rights of Persons with Disabilities* ('*CRPD*') protects equal legal capacity and requires access to support in its exercise. Australian common law and guardianship statutes often use mental or functional capacity inquiries, or decision-making ability tests, to determine validity, statutory intervention or need for an order. The article's argument is not that autistic adults lack mental capacity. It is that legal capacity may remain practically inaccessible where those inquiries are conducted without

---

[4] *CRPD* (n 1) art 12(3); *General Comment No 1* (n 1) 3 [13], 4–5 [16]–[17]; ALRC Report 124 (n 1) 12 rec 3–2(2)(b)–(c), 68 [3.22]–[3.24], 72–3 [3.37]–[3.40]; Vella et al (n 2) 557.

[5] ALRC Report 124 (n 1) 12 rec 3–2(1)(d), 12 rec 3–2(2)(b), 71 [3.31], [3.33]; World Health Organisation, 'Autism' (Fact Sheet, 17 September 2025) <www.who.int>.

[6] Lydia Luke et al, 'Decision-Making Difficulties Experienced by Adults with Autism Spectrum Conditions' (2012) 16(6) *Autism* 612; Vella et al (n 2); Dawn Adams and Stephanie Malone, 'The Impact of Anxiety on Decision Making in Individuals with Intellectual and Developmental Disabilities or a Diagnosis on the Autism Spectrum' in Ishita Khemka and Linda Hickson (eds), *Decision Making by Individuals with Intellectual and Developmental Disabilities* (Springer, 2021) 173; Tanya St John et al, 'A Review of Executive Functioning Challenges and Strengths in Autistic Adults' (2022) 36(5) *The Clinical Neuropsychologist* 1116; Maria Strömberg et al, 'Experiences of Sensory Overload and Communication Barriers by Autistic Adults in Health Care Settings' (2022) 4(1) *Autism in Adulthood* 66; Amy L Donaldson, endever* corbin and Jamie McCoy, '"Everyone Deserves AAC": Preliminary Study of the Experiences of Speaking Autistic Adults who Use Augmentative and Alternative Communication' (2021) 6(2) *Perspectives of the ASHA Special Interest Groups* 315; Ashley de Marchena et al, 'Communication in Autistic Adults: An Action-Focused Review' (2025) 27(8) *Current Psychiatry Reports* 471.

[7] *General Comment No 1* (n 1) 3–4 [12]–[14].

[8] Ibid 3–4 [13]–[15] (distinguishing mental and legal capacity and criticising the use of mental-capacity assessments to deny legal capacity); *Guardianship and Administration Act 2019* (Vic) s 5(1) ('*GAA* Vic') (a domestic decision-making capacity test).

autism-responsive support, and where no formal support pathway exists short of substitute decision-making.

That distinction matters because Australian law does not, as a whole, lack decision-specific capacity doctrine. At common law, the relevant capacity inquiry is functional, contextual and transaction-specific. The inquiry is not whether a person is capable in the abstract, but whether they have the understanding required for the particular legal act, at the particular time and in the circumstances in which the decision is made.[9] That principle is important for autistic adults because it directs attention away from diagnosis or presentation and towards the actual decision, the person's understanding and the conditions in which that understanding is assessed.

Although the common law recognises that capacity varies by decision, its role is limited. It generally operates retrospectively, asking whether a legal act was valid once it has been performed or challenged.[10] It does not itself build the conditions necessary for capacity to be exercised in real time. It does not require institutions to provide accessible communication, additional processing time, sensory adjustments, assistance to organise information or recognition of a chosen supporter whom a bank, hospital, landlord, university, employer, government agency or tribunal must engage with.[11]

That common law position must be distinguished from guardianship legislation. Guardianship and administration statutes do more than assess whether a particular legal act is valid. They create statutory mechanisms through which tribunals may appoint a guardian, administrator or financial manager, and thereby transfer decision-making authority from the adult to another person, where the relevant statutory criteria are satisfied.[12] Several Australian statutes incorporate elements of a support-sensitive approach. They may presume capacity, focus on capacity for a particular matter, require consideration of available supports and less-restrictive

---

[9] *Gibbons v Wright* (1954) 91 CLR 423, 437–8 (Dixon CJ, Kitto and Taylor JJ) ('*Gibbons*'); *Hanna v Raoul* [2018] NSWCA 201, [47]–[52] (Beazley P, Macfarlan JA agreeing at [160], White JA agreeing at [163]), [161] (Macfarlan JA) ('*Hanna*'); *PBU & NJE v Mental Health Tribunal* (2018) 56 VR 141, 186–7 [148]–[151] (Bell J) ('*PBU & NJE*').

[10] See, eg, *Gibbons* (n 9) 437–8, 441 (Dixon CJ, Kitto and Taylor JJ); *Hanna v Raoul* (n 9) [52]–[58] (Beazley P, Macfarlan JA agreeing at [160], White JA agreeing at [163]); Nick O'Neill and Carmelle Peisah, *Capacity and the Law* (AustLII Communities, 2021 ed, 14 December 2021) ch 3 [3.3]–[3.3.1] <https://austlii.community/>.

[11] Cf ALRC Report 124 (n 1) 96–7 [4.29]–[4.32], 187–9 [6.150]–[6.159]; *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, September 2023) vol 6, 179–81, rec 6.8 ('*Disability Royal Commission*'). These sources address formal support mechanisms, rather than the validity of a completed legal act. See also *CRPD* (n 1) arts 12(3), 21.

[12] See, eg, *Guardianship Act 1987* (NSW) ('*GA* NSW'); *Guardianship and Administration Act 1993* (SA) ('*GAA* SA'); *Guardianship and Administration Act 1990* (WA) ('*GAA* WA'); *GAA* Vic (n 8).

alternatives or direct decision-makers to give weight to the adult's will, preferences and rights.[13] Victoria has gone further by creating supportive guardianship and supportive administration.[14] The statutory landscape, however, remains fragmented. Across jurisdictions, formal mechanisms short of substitute decision-making are unevenly developed, leaving a gap between legislative commitments to capacity, support and least restriction and the practical pathways available to give those commitments effect.[15]

Tribunal practice must also be distinguished from statutory design. Published decisions of the New South Wales ('NSW') Civil and Administrative Tribunal ('NCAT'), while necessarily only a partial record of day-to-day practice, show that the Tribunal may reason functionally and with close attention to current evidence. It may ask whether an order is necessary at all, and may refuse, limit, revoke or allow to lapse orders where informal supports, enduring appointments or other existing arrangements are sufficient, or where current evidence shows that the person can make relevant decisions with appropriate support.[16] Tribunal discretion can protect against overreach in particular cases, but it cannot perform the work of a formal support pathway. It may prevent an unnecessary guardianship or administration order, yet still leave an autistic adult without a clear and enforceable means of obtaining the adjustments or decision-making assistance needed to exercise capacity in practice.

The argument advanced in this article is an access-to-capacity argument. Autistic adults may fall between legal categories: regarded as too capable to justify guardianship, yet insufficiently supported by informal arrangements; or treated as incapable because the conditions in which decisions are required prevent their abilities from being recognised. Informal support is often essential, but legally fragile. It may depend on family availability, service relationships, social networks and the willingness of banks, hospitals, landlords, service providers or public

[13] *Guardianship and Administration Act 2000* (Qld) ss 11, 11B, 12 ('*GAA* Qld'); *Guardianship and Administration Act 1995* (Tas) ss 8–12 ('*GAA* Tas'); *Guardianship of Adults Act 2016* (NT) ss 4, 5, 5A ('*GAA* NT'); *Guardianship and Management of Property Act 1991* (ACT) ss 4, 6A, 7 ('*GMPA* ACT'); *GAA* Vic (n 8) pt 4.

[14] *GAA* Vic (n 8) pt 4, especially ss 87, 90–4; *Disability Royal Commission* (n 11) vol 6, 179–80.

[15] See *Disability Royal Commission* (n 11) vol 6, 159, 179–81, 190; ALRC Report 124 (n 1) 96–7 [4.29]–[4.32]; Christine Bigby et al, *Diversity, Dignity, Equity and Best Practice: A Framework for Supported Decision-Making* (Research Report, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, January 2023) 1–2 ('*Diversity, Dignity, Equity and Best Practice*').

[16] 'Published Decisions', *NSW Civil and Administrative Tribunal* (Web Page) <https://ncat.nsw.gov.au/>; NSW Civil and Administrative Tribunal, 'NCAT Policy 2: Publishing Reasons for Decisions' (Policy, October 2019). For illustrations of published practice, see, listed chronologically: *QHN* [2019] NSWCATGD 34; *JHN* [2020] NSWCATGD 92; *CKJ* [2022] NSWCATGD 16; *GKC [No 2]* [2024] NSWCATGD 7.

agencies to recognise the supporter's role.[17] Where those conditions fail, the law risks both under-support and over-protection: leaving adults without the support needed to exercise legal agency, or moving too readily towards substituted decision-making.

This article develops that argument in six substantive parts. Part II explains why autistic decision-making support needs are best understood as matters of communication, sensory access, processing time, executive functioning and relational support, rather than as evidence of incapacity. Part III distinguishes art 12, *General Comment No 1*[18] and Australian common law capacity doctrine and shows why a validity doctrine cannot itself operate as a support architecture. Part IV maps state and territory legislation and published tribunal decisions, with particular attention to the gap between support-sensitive reasoning and formal support pathways. Part V provides for an implementation requirement: decision-specific capacity must be matched by decision-specific support. Part VI draws design insights from selected Canadian regimes. Part VII then proposes a tribunal-adapted Australian framework comprising voluntary supporter authorisations, structured support orders and, only where domestic law retains them, tightly confined representative orders. The aim is to move Australian guardianship law from recognising capacity in theory to enabling autistic adults to access and exercise legal capacity in practice.

II AUTISTIC ADULTS AND THE CONDITIONS FOR EXERCISING LEGAL CAPACITY

Autism-specific analysis of decision-making support is necessary, and it must be framed with care. Autistic adults' support needs warrant focused analysis because legal capacity is exercised through particular communicative, sensory, cognitive and relational conditions.[19] Legal, medical, financial and service systems often assume rapid spoken communication, tolerance of stressful environments, linear processing, conventional social presentation and immediate verbal expression of

---

[17] For the practical importance of relationships and support networks, see Bigby et al, *Diversity, Dignity, Equity and Best Practice* (n 15) 84–6; Office of the Public Advocate (SA), *Developing a Model of Practice for Supported Decision Making* (Practice Manual, June 2011) 11–12. On the case for legal recognition of supporters, see ALRC Report 124 (n 1) 93 [4.12]–[4.13], 96–7 [4.29]–[4.32]. These materials explain the support and recognition problem; they do not establish that every institution refuses informal support.

[18] *General Comment No 1* (n 1).

[19] Valerie Satkoske, Joann M Migyanka and David Kappel, 'Autism and Advance Directives: Determining Capability and the Use of Health-Care Tools to Aid in Effective Communication and Decision-Making' (2020) 37(5) *American Journal of Hospice and Palliative Medicine* 354, 354–5; Kate Silver and Sarah Parsons, 'Perspectives of Autistic Adults on the Strategies that Help or Hinder Successful Conversations' (2022) 7 *Autism & Developmental Language Impairments* 1, 1–3, 6–9; Bigby et al, *Diversity, Dignity, Equity and Best Practice* (n 15) 2, 83–6; *CRPD* (n 1) art 12(2)–(3).

preference. Those assumptions may obscure an autistic adult's understanding, preference or will. They may also lead decision-makers to treat the need for accommodation as evidence that the person lacks capacity, rather than as evidence that the decision-making process itself has not been made accessible.[20]

Three distinctions are important at the outset. At common law, capacity is a functional inquiry directed to the particular act, transaction or decision.[21] In guardianship legislation, the inquiry is statutory: whether the criteria for appointment, functions and limitations are satisfied.[22] In tribunal practice, the inquiry is also evidentiary and procedural: how decision-makers assess the person's actual functioning, available supports, risks and less-restrictive alternatives in the circumstances of the matter.[23] This Part is concerned with an earlier question: what communicative, sensory, cognitive and relational conditions must be in place for autistic adults to exercise, communicate and have their legal capacity recognised?

Australian population data confirms that support needs are significant, while also requiring careful interpretation. In 2022, the Australian Bureau of Statistics reported that 59.2% of autistic people needed assistance with at least one activity on a daily basis and that 39.4% needed daily assistance with cognitive or emotional tasks.[24] These figures are relevant because cognitive and emotional support may shape how a person accesses information, manages stress, sequences tasks, compares options or communicates a decision. However, they do not measure legal incapacity, the need for guardianship or inability to make any particular decision.

Adult autism literature supports this distinction. It does not support treating autism as evidence of reduced decision-making capacity. Rather, it shows that decision-making can depend heavily on the conditions in which a decision is made.[25]

---

[20] Luke et al (n 6) 618–19; Vella et al (n 2) 557–8.

[21] *Gibbons* (n 9) 437–8 (Dixon CJ, Kitto and Taylor JJ); *CJ v AKJ* (2015) 16 ASTLR 24, 30–1 [32]–[33] (Lindsay J) ('*CJ*'); *Scott v Scott* (2012) 7 ASTLR 299, 326 [199], 326–7 [205] (Lindsay J) ('*Scott*'). See also *Ghosn v Principle Focus Pty Ltd [No 2]* [2008] VSC 574, [69]–[70], [77]–[78] (Forrest J) ('*Ghosn*'), explaining the contextual understanding required for a power of attorney and its consistency with *Gibbons*.

[22] See, eg, *GA* NSW (n 12) ss 3(1) (definition of 'person in need of a guardian'), 4, 14–16, 21; *GAA* Vic (n 8) ss 5, 8, 30–4, 38–9; *GAA* Qld (n 13) ss 5, 12, 33–6.

[23] See, eg, *Civil and Administrative Tribunal Act 2013* (NSW) ss 36, 38(2), (4), (6), sch 6 cls 4–7, 11; *GA* NSW (n 12) ss 4, 14(2), 15(4); *LGT* [2019] NSWCATGD 9, [9]–[11], [17]–[31] ('*LGT*'); *HZC* [2019] NSWCATGD 8, [29]–[34], [99]–[102].

[24] 'Autism in Australia, 2022', *Australian Bureau of Statistics* (Web Page, 11 October 2024) <www.abs.gov.au/>. The ABS category is broader than legal decision-making and should not be treated as a proxy for guardianship need.

[25] See, eg, Vella et al (n 2) 549–50, 557–8; George D Farmer, Simon Baron-Cohen and William J Skylark, 'People with Autism Spectrum Conditions Make More Consistent Decisions' (2017) 28(8) *Psychological Science* 1067, 1067–8, 1073–5; Benedetto De Martino et al, 'Explaining Enhanced

Some autistic adults may find decisions more difficult when information is vague, unpredictable, socially coded, time-pressured or loaded with unstated expectations.[26] Others may bring particular strengths to decision-making, including careful information-gathering, consistency, attention to detail and deliberative reasoning.[27] The legal significance is clear. Autistic adults may be better able to demonstrate and exercise capacity when the decision-making process is made accessible. That may require structured information, concrete options, adequate processing time, a low-pressure environment and the ability to use trusted support without transferring decision-making authority to another person.[28]

Communication is central. Some autistic adults communicate primarily through speech. Others are non-speaking or minimally speaking. Others speak in some contexts but rely on typing, augmentative and alternative communication, gestures, scripting, objects, routines, behaviour or trusted interpreters in others.[29] A speech-centric assessment risks mistaking delayed response, silence, atypical prosody, reduced eye contact, shutdown, echolalia, scripting or reliance on text for lack of understanding.[30] The correct legal question is not whether the person communicates in a neurotypical manner, but whether their will, preferences, understanding and decision can be elicited through the communication method most reliable for them.[31]

This has particular significance for non-speaking and minimally speaking autistic adults. The evidence base remains comparatively underdeveloped and, in some

Logical Consistency during Decision Making in Autism' (2008) 28(42) *Journal of Neuroscience* 10746, 10749–50; Ana Macchia et al, 'Autistic Adults Avoid Unpredictability in Decision-Making' (2025) 55 *Journal of Autism and Developmental Disorders* 4234, 4234–5, 4242–4.

[26] See Luke et al (n 6) 612–13, 617–20; Stacey and Cage (n 2) 263–4, 267–71; Macchia et al (n 25) 4234–5, 4242–4; Philippa L Howard and Felicity Sedgewick, '"Anything but the Phone!": Communication Mode Preferences in the Autism Community' (2021) 25(8) *Autism* 2265, 2266–7, 2273–6.

[27] Farmer, Baron-Cohen and Skylark (n 25) 1073–5; De Martino et al (n 25) 10749–50; Luke et al (n 6) 618–19.

[28] See, eg, Vella et al (n 2); Michelle Browning, Christine Bigby and Jacinta Douglas, 'A Process of Decision-Making Support: Exploring Supported Decision-Making Practice in Canada' (2021) 46(2) *Journal of Intellectual and Developmental Disability* 138.

[29] Donaldson, corbin and McCoy (n 6).

[30] See Clare Cummins, Elizabeth Pellicano and Laura Crane, 'Autistic Adults' Views of their Communication Skills and Needs' (2020) 55(5) *International Journal of Language & Communication Disorders* 678, 678–9, 683–7; Howard and Sedgewick (n 26) 2266–7, 2273–6; de Marchena et al (n 6) 471–4, 476–9; Katie Logos et al, 'The Behavioral Presentation of Autistic Adults in a Forensic Interview' (2026) 56(9) *Journal of Autism and Developmental Disorders* 3503; Damian E M Milton, 'On the Ontological Status of Autism: The "Double Empathy Problem"' (2012) 27(6) *Disability & Society* 883, 884–6.

[31] *CRPD* (n 1) arts 12(3), 21(b); *General Comment No 1* (n 1) 4–5 [17].

areas, contested; some of the literature concerns children rather than adults.[32] Those limitations do not establish an absence of preference, language or decisional ability. They therefore support a cautious procedural approach: decision-makers should avoid inferring incapacity from lack of conventional speech; identify the adult's established communication methods; permit augmentative and alternative communication where used; and obtain skilled communication evidence where necessary.[33] A person's mode of communication is therefore not a preliminary hurdle to legal capacity. It is one of the conditions through which capacity may be exercised.

Executive functioning, anxiety and sensory load are also central to the conditions in which autistic adults exercise capacity.[34] Many legal, health, financial, housing and service decisions require more than understanding the final choice. They require planning, prioritising, comparing options, holding information in working memory, managing documents, meeting deadlines and implementing the decision after it has been made.[35] Executive-function differences may affect how a person organises information, sequences tasks or communicates a decision, without determining their values, preferences or right to decide.

Anxiety may make decision-making more difficult where processes are uncertain, rushed, socially demanding or high-stakes.[36] Sensory environments may further affect participation. Noise, bright lighting, crowded rooms, waiting areas, unpredictable questioning and adversarial procedures can all affect how easily an

---

[32] For an adult-focused review, see de Marchena et al (n 6) 478–9. On the limitations and differing definitions in the broader evidence base, see Lynn Kern Koegel et al, 'Definitions of Nonverbal and Minimally Verbal in Research for Autism: A Systematic Review of the Literature' (2020) 50(8) *Journal of Autism and Developmental Disorders* 2957, 2957–60, 2967–70. The frequently cited account by Helen Tager-Flusberg and Connie Kasari, 'Minimally Verbal School-Aged Children with Autism Spectrum Disorder: The Neglected End of the Spectrum' (2013) 6(6) *Autism Research* 468, 468–70, concerns children and is not direct evidence of adult legal decision-making ability.

[33] Vikram K Jaswal, Andrew J Lampi and Kayden M Stockwell, 'Literacy in Nonspeaking Autistic People' (2024) 28(10) *Autism* 2503, 2503–4, 2511–12; Steven K Kapp, 'Profound Concerns about "Profound Autism": Dangers of Severity Scales and Functioning Labels for Support Needs' (2023) 13(2) *Education Sciences* 106:1, 6–9.

[34] E A Demetriou et al, 'Autism Spectrum Disorders: A Meta-Analysis of Executive Function' (2018) 23(5) *Molecular Psychiatry* 1198, 1198–9, 1203; Luke et al (n 6) 614–15, 618–19; Ye In (Jane) Hwang et al, 'Understanding Anxiety in Adults on the Autism Spectrum: An Investigation of its Relationship with Intolerance of Uncertainty, Sensory Sensitivities and Repetitive Behaviours' (2020) 24(2) *Autism* 411, 411–12, 417–19; Keren MacLennan, Sarah O'Brien and Teresa Tavassoli, 'In Our Own Words: The Complex Sensory Experiences of Autistic Adults' (2022) 52 *Journal of Autism and Developmental Disorders* 3061, 3069–73. For clinical adjustments, see *Autism Spectrum Disorder in Adults* (n 3) 13 rec 1.1.8, 23 rec 1.3.2.

[35] St John et al (n 6).

[36] Luke et al (n 6) 614–15, 618–19; Hwang et al (n 34) 411–12, 417–19; *Autism Spectrum Disorder in Adults* (n 3) 23 rec 1.3.2.

autistic adult processes information, responds to questions or expresses a preference.[37] These features do not determine capacity, but they may determine whether capacity can be demonstrated.

For legal purposes, those barriers should not be treated as automatic evidence of incapacity. They may indicate the need for support. Relevant supports may include written information in advance, plain-language and visual explanations, reduced sensory load, breaks, asynchronous communication, extra time, predictable meeting structures, assistance to organise documents and the presence of a trusted supporter.[38] An autistic adult may be able to decide in a quiet room with written options, visual prompts and time to process, while appearing unable to decide in a noisy tribunal room, a rushed medical consultation or a high-pressure financial meeting. The difference is not necessarily capacity. It may be access.

The practical domains in which these issues arise are precisely those engaged by guardianship and administration regimes. Health-care studies show that autistic adults experience barriers including communication mismatch, inaccessible appointment systems, sensory environments and clinicians' limited autism knowledge.[39] Australian research on financial wellbeing indicates that autistic adults' financial circumstances are shaped by income, depression, financial behaviour, executive demands and the availability of practical support.[40] Housing research likewise suggests that independent living is often valued because it provides autonomy, control and personal space, while transitions into or between living arrangements may be constrained by environmental, financial and service

[37] MacLennan, O'Brien and Tavassoli (n 34) 3061–2, 3069–73; Keren MacLennan et al, '"It Is a Big Spider Web of Things": Sensory Experiences of Autistic Adults in Public Spaces' (2023) 5(4) *Autism in Adulthood* 411, 411–12, 416–20. For clinical and procedural guidance, see *Autism Spectrum Disorder in Adults* (n 3) 13 rec 1.1.8, 16 rec 1.2.1, 23 rec 1.3.2; Judicial Commission of New South Wales, 'Section 5 — People with Disabilities', *Equality before the Law Bench Book* (Online Bench Book, updated April 2025) [5.3.10], [5.6.3], [5.6.6.1], [5.6.7] <www.judcom.nsw.gov.au/>; The Advocate's Gateway, *Toolkit 3: Planning to Question People with Autism* (Toolkit, February 2026) 2 [8], 4–5 [27]–[36], 8–10 [59]–[71] <www.theadvocatesgateway.org/>.

[38] Luke et al (n 6) 618–19; *Autism Spectrum Disorder in Adults* (n 3) 13 rec 1.1.8, 16 rec 1.2.1, 23 rec 1.3.2. For application in legal proceedings, see Judicial Commission of New South Wales (n 37) [5.6.3], [5.6.6.1], [5.6.7]; The Advocate's Gateway (n 37) 7–10 [49]–[71], 11 [81]–[86].

[39] Christina Nicolaidis et al, 'Comparison of Healthcare Experiences in Autistic and Non-Autistic Adults: A Cross-Sectional Online Survey Facilitated by an Academic-Community Partnership' (2013) 28(6) *Journal of General Internal Medicine* 761; Mary Doherty et al, 'Barriers to Healthcare and Self-Reported Adverse Outcomes for Autistic Adults' (2022) 12 *BMJ Open* e056904:1; Sarah RC Arnold et al, 'Barriers to Healthcare for Australian Autistic Adults' (2024) 28(2) *Autism* 301.

[40] Ru Ying Cai, Gabrielle Hall and Elizabeth Pellicano, 'Predicting the Financial Wellbeing of Autistic Adults: Part I' (2024) 28(5) *Autism* 1203; Elizabeth Pellicano, Gabrielle Hall and Ru Ying Cai, 'Autistic Adults' Experiences of Financial Wellbeing: Part II' (2024) 28(5) *Autism* 1090.

barriers.[41] These findings support targeted decision-making support, including clearer information, step-by-step options, sensory adjustments, communication access and trusted supporters, rather than a default move to substitute decision-making.

