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PROVOCATION: A TOTALLY FLAWED DEFENCE THAT HAS NO PLACE IN AUSTRALIAN CRIMINAL LAW IRRESPECTIVE OF SENTENCING REGIME

ANDREW HEMMING*

ABSTRACT

Why another article on provocation when this partial defence to murder is already the subject of widespread criticism in the literature? The answer is because the defence is still available in five Australian jurisdictions. Furthermore, there is no consistency across the jurisdictions that have reviewed the defence. Recently, Western Australia elected to abolish the defence, but Queensland has decided to retain it. Internationally, New Zealand has removed the defence from its statute book, but the United Kingdom, Canada and the United States continue to allow the defence. This article identifies the heart of the problem as being mandatory life sentencing for murder, and seeks to argue that the partial defence of provocation is so flawed and gender biased that it is the sentencing regime that needs to be adjusted, especially as 'life' rarely actually means 'for the term of his natural life'. Nevertheless, given vested interests and the difficulty of introducing legal reform, the fallback position taken in this article is that if the defence of provocation is to be retained then it is necessary to make the defence much more difficult to run by reversing the onus of proof and by narrowing the scope of the defence. It is contended that the Western Australian Government took the correct path by abolishing the partial defence of provocation and amending the mandatory life penalty for murder. The complementary contention is that the Queensland Government in retaining an amended partial defence of provocation and the mandatory life penalty for murder has opted for a second best solution.

I. INTRODUCTION

*The Moving Finger writes; and, having writ,
Moves on: nor all thy Piety nor Wit*

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*Shall lure it back to cancel half a Line,
Nor all thy Tears wash out a Word of it.*¹

This article critically examines the partial defence to murder of provocation, which if not negated beyond reasonable doubt by the prosecution, reduces murder to manslaughter. Provocation can be traced back to the 17th century, when the criminal law distinguished between a killing where there was proof of malice aforethought, and an unpremeditated killing on the spur of the moment following a provocative act.² The distinction was significant at a time when capital punishment was the penalty for murder and could only be avoided if the defendant lacked malice aforethought.³ ‘Manslaughter was only available where the killing had occurred “suddenly” and in “hot blood” in response to an act of provocation by the deceased.’⁴

Three Australian jurisdictions (Tasmania, Victoria and Western Australia), and New Zealand, have in recent times abolished the partial defence of provocation. This article contends that provocation is a totally flawed defence that has no place at all in any Australian jurisdiction irrespective of the particular sentencing regime. Over the years, numerous Law Reform Commissions have closely studied the partial defence of provocation and have universally concluded that where the sentence for murder is mandatory life imprisonment, the defence should be retained.⁵ Such an approach can be likened to the days when capital punishment existed and juries were reluctant to convict for murder lest the defendant be executed. This argument, that

¹ Rubaiyat of Omar Khayyam, Rendered into English Verse by Edward Fitzgerald, Collins, 1971, 78.

² See Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2010) 293.

³ *Ibid*, 295, citing *Royley’s case* (1612) Cro Jac 296; *Nugget* (1666) 18 Car 2; *R v Mawgridge* (1707) 84 ER 1107.

⁴ *Ibid*, 294.

⁵ See, for example, Queensland Law Reform Commission, ‘*A Review of the Excuse of Accident and the Defence of Provocation*’, Report No 64 (2008) 10. The Commission was advised as part of its terms of reference that the Queensland Government did not intend to change the mandatory life sentence for murder (see page 3). As a result, the Commission recommended (see page 10 and 21.1) provocation be retained. ‘Given the *constraint* of the Government’s stated intention to make no change to the existing penalty of mandatory life imprisonment for murder, the Commission recommends that the partial defence of provocation to murder contained in s 304 *Criminal Code* (Qld) remain, but recommends changes to it.’ (Emphasis added.) Other examples of Law Reform Commissions treating the presence or absence of mandatory life imprisonment for murder as the touchstone of the retention of the partial defence of provocation include The Law Commission of England and Wales, *Partial Defences to Murder*, Law Com No 290 (2004); Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004); and the Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Final Report, Project No 97 (2007).

a mandatory life sentence for murder justifies the retention of the partial defence of provocation, is met head on and found wanting because the defence has no merit. The two part test most commonly adopted is both confusing and irrelevant to sheeting home criminal responsibility for an intentional killing. This article is therefore at odds with proponents of the partial defence of provocation who argue that provoked killers should be allowed to carry the lesser stigma of manslaughter because it labels such killers accurately, and to whom society is sympathetic because the killing was not premeditated.⁶

The vehicle used in this article for the analysis of the partial defence of provocation is the *Criminal Code* 1983 (NT). The Northern Territory has been selected for two main reasons. Firstly, because the Northern Territory has, along with South Australia, the toughest sentencing regime in Australia for murder with a mandatory minimum twenty year sentence before a person is even eligible for parole. Secondly, whilst the Northern Territory is in the process of applying Chapter 2 of the *Criminal Code* 1995 (Cth) in stages to all offences (which contains no defence of provocation), the Northern Territory Government specifically retained the partial defence of provocation in 2006 for the stated reason of its mandatory life sentence for murder. It is contended that this is a classic case of the sentencing tail wagging the criminal responsibility dog.