Stereotype is itself a legal risk. Autistic presentation may be misread by third parties as deceptive, suspicious, non-credible or otherwise inconsistent with expected forms of truthful behaviour. Empirical work suggests that autistic adults may be wrongly perceived as more deceptive and less credible than neurotypical adults, even when telling the truth, and that this may reflect their overall presentation rather than any reliable indicator of deception.[42] That risk is acute in capacity assessments, guardianship applications and tribunal hearings, where decision-makers often rely on presentation, responsiveness and perceived insight. Conversely, verbal fluency may mask significant support needs in executive functioning, anxiety management or decision implementation.[43] The law should therefore avoid both underestimation and overestimation. It should not assume incapacity from atypical presentation; nor should it assume that articulate adults need no support.

Autism spectrum disorder support levels in the *Diagnostic and Statistical Manual of Mental Disorders* and functioning labels should be treated with the same caution.[44] Clinical descriptors may be relevant background information, but they do not

[41] Mustafa Al Ansari, Chris Edwards and Vicki Gibbs, '"Living Independently Means Everything to Me": The Voice of Australian Autistic Adults' (2024) 6(3) *Autism in Adulthood* 312; Debbie Mason et al, 'Autistic People and Moving Home: A Systematic Review' (2023) 5(3) *Autism in Adulthood* 236.
[42] Alliyza Lim, Robyn L Young and Neil Brewer, 'Autistic Adults May Be Erroneously Perceived as Deceptive and Lacking Credibility' (2022) 52 *Journal of Autism and Developmental Disorders* 490.
[43] Luke et al (n 6) 618–19; Kate Johnston et al, 'Executive Function: Cognition and Behaviour in Adults with Autism Spectrum Disorders (ASD)' (2019) 49(10) *Journal of Autism and Developmental Disorders* 4181; Matthew J Hollocks et al, 'Anxiety and Depression in Adults with Autism Spectrum Disorder: A Systematic Review and Meta-Analysis' (2019) 49(4) *Psychological Medicine* 559; Gail A Alvares et al, 'The Misnomer of "High Functioning Autism": Intelligence Is an Imprecise Predictor of Functional Abilities at Diagnosis' (2020) 24(1) *Autism* 221. For practical assessment guidance, see New South Wales Department of Communities and Justice, *Capacity Toolkit: Information for Government and Community Workers, Professionals, Families and Carers in New South Wales* (Toolkit, reprint, April 2020) 30, 32–6; Law Society of New South Wales, *When a Client's Mental Capacity Is in Doubt: A Practical Guide for Solicitors* (Guidelines, 2016) 6–8. See also Katherine Martin, 'Using Capacity Assessments to Maximise Individuals' Autonomy: What Information Might Assist a Tribunal?' (2015) 37(4) *InPsych* <https://psychology.org.au/>.
[44] See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Association Publishing, 5th ed, 2013) 52–3 ('DSM-5'); see also American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Association Publishing, 5th ed, rev ed, 2022) 58 ('DSM-5-TR'); Amy S Weitlauf et al, 'Brief Report: DSM-5 "Levels of Support": A Comment on Discrepant Conceptualizations of Severity in ASD' (2014) 44(2) *Journal of Autism and Developmental Disorders* 471.

answer whether a person can understand, use, weigh or communicate information for a particular legal, health, financial, housing or service decision. Labels such as 'high-functioning', 'low-functioning' or 'profound autism' can obscure support needs, invite assumptions of incapacity and conflate communication, adaptive functioning, intelligence and legal agency.[45] The safer legal formulation is to identify the particular support needed for the particular decision: for example, assistance to compare options, tolerate the meeting environment, communicate with a service provider, organise records, manage deadlines or implement the decision once made.

This analysis identifies autism-specific support needs within a broader anti-stereotyping approach to disability and legal capacity. The same principle applies across disability contexts: legal capacity belongs equally to all adults, while the conditions needed to exercise and communicate that capacity may differ.[46] Dementia may make timing, fluctuation, review and advance planning especially salient.[47] Intellectual disability may make relational support, communication over time and supporter attitudes especially visible.[48] Autism may make sensory environment, processing time, anxiety, executive functioning and atypical communication especially important.[49] These are differences in support profile, rather than differences in legal personhood.

Accordingly, the reform question is not whether autistic adults occupy a special category outside ordinary capacity law. It is whether Australian guardianship and supported decision-making frameworks provide sufficiently flexible supports before, during and after a decision so that autistic adults can exercise legal capacity

[45] Kapp (n 33) 4–5 (within-person variability and the limitations of severity levels); DSM-5-TR (n 44) 58 (clinical support-level descriptors). On the implications of terminology, rather than the contents of the DSM, see Kristen Bottema-Beutel et al, 'Avoiding Ableist Language: Suggestions for Autism Researchers' (2021) 3(1) *Autism in Adulthood* 18, 20–2.

[46] *CRPD* (n 1) arts 5, 8(1)(b), 12(2)–(3); *General Comment No 1* (n 1) 3 [13]. On non-stigmatising terminology, see Bottema-Beutel et al (n 45) 20–2.

[47] See Advance Care Planning Australia and Dementia Australia, *Advance Care Planning and Dementia: Joint Position Statement* (Position Statement, May 2026) 2–4.

[48] See Christine Bigby, Mary Whiteside and Jacinta Douglas, 'Providing Support for Decision Making to Adults with Intellectual Disability: Perspectives of Family Members and Workers in Disability Support Services' (2019) 44(4) *Journal of Intellectual & Developmental Disability* 396, 397–9; Jacinta Douglas and Christine Bigby, 'Development of an Evidence-Based Practice Framework to Guide Decision Making Support for People with Cognitive Impairment due to Acquired Brain Injury or Intellectual Disability' (2020) 42(3) *Disability and Rehabilitation* 434, 436–8; Joanne Watson, 'Assumptions of Decision-Making Capacity: The Role Supporter Attitudes Play in the Realisation of Article 12 for People with Severe or Profound Intellectual Disability' (2016) 5(1) *Laws* 6:1.

[49] Luke et al (n 6) 618–19; Johnston et al (n 43); Hollocks et al (n 43). For corresponding clinical adjustments, see *Autism Spectrum Disorder in Adults* (n 3) 13 rec 1.1.8, 16 rec 1.2.1, 23 rec 1.3.2.

on an equal basis with others.[50] A person may retain legal capacity and still require support to exercise it effectively.[51] That support may include help to gather information, structure choices, understand consequences, regulate the decision-making environment, communicate will and preferences or implement the decision. Properly framed, such support does not undermine autonomy. It makes autonomy practically available.

This Part therefore supports the article's central thesis. The capacity of autistic adults is shaped not only by individual understanding, but by the conditions in which decisions are presented, processed, communicated and recognised. Where communication, sensory, processing or executive-functioning needs are not accommodated, an autistic adult may be wrongly treated as unable to decide. Where informal support is available but lacks recognition, the adult may still be left without practical assistance that third parties will accept. The task for reform is to move from capacity recognition to capacity access: to ensure that legal capacity can be exercised through the communicative, temporal, sensory, relational and practical conditions that make decision-making real.

Against that background, the next Part sets out the international and domestic legal baseline for that shift, showing how equal legal capacity and decision-specific capacity provide the foundation, but not yet the architecture, for supported decision-making.

III THE LEGAL BASELINE: ARTICLE 12 AND DECISION-SPECIFIC CAPACITY IN AUSTRALIAN LAW

Legal capacity must be understood through both international and domestic law. This Part begins with art 12 of the *CRPD* and *General Comment No 1*, which frame legal capacity as an equal right and require access to support in its exercise. It then turns to Australian common law capacity doctrine, which has long assessed mental or functional capacity by reference to the particular legal act, context and circumstances. It then brings those strands together by explaining why recognition of equal legal capacity, and a doctrine of decision-specific capacity, do not themselves create a support architecture. The question is how those principles can be translated into practical, legally recognised pathways through which autistic adults can obtain the support needed to exercise capacity before substitute decision-making is considered.

[50] *CRPD* (n 1) art 12(3); *Disability Royal Commission* (n 11) vol 6, 179–82 rec 6.8. For existing Victorian mechanisms, see *GAA* Vic (n 8) s 5, pt 4; *Powers of Attorney Act 2014* (Vic) pt 7.
[51] *CRPD* (n 1) art 12(3); ALRC Report 124 (n 1) 93 [4.12]–[4.13].

A *Article 12, General Comment No 1 and the Support Duty*

Article 12 of the *CRPD* recognises that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life, requires States Parties to provide access to the support a person may require in exercising legal capacity and requires safeguards that respect the person's rights, will and preferences.[52] Its significance goes beyond rejecting incapacity based on disability status alone. Article 12 links legal personhood to a positive obligation to build conditions under which decisions can be made, communicated and acted upon.[53] For autistic adults, that starting point is important. Diagnosis, communication style, sensory distress, anxiety, executive-functioning difficulty or the need for processing time should not be treated as proxies for incapacity.[54] The legal question is what support is required for this person to exercise legal capacity in relation to this decision.

General Comment No 1 reads art 12 as requiring States to replace substitute decision-making regimes with supported decision-making arrangements that respect the person's rights, will and preferences.[55] The Committee distinguishes legal capacity from mental capacity, criticises the use of mental-capacity assessments to deny legal capacity and states that support in the exercise of legal capacity must respect the person's rights, will and preferences rather than operate as substitute decision-making.[56] It defines substitute decision-making broadly. The concept includes arrangements in which legal capacity is removed, even for a single decision; a decision-maker is appointed by someone other than the person concerned and this can be done against that person's will; or the substitute decision is based on what is believed to be an objective assessment of best interests rather than the person's will and preferences.[57] On this view, substitute decision-making regimes must be abolished and replaced with supported decision-making arrangements, rather than retained with additional safeguards.[58]

---

[52] *CRPD* (n 1) art 12(2)–(4).
[53] Ibid art 12(3); *General Comment No 1* (n 1) 4–5 [17].
[54] Pia Bradshaw et al, 'Recognising, Supporting and Understanding Autistic Adults in General Practice Settings' (2021) 50(3) *Australian Journal of General Practice* 126, 127–9. For the domestic assessment approach, see ALRC Report 124 (n 1) 11–12 rec 3–2; Queensland Department of Justice and Attorney-General, *Queensland Capacity Assessment Guidelines 2020: A Guide to Understanding Capacity, Capacity Assessment and the Legal Tests of Capacity under Queensland's Guardianship Legislation* (Guidelines, Version 2, 7 April 2021) 10–12, 25, 39.
[55] *General Comment No 1* (n 1) 6 [26], [28].
[56] Ibid 3–4 [12]–[15], 4–5 [17], 5 [21].
[57] Ibid 6 [27].
[58] Ibid 6 [28].

General Comment No 1 also rejects the adult 'best interests' paradigm.[59] On the Committee's interpretation, art 12 requires States Parties to ensure that, where a person's will and preferences cannot be determined after significant efforts, decisions reflect the best interpretation of that person's will and preferences rather than what a third party regards as the person's best interests.[60] The Committee therefore treats equal legal capacity as incompatible with regimes that remove decision-making authority on the basis of impairment and substitute an externally assessed best-interests standard.

That distinction is important. *General Comment No 1* should be read on its own terms: it treats art 12 as requiring the abolition and replacement of substitute decision-making regimes, rather than their retention as measures of last resort. Australia has adopted a different position. Its interpretive declaration states that the *CRPD* permits fully supported or substituted decision-making arrangements where necessary, as a last resort and subject to safeguards.[61] A substantial pragmatic literature likewise argues that tightly confined representative mechanisms may remain legally or morally defensible in hard cases, including emergency treatment, exploitation, unconsciousness, legal uncertainty or serious disagreement about the person's will and preferences.[62] That view may be defended as a domestic and pragmatic response to art 12. It should not be attributed to the *CRPD* Committee.

This article does not seek to resolve the abolitionist–pragmatic debate. Its concern is narrower. While Australian law continues to retain substitute or representative orders, those orders should be preceded, reduced and constrained by formal pathways for support. Terminology matters. Supported decision-making describes arrangements in which the person remains the legal decision-maker, with assistance to understand information, consider options, communicate preferences and implement a decision.[63] Where another person is legally authorised to decide on the person's behalf, or where the person's legal authority depends on another person's

---

[59] Ibid 5 [21].
[60] Ibid.
[61] United Nations Treaty Collection, 'Convention on the Rights of Persons with Disabilities' (Web Page) <https://treaties.un.org/> (Australia's declaration concerning art 12). See also Joint Standing Committee on Treaties, Parliament of the Commonwealth of Australia, *Report 95: Review into Treaties Tabled on 4 June, 17 June, 25 June and 26 August 2008* (Report No 95, October 2008) ch 2.
[62] ALRC Report 124 (n 1) 58 [2.101], 60 [2.106]–[2.107]; Terry Carney, 'Supported Decision-Making for People with Cognitive Impairments: An Australian Perspective?' (2015) 4(1) *Laws* 37 ('Supported Decision-Making for People with Cognitive Impairments'); Terry Carney, 'Prioritising Supported Decision-Making: Running on Empty or a Basis for Glacial-to-Steady Progress?' (2017) 6(4) *Laws* 18:1; John Dawson and George Szmukler, 'Fusion of Mental Health and Incapacity Legislation' (2006) 188 *British Journal of Psychiatry* 504.
[63] See *General Comment No 1* (n 1) 4–5 [17]; ALRC Report 124 (n 1) 93 [4.12]–[4.13].

concurrence, the arrangement has moved beyond support into representative or substitute decision-making, even if it is respectful in design and guided by will and preferences.[64] Support and authority should therefore be kept analytically separate.

B *Australian Common Law Capacity Doctrine*

The domestic starting point is correspondingly nuanced. Australian common law does not treat capacity as a global on/off condition. The leading authority is *Gibbons v Wright*,[65] where the High Court held that the law does not prescribe a fixed standard of mental capacity for all transactions. Rather, for each legal act or 'piece of business', the person must have sufficient soundness of mind to understand the general nature of what they are doing.[66] Later authority has restated the same principle in more contemporary terms. In *Scott v Scott*, Lindsay J emphasised that capacity is assessed by reference to the nature, terms, purpose and context of the particular transaction.[67] *Ghosn v Principle Focus Pty Ltd [No 2]* likewise requires attention to an instrument's practical consequences and expressly treats that contextual approach as consistent with *Gibbons v Wright*.[68] The inquiry is therefore functional, temporal and decision-specific. It asks whether the person had the understanding required for the particular act at the relevant time, not whether they were globally capable or incapable. The presumption of capacity reinforces that approach, although the evidentiary burden depends on the legal act and the issues raised. In probate, for example, due execution of a rational will may support a presumption of testamentary capacity, but a genuine doubt requires the propounder to establish capacity. The inquiry remains contextual and evidentiary. It asks whether the person had the understanding required for the particular act, rather than treating disability as a legal status.[69]

The clearest illustration is testamentary capacity. *Banks v Goodfellow* ('*Banks*') asks whether the testator understood the nature and effect of making a will, the extent of the property being disposed of and the claims of those who might naturally expect

---

[64] Michelle Browning, Christine Bigby and Jacinta Douglas, 'Supported Decision Making: Understanding How its Conceptual Link to Legal Capacity is Influencing the Development of Practice' (2014) 1(1) *Research and Practice in Intellectual and Developmental Disabilities* 34 ('Supported Decision Making').
[65] *Gibbons* (n 9).
[66] Ibid 437 (Dixon CJ, Kitto and Taylor JJ). See also *Scott* (n 21) 327 [205] (Lindsay J); *CJ* (n 21) 30 [32] (Lindsay J).
[67] *Scott* (n 21) 326 [199], 326–7 [205] (Lindsay J).
[68] *Ghosn* (n 21) [69]–[70], [77]–[78] (Forrest J).
[69] See, eg, *Bull v Fulton* (1942) 66 CLR 295, 343 (Williams J) ('*Bull*') (on the probate presumption and the propounder's burden where a genuine doubt arises). On the general starting presumption in capacity assessment, see ALRC Report 124 (n 1) 72 [3.38].

to benefit, and whether any disorder of the mind affected the testamentary disposition.[70] Australian courts have long applied that test in a way that directs attention to the person's actual understanding of the particular act, rather than to diagnosis alone. A diagnosis, eccentricity, age, illness or vulnerability does not itself invalidate a will.[71] The question is whether the relevant impairment affected the specific act of will-making.[72] In *Carr v Homersham*, the NSW Court of Appeal emphasised that the negative *Banks* elements matter only to the extent that they interfere with actual decision-making; *Banks* is not a rigid statutory checklist.[73] Testamentary capacity thus already contains a sophisticated account of partial impairment, causal connection and decision-specific ability.

The same functional logic appears across other common law settings. Capacity to grant a power of attorney depends on the nature and consequences of the instrument, the powers conferred, the relationship between principal and attorney and the practical consequences of execution.[74] Capacity to consent to, or refuse, medical treatment turns on the person's ability to understand the nature and consequences of the decision; a competent adult may refuse treatment even where others regard the refusal as unwise or harmful.[75] Litigation capacity is calibrated to the proceeding in issue and requires understanding of the nature, purpose, possible outcomes and costs risks of the litigation.[76] Capacity to marry is assessed by reference to understanding the nature and effect of the marriage ceremony and relationship, not by reference to capacity for all legal purposes.[77] In the protective jurisdiction and financial management contexts, incapacity in one domain does not

[70] *Banks v Goodfellow* (1870) LR 5 QB 549, 565 (Cockburn CJ) ('*Banks*').
[71] See, eg, ibid 570–1 (Cockburn CJ); *Bailey v Bailey* (1924) 34 CLR 558, 570–2 (Isaacs J, Gavan Duffy J agreeing at 579, Rich J agreeing at 579); *Timbury v Coffee* (1941) 66 CLR 277, 280 (Rich ACJ), 282–4 (Dixon J) ('*Timbury*'); *Bull* (n 69) 299–300 (Latham CJ); *Re Estate of Griffith*; *Easter v Griffith* (1995) 217 ALR 284, 290–2 (Gleeson CJ) ('*Re Estate of Griffith*'); *Carr v Homersham* (2018) 97 NSWLR 328, 330–3 [5]–[6], [15]–[17] (Basten JA) ('*Carr*'). *Bull* is cited for the need to connect the relevant delusions with the testamentary disposition, not as a decision upholding the will.
[72] *Timbury* (n 71) 282–4 (Dixon J); *Re Estate of Griffith* (n 71) 295–6 (Kirby P); *Hanna* (n 9) [54] (Beazley P, Macfarlan JA agreeing at [160] and White JA agreeing at [163]).
[73] *Carr* (n 71) 330–3 [5]–[6], [15]–[17] (Basten JA), 353 [132] (Leeming JA).
[74] *Szozda v Szozda* [2010] NSWSC 804, [119]–[120] (Barrett J) ('*Szozda*'); *Scott* (n 21) 326 [199], 326–7 [205] (Lindsay J).
[75] *Hunter and New England Area Health Service v A* (2009) 74 NSWLR 88, 94–5 [26]–[30], 97–8 [40] (McDougall J) ('*Hunter and New England Area Health Service*').
[76] *Dalle-Molle v Manos* (2004) 88 SASR 193, 198–200 [21]–[26] (Debelle J) ('*Dalle-Molle*').
[77] *Marriage Act 1961* (Cth) s 23B(1)(d)(iii) ('*Marriage Act*'); *Babich v Sokur* [2007] FamCA 236, [244], [249], [255] (Mullane J), quoted in *Oliver (Deceased) v Oliver* [2014] FamCA 57, [202] (Foster J) ('*Oliver (Deceased)*').

establish incapacity in all others; need, benefit and the availability of support remain separate questions.[78]

C. Why Doctrine Is Not Support Architecture

Three propositions follow. First, common law capacity doctrine is not diagnosis-based. Autism, dementia, intellectual disability, acquired brain injury or psychosocial disability may be relevant evidentiary context, but no diagnosis answers the legal question. Secondly, common law capacity doctrine is not binary in the pejorative sense sometimes attributed to it. A person may be able to make a will but not manage complex litigation; understand a limited power of attorney but not an instrument authorising wide dispositions; or make personal decisions while needing assistance with financial administration. Thirdly, the difficulty is therefore not that Australian law has failed to recognise functional capacity. It is that recognition of functional capacity is not consistently matched by practical and legally recognised support.

Article 12 and the common law therefore perform different roles in the analysis. Article 12 supplies the normative commitment to equal legal capacity and support. The common law supplies a transaction-specific doctrine for determining whether a particular legal act is valid. Neither, without more, creates a reliable legal pathway through which autistic adults can obtain recognised, autism-responsive support before substitute decision-making is considered. Statutory guardianship and tribunal practice are considered separately in Part IV because they raise different questions: the design of legislative powers, the criteria for intervention, the availability of support-sensitive orders and the way tribunals assess evidence, risk, informal support and less-restrictive alternatives in practice.

Common law capacity doctrine is mainly a validity doctrine. It determines, often retrospectively, whether a will, contract, consent, refusal, power of attorney, marriage or litigation step is legally effective.[79] It does not itself give a person extra time to process information, access to augmentative communication, a low-sensory

[78] *P v NSW Trustee and Guardian* [2015] NSWSC 579, [307]–[308] (Lindsay J); *CJ* (n 21) 30 [32]–[33], 31 [38], 33 [51], 34 [54]–[56] (Lindsay J).

[79] See, eg, *Banks* (n 70) 565 (Cockburn CJ) (wills); *Gibbons* (n 9) 437–8 (Dixon CJ, Kitto and Taylor JJ) (transactions); *Hunter and New England Area Health Service* (n 75) 97–8 [40] (McDougall J) (medical consent and refusal); *Szozda* (n 74) [31], [119]–[120] (Barrett J); *Scott* (n 21) 326 [199], 326–7 [205] (Lindsay J) (powers of attorney); *Marriage Act* (n 77) s 23B(1)(d)(iii); *Oliver (Deceased)* (n 77) [202] (Foster J) (marriage); *Dalle-Molle* (n 76) 198–200 [21]–[26] (Debelle J) (litigation).

hearing room, a trusted supporter whose role third parties must recognise or assistance implementing an otherwise valid decision.[80]

The next Part therefore examines whether Australian guardianship law, in principle and practice, supplies that missing pathway or instead reproduces the gap between recognising capacity and enabling its exercise.

IV AUSTRALIAN GUARDIANSHIP LAW IN PRINCIPLE AND PRACTICE

The difficulty in Australian guardianship law is not that Australian law has no concept of decision-specific capacity. That proposition is already recognised at common law and is increasingly reflected in modern guardianship statutes. This section therefore asks a narrower question: whether state and territory guardianship systems translate that recognition into formal, accessible and autism-responsive support pathways. The answer is mixed. Australian law reform has moved substantially towards supported decision-making, will and preferences, least-restrictive intervention and recognition of diversity. Some statutes now incorporate those ideas. Published tribunal practice, especially in NSW, also shows more nuance than a binary account allows. Yet most jurisdictions still leave autistic adults with a limited formal menu: informal support of uncertain legal effect, or guardianship and administration orders that transfer legal authority within the scope of the order. That is the remaining implementation gap.

A *Australian Law Reform and Statutory Trajectory*

Australia's guardianship laws are state and territory laws. They sit against the background of adult legal capacity at common law, but operate through statutory mechanisms for guardianship, administration or financial management.[81] Since Australia's ratification of the *CRPD*, Australian law reform has increasingly treated guardianship as a last-resort mechanism rather than the ordinary legal response to disability-related decision-making difficulty.[82]

---

[80] Contrast the validity authorities cited above n 79 with the distinct sources of decision-making support, communication support and procedural accommodation: *CRPD* (n 1) arts 12(3), 13(1), 21; *Disability Discrimination Act 1992* (Cth) ss 4 (definition of 'reasonable adjustment'), 5(2), 6(2); ALRC Report 124 (n 1) 96–7 [4.29]–[4.32].

[81] Australian Law Reform Commission, *Elder Abuse—A National Legal Response* (Report No 131, May 2017) 317–18 [10.3]–[10.4] ('ALRC Report 131'); *GA* NSW (n 12) pts 3–3A; *NSW Trustee and Guardian Act 2009* (NSW) ch 4. For the common law baseline, see *Gibbons* (n 9) 437–8 (Dixon CJ, Kitto and Taylor JJ).

[82] ALRC Report 131 (n 81) 318 [10.5]; *Disability Royal Commission* (n 11) vol 6, 182–8 rec 6.9. This is the Australian reform position, distinct from *General Comment No 1*'s abolitionist interpretation discussed in Part III(A).

The Australian Law Reform Commission's ('ALRC') *Equality, Capacity and Disability in Commonwealth Laws*[83] remains the national starting point. The ALRC did not propose a crude binary model. It framed reform around four 'National Decision-Making Principles': the equal right to make decisions, access to support, decisions directed by will, preferences and rights, and safeguards.[84] It also distinguished between supporters, who assist a person to exercise legal capacity, and representatives, who may act only as a last resort and should be directed by the person's will, preferences and rights.[85] The significance of that framework for this article is twofold. First, it confirms that Australian law reform already recognises decision-making ability as support-sensitive and decision-specific. Secondly, it exposes the gap between principle and legal machinery: the ALRC principles are not self-executing and do not themselves create state and territory support pathways for autistic adults.

The *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* ('*Disability Royal Commission*') reinforced that direction. Volume 6 recommended movement away from substituted decision-making towards supported decision-making and identified guardianship and administration orders as measures that should be used only as a last resort, in the least restrictive way and in a manner directed by the person's will and preferences.[86] Recommendation 6.6 is particularly important because it expressly includes 'recognition of diversity' among supported decision-making principles.[87] For autistic adults, that principle should not be treated as rhetorical. It requires legal actors to attend to communication mode, sensory environment, processing time, executive-functioning demands, anxiety, the person's own views and the quality of support relationships before concluding that a substitute order is necessary.

The post-Royal Commission implementation picture remains incomplete. The 2024 government response and 2025 progress reporting show broad acceptance, acceptance in principle or further consideration of supported decision-making recommendations, but uneven state and territory progress on formal supporters, decision-making ability and representation orders.[88] This matters because high-level reform commitments have practical force only when translated into legal

[83] ALRC Report 124 (n 1).
[84] Ibid 11 rec 3–1, 63 [3.2].
[85] Ibid 58 [2.101], 93–4 [4.12]–[4.14].
[86] *Disability Royal Commission* (n 11) vol 6, 165–92 recs 6.6–6.10.
[87] Ibid vol 6, 165–76 rec 6.6.
[88] Australian Government, *Australian Government Response to the Disability Royal Commission* (Response, 30 July 2024); Australian Government, *Disability Royal Commission Progress Report 2025* (Report, 27 November 2025) vol 6, recs 6.6–6.10 <www.health.gov.au/>.

mechanisms that require banks, hospitals, tenancy services and tribunals to recognise and engage with a supporter's role.

B *Statutory Architecture across Australian Jurisdictions*

A useful map of Australian guardianship legislation groups jurisdictions by statutory architecture rather than proceeding through eight separate narratives. The groupings are necessarily approximate, because each statute has its own history and detail. The relevant question for this article is not whether the jurisdiction uses the language of support or least restriction, but whether it provides a formal legal pathway for assistance short of substitute decision-making.

The first group is guardianship-centric: NSW, South Australia ('SA') and Western Australia ('WA').[89] In these jurisdictions, the central formal mechanisms remain guardianship and, where relevant, financial management or administration. Orders may be limited by function and duration, and tribunal practice may apply least-restrictive reasoning. But the statutory architecture does not provide a general low-intervention supporter status comparable to Victoria's supportive appointments. Once a guardian, administrator or financial manager is appointed, legal authority within the scope of the order is transferred to that decision-maker.[90] That is a statutory consequence, not a common law conclusion about global incapacity. It should therefore be described precisely: the person is not rendered incapable for all purposes, but their legal authority is displaced for the matters covered by the order.

NSW illustrates the point. The *Guardianship Act 1987* (NSW) requires attention to the person's welfare and interests, views, relationships and the practicability of services being provided without an order.[91] It also permits limited and reviewable orders. Yet NSW has not enacted the NSW Law Reform Commission's ('NSWLRC') proposed support agreements and tribunal support orders.[92] The result is a jurisdiction with a relatively nuanced tribunal practice, but a statute still organised around substitute appointment when informal or private arrangements are insufficient.

SA remains guardianship-centric in its current statutory architecture, but recent law reform work by the South Australian Law Reform Institute ('SALRI') has identified

---

[89] *GA* NSW (n 12); *GAA* SA (n 12); *GAA* WA (n 12).
[90] *GA* NSW (n 12) ss 14, 16, 21(2A), 25G; *GAA* SA (n 12) ss 29, 33; *GAA* WA (n 12) s 43.
[91] *GA* NSW (n 12) ss 4, 14–16.
[92] Ibid ss 15(4), 16(1)(c), 16(2), 18, 25–25C, 25E(2), 25H, 25N–25P. Compare GA NSW (n 12) pts 3–3A with New South Wales Law Reform Commission, *Review of the Guardianship Act 1987* (Report No 145, May 2018) 72–8 recs 7.1–7.7, 81 rec 7.12 ('NSWLRC Report 145').

the need to move toward a more formal support-recognition model. SALRI did not purport to undertake a full review of the *Guardianship and Administration Act 1993* (SA), which it treated as a separate major exercise; rather, its report considers guardianship and administration in the broader context of supported decision-making. Its significance here is therefore normative and structural: SALRI's work supports embedding supported decision-making across SA law and practice, with substitute decision-making retained only as a necessary last resort and subject to appropriate safeguards.[93]

The second group is principles-based: Queensland, Tasmania, the Northern Territory ('NT') and the Australian Capital Territory ('ACT').[94] These jurisdictions more expressly reflect the modern functional approach. Their legislation presumes capacity, focuses on capacity for a matter and requires attention to whether the adult can decide with support or whether less-restrictive alternatives are available.[95] Queensland is the strongest example in this group. Its general principles require recognition of the adult's right to make decisions, support for participation, respect for existing supportive relationships and a structured sequence that seeks the adult's views, wishes and preferences before resorting to substituted judgment or other protective reasoning.[96] Tasmania, the NT and the ACT similarly contain capacity, support, participation and least-restrictive principles.[97]

The limitation of the principles-based model is that principle is not the same as a formal support order. A tribunal may be directed to consider support before appointing a guardian, but the person may still lack an authoritative, recognisable supporter who can obtain information, assist communication or help implement the person's decision in dealings with third parties. The ALRC's discussion of supporters' access to information and the *Disability Royal Commission's* recommendation for formal supporter appointments identify the legal machinery needed to address this problem.[98]

The third group contains only Victoria, whose legislation provides a distinct tribunal-based pathway for formally recognised decision-making support.[99] The

[93] *GAA* SA (n 12) ss 29, 35; Sylvia Villios et al, *The Need for New Solutions? Establishing a Legal Framework for Supported Decision-Making to Empower Individuals with Impaired Decision-Making* (Report, South Australian Law Reform Institute, Adelaide, 2025) 75–6 [1.2.8]–[1.2.9], 102.
[94] *GAA* Qld (n 13); *GAA* Tas (n 13); *GAA* NT (n 13); *GMPA* ACT (n 13).
[95] See, eg, *GAA* Qld (n 13) ss 11, 11B, 12; *GAA* Tas (n 13) ss 8–12; *GAA* NT (n 13) ss 4, 5, 5A; *GMPA* ACT (n 13) ss 4, 6A, 7.
[96] *GAA* Qld (n 13) ss 11, 11B, sch 1.
[97] *GAA* Tas (n 13) ss 8–12; *GAA* NT (n 13) ss 4, 5, 5A; *GMPA* ACT (n 13) ss 4, 6A, 7.
[98] ALRC Report 124 (n 1) 96–7 [4.29]–[4.32]; *Disability Royal Commission* (n 11) vol 6, 181–2 rec 6.8.
[99] *GAA* Vic (n 8) pt 4.

Guardianship and Administration Act 2019 (Vic) introduced supportive guardianship and supportive administration, giving formal recognition to a person who supports the adult to make and give effect to decisions while the adult remains the decision-maker.[100] Victoria therefore partially operationalises decision-specific capacity in a way that other jurisdictions do not. It is, however, not a complete continuum. Supportive orders still depend on statutory thresholds and tribunal processes; they do not necessarily provide an easy light-touch authorisation for every adult who needs recognised assistance in ordinary transactions.[101] The practical operation of private supportive appointments requires further evaluation. Victoria is therefore a valuable model, but not a complete solution.

C *Tribunal Practice: Capacity, Need, Informal Support and Risk*

Tribunal practice complicates the statutory map. Guardianship statutes provide the legal architecture, but tribunals determine whether orders are made, limited, reviewed, revoked or allowed to lapse. Published decisions must be used cautiously. NCAT publishes only a selection of Guardianship Division decisions, so those decisions are evidence of published practice rather than an exhaustive account of all tribunal work.[102] Even with that limitation, the published NSW cases are important because they answer overstated accounts of NSW practice.

The central point is that published NCAT decisions do not support a claim that NSW simply or automatically imposes substitute decision-making orders, or displaces a person's decision-making authority, once disability or diagnosis is identified. NCAT often distinguishes between capacity, need, risk, informal support and the particular decision domain. In financial management matters, it applies a practical functional test: whether the person can manage their affairs in a reasonably competent, rational and orderly way, having regard to present and prospective needs and risks.[103] In guardianship matters, the Tribunal asks whether the person is someone for whom an order can be made, whether an order should be made, what functions are needed and whether services can practicably be provided without an order.[104] That method is statutory and tribunal-based; it is not the same as common law capacity doctrine, although it is consistent with the broader legal rejection of global incapacity.

---

[100] Ibid ss 79, 87, 90–4.
[101] Office of the Public Advocate (Vic), *Reflections on Guardianship: The Law and Practice in Victoria* (Report, 2023); 'Supportive Guardians and Supportive Administrators', *Victorian Civil and Administrative Tribunal* (Web Page) <www.vcat.vic.gov.au/>.
[102] 'Published Decisions' (n 16). See *GA* NSW (n 12) ss 4, 14–16, 25G.
[103] *GKC [No 2]* (n 16) [45].
[104] *GA* NSW (n 12) ss 14–16.

The autism-specific decisions are especially useful. In *GKC [No 2]*,[105] NCAT allowed a guardianship order concerning a 19-year-old autistic man to lapse and revoked a financial management order. The Tribunal accepted that GKC continued to need support, but concluded that he could make important life decisions with trusted informal assistance and that his practical financial capacity had improved.[106] The case is a direct answer to any suggestion that autism diagnosis itself leads to guardianship or financial management. It also supports this article's deeper claim; the decisive question was whether supports enabled the person to exercise decision-making agency.

MKF points in the same direction, although in a narrower sense.[107] There, NCAT accepted that MKF's severe autism spectrum disorder, epilepsy and intellectual disability prevented him from making important life decisions, so that he was a person for whom an order could be made. The Tribunal nevertheless dismissed the guardianship application because informal and statutory supports were operating, services could practicably be provided without an order, medical and dental consent could be dealt with through the 'person responsible' framework, and there were no current decisions requiring guardian intervention.[108] The disability was significant, but necessity for a guardianship order was not established. By contrast, *Vivian (a pseudonym)* shows that NCAT may still intervene where risk is acute.[109] The Tribunal made a six-month, limited guardianship order for an adult with autism and borderline personality disorder, but the order was confined to travel and passport functions.[110] *Vivian (a pseudonym)* therefore shows both the continuing coercive potential of the NSW regime and the Tribunal's capacity to tailor orders to specific risks.

Other NSW decisions reinforce the separation between incapacity and necessity. In *Samantha (a pseudonym)*, NCAT dismissed both guardianship and financial management applications despite cognitive impairment and current decision-making incapacity in relevant domains because enduring appointments were already in place and functioning appropriately.[111] In *KGN*, the Tribunal made a limited guardianship order for services, health care and medical and dental consent, but dismissed the financial management application because finances were being

[105] *GKC [No 2]* (n 16).
[106] Ibid [18]–[19], [37]–[39], [50]–[61].
[107] *MKF* [2022] NSWCATGD 25, [11]–[13] ('*MKF*').
[108] Ibid [18]–[20], [30]–[32].
[109] *Vivian (a pseudonym)* [2025] NSWCATGD 4, [22]–[32].
[110] Ibid [44]–[46].
[111] *Samantha (a pseudonym)* [2024] NSWCATGD 26, [83]–[87], [100]–[102].

managed adequately with informal assistance.[112] In *DKK*, the Tribunal declined guardianship because it was not persuaded, on the current evidence, that the person was in need of a guardian, and because neighbours, friends and family could support personal decision-making needs, although financial management was still ordered.[113] These decisions show that the Tribunal may treat informal support, enduring appointments and domain-specific functioning or domain-specific need as real alternatives to broader intervention.

The dementia and Alzheimer's decisions are equally important because they reinforce a central point: autism should not be contrasted with dementia or intellectual disability in a way that implies those diagnoses ordinarily entail global incapacity. In *Laura (a pseudonym)*, NCAT dismissed a financial management application despite an early-stage Alzheimer's diagnosis, focusing on preserved executive functioning, the person's ability to explain her affairs and available formal and informal support.[114] In *JHN*, the Tribunal dismissed both guardianship and financial management applications where current clinical evidence and the Tribunal's own observations supported retained decision-making ability notwithstanding earlier concerns about dementia and alcohol use.[115] Those cases demonstrate the same anti-diagnostic principle that this article argues should be applied carefully to autism: diagnosis is evidentiary context, not a legal conclusion.

This does not mean that tribunal practice supplies a complete answer. Published cases also show that risk, conflict, exploitation concerns, medical urgency, travel concerns and service deadlock may be relevant and, in some cases, may justify formal orders.[116] The person's wishes and preferences may be recorded and weighed, but in NSW they remain embedded in a protective statutory framework rather than a pure will-and-preferences model of the kind favoured by *General Comment No 1*.[117] For autistic adults, the practical concern is how evidence is gathered and interpreted. Silence, distress, avoidance of eye contact, rigidity,

[112] *KGN* [2024] NSWCATGD 23, [1]–[2], [79]–[80].
[113] *DKK* [2023] NSWCATGD 19, [11]–[14], [20]–[24].
[114] *Laura (a pseudonym)* [2025] NSWCATGD 12, [105]–[108], [111]–[112].
[115] *JHN* (n 16) [18]–[22], [31]–[33].
[116] See, eg, *Zoe (a pseudonym)* [2025] NSWCATGD 7, [59], [66]–[74], [119]–[125] (neglect, control, alleged financial abuse and intermingled finances); *Victoria (a pseudonym)* [2025] NSWCATGD 14, [76]–[80], [83]–[90] (family conflict and informal decision-making difficulties); *Sophie (a pseudonym)* [2026] NSWCATGD 2, [94]–[98] (medical treatment delay and formal consent order); *Vivian (a pseudonym)* (n 109) [22]–[32], [44]–[46] (urgent travel risks and travel/passport functions); *TQX* [2016] NSWCATGD 56, [17]–[26] (NDIS access and service arrangements); *FKT* [2020] NSWCATGD 96, [11]–[12], [24]–[25] (family conflict impeding informal decision-making about services, health care, accommodation and access).
[117] *GA* NSW (n 12) s 4. Cf *General Comment No 1* (n 1) 5 [21].

dependence on routines, reliance on trusted supporters or difficulty answering rapid questions may be misread as incapacity unless the tribunal asks whether the decision-making environment itself is disabling.[118] Conversely, verbal fluency may obscure serious executive-functioning difficulty. The tribunal decisions nevertheless show why current, domain-specific and communication-sensitive evidence matters. *GKC [No 2]* is instructive because current evidence, including written submissions, trusted supporter evidence and the person's own presentation, displaced older material that no longer reflected his functioning.[119] The point is not that NCAT lacks functional concepts, but that functional concepts depend on evidence quality, current assessment and autism-sensitive procedure.

The tribunal cases should therefore be used for a precise proposition. They do not prove that NSW or other Australian systems already provide adequate supported decision-making. Published decisions are only a partial window into practice, and tribunal mitigation depends on evidence quality, party resources, available supporters and the Tribunal's understanding of disability.[120] They do show, however, that the Australian problem is not conceptual ignorance of decision-specific capacity. Nor is it simply a failure to recognise informal support in individual cases. It is the absence of a consistent legal pathway through which a person who requires support, but not substitute authority, can obtain recognised assistance without resorting to guardianship.

D *The Remaining Implementation Gap*

The remaining gap is therefore not conceptual but institutional. Australian common law recognises decision-specific capacity; modern statutes increasingly incorporate support-sensitive principles; and published tribunal decisions show that orders may be refused, narrowed, revoked or allowed to lapse where supports are sufficient. But none of those features creates a general right to formal decision-making support.

The reform question is therefore how Australian law can move from capacity recognition to capacity access: from asking whether a person can decide unaided, to providing formal, graduated and autism-responsive mechanisms through which the

---

[118] Bradshaw et al (n 54) 127–8; Cummins, Pellicano and Crane (n 30) 683–7; Luke et al (n 6) 618–19. For procedural guidance rather than empirical evidence, see Australian Guardianship and Administration Council, *Guidelines for Australian Tribunals: Maximising the Participation of the Person in Guardianship Proceedings* (Guidelines, 20 June 2019) 4 guidelines 3–4, 5 guidelines 11–13, 6 guidelines 16, 23–4; Judicial Commission of New South Wales (n 37) [5.6.6.3]–[5.6.6.6].
[119] *GKC [No 2]* (n 16) [17]–[26], [37]–[39].
[120] 'Published Decisions' (n 16).

person can decide with support. That is the gap to which the comparative and reform sections now turn.

V Operationalising Decision-Specific Capacity across the Spectrum of Support Need

For autistic adults, the implementation gap is acute. What is distinctive in the autism context is the profile of barriers that may obstruct the exercise or assessment of capacity. An autistic adult may be able to understand and decide where information is written, concrete and provided in advance; where options are sequenced; where time for processing is available; where sensory demands are reduced; where anxiety is not intensified by adversarial questioning; and where a trusted supporter can assist communication without taking over the decision.[121] Conversely, the same adult may appear confused, rigid, avoidant, distressed or non-responsive in a rushed, noisy or unfamiliar environment. That presentation should not be converted into incapacity unless the decision-maker has first considered whether the environment, communication method and available supports are disabling the decision-making process.[122]

A spectrum-responsive inquiry should therefore be practical and decision-specific. It should ask: what is the decision; what information must be understood, retained, used or weighed; how does this person communicate most reliably; what sensory, temporal and social conditions enable participation; what role do existing supporters play; can the person decide with support; what legal recognition does that support require; and is any more restrictive arrangement necessary? These questions preserve the common law insight that capacity is transaction-specific, while translating it into an operational method for tribunals, lawyers, clinicians and service providers.[123]

Informal support will remain central. Many autistic adults rely on parents, partners, siblings, friends, advocates, support workers or trusted professionals to gather information, compare options, regulate anxiety, organise documents, communicate

---

[121] Autism Spectrum Australia (Aspect), Submission No 4 to Parliament of New South Wales, *Inquiry into Supported Decision-Making for Adults with Disability and Older People in NSW* (4 March 2026) 2, 5–6; New South Wales Department of Communities and Justice (n 43) 42–4, 147–53; ALRC Report 124 (n 1) 93–4 [4.12]–[4.14], 104 [4.65]–[4.66]; *Disability Royal Commission* (n 11) vol 6, 17–18 rec 6.7, 391–2 rec 6.32.
[122] Vella et al (n 2); Adams and Malone (n 6); de Marchena et al (n 6).
[123] *Gibbons* (n 9) 437–8 (Dixon CJ, Kitto and Taylor JJ); *PBU & NJE* (n 9) 186–7 [148]–[151] (Bell J); *GAA* Vic (n 8) ss 5, 8, 30–1; ALRC Report 124 (n 1) 11–12 rec 3–2.

decisions and implement choices.[124] Tribunal practice shows that such support can be legally significant. It may justify refusing, limiting, lapsing or revoking formal orders.[125] Yet informal support is fragile. It may be unavailable, conflicted, unstable, geographically distant, abusive or unrecognised by third parties. It may fail precisely where legal recognition matters most: when a bank will not discuss accounts, a health service will not speak with a supporter, a landlord requires authority, a university or employer insists on formal documentation or a government agency demands proof of power.[126] The law should not make the presence of a competent family member the functional substitute for a right to support.

The purpose of a spectrum-responsive model is to fill that gap without collapsing support into guardianship. At the lightest level, an adult who retains decision-making authority but needs help accessing, organising, understanding or communicating information should be able to appoint a recognised supporter. At an intermediate level, where the person can participate meaningfully but cannot reliably complete some decisions alone, legislation might provide a tribunal support order, structured support arrangement or carefully defined co-decision mechanism confined to specified matters and subject to safeguards. But terminology matters. A tier of more intensive support is not the same thing as a transfer of legal authority. Under *General Comment No 1*, supported decision-making must not be redescribed to include substitute decision-making; if another person is legally authorised to decide for the adult, or if the adult's decision depends on another person's concurrence for legal effect, the arrangement is representative, co-decision or substitute decision-making, not pure support.[127] Australia's interpretive position and pragmatic scholarship may defend narrowly confined representative mechanisms as a last resort, but that is a contested domestic position, not the *CRPD* Committee's view.[128]

---

[124] Commonwealth Department of Social Services, *National Autism Strategy 2025–2031* (Strategy, January 2025) 9–10, 22–3; ALRC Report 124 (n 1) 67–9 [3.18]–[3.28], 93–4 [4.12]–[4.15]; Bigby, Whiteside and Douglas (n 48) 397–8, 405–7.

[125] *GA* NSW (n 12) ss 4, 14(2), 15(4), 25C, 25P; *LBL* [2016] NSWCATGD 22; *SAQ* [2016] NSWCATGD 47; *LGT* (n 23) [10]–[15], [21]–[24], [31]–[34]; *TLS* [2017] NSWCATGD 15, [8]–[15], [19], [21]–[29] ('*TLS*'); Christine Fougere, *Guardianship, Financial Management and the NDIS: NCAT's Experience* (Paper, Australian Guardianship and Administration Council Heads of Tribunal Meeting, Hobart, 23 March 2017) 20–1 [78]–[82], 28–9 [106]–[112].

[126] ALRC Report 124 (n 1) 96–7 [4.29]–[4.32], 187–9 [6.150]–[6.159]; *TLS* (n 125) [19], [28]; Fougere (n 125) 29 [109]–[112].

[127] *General Comment No 1* (n 1) 4–5 [17], 6 [27]–[28]; Browning, Bigby and Douglas, 'Supported Decision Making' (n 64).

[128] United Nations Treaty Collection (n 61) (Australia's declaration concerning art 12); ALRC Report 124 (n 1) 58 [2.101], 60 [2.106]–[2.107]; Carney, 'Supported Decision-Making for People with Cognitive Impairments' (n 62).

This article therefore uses tiering cautiously. The Canadian models considered later are not evidence that Canada has solved the problem, nor are they a template for transplantation into Australia's tribunal-centred guardianship systems. Their value is illustrative: selected Canadian statutes show how legal systems can create a more graduated menu between unrecognised informal assistance and full guardianship.[129] An Australian model would need to be adapted to state and territory legislation, public guardian and public trustee institutions, tribunal procedures, Commonwealth disability services and existing local reform proposals.

Decision-specific capacity must be matched with decision-specific support. A reformed framework should ensure that autistic adults are not abandoned because they are considered "too capable" for guardianship, nor unnecessarily restrained because no lesser formal support option exists. The aim is to support the person, for the decision, in the conditions in which legal agency can actually be exercised.

VI Canadian Design Insights

Canada remains a useful comparator. The relevant Canadian regimes are not a single "Canadian model" capable of direct transplantation into Australian guardianship law. They are provincial and territorial statutory experiments which occupy the space between informal assistance and formal guardianship in different ways. The constitutional analogy is limited. Canadian provincial adult-capacity law rests largely on provincial responsibility for property and civil rights and the administration of justice, while the Yukon exercises devolved territorial authority.[130] Australian guardianship and administration law is likewise principally subnational, but it is administered primarily through state and territory tribunals, public guardians and public trustees, not through the same court-centred structures that

[129] See, eg, *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2, ss 2, 4, 6, 13, 26, 33, 46, 54–6, 87–101; *Adult Protection and Decision Making Act*, SY 2003, c 21, sch A, ss 2–6, 11, 14–15, 23, 25, 32, 37–8; *Representation Agreement Act*, RSBC 1996, c 405, ss 2–3, 7–10, 16, 36; *Supported Decision-Making and Representation Act*, SNB 2022, c 60, ss 2–3, 6, 17–30, 34–50; *General Regulation — Supported Decision-Making and Representation Act*, NB Reg 2023-66, ss 5, 8, 11, forms 1–3. See also the comparative discussion in Part VI below.