Any analysis of the partial defence of provocation also needs to take place in the context of other available defences such as the partial defence to murder of diminished responsibility, and whether, if provocation is abolished, excessive self defence should be available, particularly to women who kill abusive husbands, as was the case in

⁶ See, for example, the New South Wales Law Reform Commission, *'Partial Defences to Murder: Provocation and Infanticide'*, Report 83 (1997) 2.23. 'In the Commission's view, there are circumstances in which a person's power to reason and control his or her actions accordingly is impaired by a loss of self-control to such an extent as markedly to reduce that person's culpability for killing. Through the defence of provocation, the law offers a degree of compassion to those whose will to act rationally is overcome by a loss of self-control in circumstances where the community generally can understand or sympathise with their reaction. While there may be other extenuating circumstances in which a person kills and which ought to be recognised as mitigating that person's punishment, it is appropriate that loss of self-control be expressly recognised by way of a defence of provocation because it is a condition which significantly impairs the accused's mental state and reduces his or her blameworthiness. Given that, in our criminal justice system, culpability for serious offences is assessed according to an accused's mental state in committing that offence, factors which significantly affect that mental state should be recognised as reducing the accused's responsibility for his or her actions.' (2.28 and original emphasis.)

Victoria when that State abolished provocation in 2005. The partial defence of diminished responsibility (which is available in four Australian jurisdictions, including the Northern Territory, although not in Victoria), like provocation, reduces murder to manslaughter, but unlike provocation, the onus of proof is placed on the defence on the balance of probabilities. There have been some recommendations that rather than abolish the partial defence of provocation completely, it should be amended such that the onus of proof is on the defence. One justification for the reversal of the onus of proof for provocation is that it would then be consistent with the onus of proof for diminished responsibility. Other suggestions have included excluding a provocation based on words alone or the deceased's choice about a relationship.

It is contended that these proposed amendments are unsatisfactory in isolation. It will be argued that provocation is an historical anachronism; an unacceptable legal concession to male weakness and frailty, that allows anger and loss of self-control to be a mitigating factor when the reverse should be the case, especially as no such mitigation is shown to 'compassionate killings'. Killing someone in response to a provocation, no matter how severe, is never the response of an ordinary person. Today, there is no place for the law to send a misguided message that draws a distinction between provoked and unprovoked killings, based on killing someone in the heat of passion as opposed to a premeditated killing.⁷ The partial defence of provocation is both open-ended as to the emotions allegedly driving the defendant, biased in favour of heterosexual men who are the main beneficiaries of the defence,⁸ and promotes a culture of blaming the victim who is not present in court to give her (or less frequently his) version of events.⁹

⁷ Ibid, 2.2. 'In the 16th century, "murder" was defined as killing with "malice aforethought", at that time interpreted as meaning killing with cold-blooded premeditation. Malice aforethought was implied by law unless it could be shown that the killer acted upon provocation, in sudden anger or "hot blood", in which case he or she would be convicted of manslaughter instead of murder. The distinction between murder and manslaughter was based on different underlying degrees of blameworthiness, reflected in differences in the punishment imposed.'

⁸ The Victorian Law Reform Commission examined a sample of 182 people charged with homicide offences. Of the 109 who chose to proceed to trial, at least 27 raised provocation as a defence of whom 24 were male and only 3 were female. See Victorian Law Reform Commission, 'Defences to Homicide: Options Paper' (2003) 51. This is unsurprising as in Australia in 2005-06, a total of 88% of homicide offenders were male. Megan Davies and Jenny Mouzos, *Homicide in Australia: 2005-06 National Homicide Monitoring Program (NHMP) Annual Report* (2007) Australian Institute of Criminology, 60. Given the different circumstances that men and women charged with murder raise the defence of provocation, with men killing out of jealousy or to maintain control and women killing out of fear, see also Jenny Morgan, 'Provocation

Given that the prosecution is rarely in a position to contest the defendant's version of events, as the only other witness has been killed by the defendant, this is a strong justification for reversing the onus of proof upon a defendant raising the partial defence of provocation.¹⁰ Where the defendant has to prove provocation on the balance of probabilities, the claim of provocation will likely need to be articulated more clearly, with the trial judge having a greater capacity to prevent weak claims going to the jury. This article supports the reversal of the onus of proof in the absence of the abolition of the defence.