[130] Victorian Law Reform Commission, *Guardianship* (Consultation Paper No 10, 2010) 120–1 [7.25]–[7.33], 129 [7.84]–[7.87] ('VLRC Consultation Paper'); Krista James and Laura Watts, *Understanding the Lived Experiences of Supported Decision-Making in Canada* (Commissioned Paper, Law Commission of Ontario, March 2014) 4–6, 23–34. On the constitutional allocation, see *Constitution Act 1867* (Imp), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, ss 92(13)–(14) ('*Constitution Act 1867*'); *Yukon Act*, SC 2002, c 7, ss 18(1)(j)–(k).

feature in many Canadian comparators. The comparison is therefore one of legislative design, not institutional identity.[131]

That qualification is important for this article's thesis. The point is not that Canadian law reveals a doctrine of spectrum-based capacity unknown to Australia. Earlier parts of this article have shown that Australian common law already treats capacity as decision-specific, functional and contextual, and that tribunal practice may refuse, confine, review or end orders where support is sufficient or necessity is not established. The remaining problem is statutory architecture: many Australian regimes still provide no clear formal pathway for an adult who requires legally recognised support but does not require substitute decision-making. The Canadian material is useful because selected statutes show how support can be graduated without assuming that all adults must be placed either outside the legal system or under guardianship.[132]

Alberta provides the clearest illustration. Its *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2 distinguishes supported decision-making authorisations, co-decision-making orders, guardianship, specific decision-making and trusteeship.[133] At the least restrictive level, an adult who remains capable of making personal, non-financial decisions may authorise a supporter to access relevant information and assist the adult to make and communicate decisions.[134] That tool is useful for autistic adults who retain decision-making authority but require assistance with organising information, communicating choices, managing executive-function demands or dealing with service providers. At the intermediate level, a co-decision-making order permits a court-appointed co-decision-maker to work through specified personal decisions with the adult, while the adult remains the final decision-maker.[135] Guardianship and trusteeship are more restrictive court

131 *Constitution Act 1867* (n 130) ss 92(13)–(14), 96–101; *Australian Constitution* ss 51, 109, 122; ALRC Report 131 (n 81) 317–18 [10.3]–[10.4].

132 See, eg, *Gibbons* (n 9) 437–8 (Dixon CJ, Kitto and Taylor JJ); *GKC [No 2]* (n 16) [37]–[39], [50]–[61]; *MKF* (n 107) [18]–[20], [30]–[32].

133 *Adult Guardianship and Trusteeship Act* (n 129) pts 2–4; 'Supported Decision-Making'; 'Co-Decision-Making'; 'Adult Guardianship'; 'Trusteeship', *Government of Alberta* (Web Page) <www.alberta.ca/>.

134 *Adult Guardianship and Trusteeship Act* (n 129) ss 2(c), 3, 4(1)–(2), 6(1)–(2), 9(1); VLRC Consultation Paper (n 130) 120–1 [7.28]–[7.29]. For the autism-specific need for structured and communicative support, see Luke et al (n 6) 618–19; *Autism Spectrum Disorder in Adults* (n 3) 31 rec 1.6.3.

135 *Adult Guardianship and Trusteeship Act* (n 129) ss 12, 13(4)(a)(ii)–(iii), 13(4)(c), 13(5), 15, 17(1)–(2), 17(5), 18(1)–(2), 18(4)–(5); VLRC Consultation Paper (n 130) 121 [7.30]–[7.32]; James and Watts (n 130) 5–6, 26–7.

orders and should not be described as supported decision-making merely because they may be accompanied by duties to consider the adult's wishes.[136]

The value of Alberta's approach should not be overstated. Its supported and co-decision-making mechanisms are principally directed to personal, non-financial decisions; financial matters are dealt with separately.[137] Its co-decision-making and more restrictive orders are court-based, involve capacity assessment and may involve cost and delay; the voluntary supporter authorisation is not itself a court order.[138] Nor does its existence answer the art 12 debate. *General Comment No 1* rejects substitute decision-making, and co-decision-making may itself be controversial where legal effect depends on another person's concurrence.[139] Alberta is therefore best treated as a useful example of graduated statutory drafting, not as proof that tiering alone produces *CRPD* compliance.

The Yukon offers a different form of continuum. The *Adult Protection and Decision Making Act*, SY 2003, c 21, sch A, enacted as sch A to the *Decision Making, Support and Protection to Adults Act*, SY 2003, c 21, provides for supported decision-making agreements, representation agreements and guardianship.[140] The Yukon material is useful because it requires attention to less-restrictive arrangements before guardianship and because it recognises that adults may need legally recognised support short of a full guardianship order.[141] However, the Yukon's middle mechanism should not be assimilated to Alberta-style co-decision-making. A representation agreement may authorise decisions to be made on the adult's behalf and is therefore closer to representative decision-making than to a model in which the adult remains the sole legal decision-maker.[142] It supports the case for graduated tools, but not the stronger claim that all Canadian middle tiers preserve legal agency in the same way.

---

[136] *Adult Guardianship and Trusteeship Act* (n 129) ss 26, 33, 46, 54–6. See also 'Adult Guardianship' (n 133); 'Trusteeship' (n 133).

[137] See *Adult Guardianship and Trusteeship Act* (n 129) ss 1(o), 1(bb), 3, 4(2), 9(1), 12, 17(1)–(2), 22(1), 44(1), 46(5), 55(1); Victorian Law Reform Commission, *Guardianship* (Final Report No 24, 2012) 153 [9.8]–[9.9] ('VLRC Final Report').

[138] See *Adult Guardianship and Trusteeship Act* (n 129) ss 13(1)–(2), 13(4)–(5), 17(6)–(7), 20, 21(1), (3); Centre for Public Legal Education Alberta, *The Adult Guardianship and Trusteeship Act* (Booklet, 2019) 14–17.

[139] *General Comment No 1* (n 1) 6 [27]–[28]; *Adult Guardianship and Trusteeship Act* (n 129) ss 17(5), 18(5); VLRC Final Report (n 137) 153 [9.8]–[9.9], 156 [9.28]–[9.30].

[140] *Decision Making, Support and Protection to Adults Act*, SY 2003, c 21, sch A; *Adult Protection and Decision Making Act* (n 129) pts 1–3.

[141] *Adult Protection and Decision Making Act* (n 129) ss 2(c)–(d), 4–6, 10–11, 14, 32(1)(c), 37(1)(b).

[142] Compare *Adult Protection and Decision Making Act* (n 129) ss 14, 15(2), 18, 25 with *Adult Guardianship and Trusteeship Act* (n 129) ss 13(4)(a)(ii), 17(1)–(2), 18(2), (4)–(5). Cf the supportive functions in *Adult Protection and Decision Making Act* (n 129) ss 5(2), 11.

British Columbia should also be treated separately. Its *Representation Agreement Act*, RSBC 1996, c 405, is not a simple two-tier guardianship model. A standard agreement under s 7 may authorise a representative to help an adult make decisions, or to make decisions on the adult's behalf, in relation to personal care, routine financial affairs, health care and some legal services.[143] Section 8 is especially significant: an adult may make a s 7 agreement even though incapable of making a contract, managing health care, personal care or legal matters or managing routine financial affairs. The assessment instead attends to matters such as communication of desire, demonstration of choices and preferences, awareness that the representative may make decisions affecting the adult and a relationship of trust.[144] This relational and communication-sensitive threshold has obvious relevance for autistic adults, particularly where capacity may be obscured by non-conventional communication or environmental barriers. But more intrusive intervention in British Columbia occurs through different mechanisms, including broader s 9 agreements and court-appointed committeeship under the *Patients Property Act*, RSBC 1996, c 349, ss 2–3. British Columbia is therefore better understood as a planning and representation regime alongside committeeship, not as a complete ladder from support to guardianship.

New Brunswick provides the most recent of the comparators considered here. Its *Supported Decision-Making and Representation Act*, SNB 2022, c 60, in force from 1 January 2024, expressly seeks to protect and promote autonomy and dignity and creates a three-level framework of decision-making assistance, supported decision-making orders and representation orders.[145] That framework supplies useful contemporary drafting language for Australian reform. It also confirms the importance of distinguishing assistance and support from representation.[146] However, New Brunswick's jurisprudence is still developing.[147]

Three design insights follow. First, a voluntary supporter authorisation can give third parties a legally recognisable role without any finding of incapacity. Secondly, a tribunal-made support or co-decision order could occupy the missing middle for adults who need formal, reviewable assistance but should remain the primary

[143] *Representation Agreement Act* (n 129) ss 1 (definition of 'representation agreement'), 2, 7(1)(a)–(d), 8–10.
[144] Ibid ss 8(1)(a)–(c), 8(2)(a)–(d).
[145] *Supported Decision-Making and Representation Act* (n 129) ss 2–3, 6, 17–30, 34–50. See also General Regulation — *Supported Decision-Making and Representation Act* (n 129).
[146] See *Supported Decision-Making and Representation Act* (n 129) ss 2–4, 6, 10(5), 20–2, 27–8, 36–9. For the Australian distinction between support and representation, see *Disability Royal Commission* (n 11) vol 6, 179–88 recs 6.8–6.9.
[147] *Denton v Léger* [2026] NBCA 44, [34], [43]–[45] (LaVigne JA for the Court).

decision-maker. Thirdly, where Australian law retains guardianship, administration or representation, those orders should be decision-specific, time-limited, reviewable and preceded by reasons explaining why voluntary and structured support would not meet the need.[148] The Canadian lesson, then, is not adoption. It is adaptation: Australian jurisdictions should translate their existing commitment to decision-specific capacity into tribunal-compatible, autism-responsive and graduated legal tools.

VII A Tribunal-Adapted Australian Reform Model for Autistic Adults

Australian reform should therefore proceed by adapting the design insight of graduated support to Australian tribunal systems. The model should be statutory, state- and territory-based and administered through existing guardianship tribunals, rather than through a new superior court process.

The first tier should be a voluntary supporter authorisation. This would be a statutory instrument made by an adult who wants legally recognised assistance but does not require a finding of impaired capacity. It would resemble, but not simply copy, the personal supporter arrangements proposed by the NSWLRC and the formal supporter model recommended by the *Disability Royal Commission*.[149] The adult would remain the legal decision-maker. The supporter's authority would be facilitative: to obtain and receive information, explain options, assist with communication, organise documents, attend meetings, help implement decisions and communicate the adult's will and preferences to third parties. The supporter would have no authority to decide, veto, consent, contract or transact on the adult's behalf unless another lawful instrument separately conferred that power.

This tier is especially important for autistic adults whose support needs are real but not accurately characterised as incapacity. An autistic adult may be able to make a health, tenancy, financial or service decision if information is provided in writing, options are structured visually, adequate processing time is given, sensory load is reduced and a trusted person assists with communication or executive-functioning demands.[150] A voluntary authorisation would give banks, hospitals, landlords, universities, government agencies and service providers a clear legal basis to deal with the supporter without forcing the adult into guardianship. It should be low-cost, revocable, capable of being limited by decision domain and registrable or

---

[148] *Disability Royal Commission* (n 11) vol 6, recs 6.7–6.10; *GAA* Vic (n 8) ss 30(2), 31, 34, 159; *Supported Decision-Making and Representation Act* (n 129) ss 20(1)(d), 21–2, 32, 36(2), 37(1)(c), 38–9, 49.

[149] NSWLRC Report 145 (n 92) chs 5–6; *Disability Royal Commission* (n 11) vol 6, recs 6.6–6.10.

[150] Vella et al (n 2); Luke et al (n 6); Adams and Malone (n 6).

otherwise readily verifiable. Its safeguards should include witness requirements, plain-language explanation, conflict-of-interest disclosure, a prohibition on self-dealing, record-keeping where the supporter deals with third parties and a simple tribunal pathway for suspension or cancellation where abuse, undue influence or breakdown of trust is alleged.

The second tier should be a tribunal-made support order. This would occupy the space between purely voluntary support and guardianship. It would be available where informal or voluntary arrangements are insufficient because third parties refuse to cooperate, records cannot be accessed, family conflict obstructs implementation or the adult requires a more structured and reviewable support arrangement. The order should still preserve the adult as the decision-maker. Its functions might include providing authority for a named supporter to receive specified information, attend specified meetings, assist communication with service systems, help prepare and lodge documents or support implementation of a decision already made by the adult. The order should be confined to specified matters, such as NDIS planning, accommodation, health care, education, employment services or routine financial administration, and should not operate as general guardianship by another name.

A tribunal support order should require positive findings directed to support rather than incapacity. The tribunal should identify the decision or decision-domain, the adult's preferred communication method, the supports already available, the barriers that make voluntary support insufficient and the reasons why a support order is less restrictive than guardianship or administration. This structure reflects what published tribunal practice already sometimes does well. In cases such as *GKC [No 2]* and *MKF*, informal support and the absence of present need were central to refusing or ending formal orders;[151] *Vivian (a pseudonym)* illustrates that where intervention is made, it can be narrow and time-limited.[152] Those cases do not prove that Australian practice is uniformly rights-protective. They show that tribunals already have some of the analytic tools required for a graduated model. The reform proposed here would make those tools express, transparent and consistently available.

If a jurisdiction adopts a co-decision order in addition to a support order, it should do so cautiously. A co-decision model may be useful where the adult can participate meaningfully but needs another person formally joined in a legally significant process. However, if the adult's legal act has no effect without the other person's

[151] *GKC [No 2]* (n 16) [37]–[39], [50]–[61]; *MKF* (n 107) [18]–[20], [30]–[32].
[152] *Vivian (a pseudonym)* (n 109) [44]–[46].

concurrence, the arrangement risks moving beyond support into a restriction on legal agency. The statute should therefore state whether the co-decision-maker merely assists, whether concurrence is required for validity and how disagreement is resolved. Any such order should be rare, decision-specific, time-limited, subject to review and accompanied by reasons explaining why a less-restrictive support order is insufficient. It should not be described as uncontroversially compliant with *General Comment No 1*.

The third tier should be a constrained representative or guardianship order. This tier exists only because Australian domestic law presently retains guardianship and administration. It should not be labelled supported decision-making. It should be available only where the tribunal is satisfied, on current functional evidence, that the adult cannot make or communicate the relevant decision even with appropriate support and that no voluntary supporter authorisation, tribunal support order, enduring appointment, informal arrangement or service adjustment can meet the need. The order should be confined to the particular decision or function that justifies it, expressed in the least restrictive terms and reviewed within a short period unless there are compelling reasons for a longer order.

The statute should also require a written "support exhaustion" finding before any representative order is made. That finding should identify the supports considered, the supports attempted where practicable, why those supports failed or would be inadequate and why the representative function is necessary. The decision-making standard should be will and preferences, not objective best interests. Where the adult's actual will and preferences cannot be determined after serious efforts, the representative should be required to act on the best interpretation of will and preferences, subject to a narrowly drawn serious-harm exception under domestic law.[153] Such an exception is a feature of the proposed domestic model, not an exception endorsed by *General Comment No 1*. This formulation would align more closely with the *Disability Royal Commission*, the ALRC's supporter/representative distinction and Victoria's more recent will-and-preferences orientation, while acknowledging that retained substitute decision-making remains contested under art 12.[154]

The model must also be autism-responsive in procedure and evidence. A tribunal should not assess capacity or support need until it has first considered whether the

[153] For the best-interpretation standard, see *General Comment No 1* (n 1) 5 [21]. The serious-harm exception is a proposed domestic safeguard: cf *GAA* Vic (n 8) s 9(1). It is not attributed to the Committee as permission to retain substitute decision-making.
[154] ALRC Report 124 (n 1) 11 rec 3–1; *GAA* Vic (n 8) ss 8–9; *Disability Royal Commission* (n 11) vol 6, recs 6.6–6.10.

adult has had a meaningful opportunity to participate. At minimum, legislation or rules should require accessible information before the hearing; permission to use augmentative and alternative communication; written questions or agendas in advance where practicable; breaks; remote or hybrid attendance; low-sensory hearing arrangements; and the presence of a trusted supporter unless there is a demonstrated conflict or risk. Silence, distress, limited eye contact, reliance on routine, delayed response, masking, shutdown or dependence on a trusted supporter should not be treated as incapacity without analysis of the communication and environmental context.[155] Conversely, verbal fluency should not be treated as conclusive proof that no support is needed.

Evidence requirements should be equally important. Tribunals should prefer current, decision-specific and functional evidence over diagnostic labels or stale assessments. Expert reports should be asked to identify what supports were used during assessment, what communication method was relied upon, whether the environment was accessible and whether the adult's performance changed when information was presented differently. Where autism is relevant, evidence should address sensory load, processing time, anxiety, executive functioning, communication modality, service-system complexity and the role of trusted supporters. The reasons for decision should expressly state that diagnosis is not determinative, identify the decision domain, explain the support options considered and justify the legal effect of the order chosen.

These safeguards would not eliminate hard cases. Nor would they remove the need for funding, advocacy, training and service cooperation. Supported decision-making cannot be created by legislation alone. It depends on skilled supporters, responsive institutions and practical recognition by the agencies with which adults deal. But a tribunal-adapted statutory pathway would reduce the present all-or-nothing pressure. Autistic adults who need structured support would not be left to informal arrangements of uncertain legal effect. Nor would they be pushed prematurely into guardianship merely because no lesser formal order exists. The purpose of the model is therefore modest but significant: to operationalise decision-specific capacity through decision-specific support, while reserving representative authority for the rare cases in which domestic law still permits it and no less-restrictive arrangement can meet the need.

[155] See Vella et al (n 2); Kapp (n 33); Donaldson, corbin and McCoy (n 6).

VIII Conclusion

This article began with a practical problem, not a claim of doctrinal novelty. Australian law already contains important resources for autonomy. At common law, capacity is presumptive, functional and decision-specific.[156] In several guardianship statutes, decision-making ability is assessed by reference to the particular matter, available supports and less-restrictive alternatives.[157] In published tribunal practice, orders may be refused, limited, allowed to lapse or revoked where the evidence shows capacity with support, or no present need for formal intervention.[158] That legal recognition is significant. It is not, however, the same as a support architecture.

The remaining gap is operational. Autistic adults may require assistance not because they lack global intellectual capacity, but because ordinary legal, medical, financial and service systems often demand communication styles, sensory tolerance, processing speed and executive organisation that do not fit autistic ways of deciding.[159] A person may be able to understand and communicate a decision with written information, time, sensory adjustment, augmentative communication or a trusted supporter, yet appear unable to do so in a rushed, oral or adversarial setting. The law therefore risks both over-protection and under-support: some adults may be moved towards guardianship because no lesser formal pathway exists; others may be left with informal support that third parties need not recognise.

Selected Canadian regimes are useful. They do not supply a transplantable model for Australia's federal, state and territory tribunal-based systems. They do, however, illustrate how law may recognise voluntary support, structured support or co-decision-making and tightly confined representative authority as distinct legal tools.[160] An Australian model should be adapted to local guardianship legislation and tribunal practice: voluntary supporter appointments without a finding of incapacity; tribunal-made support orders where informal assistance is insufficient; and, only where domestic law continues to permit it, time-limited and reviewable representative orders directed by the person's will and preferences so far as they can be ascertained.

---

[156] See, eg, *Gibbons* (n 9) 437–8 (Dixon CJ, Kitto and Taylor JJ); *Scott* (n 21) 326 [199], 326–7 [205] (Lindsay J); *Banks* (n 70) 565 (Cockburn CJ).

[157] See, eg, *GAA* Qld (n 13) ss 11, 11B; *GAA* Tas (n 13) ss 8–12; *GAA* NT (n 13) ss 4–5A; *GAA* Vic (n 8) ss 5, 30, 79, 87, 90–4.

[158] *GKC [No 2]* (n 16) [37]–[39], [50]–[61]; *MKF* (n 107) [18]–[20], [30]–[32]; *Vivian (a pseudonym)* (n 109) [44]–[46]; *Laura (a pseudonym)* (n 114) [105]–[108], [111]–[112].

[159] Luke et al (n 6); Vella et al (n 2).

[160] *Adult Guardianship and Trusteeship Act* (n 129); *Adult Protection and Decision Making Act* (n 129); *Representation Agreement Act* (n 129); *Supported Decision-Making and Representation Act* (n 129).

RESTORATIVE JUSTICE AS AFFECTIVE GOVERNANCE: DISCURSIVE CONTROL AND STATE POWER IN YOUTH JUSTICE IN AUSTRALIA AND CHINA

HAN LU*

This article examines youth restorative justice in Australia and China as a form of affective governance. Through critical discourse analysis, comparative legal analysis, and socio-cultural critique, it shows how restorative vocabularies of participation, responsibility, and repair are embedded in legal and bureaucratic structures that manage voice, emotion, and agency. In Australia, youth restorative justice is shaped by settler-colonial and administrative forms of control; in China, restorative elements are absorbed into state-led correctional governance. Across both contexts, dialogue becomes a managed performance of state-defined repair, revealing the limits of state-led restoration and its translation of care into control.

I Introduction 333

II Protection as Control: Settler-Colonial Governance of Youth Restorative Justice in Australia 338

A *The Architecture of Diversion and the Construction of Responsibility* *340*

B *The Bureaucratisation of Restoration and the Role of Victims* *342*

C *The Paternal Logic of Protection and Rehabilitation* *345*

D *Indigenous Inclusion and the Limits of Voluntariness* *347*

---

* LLM with Excellence, University of New South Wales. I gratefully acknowledge that this work was conducted on unceded Aboriginal land and pay my respects to the traditional custodians, Elders past, present, and emerging. I am deeply grateful to Dr Ingrid Matthews for her critical insight throughout the development of this article.

E *Conclusion: Restorative Justice as Administrative Governance* ... *348*

III Harmony without Dialogue: State Capture of Youth Restorative Justice in China ... 349

A *Predefined and Highly Regulated Participant Roles* ... *350*

B *The Institutionalised Framework of 'Repair', 'Reconciliation', and 'Responsibility'* ... *352*

C *Compressed Space for Personal Narratives and Emotional Complexity* ... *354*

D *Individual Instrumentalisation: A Carrier Serving Policy Goals* ... *355*

E *Conclusion: Restorative Justice as State-Led Correctional Governance* ... *357*

IV Comparative Analysis: Discursive Parallels and Divergences ... 359

A *Macro-Level Analysis: Governance, Power, and the State's Moral Vocabulary* ... *359*

B *Micro-Level Analysis: Prescribed Scripts and Discursive Roles* ... *363*

C *Synthesis: The Mirror Logic of Control* ... *366*

V Conclusion: Toward a More Transformative Restorative Justice ... 368

I Introduction

Restorative justice ('RJ') is often presented as a participatory alternative to punitive criminal justice, centred on healing, reparation, and victim empowerment through dialogue.[1] In youth justice, this promise has been especially influential because it aligns with rehabilitative ideals of reintegration, diversion, and reduced reliance on punishment.[2] Partly developed in reaction to criticism over the shortcomings of Western criminal justice systems in supporting victims and communities, along with references to Indigenous ways of resolving conflict, the RJ model (mediation, family group conferencing, circles, and so on) has been utilised in many jurisdictions

[1] Paul McCold, 'The Recent History of Restorative Justice: Mediation, Circles, and Conferencing' in Dennis Sullivan and Larry Tifft (eds), *Handbook of Restorative Justice: A Global Perspective* (Routledge, 2006) 23.

[2] Gordon Bazemore and Mark Umbreit, 'Rethinking the Sanctioning Function in Juvenile Court: Retributive or Restorative Responses to Youth Crime' (1995) 41(3) *Crime and Delinquency* 296, 302, 311; Gordon Bazemore, 'Young People, Trouble, and Crime: Restorative Justice as a Normative Theory of Informal Social Control and Social Support' (2001) 33(2) *Youth & Society* 199, 204–5, 208–9, 214.

around the world.[3] Nevertheless, behind this aura of transformative potential is a complex and often contradictory reality: although RJ claims a participatory philosophy, it is constituted through state power.[4] This dynamic is particularly evident in the legally and institutionally discursive aspects of RJ: how language, procedure, institutional narratives, and facilitated dialogue are structured to shape and constrain participation.[5]

The academic and policy literatures on RJ offer important insights but often operate within a state-centric framework, accepting institutional definitions of 'success' and generally overlooking the crucial question of power dynamics.[6] Indeed, an emerging body of literature has begun to reveal the power dynamics concealed beneath restorative discourse and practice.[7] However, a significant gap remains: a sustained, comparative examination of how RJ's legal and institutional frameworks structure participation, responsibility, and repair in ways that constrain voice and agency and

[3] See McCold (n 1). See also Daniel W Van Ness and Karen Heetderks Strong, 'The Shape of Things to Come: A Framework for Thinking about a Restorative Justice System' in Elmar GM Weitekamp and Hans-Jürgen Kerner (eds), *Restorative Justice: Theoretical Foundations* (Willan Publishing, 2002) 1.

[4] The moral vocabulary of 'restoration' and 'community' can become a mechanism of social control when institutionalised by the state. Once these vocabularies are absorbed into bureaucratic or legal frameworks, they may legitimise institutional priorities and transform restorative ideals into instruments of governance rather than empowerment: see John Braithwaite, 'The Family Model of the Criminal Process: Reintegrative Shaming' in *Crime, Shame, and Reintegration* (Cambridge University Press, 1989) 54, 59, 62; Giuseppe Maglione, 'Restorative Justice and the State. Untimely Objections against the Institutionalisation of Restorative Justice' (2021) 17(1) *British Journal of Community Justice* 5.

[5] Juan Tauri, 'The Plastic Shamans of Restorative Justice' in Chris Cunneen et al (eds), *The Routledge International Handbook on Decolonizing Justice* (Taylor & Francis Group, 2023) 43, 45–6 ('Plastic Shamans').

[6] These studies mainly took two dominant trajectories. Procedural design and comparative models are the primary focus of the first, where the implementation of RJ across different legal systems is evaluated: see 江山河 [Jiang Shanhe] and 张健 [Zhang Jian], 《恢复性司法: 国外起源与发展、主要操作模式及中国实践》 [Restorative Justice: Its Origin, Development and Major Models in the World and China's Practice] (2024) 1 青少年犯罪问题 *Issues on Juvenile Crimes and Delinquency* 96. The second, more extensive strand focuses on outcomes, including the effectiveness of RJ in reducing recidivism, enhancing victim satisfaction, and generating cost efficiencies for justice systems that can be measured: see Simon Little, Anna Stewart and Nicole Ryan, 'Restorative Justice Conferencing: Not a Panacea for the Overrepresentation of Australia's Indigenous Youth in the Criminal Justice System' (2018) 62(13) *International Journal of Offender Therapy and Comparative Criminology* 4067, 4072, 4084.

[7] A smaller, but vital, critical scholarship — often drawing on decolonial, feminist, and critical legal theories — has interrogated whether RJ might operate as a neocolonial tool, appropriating Indigenous cultural symbols while reinforcing state control, in settler-colonial contexts like Australia and Canada: Tauri, 'Plastic Shamans' (n 5) 43–52; Juan Marcellus Tauri, 'What Exactly Are You Restoring Us to? A Critical Examination of Indigenous Experiences of State-centred Restorative Justice' (2022) 61(1) *Howard Journal of Crime and Justice* 53, 54–7; Dean Young, 'Your Ways or Our Ways?: Addressing Canadian Neo-Colonialism and Restorative Justice' (2019) 7(2) *Salus Journal* 85.

thereby function as a mechanism of state governance in vastly different political and cultural contexts.

This article argues that youth RJ in Australia and China operates as a form of affective governance, in which restorative discourses of participation, responsibility, and repair are structured by legal and institutional frameworks and translated into state-managed practices of control.

The article selects Australia and China because, as two Asia-Pacific jurisdictions, they provide a strategically useful different-systems comparison through which to examine how youth RJ is institutionalised across contrasting legal-political orders.[8] Australia and China differ markedly in their constitutional structures, legal traditions, political ideologies, and the historical foundations of state authority.[9] However, both countries have made children and young people primary sites for RJ experimentation, and both exhibit a strong state involvement in its construction and management.[10] Precisely because these systems are so different, the recurrence of similar discursive patterns is analytically significant. In both contexts, restorative vocabularies are translated into institutional practices that structure who may speak, how responsibility must be performed, and what forms of repair become legally recognisable. The comparison seeks to test whether the state-centred

[8] This form of comparison does not rest on the claim that the selected jurisdictions are unique or representative of an entire legal family. Rather, it follows a problem-oriented and 'most different systems' logic: jurisdictions may be selected because they confront a common legal or governance problem while differing sharply in institutional, political, and socio-legal context: see Ran Hirschl, 'Case Selection and Research Design in Comparative Constitutional Studies' in *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press, 2014) 224; Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2nd ed, 2019) 345. For recent examples of problem-oriented case selection in comparative legal scholarship: see Brendan Clift, 'Defamation Law in Greater China: Principles, Politics, and Prospects' (2025) 13 *The Chinese Journal of Comparative Law* cxaf006:1–19; Rory Gillis, 'Federalism and Vertical Tax Competition' (2025) 73(1) *The American Journal of Comparative Law* 76; Alvin Hoi-Chun Hung, 'Evolution of Intangible Property to Crypto Assets: Legal Pragmatism in Anglo-American Common Law and Chinese Civil Law' (2024) 12 *The Chinese Journal of Comparative Law* cxae011:1–20.

[9] Zhu Jingwen, 'The Socialist Legal System with Chinese Characteristics: Its Structure, Features and Trends' (2011) 32(3) *Social Sciences in China* 87, 89. See also Leslie Zines, 'The Common Law in Australia: Its Nature and Constitutional Significance' (2004) 32(3) *Federal Law Review* 337, 337–44. It is worth noting that the Chinese government defines its legal system as 'socialist rule of law with Chinese characteristics (中国特色社会主义法治体系)'：《法治中国建设规划（2020—2025年）》 [Plan on Building the Rule of Law in China (2020-2025)] (People's Republic of China) Communist Party of China ('CPC') Central Committee, 10 January 2021.

[10] 史立梅 [Shi Limei] and 王坤 [Wang Kun],《恢复性少年司法在我国的价值及其实现》 [Restorative Juvenile Justice: Value and Realization in China] (2017) 5 贵州民族大学学报(哲学社会科学版) *Journal of Guizhou Minzu University (Philosophy and Social Science)* 133, 133–4. See also Little, Stewart and Ryan (n 6) 4069–70.

cooption of RJ may be a broader feature of modern governance rather than a pathology of one legal culture alone.

The article proceeds in four substantive parts. Part II examines how youth RJ in Australia is institutionalised through settler-colonial and administrative forms of governance. Part III turns to China, analysing how restorative-type juvenile justice mechanisms translate the concept of RJ into state-led correctional practices.[11] Part IV develops the comparative discourse analysis, identifying both the divergences and convergences through which different legal-political systems transform restorative dialogue into a managed performance of state-defined repair. Part V concludes by considering the limits of state-led youth RJ and the conditions under which RJ might recover its transformative potential.

Across these parts, the article shows that the promise of RJ is consistently compromised by its institutionalisation, which translates care into control and reproduces hierarchies under the moral veneer of restoration.[12] In both contexts, the discursive structure of RJ processes creates a hierarchy of voices that prioritises state-defined outcomes.[13] In Australia, a settler-colonial legal order historically founded upon English common law introduced by the colonising power (the British Empire), youth RJ has been institutionalised through models such as youth justice conferencing.[14] Despite being marketed as 'Indigenous-inspired', these practices have been critiqued as a form of 'plastic shamanism' that appropriates cultural symbols while serving state crime control agendas and failing to address the systemic hyperincarceration of Aboriginal and Torres Strait Islander children and young people.[15] In China, youth RJ is framed through an officially mobilised vocabulary of harmony, education, and social stability, drawing partly on Confucian

---

[11] Chinese law does not formally adopt or define 'restorative justice' as a coherent legal doctrine or institutional model. However, a range of juvenile justice practices contain restorative elements that reflect core RJ concerns with repair, responsibility, and reintegration. Part III explains this usage in more detail.

[12] See Jordana Silverstein, 'Legislation' in *Cruel Care: A History of Children at Our Borders* (Monash University Publishing, 2023) 87.

[13] See generally Norman Fairclough, *Language and Power* (Routledge, 3rd ed, 2015). See also Pierre Bourdieu, *Language and Symbolic Power*, ed John B Thompson, tr Gino Raymond and Matthew Adamson (Polity Press in association with Basil Blackwell, 1991).

[14] The Australian state maintains its existence through the 'continuous repetition of state violence', and judicial institutions such as police and prisons are 'a continuation of colonial violence': Crystal McKinnon, 'The Lives Behind the Statistics: Policing Practices in Aboriginal Literature' (2019) 45(2) *The Australian Feminist Law Journal* 207, 208–9; Michele Zappavigna and JR Martin, 'Approaching Restorative Justice' in *Discourse and Diversionary Justice: An Analysis of Youth Justice Conferencing* (Palgrave Macmillan Cham, 2018) 1, 10; Jeremy Prichard and Rosanne Burton-Smith, 'Conscience and Moral Development: An Explanation of RISE Recidivism Results with Implications for Juvenile Conferencing and Restorative Justice' (2004) 15 *Australasian Dispute Resolution Journal* 248, 248–50.

[15] Tauri, 'Plastic Shamans' (n 5); Little, Stewart and Ryan (n 6).

moral idioms but operating within a party-state legal order.[16] In both systems, 'dialogue' becomes a scripted performance, and participants are reduced to objects of management rather than agents of their own healing.[17]

The article employs a macro-micro comparative framework that illuminates how RJ operates simultaneously as a moral-legal discourse and a governance technology. At the macro level, the analysis examines the similar structural logics through which both Australia and China institutionalise RJ as an instrument of governance.[18] At the micro level, the study investigates how these macro discourses materialise in concrete legal areas (primarily legislation) where young people and victims are procedurally arranged to engage in structured dialogue. Although micro-level legal procedures, institutional arrangements, and governing vocabularies differ between the two jurisdictions, these differences illustrate divergent pathways of operationalising 'restoration' that ultimately serve analogous state purposes.[19] Bringing these two levels together demonstrates that RJ, far from operating outside

---

[16] 'Harmony (He Xie 和谐)' was formally incorporated into China's Core Socialist Values in the 2010s as one of the 'national-level value goals', but its political significance predates that incorporation, having long been framed in central policy discourse as an essential attribute of socialism with Chinese characteristics and a long-standing goal of the Party: 《关于培育和践行社会主义核心价值观的意见》 [Opinions on Cultivating and Practicing the Core Socialist Values] (People's Republic of China) General Office of the CPC Central Committee, 23 December 2013 ('*Core Socialist Values*'); 《中共中央关于构建社会主义和谐社会若干重大问题的决定》 [Decision of the CPC Central Committee on Major Issues Concerning the Building of a Socialist Harmonious Society] (People's Republic of China) CPC Central Committee, 11 October 2006 ('*Harmonious Society Decision*'). Central policy documents such as *Decision of the CPC Central Committee on Strengthening the Party's Governing Capacity* characterise 'social harmony' and 'stability maintenance (Wei Wen 维稳)' as core governance imperatives, forming the ideological backdrop against which criminal justice practices — including mediation — are implemented: 《中共中央关于加强党的执政能力建设的决定》 [Decision of the CPC Central Committee on Strengthening the Party's Governing Capacity] (People's Republic of China) CPC Central Committee, 19 September 2004. See also Yan Zhang and Yiwei Xia, 'Can Restorative Justice Reduce Incarceration? A Story from China' (2021) 38(7) *Justice Quarterly* 1471, 1486; 王平 [Wang Ping], 《恢复性司法在中国的发展》 [Developments of Restorative Justice in China] (2016) 14(4) 北京联合大学学报(人文社会科学版) *Journal of Beijing Union University (Humanities and Social Sciences)* 70, 72.

[17] RJ conferences use pre-set 'scripts' to structure dialogues and are strictly managed by a coordinator, who may intervene and direct the perpetrator's behaviour during the conference: see Clare McGlynn, Nicole Westmarland and Nikki Godden, '"I Just Wanted Him to Hear Me": Sexual Violence and the Possibilities of Restorative Justice' (2012) 39(2) *Journal of Law and Society* 213, 226–7.

[18] See 王平 [Wang Ping] (n 16); Tauri, 'Plastic Shamans' (n 5). See also Zhang and Xia (n 16); Xiaoyu Yuan, 'Good Seeds, Bad Soil? A Case Study of the Vital Context in the Restorative Justice Process in Mainland China' (2018) 54 *International Journal of Law, Crime and Justice* 34.

[19] See Barry Goldson et al, 'The Racialisation of Youth Justice and Penality' in *Youth Justice and Penality in Comparative Context* (Routledge, 2020) 100, 119, 123–4; Youth Justice NSW, *Youth Justice Conferencing Manual* (Manual Version 1.0, May 2021) 4; 'Restorative Justice', *Corrective Services NSW* (Web Page, 22 January 2026) <https://correctiveservices.dcj.nsw.gov.au> ('NSW Restorative Justice Web Page'); Xiaoyu Wang, Shujun Wang and Guoyi Lv, 'Three Models of Community Corrections in China' (2024) 6(11) *Journal of Social Science and Humanities* 127, 128.

state power, functions as one refined expression — an affective governance model that aestheticises control through the language of care.[20] In this sense, the comparative framework reveals that what differs at the legal procedure and institutional form converges at the level of governance: distinct procedural forms enact a shared logic of control, institutionalising state authority through the moral vocabulary of restoration.[21]

Methodologically, this article combines critical discourse analysis, comparative legal analysis, and socio-cultural critique.[22] It examines legal and policy materials in Australia and China not to evaluate RJ through measures of effectiveness, but to analyse how RJ is legally and bureaucratically constructed as a language of governance. Through this form of governance, care, rehabilitation, and restoration can be transformed into administrative and emotional regulation. The scope of the study focuses on selected materials within each country: in Australia, the analysis centres on legal materials from New South Wales ('NSW') and the Northern Territory ('NT') as analytically strategic and contrastive sites within Australia's fragmented federal youth justice landscape; in China, the analysis is based primarily on statutes, judicial interpretations, and other official normative and policy documents, acknowledging the centralised structure of its legal system, which means policies are nationally mandated and locally implemented.[23]

II PROTECTION AS CONTROL: SETTLER-COLONIAL GOVERNANCE OF YOUTH RESTORATIVE JUSTICE IN AUSTRALIA

This part focuses on the legislative architecture of youth RJ in selected Australian jurisdictions — NSW and the NT. These two sites have been deliberately chosen to capture both the centre and the periphery of Australia's youth justice landscape.

[20] See Silverstein (n 12). See also Kieran McEvoy and Anna Eriksson, 'Restorative Justice in Transition: Ownership, Leadership and "Bottom-up" Human Rights' in Dennis Sullivan and Larry Tifft (eds), *Handbook of Restorative Justice: A Global Perspective* (Routledge, 2006) 321.

[21] See Brian M Lowe, 'The Creation and Establishment of Moral Vocabularies: Why Moralizing and Moral Vocabularies Matter' in Steven Hitlin and Stephen Vaisey (eds), *Handbook of the Sociology of Morality* (Springer New York, 2010) 293, 294–5, 297.

[22] See generally Fairclough (n 13). See also Gilbert Weiss and Ruth Wodak (eds), *Critical Discourse Analysis: Theory and Interdisciplinarity* (Palgrave Macmillan, 2003); Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2nd ed, 2019); Roger Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Ashgate, 2006).

[23] Here, 'official normative and policy documents' refers to the broader body of authoritative materials through which juvenile justice rules are formulated, interpreted, and implemented in China. In addition to national legislation, this article analyses central policy documents, judicial interpretations, procuratorial and court procedural rules, implementation measures, opinions, and other official materials issued by central legal and governmental institutions.

NSW is the most populous state and the invasion 'ground zero', where the British imposed their law without permission.[24] The *Young Offenders Act 1997* (NSW) is a useful point of entry into this broader Australian pattern: it formalises diversion through warnings, cautions, and Youth Justice Conferences, thereby making visible the admission — responsibility — conference logic that has become central to Australian youth RJ, albeit in jurisdictionally varied forms.[25] NSW exemplifies a managerial form of RJ that integrates moral vocabulary into bureaucratic rationalities.

By contrast, the NT represents a frontier jurisdiction where RJ operates in a context of concentrated settler-colonial governance, reflected most starkly in the overwhelming overrepresentation of First Nations children in youth detention.[26] The NT represents both the periphery and the mirror of this system — a jurisdiction where RJ operates as a continuation of colonial administration under the veneer of community healing. Its framework — anchored in the *Youth Justice Act 2005* (NT), *Youth Justice Regulations 2006* (NT), and *Care and Protection of Children Act 2007* (NT) — illustrates how the NT youth justice framework fuses penal, welfare, and cultural rationalities into a composite regime of racial and colonial control. Here, RJ becomes a language through which punishment is moralised, welfare is instrumentalised, and racialised governance is bureaucratised within a penal-welfare complex.[27]

---

[24] Australian Bureau of Statistics, *National, State and Territory Population, September 2025* (Web Page, 19 March 2026) <www.abs.gov.au>; Dharug Ngurra et al, 'Biyani Guwiyang Dharug Ngurrawa: Healing Fire on Dharug Country' (2025) 21(1) *Ecosystems and People* 2495016:1–17, 3; Katrina Thorpe, Linda ten Kate and Cathie Burgess, 'Reimagining Democratic Education by Positioning Aboriginal Country-Centred Learning as Foundational to Curriculum and Pedagogy' (2024) 44(2) *Curriculum Perspectives* 205, 207–9, 211.

[25] *Young Offenders Act 1997* (NSW). See Kelly Richards, 'Police-Referred Restorative Justice for Juveniles in Australia' (Trends & Issues in Crime and Criminal Justice No 398, Australian Institute of Criminology, August 2010). See also Jacqueline Joudo-Larsen, *Restorative Justice in the Australian Criminal Justice System* (Research and Public Policy Series No 127, Australian Institute of Criminology, 2014).

[26] While there are more incarcerated Indigenous children than any other group in all Australian jurisdictions, in the Northern Territory, on any given night, almost all incarcerated children are Indigenous children: see *Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory* (Final Report, 17 November 2017) ('*NT Youth Detention Royal Commission Final Report*'). See also Australian Institute of Health and Welfare, *Youth Justice in Australia 2023–24* (Web Report, 28 March 2025); Chloe Boffa and Anita Mackay, 'Hyperincarceration and Human Rights Abuses of First Nations Children in Juvenile Detention in Queensland and the Northern Territory' (2025) 37(1) *Current Issues in Criminal Justice* 58, 58–61, 64; Thalia Anthony, 'The Perils of Positivism in the NT Royal Commission into Youth Detention: The Case for a Post-Positivist Frame for First Nations Justice' (2020) 29(1) *Griffith Law Review* 43.

[27] See Loïc Wacquant, 'The Criminalization of Poverty in the Post-Civil Rights Era' in *Punishing the Poor: The Neoliberal Government of Social Insecurity* (Duke University Press, 2009) 41, 41, 43, 47–8, 60.

Analysing these two jurisdictions together reveals the structural continuum of Australian youth RJ — from the metropolitan forms of coloniality embedded in liberal-managerial governance to the frontier expressions of coloniality sustained through racialised control.[28] Their juxtaposition thus enables a critical examination of how 'restoration' is translated into governance across different colonial spaces, exposing both the national coherence and regional differentiation of the settler-colonial state's restorative discourse. The analysis does not claim that NSW and the NT are representative of youth RJ practices across Australia as a whole; rather, they are treated as strategically selected jurisdictions.

A *The Architecture of Diversion and the Construction of Responsibility*

The *Young Offenders Act 1997* (NSW) establishes a three-tier diversionary hierarchy — warnings, cautions, and conferences.[29] Its stated purpose is to 'provide an alternative process to court proceedings for dealing with children' and to promote 'acceptance of responsibility by the offender' while 'meeting the needs of victims'.[30] The principle that 'the least restrictive form of sanction' should be applied reflects a welfare-oriented approach, but it also encodes a graded logic of control: only those who 'admit the offence' and consent to diversion may access 'diversionary' options.[31] Thus, confession becomes a precondition of eligibility, turning moral recognition into procedural compliance.

Conferences are portrayed as participatory but are tightly supervised by police referrals, prosecutorial oversight, and standardised outcome plans.[32] In diversionary levels, responsibility is not an autonomous moral act but a governed practice — a process through which the child, positioned as a suspect or target of intervention, learns to internalise the expectations of authority. The Act's emphasis on 'acceptance of responsibility' as the main objective of conferences exemplifies this managerial turn: responsibility becomes a behavioural marker of rehabilitation

---

[28] See generally Heidi Norman, *What Do We Want? A Political History of Aboriginal Land Rights in New South Wales* (Aboriginal Studies Press, 2015). See also Susan Greer and Patty McNicholas, 'Accounting for "Moral Betterment": Pastoral Power and Indentured Aboriginal Apprenticeship Programs in New South Wales' (2017) 30(8) *Accounting, Auditing and Accountability Journal* 1843, 1845, 1851, 1861; Lana D Hartwig, Sue Jackson and Natalie Osborne, 'Trends in Aboriginal Water Ownership in New South Wales, Australia: The Continuities between Colonial and Neoliberal Forms of Dispossession' (2020) 99 *Land Use Policy* 104869:1–13; Jillian Kramer, '"Legitimating Fictions": The Rule of Law, the Northern Territory Intervention and the War on Terror' (2015) 19 *Law Text Culture* 127, 128, 132, 142. See Deirdre Howard-Wagner and Ben Kelly, 'Containing Aboriginal Mobility in the Northern Territory: From "Protectionism" to "Interventionism"' (2011) 15 *Law Text Culture* 102.

[29] *Young Offenders Act 1997* (n 25) ss 13–61.

[30] Ibid s 3.

[31] Ibid ss 7(a), 10, 19(b)–(c), 36(b)–(c), 40(1)(b)–(c).

[32] Ibid ss 34–52.

rather than a freely chosen ethical stance.[33] In reality, this is less an ethical choice than a coerced confession of criminality — an act performed under the procedural authority of police officers who define and validate the child's 'responsibility'.

This institutional design also has broader political consequences. Where diversion depends upon admission, compliance, and administratively recognisable responsibility, it is unlikely to address the structural causes of youth offending, including poverty, racialised policing, family instability, exclusion from education, and the intergenerational effects of colonial governance.[34] Yet when offending persists or becomes publicly visible, the limits of diversion are often interpreted not as evidence of these deeper structural failures, but as evidence that diversion itself is too lenient or ineffective.[35] This dynamic allows governments to celebrate RJ when it produces measurable compliance, while disavowing it when public anxiety about youth crime intensifies.[36] The result is a circular politics of youth justice: diversion is constrained by state-defined eligibility and completion requirements, and its constrained outcomes are then used to justify renewed punitive intervention in the name of community safety and victims' rights.

This logic of governed responsibility is also diffused across the family unit. The Act specifies that 'parents are primarily responsible for the development of children', and it requires their participation in conferences where appropriate.[37] This distribution of responsibility reflects the logic of governance through delegation, transforming familial relations into auxiliary instruments of correction. What appears as community participation is, in effect, a police-gatekept and state-administered process that internalises state authority within the community

---

[33] Ibid s 34(1)(a)(i).

[34] Estrella Pearce, 'Why "Admission of Guilt" Is Not Working in Youth Diversionary Schemes in NSW: Exploratory Findings from Interviews with Police Officers' (2021) 33(3) *Current Issues in Criminal Justice* 285, 286–7, 291–5; Ruth McCausland and Eileen Baldry, 'Who Does Australia Lock up? The Social Determinants of Justice' (2023) 12(3) *International Journal for Crime, Justice and Social Democracy* 37, 45–8.

[35] Tamara Walsh and Robin Fitzgerald, 'Youth Justice, Community Safety and Children's Rights in Australia' (2022) 30(3) *International Journal of Children's Rights* 617, 629–633.

[36] See Matthew D Kim, 'Redesigning Restorative Justice for Criminal Justice Reform' (2022) 88(4) *Tennessee Law Review* 947, 950–1, 956–9, 977–80. See also Kevin Drakulich, 'Public Opinion and Criminal Justice Reform' (2022) 47(6) *American Journal of Criminal Justice* 1166.