In line with present community standards, this article calls for the complete abolition of the partial defence of provocation across Australia. As a second best solution, the price to abolish provocation in the Northern Territory may require a legislative package amending the *Sentencing Act 1995* (NT) to widen the 'exceptional circumstances' provision for murder, as well as the introduction of defensive homicide in domestic violence situations similar to legislation introduced in Victoria in 2005 and Queensland in 2010. Finally, the least preferred option is the retention of the partial defence of provocation, but with an objective test only, with a narrowing of the definition of provocation, and with the onus of proof placed on the defence on the balance of probabilities. As Bronitt and McSherry acknowledge 'it may be more realistic to work towards circumscribing the scope of the offence and providing a more workable objective component than to abandon it entirely'.¹¹

II. BACKGROUND

Law and Facts: Dead Women Tell No Tales, Tales are Told about Them' (1997) 21 *Melbourne University Law Review* 237.

⁹ Research conducted by Barry Mitchell and Sally Cunningham for the Law Reform Commission of England and Wales showed that provocation was the second most popular plea in the sample of murder cases examined (22.3%) after denial of intent (39.4%). See Law Reform Commission of England and Wales, *Murder, Manslaughter and Infanticide*, Law Com No 304 (2006), 5.5 and Appendix C. In a recent review in Queensland of 80 murder trials, provocation was raised in 25 of those trials out of which five defendants were convicted of manslaughter and three were acquitted. The outcome is complicated because in only two of the 25 cases was provocation the only defence left to the jury. See Queensland Department of Justice and Attorney-General, *Discussion Paper Audit on Defences to Homicide: Accident and Provocation* (2007) 39.

¹⁰ See above Queensland Law Reform Commission, n 5, 20.225 and footnote 1491.

¹¹ See above Bronitt and McSherry, n 2, 327.

*I had all the provocation in the world to kill ... I had no malice or spleen against him ... It was not designedly done, but in my passion, for which I am heartily sorry.*¹²

Although the leading case on provocation, *Stingel v The Queen* (1995) 183 CLR 58 (“*Stingel*”) concerned the now repealed provisions of the *Criminal Code* (Tas), ‘the High Court has observed that there is a large degree of conformity in the law of provocation, whether it be common law or statutory [and] the High Court subsequently affirmed that the test in *Stingel* equally applied to the common law’.¹³ In Queensland, where s 304 *Criminal Code* (Qld) is the relevant section, Kenny states that ‘in the absence of a statutory definition of provocation for murder, reliance is placed upon the principles pertaining to provocation as they develop at common law’.¹⁴

A man named Stingel, aged nineteen, killed a man named Taylor by stabbing him in the chest with a butcher’s knife. For some time Stingel had stalked his ex-girlfriend, who had obtained a court order restraining Stingel from approaching her or talking to her. The facts leading up to the killing of Taylor were disputed. On the version of events most favourable to Stingel, he had come upon Taylor and his ex-girlfriend engaging in sexual activity in a car, opened the car door, was verbally abused by Taylor, then went to his own car where he collected a butcher’s knife, and returned to stab Taylor. Stingel was convicted of murder. Stingel’s appeal to the High Court concerned the trial judge’s refusal to leave provocation with the jury, and the case afforded the High Court the opportunity to reassess the test for provocation.

The central issue in *Stingel* was the interpretation of the test in the now repealed s. 160(2) of the *Criminal Code* 1924 (Tas) that required the wrongful act or insult to be ‘of such a nature as to be sufficient to

¹² William Kidd (1645 – 1701), executed for piracy. One of the reasons for the development of the defence of provocation was to spare ‘hot blooded’ killers from the death penalty. See Graeme Coss, ‘“God is a righteous judge, strong and patient: and God is provoked every day”. A Brief History of Provocation in England’ (1991) 13 *Sydney Law Review* 570, 601.

¹³ See above, Bronitt and McSherry, n 2, 297, citing *Stingel v The Queen* (1990) 171 CLR 312, 320 and *Masciantonio v The Queen* (1995) 183 CLR 58, 66.