[37] *Young Offenders Act 1997* (n 25) ss 7(f), 45, 47.

sphere.[38] Because it is conducted by sworn officers, it cannot escape the criminalising logic of policing, no matter how restorative its language may appear.[39]

The legal framework in the NT extends and intensifies this logic by situating responsibility in a moral-therapeutic narrative of 'care through discipline'. Section 3 of the *Youth Justice Act 2005* (NT) states that a youth who commits an offence should be given 'appropriate treatment, punishment and rehabilitation'.[40] This is bolstered in s 4 with the requirement that children 'develop in socially responsible ways' and that family 'relationships are maintained where appropriate', alongside the preservation of 'the interests of the community'.[41] The language of 'rehabilitation' here is also about correction, and the young person's moral reform is both the goal and the measure of justice.

In contrast to the procedural diversion model of NSW, Part 3 of the *Youth Justice Act 2005* (NT) provides the mechanism to inscribe diversion in a police-managed morality regime.[42] Diversion to a Youth Justice Conference or diversion program is unavailable where the youth denies the alleged behaviour; legal closure depends on satisfactory completion.[43] The NT diversion framework formalises this process into the 'ritual' of the State — through warnings, program attendance and documented reflection on behaviour and its effects.[44] Responsibility is turned into an audit trail: remorse documented, reflection logged, and compliance rewarded. This is more than an administrative detail — it represents a governmentalisation of morality: the production of responsible subjects through procedural confession.[45] In terms of the NT, the frontier context exacerbates this dynamic; responsibility is a state pedagogy for Indigenous youth taught by a settler-imposed framework, not one against it.

B *The Bureaucratisation of Restoration and the Role of Victims*

Unless the conference administrator reasonably considers it impracticable, a conference must be held within 42 days of the administrator receiving the referral and at least 10 days after notice is given to the child under s 45, and must be

---

[38] Ibid ss 21, 38, 40–41; Australian Institute of Health and Welfare, Youth Justice in Australia 2023–24: Appendix D — State and Territory Youth Justice Systems, Policies and Programs 2023–24 (Web Report, 28 March 2025) 2–5.
[39] Pearce (n 34).
[40] *Youth Justice Act 2005* (NT) s 3(e).
[41] Ibid s 4.
[42] Ibid ss 37–44.
[43] Ibid ss 39(2), 40(1), 41(1), 42(1)–(3), 42A(1). See also 'Youth Diversion Programs', *Northern Territory Government* (Web Page) <https://nt.gov.au >.
[44] *Youth Justice Act 2005* (n 40) ss 39, 42A. See also Youth Diversion Programs (n 43).
[45] See Nikolas Rose and Peter Miller, 'Political Power beyond the State: Problematics of Government' (2010) 61(s1) *The British Journal of Sociology* 271, 273, 281–6.

conducted in accordance with any applicable written guidelines approved by the Secretary.[46] Participants are required to reach an outcome plan — a written agreement setting out specific actions or undertakings. Once the conference administrator gives written notice that the outcome plan has been satisfactorily completed, no further criminal proceedings may be taken.[47] Restoration thus becomes a matter of bureaucratic closure rather than moral dialogue.[48] The process is bound by deadlines, reporting obligations, and record-keeping requirements, reflecting an administrative rather than relational conception of justice.

The participation of victims and other relevant parties, though frequently invoked as a symbol of inclusivity, is similarly scripted. The Act defines 'victim' to include any person that has suffered 'physical, emotional or psychological harm', broadening the concept of harm while extending the state's moral jurisdiction.[49] The convenor may exclude persons other than the child or any victim whose presence 'would frustrate the purpose or conduct of a conference'.[50] This structure transforms participation into a managed performance of reconciliation, designed to sustain legitimacy and efficiency.

In effect, the NSW scheme bureaucratises empathy. The emotional language of 'closure', 'safe environment', and 'respectful dialogue' that is contained in policy documents, such as the *Restorative Justice Service Policy*, demonstrates that affect has been codified as an administrative task.[51] The convenor does not merely facilitate open-ended reconciliation; rather, the role involves structuring affective exchange and eliciting institutionally legible expressions of remorse, apology, and repair, while containing participation within an orderly, safe, and procedurally efficient sequence.[52] Restoration is governed by emotional regulation, not transformative healing.

Indeed, the NT system displays a similar administrative translation of feeling into material — only this is a language closely integrated with the language of 'community repair'. Part 5, Division 3 of the *Youth Justice Act 2005* (NT) requires

---

[46] *Young Offenders Act 1997* (n 25) ss 43, 49.
[47] Ibid ss 52(1), 52(6)–(7), 56(1), 57(1), 58.
[48] See Gordon Bazemore, 'Restorative Justice and Earned Redemption: Communities, Victims, and Offender Reintegration' (1998) 41(6) *American Behavioral Scientist* 768, 770, 775, 779.
[49] *Young Offenders Act 1997* (n 25) ss 5(1)–(2).
[50] Ibid ss 47(1)(i), 48(3), 52(1), 52(4)–(5).
[51] Corrective Services NSW, *Restorative Justice Service* (Policy No D23/1524568, 28 November 2023) 4, 7, 17, 23. Psychological pain and recovery have become a capitalisable industry, and emotional capacity has become a form of capital: Eva Illouz, 'Suffering, Emotional Fields, and Emotional Capital' in *Cold Intimacies: The Making of Emotional Capitalism* (Polity Press, 2007) 40, 41–2.
[52] See Jane J Bolitho, 'Restorative Justice: The Ideals and Realities of Conferencing for Young People' (2012) 20(1) *Critical Criminology* 61, 65–6.

courts to examine 'victim reports' and 'impact statements'; however, those statements are a matter of the judicial officer's judgement, not that of the community itself.[53] Thus, restorative practice can be pre-filtered via state analysis.

The *Youth Justice Regulations 2006* (NT) codify 'community work orders', prescribing hours, supervision, and behavioural criteria.[54] What is presented as reparation or service becomes a metric of compliance — a measurable proxy for moral transformation.[55] The *Sentencing Act 1995* (NT) reinforces this logic by authorising community correction orders subject to statutory good-behaviour and program conditions that extend punishment into the domains of supervision, rehabilitation, and behavioural reform, rendering correction measurable through official criteria of compliance.[56] The bureaucratic form, while appearing inclusive, reproduces a colonial logic of translation: emotion is rendered legible only through state reporting.

This system performs a dual movement — it civilises deviance through care and obscures control through empathy. The administrative language of 'healing', 'closure', and 'respectful community involvement' aligns closely with what the *Northern Territory Aboriginal Justice Agreement 2021–2027* ('*Aboriginal Justice Agreement*') presumes cultural healing partnerships.[57] Yet these partnerships are bound by governmental oversight: cultural repair is authorised only when it serves policy objectives such as reducing recidivism or promoting 'community harmony'.[58] Restoration thus becomes not the opposite of punishment but its affective extension.

---

[53] *Youth Justice Act 2005* (n 40) ss 76–80.
[54] *Youth Justice Regulations 2006* (NT) regs 5–21; *Youth Justice Act 2005* (n 40) ss 94(7), 95.
[55] *Youth Justice Regulations 2006* (n 54) regs 5–21; *Youth Justice Act 2005* (n 40) ss 94(7), 95.
[56] *Sentencing Act 1995* (NT) ss 30–4.
[57] Department of the Attorney-General and Justice (NT), *Northern Territory Aboriginal Justice Agreement 2021–2027* (Agreement, 2021) 8–9 ('*Aboriginal Justice Agreement*'). However, it is critical to note that 'healing' is not a neutral therapeutic term but one that originates from Aboriginal English, deeply rooted in the experiences and policy advocacy of the Stolen Generations and their descendants (for example, the Lowitja Institute houses a lot of these policy documents): see 'Lowitja Library', *Lowitja Institute* (Web Page) <https://lowitja.org.au>. The language was misappropriated into state-led administrative frameworks, illustrating how culturally embedded concepts are recontextualised — stripped of their political and historical significance — and redeployed to obscure settler-state governance.
[58] Department of the Attorney-General and Justice (NT), *Northern Territory Aboriginal Justice Agreement Implementation Plan 2021–2027* (Implementation Plan, 2021) 6–7, 11–13; Department of the Attorney-General and Justice (NT), *Northern Territory Aboriginal Justice Agreement Action Plan 2021–2022* (Action Plan, 2021) 5–6.

C *The Paternal Logic of Protection and Rehabilitation*

The broader NSW legal landscape shows how protection can take on a paternalistic logic through complementary statutes. The *Children (Criminal Proceedings) Act 1987* (NSW) mandates that 'children are to have the benefit of special procedures' and empowers courts to impose 'good behaviour bonds', 'probation', or 'community service orders'.[59] These provisions are protective in purpose and may provide important safeguards for children, but they also risk reproducing a logic in which young people are approached as objects of supervision and correction rather than fully as rights-bearing subjects.[60] Protection becomes a justification for surveillance, mirroring the paternalism embedded in the *Young Offenders Act* itself.

The *Children and Young Persons (Care and Protection) Act 1998* (NSW) extends this governance logic beyond the criminal process by recoding family conflict, inadequate supervision, and behavioural concerns as matters of care, protection, and welfare.[61] Its guiding concern with the child's 'best interests' and 'safety, welfare and well-being' shows how protective intervention can become a technique for managing risk in and around youth justice.[62] It forms part of the wider NSW legal ecology, in which young people are constructed less as autonomous, rights-bearing participants than as vulnerable subjects requiring supervision, correction, and therapeutic management.[63]

Parallel tendencies are evident in the *Crimes (Sentencing Procedure) Act 1999* (NSW), which incorporates rehabilitation, accountability, and recognition of harm to the victim and community as statutory sentencing objectives.[64] Here, restorative language is integrated into mainstream penal discourse, transforming rehabilitation into an obligation of self-improvement and reparation into a duty owed to society. This merging of moral and penal logics demonstrates the managerial nature of

---

[59] *Children (Criminal Proceedings) Act 1987* (NSW) ss 6, 33.
[60] This argument is not intended to deny that child-specific procedures are protective in purpose or that they may secure meaningful safeguards for children. Rather, it points to a familiar tension in child justice: protective and welfare-oriented frameworks may safeguard children's developmental interests, while also authorising intrusive supervision when children are constructed primarily as vulnerable objects of correction rather than as rights-bearing participants: Yannick van den Brink, 'Equality in the Youth Court: Meaning, Perceptions and Implications of the Principle of Equality in Youth Justice' (2022) 22(3) *Youth Justice* 245.
[61] *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 8, 9, 38A, 71(1)(e)–(f), 111, 113.
[62] Ibid ss 9–10.
[63] See John Christman, 'Relational Autonomy and the Social Dynamics of Paternalism' (2014) 17(3) *Ethical Theory and Moral Practice* 369.
[64] *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 3A(d), (e), (g).

Australian RJ — its design to obscure punishment by embedding it in a discourse of reform, which is a technology of power.

The acts also collectively define the family and community as co-responsible units. In this way, the framework does not treat the child as an isolated offender, but draws parents, responsible adults, and family members into the conferencing process and situates the child within a wider regime of supervised responsibility.[65] Thus, what begins as 'support' for reintegration ultimately becomes a disciplinary apparatus diffused across social networks. Responsibility is collectivised, but accountability flows downward — from the state to the family to the child — reproducing a vertical hierarchy under the guise of partnership.

The NT regime radicalises this coloniality through its fusion of family responsibility, welfare surveillance, and penal correction. Part 6A of the *Youth Justice Act 2005* (NT) provides for 'family responsibility agreements', under which an appropriate Agency may enter into agreements with parents where a youth has demonstrated behavioural problems and family circumstances are considered to have contributed to those problems.[66] These agreements, though formally non-enforceable, operate as quasi-legal instruments: failure to comply can trigger renewed state intervention under the *Care and Protection of Children Act 2007* (NT).[67]

The logic of 'therapeutic correction' extends to the detention regime. Detention is justified as a means to ensure 'health, education and self-respect', while the *Bail Act 1982* (NT) allows the imposition of conditions.[68] Together, these provisions embed coercion within care. Young people are not punished in opposition to welfare — they are rehabilitated through subjection. They reveal a broader NT youth justice ecology in which care, rehabilitation, and cultural repair are attached to coercive supervision. RJ therefore operates within, rather than against, a penal-welfare framework that can recast punishment in therapeutic and culturalised terms.

Given that almost all criminalised children in the NT are Aboriginal or Torres Strait Islander, the very requirement to participate in state-mandated 'cultural awareness' programs is especially egregious.[69] The same settler-colonial system that removes Indigenous children from Country, kin, and culture then mandates they perform 'cultural awareness' from outside their cultural home.[70] What is framed as cultural

---

[65] *Young Offenders Act 1997* (n 25) ss 47; *Children (Criminal Proceedings) Act 1987* (n 59) ss 33, 41.
[66] *Youth Justice Act 2005* (n 40) ss 140D–140F.
[67] Ibid ss 140F(1)–(2). See also *Care and Protection of Children Act 2007* (NT) s 32.
[68] *Bail Act 1982* (NT) ss 24A(2)(i), 27(1)–(2), 27A(1), 28(1)–(2A).
[69] *NT Youth Detention Royal Commission Final Report* (n 26); Boffa and Mackay (n 26).
[70] William Tilmouth et al, 'Apmerengentyele: Our Systems, Our Children, Our Safety, Our Wellbeing' (2025) 9(3) *Genealogy* 095:1–21, 8, 11, 14; Anne Maree Payne, '"Never Again"? Resonances of the

restoration is in fact a form of cultural management — culture rendered legible, acceptable, and governable within state-defined parameters, rather than embodied, relational, and sovereign.

D *Indigenous Inclusion and the Limits of Voluntariness*

The *Young Offenders Act 1997* (NSW) explicitly recognises 'the over-representation of Aboriginal and Torres Strait Islander children in the criminal justice system' and declares the need to address it using warnings, cautions, and conferences.[71] This acknowledgment, however, is framed in procedural rather than structural terms. The Act treats inequality as a matter of access to diversion, not as a symptom of systemic injustice. However, 'diversion' is absorbed back into the architecture of state control, functioning less as an alternative to punishment than as a re-routing of young people through scripted rituals of compliance within the criminal justice system.[72] Its call for 'culturally appropriate' conferencing allows the inclusion of 'respected community members' in proceedings but does not alter the underlying power dynamics.[73] Indigenous participation thus risks functioning symbolically, incorporating Indigenous presence into the process while leaving the settler legal framework of confession, compliance, and final authority intact.[74]

Voluntariness, another central principle of RJ, is also constrained by institutional design.[75] A child needs to consent to a caution or conference, yet refusal can trigger prosecution.[76] Participation is framed as a choice within tightly bounded parameters: the young people may choose only between compliance and escalation. This conditional voluntariness converts consent into a mechanism of control: the child's choice to participate becomes evidence of responsibility, while refusal risks escalation into formal prosecution. The very act of choosing to participate demonstrates the child's internalisation of responsibility — the ideal subject of restorative governance.

Past in Contemporary Aboriginal and Torres Strait Islander Child Removal' (2024) 16(3) *Cosmopolitan Civil Societies* 104, 108, 110–11, 114.

[71] *Young Offenders Act 1997* (n 25) s 7(h).

[72] Chris Cunneen, Rob White and Kelly Richards, 'Restorative Justice and Juvenile Conferencing' in *Juvenile Justice: Youth and Crime in Australia* (Oxford University Press, 5th ed, 2015) 336, 348, 350–1, 355–6.

[73] *Young Offenders Act 1997* (n 25) ss 34(1)(a)(v), 47(2)(a).

[74] Gerald Taiaiake Alfred, 'Colonialism and State Dependency' (2009) 5(2) *International Journal of Indigenous Health* 42.

[75] Adam Crawford and Pablo Pineda Rojas, 'Restorative Justice, Voluntariness and the Ongoing Challenges of Institutionalisation' (2024) 7(3) *International Journal of Restorative Justice* 401.

[76] *Young Offenders Act 1997* (n 25) ss 19(c), 36(c), 9(2).

In the NT context, Indigenous 'inclusion' is explicitly codified yet structurally colonised. Part 5, Division 4 of the *Youth Justice Act 2005* (NT) introduces the 'community court sentencing procedure', requiring courts to consider Aboriginal experience reports and permitting consideration of responses from Law and Justice Groups.[77] Theoretically, this gestures toward the right to self-determination; in practice, however, it risks functioning as a form of symbolic incorporation, as Aboriginal knowledge and community input are invited into the sentencing process without displacing the court's ultimate authority.[78] These cultural mechanisms are inserted within judicial processes without altering their underlying logic of authority. 'Culture' becomes evidence, not law.

The *Aboriginal Justice Agreement* further advances this aesthetic of 'inclusion'.[79] It promises 'community-led justice' and 'cultural healing', yet the operative verbs throughout the document — 'collaborate', 'partner', and 'build capacity' — reveal its managerial core.[80] Aboriginal justice is recognised insofar as it can be administered, audited, and reported.[81] This is the nationalisation and aestheticisation of culture: the transformation of Indigenous restoration into a measurable policy deliverable.

In this sense, the NT's RJ model serves as a form of colonial reconciliation through governance. It invites Indigenous communities to co-produce legitimacy for the state's justice apparatus, rather than transforming it. The affective vocabulary of healing and respect thus conceals the enduring asymmetry of power. RJ, here, is not decolonisation — it is the emotional grammar of settler sovereignty.

E *Conclusion: Restorative Justice as Administrative Governance*

In the NSW context, the youth RJ system's efficiency-oriented structure — its deadlines, eligibility rules, and procedural safeguards — ensures administrative predictability while constraining the spontaneity that genuine restoration would require. Victim inclusion is choreographed, family participation is instrumentalised, and Indigenous engagement is tokenised. What emerges is a sophisticated model of governance through empathy: a regime that speaks the language of healing but practices the logic of management. In this sense, the NSW legislative framework reveals that RJ's moral aspiration has always been intertwined with the state's moralising discourse. Its language of healing and responsibility does not escape

[77] *Youth Justice Act 2005* (n 40) ss 80A–80E.
[78] Thalia Anthony and Will Crawford, 'Northern Territory Indigenous Community Sentencing Mechanisms: An Order for Substantive Equality' (2013) 17(2) *Australian Indigenous Law Review* 79.
[79] See *Aboriginal Justice Agreement* (n 57).
[80] Ibid 8, 14, 17–18.
[81] Ibid 24–5.

state power; it renders that power more humane, affective, and administratively acceptable.

In the NT, this fusion becomes explicit: the state governs through care that disciplines, healing that normalises, and culture that authorises. What appears as the restoration of community is, in fact, the restoration of state authority through new moral vocabularies. The restorative ideal, far from existing outside power, becomes its most refined expression — humanising domination through empathy and embedding colonial sovereignty in the language of repair.

The acts construct a continuum from welfare to punishment, where restorative ideals are subsumed within bureaucratic rationalities. Across these texts, the language of responsibility, rehabilitation, and care performs a technology of power: it transforms control into compassion and compliance into consent. They stand as the critical examples of how settler-colonial legal systems convert discourses of repair into instruments of regulation — where caring becomes a form of control and reconciliation a mode of governance.

III Harmony without Dialogue: State Capture of Youth Restorative Justice in China

Although China's legal framework for juvenile justice procedures (centred on the *Criminal Procedure Law*, the *Law on the Protection of Minors*, the *Law on the Prevention of Juvenile Delinquency*, and the *Community Corrections Law*) does not explicitly use the term 'restorative justice', its core concepts (education, correction, reintegration, and restoration) are significantly consistent with the restorative path.[82] An in-depth analysis of these legal texts can reveal a set of structures that deeply reflect state dominance, institutionalised frameworks, and potential reproduction of inequality.[83]

---

82 《中华人民共和国未成年人保护法》 [Law of the People's Republic of China on the Protection of Minors] (People's Republic of China) National People's Congress (NPC) Standing Committee, as amended 26 April 2024, arts 110, 113, 116 ('*Protection Law of Minors*'); 《中华人民共和国预防未成年人犯罪法》 [Law of the People's Republic of China on the Prevention of Juvenile Delinquency] (People's Republic of China) NPC Standing Committee, as revised 26 December 2020, arts 1–4, 31, 38–45 ('*Prevention Law of Juvenile Delinquency*'); 《中华人民共和国社区矫正法》 [Community Corrections Law of the People's Republic of China] (People's Republic of China) NPC Standing Committee, Order No 40, 28 December 2019, arts 1–3, 23, 28, 36, 42, 52 ('*Community Corrections Law*'); 《中华人民共和国刑事诉讼法》 [Criminal Procedure Law of the People's Republic of China] (People's Republic of China) National People's Congress, as amended 26 October 2018, arts 277, 279, 282–4, 288–90 ('*Criminal Procedure Law*').

83 See 苏镜祥 [Su Jingxiang] and 马静华 [Ma Jinghua], 《未成年人刑事和解—基于中国实践的考察和分析》 [Victim Offender Mediation for the Juvenile: Based on the Surveys and Analyses of China's Practice] (2009) 3 四川大学学报(哲学社会科学版) *Journal of Sichuan University (Social Science Edition)* 118.

Unlike Australia's fragmented federal youth justice landscape, China's juvenile justice framework operates within a unitary legal and policy architecture characterised by national legislation and central guidance.[84] For this reason, the Chinese analysis does not select sub-national jurisdictions in the same way as the Australian part does. Instead, it focuses on national legislation, judicial interpretations, procuratorial and court procedural rules, implementation measures, opinions, and other official normative and policy documents issued by central legal and governmental institutions, while drawing on selected local implementation materials to illustrate the practical operationalisation of centrally formulated rules. These materials collectively shape how juvenile justice rules are formulated, interpreted, and implemented. Although not all these instruments have the same formal legal status, they remain highly authoritative in structuring how statutory rules are applied by local judicial, procuratorial, and administrative bodies.[85]

A *Predefined and Highly Regulated Participant Roles*

In China's legal context, juveniles refer to individuals under the age of eighteen, while criminal responsibility generally begins at the age of sixteen.[86] The state's

[84] Wei Liu, Toby S James and Caixia Man, 'Governance and Public Administration in China' (2022) 43(3) *Policy Studies* 387, 389–90; Hsin Hsien Wang and Shan Yun Shi, 'Comprehensive Law-Based Governance in China? Legislating Authoritarianism in the Xi Jinping Era' (2022) 11(2) *Journal of Contemporary East Asia Studies* 195, 198–9, 209.

[85] This is important in the Chinese context because judicial interpretations issued by the Supreme People's Court and the Supreme People's Procuratorate have legal effect, while other official normative and policy documents, including procedural rules, implementation measures, and opinions, may not necessarily have the same formal status but nevertheless carry significant practical force in guiding the interpretation, operationalisation, and enforcement of statutory rules by courts, procuratorates, and administrative authorities at the local level: 《中华人民共和国人民法院组织法》 [Organic Law of the People's Courts of the People's Republic of China] (People's Republic of China) NPC Standing Committee, as revised 26 October 2018, art 18; 《最高人民法院关于司法解释工作的规定》 [Provisions of the Supreme People's Court on Judicial Interpretation Work] (People's Republic of China) Supreme People's Court, Fa Fa [2021] No 20, 9 June 2021, arts 2, 5–6; 《中华人民共和国人民检察院组织法》 [Organic Law of the People's Procuratorates of the People's Republic of China] (People's Republic of China) NPC Standing Committee, as revised 26 October 2018, arts 23, 31; 《最高人民检察院司法解释工作规定》 [Provisions of the Supreme People's Procuratorate on Judicial Interpretation Work] (People's Republic of China) Supreme People's Procuratorate, 13 May 2019, arts 5–6.

[86] Children aged between fourteen and sixteen can also be held criminally responsible for serious violent offences, including intentional homicide, intentional injury causing serious injury or death, rape, robbery, drug trafficking, arson, explosion, and placing dangerous substances. Moreover, children aged between twelve and fourteen may bear criminal responsibility where they commit intentional homicide or intentional injury causing death, or causing serious injury resulting in severe disability by especially cruel means, where the circumstances are vile and prosecution is approved by the Supreme People's Procuratorate: 《中华人民共和国刑法》 [Criminal Law of the People's Republic

intervention can occur much earlier, through preventive and educational measures defined in the *Law on the Protection of Minors* and the *Law on the Prevention of Juvenile Delinquency*.[87] Against this background, legal texts strictly presuppose and regulate the role positioning and interaction methods of 'juvenile suspects or defendants' and 'victims'.

The first notable aspect is the presupposition of 'correctability' in the youth's role. The legislation positions juveniles as objects of 'education, persuasion, and salvation'.[88] This presupposes their essential 'plasticity' and 'need for correction'. For example, the core logic of conditional non-prosecution and community correction is that the state guides them to 'return to the right path' by setting conditions, probation periods, and supervision and inspection.[89] Their identity is, first of all, 'a person in need of correction', and then the bearer of responsibility.

At the same time, the victim's role is rendered passive and institutionalised. In the criminal reconciliation procedure, although the victim is the key party to the reconciliation, their role is strictly limited to the 'forgiveness' link.[90] The law requires that 'the criminal suspect or defendant sincerely repents, obtains the victim's forgiveness through compensation for losses, apology, etc., and the victim voluntarily reconciles'.[91] However, after the so-called 'voluntary reconciliation', the effectiveness and consequences of the reconciliation (the suggestion or decision to treat leniently) are reviewed, validated, and ultimately determined by public security, procuratorial organs, and judicial authorities.[92] The victim lacks the right to influence the process and the final judicial discretion effectively, and their 'forgiveness' is more of an institutionalised prerequisite for the state judicial organs to deal leniently.[93] Article 110 of the *Law on the Protection of Minors* further provides that underage victims and witnesses generally do not appear in court to testify, and that where their appearance is necessary, protective measures such as privacy-protecting technical means and psychological intervention should be adopted.[94] This

of China] (People's Republic of China) National People's Congress, as amended 29 December 2023, art 17.

[87] See *Protection Law of Minors* (n 82) arts 113, 116. See also *Prevention Law of Juvenile Delinquency* (n 82) arts 1–4, 31, 38–45.

[88] *Criminal Procedure Law* (n 82) art 277; *Protection Law of Minors* (n 82) art 113.

[89] *Criminal Procedure Law* (n 82) arts 282–4; *Community Corrections Law* (n 82) arts 3, 52.

[90] *Criminal Procedure Law* (n 82) arts 288–90.

[91] Ibid art 288.

[92] Ibid arts 289–90.

[93] See Benjamin L Liebman, 'Leniency in Chinese Criminal Law? Everyday Justice in Henan' (2015) 33(1) *Berkeley Journal of International Law* 153, 180–1, 186.

[94] *Protection Law of Minors* (n 82) art 110.

protective framework reduces their direct exposure to adversarial courtroom settings, but it may also limit the space for direct narrative participation.

A third characteristic is the state's mediation of interaction between the two roles. Direct contact and dialogue space between victims and perpetrators is almost non-existent in legal texts. Reconciliation requires the preparation of an agreement under the 'hosting' of public security and judicial organs.[95] 'Repairing social relations' in community corrections is mainly reflected in 'participating in public welfare activities' rather than directly promoting dialogue and emotional repair between the victim and the juvenile.[96] State institutions (judicial organs, community correction institutions) have become the core mediators and controllers of role interaction.[97]

B *The Institutionalised Framework of 'Repair', 'Reconciliation', and 'Responsibility'*

The core concepts of RJ are incorporated into a strict institutionalised framework in Chinese legal texts, and their connotations are defined and limited by the state. The path of 'repair' is nationalised and de-personalised: emotions are not eliminated but extracted from genuine relational contexts and reinserted as scripted performances — quantified, audited, and used as indicators of compliance rather than as expressions of healing.[98] 'Repair' mainly refers to the abstract restoration of social relations and the reaffirmation of state legal order, rather than the healing of emotional trauma between individuals.

Community correction subjects are organised to participate in public welfare activities to 'repair social relations and cultivate a sense of social responsibility'.[99] For example, community correction subjects were organised to participate in disaster relief after a landslide — performing tasks such as transporting supplies, setting up emergency shelters, and providing logistical support, which were

[95] *Criminal Procedure Law* (n 82) art 289.
[96] *Community Corrections Law* (n 82) art 42.
[97] 江山河 [Jiang Shanhe] and 张健 [Zhang Jian] (n 6) 112.
[98] Yuchen Meng and Jize Jiang, 'Visible Body and Invisible Mind: Bureaucratic Performance, Self-Rehabilitation, and the Machinery of Chinese Community Corrections' (2024) *Criminology & Criminal Justice* 1, 8, 12, 18; Jize Jiang and Xuan Chen, 'Rehabilitation as Performance: Symbolizing Penal Welfare in Chinese Community Corrections' (2025) 65(4) *British Journal of Criminology* 840, 851–3. See 《关于贯彻落实<中华人民共和国社区矫正法实施办法>的实施细则》 [Detailed Rules for Implementing the Measures on the Implementation of the Community Corrections Law of the People's Republic of China] (People's Republic of China) Beijing High People's Court, Beijing People's Procuratorate, Beijing Municipal Public Security Bureau and Beijing Municipal Bureau of Justice, 23 November 2021, art 92.
[99] *Community Corrections Law* (n 82) art 42.

formally recorded as evidence of 'repair', 'repentance', and 'social reintegration'.[100] They function as demonstrations of compliance, civic loyalty, and moral transformation under state supervision. Rather than treating reconciliation as an autonomous process of relational repair, Article 290 of the *Criminal Procedure Law* converts it into a legal trigger for state-administered leniency, including recommendations for lenient punishment, non-prosecution in eligible minor cases, and lenient sentencing.[101] The criteria for 'repair' are the compliance of behaviour set by the state (compliance with inspection regulations, participation in public welfare activities) and repentance.[102]

Equally, 'reconciliation' operates as an instrumental and conditional mechanism. Criminal reconciliation is strictly limited to specific types of minor crimes (caused by civil disputes, with a possible sentence of less than three years; negligent crimes with a sentence of less than seven years) and excludes those who have committed intentional crimes within five years.[103] Its initiation requires the fulfilment of the three conditions of 'sincere repentance', 'obtaining forgiveness', and 'voluntary reconciliation', and its 'voluntariness and legality' shall be reviewed by state organs.[104] The core value of reconciliation is positioned as the legal basis for judicial organs to grant leniency.[105] It is an instrumental way for the state to implement the criminal policy of 'leniency and severity' and to decriminalise or lighten the punishment of specific cases, rather than an independent, autonomous procedure centred on the restoration of the relationship between the parties.

Finally, 'responsibility' is not framed as an open-ended ethical relation to the victim, but as compliance with state-defined correctional expectations. The 'responsibility' of juveniles is mainly expressed in legal discourse as accepting the state's education, persuasion, and rescue policies, obeying supervision and management, complying with inspection regulations, and participating in educational correction activities.[106] Its core is to be responsible for the state's legal authority and the set correctional norms, which are manifested as 'obedience' and 'acceptance of reform'. Although it also includes compensation for losses, this is more of a necessary condition for

---

100 See '四川省宜宾市筠连县司法局积极组织社区矫正对象参与灾害救援' [The Justice Bureau of Junlian County, Yibin City, Sichuan Province, Actively Organised Community Correction Subjects to Participate in Disaster Relief], 中华人民共和国司法部 [Ministry of Justice of the People's Republic of China] (Web Page, 7 April 2025) <www.moj.gov.cn >.
101 *Criminal Procedure Law* (n 82) art 290.
102 Ibid art 282. *Community Corrections Law* (n 82) art 28.
103 *Criminal Procedure Law* (n 82) art 288.
104 Ibid art 289.
105 Ibid art 290.
106 *Criminal Procedure Law* (n 82) arts 277, 283; *Community Corrections Law* (n 82) arts 4, 23, 36.

obtaining forgiveness and then obtaining lenient treatment from the state, rather than the core or endpoint of responsibility.[107]

C *Compressed Space for Personal Narratives and Emotional Complexity*

The procedural framework constructed by legal texts greatly compresses the space for young people and victims to express personal narratives and emotional complexity. Personal narratives are displaced by procedural formalisation, as the legal process directs attention away from lived experience and emotional complexity toward facts, risk factors, and correctional needs. Social investigation focuses on objective factors such as 'growth experience, causes of crime, guardianship education'.[108] Its function is primarily decision-oriented: it translates the juvenile's background, family environment, and causes of offending into information for case handling, education, and correction, rather than creating a dialogical space for the juvenile's own narrative or emotional complexity.[109] Although the interrogation and trial procedures require the presence of legal representatives, the core purpose is to ensure the legality of litigation rights and procedures, and the focus is on ascertaining facts and educating, rather than listening to their deep narratives about criminal motives and inner struggles.[110] Although psychological intervention is mentioned, its purpose is 'correction' and 'return', serving the transformation goals set by the state, rather than accepting their emotional complexity.[111]

Furthermore, victim narratives are marginalised under the guise of protection. As mentioned above, victims that are minors are typically exempt from appearing in court, and their statements are either written or narrated by others.[112] Even if they appear in court, they emphasise the use of technical means to protect privacy and psychological intervention.[113] While this protective measure avoids secondary harm, it also significantly reduces the victim's opportunity to directly, fully, and individually narrate their experience and articulate their emotional responses within the formal judicial setting, thereby limiting their expressive participation in the process. Their

---

[107] *Criminal Procedure Law* (n 82) art 288.
[108] Ibid art 279.
[109] See 郭涛 [Guo Tao], 《涉罪未成年人家庭教育分析——以一百二十二份社会调查报告为样本》 [Analysis of Family Education of Minors Involved in Crime: Based on 122 Social Investigation Reports], 检察日报·未来周刊·实务 [Procuratorial Daily, Future Weekly — Practice] (Web Page, 29 June 2023) <www.spp.gov.cn>.
[110] *Criminal Procedure Law* (n 82) art 281.
[111] *Protection Law of Minors* (n 82) art 116.
[112] Ibid art 110.
[113] Ibid.

narrative is simplified to an 'understanding' factor that affects sentencing or reconciliation.

The legal text lacks regulations or guidance on how to safely and effectively guide and accommodate the complex emotions (such as anger, regret, fear, and shame) of the parties (especially minors involved in crimes) in the procedure.[114] The focus of the procedure is on behavioural performance (whether repentance is shown, whether regulations are followed) and fact-finding. The emotional dimension is regarded as an object that needs intervention (psychological correction) or protection (avoiding secondary harm to the victim), rather than a necessary component that the procedure itself needs to accommodate and deal with actively.

D *Individual Instrumentalisation*[115]*: A Carrier Serving Policy Goals*

Juveniles are largely regarded as tools to achieve national governance goals via prioritisation of specific policy goals. The law explicitly emphasises that its goals are to 'ensure the healthy growth of minors' and 'prevent and reduce crime'.[116] However, studies indicate that many community correction programs for minors remain primarily punitive and supervisory rather than genuinely rehabilitative.[117] In this context, 'healthy growth' is not treated as an open-ended welfare ideal but is legally framed through the state's objectives of prevention, correction, and social order.[118] The concept operates less as an empowerment-oriented vocabulary than as a normative standard through which young people are evaluated, supervised, and redirected toward state-defined developmental goals.

For instance, the official claim that most minors subject to conditional non-prosecution have 'returned to the right path' reveals how success is measured against a state-defined image of normative reintegration: the young person is

---

[114] See *Criminal Procedure Law* (n 82) arts 279, 281; *Protection Law of Minors* (n 82) arts 110, 116; *Community Corrections Law* (n 82) arts 28, 36, 42. These provisions emphasise social investigation, procedural legality, psychological intervention, protection of minors, and correctional compliance, but do not establish a dialogical framework for the expression and accommodation of complex emotions within restorative-type encounters.

[115] Instrumentalisation is used here in both a moral-philosophical and governmental sense: it refers to the reduction of persons into means for the achievement of external institutional ends, and to the governance practices through which subjects are mobilised to fulfil state-defined objectives: see generally Immanuel Kant, *Groundwork of the Metaphysics of Morals*, ed Mary Gregor and Jens Timmermann, tr Mary Gregor (Cambridge University Press, 2nd rev ed, 2012) ch 2. See also Rose and Miller (n 45).

[116] *Prevention Law of Juvenile Delinquency* (n 82) art 2; *Community Corrections Law* (n 82) art 1.

[117] Enshen Li, 'China's Community Corrections: An Actuarial Model of Punishment' (2015) 64(1) *Crime, Law and Social Change* 1, 5, 19.

[118] *Prevention Law of Juvenile Delinquency* (n 82) arts 1, 2, 4, 28, 31, 41; *Community Corrections Law* (n 82) arts 1, 3, 4; *Criminal Procedure Law* (n 82) art 277.

deemed restored when they demonstrate correction, supervision-compliance, and reintegration, rather than when repair is defined through dialogue or by the participants themselves.[119] Juveniles are regarded as carriers and objects of achieving grand policy goals such as 'education and rescue', 'reducing crime rates', and 'promoting social harmony and stability'.[120] Their individual needs, rights, and development must be subject to or integrated into the framework of these national goals. The ultimate goal of community correction is to 'promote the smooth integration of community correction subjects into society, prevent and reduce crime', thereby positioning community correction as a means of securing broader social order.[121]

Moreover, rights protection assumes an instrumental rather than an emancipatory role. Although the law emphasises the protection of minors' litigation rights, non-discrimination, privacy rights, and other human rights protection clauses, the implementation of these rights often remains closely tied to the state's objectives of education, supervision, and behavioural regulation.[122] For example, even the requirement that juvenile community correction groups include personnel familiar with minors' physical and psychological characteristics is framed within a correctional apparatus designed to assess developmental needs, identify causes of offending, supervise behaviour, and implement targeted transformation.[123] Although presented as a protective measure, this arrangement also shows how rights protection is absorbed into a correctional framework that marks young people as objects of assessment, supervision, and behavioural transformation. This creates a deeper paradox: the same legal framework that claims to protect young people may also expose them to the social stigma, exclusion, and diminished life prospects produced or intensified by the state's own correctional and criminal justice apparatus. In this sense, the state's 'protective' role serves as a compensatory

---

119 '逾97%被附条件不起诉未成年人走上正途' [Over 97% of Minors Given Conditional Non-Prosecution Have Successfully Returned to the Right Path], 中华人民共和国最高人民检察院 [(People's Republic of China) Supreme People's Procuratorate] (Web Page, 28 October 2022) <www.spp.gov.cn>.

120 See *Criminal Procedure Law* (n 82) arts 277, 282–4. See also *Community Corrections Law* (n 82) arts 1, 3, 11, 13, 35–43, 52; *Protection Law of Minors* (n 82) art 113.

121 *Community Corrections Law* (n 82) art 1.

122 Ibid arts 54, 57; *Criminal Procedure Law* (n 82) arts 277, 286; *Protection Law of Minors* (n 82) arts 103, 113.

123 *Community Corrections Law* (n 82) art 52; 《中华人民共和国社区矫正法实施办法》 [Measures on the Implementation of the Community Corrections Law of the People's Republic of China] (People's Republic of China) Supreme People's Court, Supreme People's Procuratorate, Ministry of Public Security and Ministry of Justice, Si Fa Tong [2020] No 59, 18 June 2020, arts 19, 21–4, 32–3, 55 ('*Community Corrections Law Implementation Measures*').

response to injuries generated by the very system that claims to educate, correct, and save them.[124]

In the Chinese system design, the roles and functions of participants such as young people, victims, guardians, and social organisations are pre-set. Youths are required to 'admit their guilt and repent', 'accept education and correction', and 'obey management', with their cooperation serving as a prerequisite for achieving the state's correctional goals.[125] Victims' 'forgiveness' functions as one of the legitimate bases for the state's lenient treatment of offenders.[126] Guardians bear legal obligations to 'strengthen discipline', 'cooperate with supervision and inspection', and 'perform guardianship responsibilities', effectively acting as extensions of the state's correctional authority.[127] Meanwhile, social organisations and social workers, though 'encouraged and supported' to participate, must operate under the leadership and within the framework of specialised state institutions such as judicial or community correction bodies.[128] Their professional services — ranging from 'psychological intervention, legal aid, social investigation, social supervision, to educational correction' — serve primarily as tools assisting the state in fulfilling its correctional objectives.[129]

E *Conclusion: Restorative Justice as State-Led Correctional Governance*

China's legal texts construct a distinctive discourse on juvenile justice. It has absorbed some core values of RJ at the conceptual level, such as diversion from formal punishment, educational correction, return to society, and relationship repair.[130] Yet, once translated into legal and institutional arrangements, these values are reconfigured through state dominance, procedural rigidity, and discursive instrumentalisation.

First, the system operates within a state-led institutional framework. Concepts such as 'repair', 'reconciliation', and 'responsibility' are strictly defined and procedurally constrained. Rather than functioning as autonomous or dialogical practices, they are embedded within the national punishment and community correction systems,

---

[124] See Zachary R Rowan et al, 'Labeling Effects of Initial Juvenile Justice System Processing Decision on Youth Interpersonal Ties' (2023) 61(4) *Criminology* 731. See also Jo Deakin, Claire Fox and Raquel Matos, 'Labelled as "Risky" in an Era of Control: How Young People Experience and Respond to the Stigma of Criminalized Identities' (2022) 19(4) *European Journal of Criminology* 653.
[125] *Community Corrections Law* (n 82) arts 23, 28, 36. See also *Criminal Procedure Law* (n 82) art 282.
[126] *Criminal Procedure Law* (n 82) arts 288, 290.
[127] Ibid art 283; *Community Corrections Law* (n 82) art 53.
[128] *Protection Law of Minors* (n 82) art 116; *Community Corrections Law* (n 82) arts 11, 13, 40, 56.
[129] *Protection Law of Minors* (n 82) art 116.
[130] *Criminal Procedure Law* (n 82) arts 277, 282–284, 288–290; *Community Corrections Law* (n 82) arts 1, 3, 36, 42, 52; *Protection Law of Minors* (n 82) art 113; *Prevention Law of Juvenile Delinquency* (n 82) arts 1, 2, 4.

serving as institutional tools for achieving state governance objectives such as 'education first, punishment second', 'crime prevention', and 'social harmony'.[131]

Second, the procedural structure compresses individual narratives and marginalises emotional complexity. Highly standardised procedures, the restriction of victims' in-court presence, and limited engagement with the subjective experiences of juveniles collectively narrow the space for personal expression. The procedural emphasis rests on behavioural compliance, fact-finding, and policy fulfilment, rather than the dialogical exploration of emotions and accountability that RJ ideally promotes.

Third, the positioning of participants reflects a deeply instrumental logic. Juveniles are constructed primarily as objects to be 'educated and saved' by the state, while their rights and developmental needs are filtered through policy goals of risk prevention, reducing reoffending, and maintaining social stability.[132] The 'forgiveness' of victims becomes a procedural condition for the state's leniency, while guardians and social organisations are assigned auxiliary roles to cooperate with state authorities in fulfilling correctional tasks.

Stated attempts to achieve a 'safe' and 'effective' (in line with policy goals) 'repair' follow an institutionalised path that is strictly controlled and defined by the state. Although this path can provide procedural guarantees and policy consistency, it is itself the operation of a state-controlled governance model that produces structural inequality through the language of harmony and education.[133] What appears as 'restoration' is in fact the institutional form of governance through correction. As a result, in the youth RJ process, the voices of defendants and victims are suppressed, while the state-dominated voice exerts a controlling influence. This is a structural inequality of discourse that reflects how state power in China permeates and controls RJ for juveniles. The unique experiences, emotional needs, and subjectivity of individuals are significantly compressed in the face of the powerful logic of national governance and institutionalised procedures, and their value is instrumentally used to serve the preset national goals. This deeply reflects the specific form of the 'state-led' model in China's social governance in the field of juvenile justice. The state deploys soft, emotive vocabularies — such as 'forgiveness',

---

[131] *Criminal Procedure Law* (n 82) art 277; *Prevention Law of Juvenile Delinquency* (n 82) arts 1–2, 4; *Community Corrections Law* (n 82) art 1; *Harmonious Society Decision* (n 16).

[132] See Xue Yang, 'Community Corrections Programs in China: New Forms of Informal Punishments?' (2017) 19(1) *Asian-Pacific Law & Policy Journal* 49.

[133] Enshen Li and Mingyue Su, 'From Punishment to Control: Assessing Juvenile Diversion in China' (2020) 45(2) *Law & Social Inquiry* 372. See also Chengchen He, 'Selective Adaptation of the RNR Model in China's Juvenile Criminal Justice System: Balancing Rehabilitation and Risk Management' (2025) 25(2) *Youth Justice* 158.

'rehabilitation', and 'restoration' — to obscure processes that are, in practice, intimidating and often inflict long-term harm on young people.

IV COMPARATIVE ANALYSIS: DISCURSIVE PARALLELS AND DIVERGENCES

This part applies the macro-micro analytical lens: the macro level examines the governance logics, institutional rationalities, and moral vocabularies through which the state structures youth RJ; the micro level analyses the participation scripts, role allocations, and affective expectations encoded in legal, policy, and administrative materials. Together, these layers reveal how RJ operates not as a neutral problem-solving mechanism, but as a patterned configuration of power, discourse, and state authority. This part concludes by drawing these strands together into the 'mirror logic of control'.

A *Macro-Level Analysis: Governance, Power, and the State's Moral Vocabulary*

1 *Settler-Colonial and Party-State Logics of Governance*

On the macro level, youth RJ in Australia and China is not a break with state authority but a reconstituted form of its apparatus. In both instances, RJ has been discursively recognised as a humane alternative to punitive control, yet once institutionalised, it has produced the similarly organised hierarchical relationships that produce state authority. This convergence is analytically significant precisely because Australia and China draw on different legal traditions, cultural repertoires, and institutional arrangements.

Australia's youth RJ framework works within a settler-colonial system, built upon the law of the colonising power.[134] Colonialism is not merely historical but structural: Australian RJ operates within a settler legal order founded on Crown sovereignty and reproduced through federal and state institutions.[135] More precisely, this restorative framework is embedded in a colonial-settler-migrant formation whose legal and welfare architectures remain deeply hierarchical.[136] These hierarchies — structured through race, class, migration status, and indigeneity — shape the very conditions under which 'restoration' can be imagined.[137] RJ cannot, in such a setting,

---

134 Tauri, 'Plastic Shamans' (n 5).
135 Ibid; Alfred (n 74). See also Patrick Wolfe, 'Science, Colonialism and Anthropology: The Logic of a Global Transformation' in *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (Cassell, 1999) 43, 52. See *Mabo v Queensland [No 2]* (1992) 175 CLR 1.
136 See generally Ghassan Hage, White Nation: Fantasies of White Supremacy in a Multicultural Society (Pluto Press, 2000).
137 Ibid.

displace the dispossession but instead softens it through a therapeutic narrative of reconciliation.[138]

In contrast, China presents a party-state legal order officially framed through socialist rule-of-law discourse, in which legality is closely tied to political mandates of stability, harmony, and corrective governance.[139] Here, restorative elements are situated within the governance discourse of 'harmonious society', through which conflict resolution is recast as a moral performance of collective unity.[140] Both forms, despite their divergent genealogies — settler-colonial liberal legality in Australia and party-state legality in China — are based on the use of RJ as a moral governance that reasserts normative authority: a manner through which normative authority is reaffirmed under the moralised vocabulary of care, harmony, and repair.[141]

Thus, in the name of 'protection' in Australia or 'harmony' in China, RJ operates as a moralised technology of governance through which the state turns coercion into a performance of care. The settler-colonial state disciplines through the symbolic inclusion of Indigenous communities and the protective vocabulary of youth welfare; the Chinese party-state disciplines by blurring the boundary between moral cultivation and political order under the vocabulary of harmony. These discourses, in the case of Australia and China, legitimise intervention while at the same time covering over asymmetrical relations that derive from them.[142] This common logic — governance disguised through the language of restoration — forms the first axis of convergence between the two jurisdictions.[143]

---

[138] Kathleen Daly, 'Restorative Justice: The Real Story' (2002) 4(1) *Punishment & Society* 55, 64; Little, Stewart and Ryan (n 6).

[139] Ding Xiaodong, 'Law According to the Chinese Communist Party: Constitutionalism and Socialist Rule of Law' (2017) 43(3) *Modern China* 322, 330–1. See also Xudong Zhang, 'Introduction: The Cultural Politics of Postsocialism' in *Postsocialism and Cultural Politics: China in the Last Decade of the Twentieth Century* (Duke University Press, 2008) 1, 4, 8, 12.

[140] Flora Sapio et al, 'The Expression of Justice in China' in *Justice: The China Experience* (Cambridge University Press, 2017) 3, 8–9, 10–12, 22; Yuan (n 18); Zhang and Xia (n 16).

[141] Tauri, 'Plastic Shamans' (n 5); 杨松源 [Yang Songyuan], 《德法合治的法律传统与当代启示》 [The Legal Tradition of the Combination of Morality and Law and Its Contemporary Enlightenment] (2024) 2(7) 社会与经济 *Society and Economy* 59. See also Yuan-Kang Wang, *Harmony and War: Confucian Culture and Chinese Power Politics* (Columbia University Press, 2011).

[142] See Pierre Bourdieu, 'Structures, Habitus, Power: Basis for a Theory of Symbolic Power' in *Outline of a Theory of Practice*, tr Richard Nice (Cambridge University Press, 1977) 159, 164–5, 168–9, 188. See also Nikolas Rose, *Powers of Freedom: Reframing Political Thought* (Cambridge University Press, 1999).

[143] See John Pratt, 'Penal Populism and Crime Control' in *Penal Populism* (Taylor and Francis, 2007) 94.

2 *Moral-Ethical Vocabularies and the Aestheticisation of Control*

The vocabulary of RJ is the vocabulary of emotion, such as 'healing', 'forgiveness', 'reintegration', and 'community'. But, as the comparisons across the two nations indicate, these are not neutral signifiers, but moral technologies that aestheticise power. In Australia, the language of 'healing' and 'community' is shaped by a settler-colonial politics of reconciliation: it allows the state to appear reparative without relinquishing sovereignty.[144] RJ functions here in part as an emotional proxy for political reform: it generates the sensation of progress, rather than its substance.[145] The state's emotional investment in reconciliation subsumes the structural questions of land, reparation, and sovereignty under the individualised drama of apology and forgiveness.[146] The 'softness' of this vocabulary performs a legitimating and affective function, managing public emotion and rendering the colonial order institutionally acceptable through the language of empathy.[147]

In China, a parallel moral discourse is mobilised through the vocabulary of harmony, which folds education and correction into a moralised vision of political order. The state's paternal role as educator and moral guardian frames RJ as part of a broader project of social tutelage. The youth is constructed as a moral pupil to be educated and corrected, while coercive intervention is recoded as a gift of the state.[148] 'Harmony' functions as a moral vocabulary comparable to 'protection': both translate coercive intervention into moral pedagogy.

In both instances, moral language operates not through direct coercion but through persuasion, emotion, and moral suasion. The outcome is convergence of governance forms: they both use restorative discourse to assert legitimacy. This shared logic shows the elasticity of RJ as a transnational technology of moral governance — embedded in any ideological order because its language of 'care' is politically non-threatening.

---

144 Aileen Moreton-Robinson, 'Writing off Sovereignty: The Discourse of Security and Patriarchal White Sovereignty' in *The White Possessive: Property, Power, and Indigenous Sovereignty* (University of Minnesota Press, 2015) 137, 150–1; Tauri, 'Plastic Shamans' (n 5). See also *Royal Commission into Aboriginal Deaths in Custody: National Report* (Report, 15 April 1991) ('*Aboriginal Deaths Report*').
145 Sara Ahmed, 'Commitment as a Non-performative' in *On Being Included: Racism and Diversity in Institutional Life* (Duke University Press, 2012) 113, 115–17, 124–7.
146 Lorenzo Veracini, 'Sovereignty' in *Settler Colonialism: A Theoretical Overview* (Palgrave Macmillan, 2010) 53, 64–5.
147 See generally Sara Ahmed, 'In the Name of Love' in *The Cultural Politics of Emotion* (Edinburgh University Press, 2nd ed, 2014) 122, 122–3. See also Elspeth Probyn, 'Shame, Bodies, Places' in *Blush: Faces of Shame* (University of Minnesota Press, 2005) 37, 46.
148 *Community Corrections Law* (n 82) arts 1, 3, 36, 42, 52; *Core Socialist Values* (n 16); *Harmonious Society Decision* (n 16).

3 *Institutionalisation, Bureaucratic Management, and Emotional Governance*

Rather than merely formalising RJ, institutionalisation absorbs restorative practices into bureaucratic structures, turning the language of repair into an administratively managed process of compliance. In both instances, RJ has been integrated into the state's machinery and utilises moral language to achieve measurable results and establish procedural boundaries. This is evident in Australia by laws such as the *Young Offenders Act 1997* (NSW), in which the concept of 'restoration' is legalised in a tiered process of warnings, cautions, and conferences, each with defined time limits and requirements for documentation.[149] Voluntariness — supposedly a cornerstone of RJ — becomes a procedural tick-box. 'Reconciliation' is a code word for bureaucratic closure. The administrative efficiency of RJ, rather than its relational authenticity, becomes its justification.[150]

In China, youth RJ has been inscribed into the judicial and prosecutorial system and is governed by the rules of the Supreme People's Court and Procuratorate.[151] Mediation outcomes are reported as performance indicators in the national stability apparatus.[152] The bureaucratisation of moral discourse turns 'dialogue' into a state-managed ritual where success is measured by compliance and speed of resolution, rather than empowerment or transformation. Emotional governance — training participants to be calm, repentant, and grateful — narrows the participatory promise of RJ into a state-managed process of affective regulation.

---

[149] *Young Offenders Act 1997* (n 25) ss 10, 19(b)–(c), 36(b)–(c), 40(1)(b)–(c), 43, 48–49, 52, 56–58, 64.

[150] See Thom Brooks, 'Punitive Restoration and Restorative Justice' (2017) 36(2) *Criminal Justice Ethics* 122, 125.

[151] *Criminal Procedure Law* (n 82) arts 288–90; 《人民检察院刑事诉讼规则》 [Rules of Criminal Procedure for the People's Procuratorates] (People's Republic of China) Supreme People's Procuratorate, 30 December 2019, arts 492–501 ('*Procuratorates Criminal Procedure Rules*'); 《最高人民法院关于适用"中华人民共和国刑事诉讼法"的解释》 [Interpretation by the Supreme People's Court on the Application of the Criminal Procedure Law of the People's Republic of China] (People's Republic of China) Supreme People's Court, Fa Shi [2021] No 1, 26 January 2021, arts 587–96 ('*Supreme Court Interpretation on Criminal Procedure Law*').

[152] For example, the *Opinions on Maximising the Basic Role of People's Mediation in Promoting Litigation Source Governance* explicitly requires that 'people's mediation work shall have an increased weight in the Ping'an Construction assessment', thereby incorporating mediation outcomes into the performance assessment framework of China's stability governance system. It further mandates that mediation results be 'reported back to the People's Courts' and links mediation performance to funding and rank evaluation for mediators. These provisions demonstrate that mediation outputs are systematically quantified, reported, and used as performance indicators within the national stability apparatus: 《关于充分发挥人民调解基础性作用 推进诉源治理的意见》 [Opinions on Maximising the Basic Role of People's Mediation in Promoting Litigation Source Governance] (People's Republic of China) Supreme People's Court and the Ministry of Justice, Si Fa [2023] No 1, 27 September 2023.

RJ thus functions, across different legal-political systems, as a technology of affective governance that translates care into control. Feelings are being laundered; empathy is being mechanised and subject to official guidance. It is no longer a conversation but a display of legitimacy. This, then, is the paradox of the macro: under the language of decentralisation, the state mobilises RJ to extend administrative control; under the language of care and emotion, it transforms feelings into an object of institutional management.

B *Micro-Level Analysis: Prescribed Scripts and Discursive Roles*

1 *Scripts, Facilitation, and the Regulation of Speech*

At the micro level, in both jurisdictions, RJ is organised communication around pre-scripted dialogue. Australian youth justice conference facilitators are trained to follow a sequence of scripted speech.[153] RJ processes also have different phases, for example, the NSW Restorative Justice Conference has four phases: meeting, preparation, communication, and planning.[154] This may be participatory, but it is so at the expense of enforcing a discursive order such that some voices are privileged over others — the facilitator's and the institution's at the expense of the young person's — and that young person's speech is confined to a confessional mode; the victim's voice channels forgiveness. The exchange as a whole takes place within a state-managed dialogic space, where participants are expected to perform remorse, calmness, and acceptance, while departures from this emotional script are subtly corrected or marginalised.

In China, youth RJ is more explicitly structured by procedural requirements, institutional review, and state-defined correctional goals. Mediation procedures are conducted by state officials who serve as the moral arbiters, leading both parties to a mutually acceptable solution befitting 'social harmony'.[155] Dialogue becomes increasingly monologic: rather than enabling open-ended exchange, the process channels participants toward state-defined expressions of repentance, forgiveness, and correction. Voluntariness is a formality; agreement is reached when the participants assume the appropriate emotional demeanour of repentance and understanding.[156] Here, the institutional design of facilitation frames dialogue less

153 See *Youth Justice Conferencing Manual* (n 19). See also Youth Justice NSW, Convenor Management Manual: Policy and Procedure (Manual, 2024) 5, 22, 26, 28.

154 See the part titled 'How does a Restorative Justice process work?' on the NSW Restorative Justice Web Page (n 19).

155 *Procuratorates Criminal Procedure Rules* (n 151) arts 492, 495–498.

156 See *Supreme Court Interpretation on Criminal Procedure Law* (n 151) arts 590–592; *Criminal Procedure Law* (n 82) arts 289–290.

as open-ended participation than as a ritualised performance of responsibility and compliance.

Who speaks, how, and with what legitimacy is pre-determined by institutional design. Speech is not a space for agency but an instrument for moral alignment. The apparent dialogue of RJ is, in practice, a managed performance of consent. At the micro level, the regulation of emotion within restorative encounters reflects broader state-defined vocabularies: harmony and correction in China, and protection and rehabilitation in Australia. In both contexts, control is embedded not only in legal outcomes but in the communicative structure of the process itself.

2 *Empathy, Emotion, and Affective Management*

Emotion becomes a central medium through which state power is translated into micro-level forms of participation, repentance, and repair, making control appear as care, responsibility, and reconciliation. The moral authority of the state is not asserted through coercion but through affective conditioning. The legal and policy framework positions remorse, empathy, and forgiveness as desirable indicators of successful participation, thereby narrowing the range of legitimate emotional expression. In Australia, youth justice conferencing is framed through an affective sequence of responsibility, harm recognition, dialogue, and repair, with procedural closure achieved through an agreed outcome plan.[157] This does not prove how every conference unfolds in practice, but it shows how the official framework makes certain emotional performances more institutionally legible than others. The young person is positioned as a responsible and remorseful subject, while the victim's participation is channelled toward repair, closure, and procedural resolution. These emotions are not only expressions of spontaneous feeling, but they are staged performances that affirm the legitimacy of the state's narrative of redemption. Thus, the process turns individual feeling into a bureaucratic artefact: a signed agreement, a recorded apology, a closure report.

In China, the emotional register is differently inflected. The rhetoric of 'education' represents emotion as a marker of moral progress: the remorseful tears that the young person sheds or the victim's nod of forgiveness are signs that state morality has been internalised.[158] Unlike the Australian model, the Chinese framework filters emotion through institutional review, conditional leniency, and correctional

[157] *Youth Justice Conferencing Manual* (n 19); *Young Offenders Act 1997* (n 25) s 3(c), 52, 56-8; 'Youth Justice Conferences', *NSW Government* (Web Page) <www.nsw.gov.au>.
[158] See Shanhe Jiang et al, 'Community Corrections in China: Development and Challenges' (2014) 94(1) *Prison Journal* 75, 81–2, 90.

supervision.[159] Remorse and forgiveness become less expressions of relational repair than indicators that the young person has accepted the state-defined path of correction. The affective trajectory is therefore organised around a linear and didactic movement from error to repentance and then to harmony, so that emotion becomes both the means through which correction is communicated and the evidence that the young person has accepted the state-defined path of reform. Participants are not simply invited to express their feelings but are guided toward institutionally recognisable forms of remorse, gratitude, and acceptance.

When we consider how emotional expression varies in different contexts, both systems provide evidence of moral rehabilitation. And in both cases, the performative act of affect replaces structural change. Empathy becomes a form of control, not freedom. The restorative encounter shows us how modern states do not merely govern bodies but feelings: emotional sincerity is transubstantiated into administrative capital.[160]

3 *Agency, Compliance, and the Aesthetic of Participation*

One of the most striking similarities is how both systems aestheticise participation. Although RJ is theoretically grounded in voluntary participation and mutual respect, its institutional design often transforms participation into a condition of compliance.[161] In Australia, the process of gaining access to conferencing requires an admission and can only begin once the young person has accepted culpability.[162] The young person's 'choice' to be a participant is therefore conditioned upon the threat of being arrested and charged by police. The appearance of agency in adopting RJ veils the underlying reasons for compliance with the punitive system. The same is true for victims, whose participation may be framed as civic virtue but whose consent can be instrumentalised to legitimise leniency or administrative closure.

---

159 *Criminal Procedure Law* (n 82) arts 282–4, 288–90; *Community Corrections Law Implementation Measures* (n 123) arts 9, 23–4, 32. See also 对涉罪未成年人适用附条件不起诉 — 找准办案、帮教与转化的平衡点' [Applying Conditional Non-Prosecution to Minors Suspected of Crimes: Identifying the Balance between Case Handling, Assistance and Transformation], 中华人民共和国最高人民检察院 [(People's Republic of China) Supreme People's Procuratorate] (Web Page, 26 June 2021) <www.spp.gov.cn>.

160 See Christian Sorace, 'The Chinese Communist Party's Nervous System: Affective Governance from Mao to Xi' (2021) 248 *China Quarterly* 29. See also Yijing Tong, Chih-Wei Hsieh and Jincheng Fan, 'Emotional Governance at the Street Level: A Content Analysis of Service Slogans in China' (2024) 4(2) *Global Public Policy and Governance* 134; Michael Howcroft, Nicky Marsh and Joseph Owen, 'Levelling Up, Affective Governance and Tensions within "Pride in Place"' (2025) 43(2) *Environment and Planning C: Politics and Space* 387.

161 Marian Liebmann, 'Issues in Restorative Justice' in *Restorative Justice: How It Works* (Jessica Kingsley Publishers, 2007) 319, 323–6.

162 *Young Offenders Act 1997* (n 25) ss 10, 19(b)–(c), 25(1), 36(b)–(c), 40(1)(b)–(c), 44(1), 64(1)(b).

In China, the illusion of agency is produced through the state's presentation of reconciliation and mediation as cooperative, consensus-based processes. The mediation is presented as a cooperative act of moral restoration, but in fact, it takes place in an exclusive order in which the moral authority is the state.[163] The repentance of the youth and the forgiveness of the victim are two roles that are preordained. Disobeying the morality play — not forgiving, reacting emotionally, doubting the fairness — makes the involved parties 'unharmonious'.[164] In this way, 'agency' is not exercised but performed as compliance, tolerated only insofar as it reinforces the state's moral order rather than contests it.

In both cases, RJ's purported participatory nature can obscure the coercive force of state authority, making structured compliance appear as voluntary dialogue and repair. The legally structured conference or mediation process becomes an institutional form through which dialogue is rendered legible as compliance. The conference table or mediation room, therefore, becomes an aesthetic space of consensus in which the appearance of dialogue substitutes for real justice. And where this process offers nothing from the inside out but performative inclusion: participation is not empowering but enacted so that participants are seen, heard, and managed. The aesthetic of engagement — soft, empathetic, orderly — is the micro-logical expression of a macro-logic of control.

C *Synthesis: The Mirror Logic of Control*

Macro and micro mirror with a strong symmetry.[165] Despite profound differences in legal tradition, political structure, and cultural context, Australia and China both convert RJ's restorative vocabulary into state-centred governance. Australia does so through protection and care shaped by settler-colonial and welfare-administrative logics; China through harmony, education, and correction articulated within state-centred legal and policy discourse. In both contexts, restoration becomes a language through which state power is organised and legitimated.

At the macro level, the moral vocabularies of 'protection' and 'harmony' operate as affective technologies of governance, recasting coercion as care and control as compassion.[166] At the micro level, these vocabularies are translated within legal and

[163] *Procuratorates Criminal Procedure Rules* (n 151) arts 496–8. *Supreme Court Interpretation on Criminal Procedure Law* (n 151) arts 592–6.
[164] See *Core Socialist Values* (n 16); *Harmonious Society Decision* (n 16); *Criminal Procedure Law* (n 82) arts 288–90; *Procuratorates Criminal Procedure Rules* (n 151) arts 492, 497–8.
[165] It is important to note that the 'mirror image' relationship identified here does not arise organically from the two systems; rather, it emerges as a methodological outcome of holding the jurisdictions against one another through the comparative micro–macro framework.
[166] See generally Joseph S Nye, *Soft Power: The Means to Success in World Politics* (PublicAffairs, 2004).

policy materials into procedural scripts, role allocations, and affective expectations, producing an official image of participation as orderly, dialogic, and consensual. Australia and China both construct authority through managed, pedagogical, and affective forms of communication. The RJ encounter thus becomes a site where power speaks softly but firmly — through feelings of empathy, pedagogy, and actions.

The structural similarity lies not in the moral content of these vocabularies but in their governmental function: affect is mobilised as a means of rule, while moral discourse provides the vehicle through which coercion is translated into care, responsibility, and repair.[167] In both, the state appropriates restorative language as an act of reconstitution with which to reauthorise itself during moral crises.[168] While the colonial state governs through the language of reconciliation and the authoritarian state through the pursuit of stability, both rely on kinds of semiotic registers of affective governance: empathy in one, harmony in the other. But these registers all converge toward the same effects: the pacifying of dissent, the reproduction of obedience.

This mirror logic reveals the limits of imagining RJ as an emancipatory practice once it is absorbed into state legal and bureaucratic frameworks. In such contexts, RJ may become one of the most sophisticated contemporary technologies of state power: an affective mode of governance that fuses moral vocabulary with bureaucratic reason. Its emancipatory promise is neither wholly false nor fully realised: RJ can produce moments of voice, recognition, and emotional encounter, but under state-led institutionalisation, those moments exist within structures designed to capture them and convert them into administratively legible forms of responsibility, remorse, and repair.

This comparative scrutiny argues that youth RJ in Australia and China works as a dual discourse: it speaks the voice of care whilst enacting the role of control. The state's emotional lexicon recasts RJ as a moral drama, legitimating a broader regime

---

[167] See generally Alan Hunt, *Governing Morals: A Social History of Moral Regulation* (Cambridge University Press, 1999).

[168] RJ probably emerged from a period of moral crisis in Australia. By the 1990s, the carceral consequences of minor public order offences carrying custodial penalties under the *Summary Offences Act 1988* (NSW) were becoming increasingly visible, against the background of a marked rise in Australian prison populations: see *Summary Offences Act 1988* (NSW) s 4, as substituted by *Summary Offences (Amendment) Act 1993* (NSW) s 3; Carlos Carcach and Anna Grant, 'Imprisonment in Australia: Trends in Prison Populations and Imprisonment Rates 1982–1998' (Trends & Issues in Crime and Criminal Justice No 130, Australian Institute of Criminology, October 1999). At the same time, the *Aboriginal Deaths Report* made visible the fact that Aboriginal deaths in custody are driven by police deliberately targeting and criminalising Aboriginal people — from a very young age: see *Aboriginal Deaths Report* (n 144).

of affective governance through the language of care, responsibility, and repair. The recurrence of these patterns across divergent political orders reveals the adaptability of state power in RJ: restoration becomes a language through which authority is moralised, affectively managed, and institutionally produced.

In this respect, RJ's transformative promise is reworked through state power: empathy becomes a resource of compliance, dialogue becomes a managed procedure, and healing becomes a moral language through which authority is reaffirmed. The moral lexicon differs, the institutional apparatus changes, but the power structure remains. This is the logic of state-led RJ: an efficient and sometimes ruthless mode of governance concealed beneath the gentle face of care, dialogue, and repair. Once a process of institutionalisation emerges, RJ faces a risk: that it will be reduced to a mechanism for coordinating participation, documenting compliance, and generating institutionally recognisable outcomes.[169] RJ becomes a component of the state's administrative machinery, transforming moral rhetoric into measurable outcomes and procedural benchmarks.

V Conclusion: Toward a More Transformative Restorative Justice

If RJ is to recover its transformative potential, the task is to prevent its relational promise from being captured by compliance-based diversion, bureaucratic closure, and state-defined measures of success. This does not require the state to disappear altogether; rather, it requires a redistribution of authority. The state may remain responsible for funding, rights protection, and victim safety, but it should not monopolise the definitions of harm, responsibility, repair, and success.

Comparative examples such as Hollow Water's Community Holistic Circle Healing in Canada and Indigenous community-based justice programmes supported under Canada's Aboriginal Justice Strategy suggest that restorative practices become more transformative when communities exercise authority over accountability, healing, and reintegration, rather than merely providing cultural legitimacy to state processes.[170] Te Pae Oranga in Aotearoa New Zealand similarly illustrates a hybrid model in which iwi and other Māori partners and community panels address offending through tikanga, kaupapa Māori, and restorative practices, while still

---

[169] See William R Wood and Masahiro Suzuki, 'Getting to Accountability in Restorative Justice' (2024) 19(7) *Victims & Offenders* 1400, 1403–6.

[170] 'About', *Community Holistic Circle Healing* (Web Page) <www.communityholisticcirclehealing.ca>; 'Compendium of Promising Practices to Reduce Violence and Increase Safety of Aboriginal Women in Canada – Compendium Annex: Detailed Practice Descriptions', *Department of Justice Canada* (Web Page, 2 December 2021) <https://justice.gc.ca>; Department of Justice Canada, *Evaluation of the Aboriginal Justice Strategy* (Report, December 2016).

revealing the limits of state referral and compliance-based completion.[171] These examples do not provide a simple template for Australia or China, but they show that the crucial issue is not whether RJ occurs inside or outside the state, but who has authority to define harm, safety, repair, and success.[172]

In Australia, the question is whether youth RJ can move beyond police-led diversion, administrative outcome plans, and symbolic Indigenous inclusion toward practices that redistribute authority to Aboriginal and Torres Strait Islander communities, victims, young people, and families. In NSW, this is visible in the procedural management of conferencing through admission, referral, and outcome-plan compliance; in the NT, the same logic appears in a more concentrated frontier form, as the incorporation of 'community' and 'culture' into a settler-colonial penal-welfare framework. A more transformative model would therefore require not merely culturally sensitive participation but a deeper shift in authority: from state-managed inclusion to community-defined processes of accountability, safety, healing, and reintegration.

In China, the equivalent question is whether youth RJ can move beyond state-led correctional governance toward more autonomous forms of social support. Juvenile prosecutorial social support systems, judicial social work, social investigation, appropriate-adult services, victim protection, and conditional non-prosecution assistance show that repair need not be confined to punishment, compensation or repentance.[173] Their transformative potential, however, depends on whether social workers, families, victims, and young people can shape support and reintegration themselves, rather than merely fulfil state-defined goals of education, correction, and rescue.

---

171 'Te Pae Oranga Iwi Community Panels', *New Zealand Police* (Web Page) <www.police.govt.nz>.

172 William R Wood and Juan Tauri, 'Restorative Justice on Stolen Ground: Dispossession, Entrenchment, and Eurocentric Justice in Australia and New Zealand' (2026) 36(3) *International Criminal Justice Review* 315.

173 '未成年人检察社会支持体系示范建设典型案例 [Typical Cases of Demonstration Construction of the Social Support System for Procuratorial Work Involving Minors]', 中华人民共和国最高人民检察院 [(People's Republic of China) Supreme People's Procuratorate] (Web Page, 14 April 2023) <www.spp.gov.cn>； '最高检发布第二十七批指导性案例规范办理涉罪未成年人附条件不起诉案件 [The Supreme People's Procuratorate Releases the 27th Batch of Guiding Cases to Standardise the Handling of Conditional Non-Prosecution Cases Involving Minors Suspected of Crimes]', 中华人民共和国最高人民检察院 [(People's Republic of China) Supreme People's Procuratorate] (Web Page, 3 March 2021) <www.spp.gov.cn>.

The advantage of redistributing authority is that families and communities would no longer function merely as auxiliary supervisors or cultural witnesses but as participants with authority to identify trauma, material need, relational harm, and appropriate forms of support. At the same time, the risk in both jurisdictions is that the state may outsource the labour of restoration while retaining control over funding, eligibility, evaluation, and success.[174] Transformative RJ must therefore be community-governed or socially supported but not safeguard-free: young people require independent legal advice; victims require independent support and options for indirect or representative participation; serious power imbalances must be screened; and refusal to participate should not trigger punitive escalation. A more transformative RJ therefore depends not on the state's capacity to administer remorse, closure, or compliance but on its willingness to redistribute authority over harm, safety, repair and success to those most affected by them.

[174] See generally Jude Howell, Regina Enjuto Martinez and Yuanyuan Qu, 'Technologies of Authoritarian Statecraft in Welfare Provision: Contracting Services to Social Organizations' (2021) 52(6) *Development and Change* 1418.

ISSN 0042-0328
uwa.au/law-review