¹⁴ R. G. Kenny, *An Introduction to Criminal Law in Queensland and Western Australia* (2008) 250, citing inter alia *Johnson* [1964] Qd R 1, 4-6; *Callope* [1965] Qd R 456, 465; *Pangilinan* [2001] 1 Qd R 56, 64; *Vidler* (2000) 110 A Crim R 77, 84. South Australia relies on the common law (*The Queen v R* (1981) 28 SASR 321). The other jurisdictions that retain the partial defence of provocation adopt a version of the two part test in *Stingel v R* (1990) 171 CLR 312: *Crimes Act* 1900 (NSW) s 23; *Crimes Act* 1900 (ACT) s 13; *Criminal Code* 1983 (NT) s 158.

deprive an ordinary person of the power of self-control', which involved an objective threshold test. The High Court held that such an objective test could not be answered without an objective assessment of the gravity in the circumstances of the particular case of the wrongful act or insult:

[T]he fact that the particular accused lacks the power of self-control of an ordinary person by reason of some attribute or characteristic which must be taken into account in identifying the content or gravity of the particular wrongful act or insult will not affect the reference point of the objective test, namely, the power of self-control of a hypothetical 'ordinary person'.¹⁵

Six years before *Stingel* was decided, the *Criminal Code* 1983 (NT) came into law, on 1 January 1984. Section 34(2), which was operative until 20 December 2006 and which was based on s 304 *Criminal Code* (Qld),¹⁶ dealt with the partial defence to murder of provocation as follows:

- (2) *When a person who has unlawfully¹⁷ killed another under circumstances that, but for this subsection, would have constituted murder,¹⁸ did the act that caused death because of provocation¹⁹ and to the person who gave him that provocation,²⁰ he is excused from criminal responsibility for murder and is guilty of manslaughter only provided –*

¹⁵ *Stingel v R* (1990) 171 CLR 312, 332. The only qualification made by the High Court was to allow on grounds of fairness and common sense that 'at least in some circumstances, the age of the accused should be attributed to the ordinary person of the objective test' (329). While the High Court referred to an objective assessment of the gravity of the provocation, the assessment of the content and extent of the provocative conduct from the viewpoint of the defendant is generally understood to be the subjective element of the defence. See above, Bronitt and McSherry, n 2, 297.

¹⁶ *Criminal Code* 1899 (Qld) Section 304 Killing on Provocation states: 'When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation, and before there is time for the person's passion to cool, the person is guilty of manslaughter only.'

¹⁷ 'Unlawfully' is defined in s 1 as 'without authorisation, justification or excuse'.

¹⁸ Manslaughter committed under circumstances of provocation is a species of 'voluntary' manslaughter which arises where the defendant possesses both the external and fault elements of murder and thus would otherwise be guilty of murder.

¹⁹ 'Provocation' was defined under the now repealed definition in s 1 as: 'Any wrongful act [an act that is wrong by the ordinary standards of the community] or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person, to deprive him of the power of self-control.'

²⁰ The provocation must have come from the victim but the provocation need not be aimed at the defendant provided it is someone with whom the defendant has a close relationship. In *R v Terry* [1964] VR 248 the provocation was aimed at the defendant's sister.

- (a) *he had not incited the provocation;*
- (b) *he was deprived by the provocation of the power of self-control;*
- (c) *he acted on the sudden and before there was time for his passion to cool; and*
- (d) *an ordinary person similarly circumstanced would have acted in the same or a similar way.*

Section 34(2) above reflects the historical common law defence of provocation,²¹ and the then definition of provocation in s. 1 allowed the provocation to be either an act or an insult. This wide definition of provocation is retained in the new s. 158 of the *Criminal Code* (NT) and will be critically discussed in the following section where it will be contended that an insult or gesture should be excluded from the legal definition of provocation in order to narrow the scope of the partial defence should it be retained.

Section 34(2)(a) was designed to ensure that the accused cannot have incited or set up the situation where the victim acts in a provocative way. Thus, an accused could not rely on the predictable results of his or her own conduct unless the hostile reaction of the victim was extreme.²²

Section 34(2)(b) dealt with the subjective test of the defendant being deprived by the provocation of the power of self-control, which was and remains under s 158(2)(a) a difficult task for the prosecution to negative beyond reasonable doubt. Effectively, the prosecution, in order to knock out the partial defence of provocation at the deprivation of self-control stage, has to prove beyond reasonable doubt that the conduct was premeditated. Here, subjective refers to the actual mental state of the accused, whereas objective refers to the 'supposed mental state of a hypothetical reasonable person acting in the way in which the accused acted'.²³ The difficulties in explaining such a subjective test to

²¹ For a classic statement of the tests for provocation at common law, see King CJ in *The Queen v R* (1981) 28 SASR 321, 322. 'To amount in law to provocation the acts or words must satisfy the following tests: (1) they must be done or said by the deceased to or in the presence of the killer; (2) they must have caused in the killer a sudden and temporary loss of self-control rendering the killer so subject to passion as to make him for the moment not master of his mind; (3) they must be of such a character as might cause an ordinary person to lose his self-control to such an extent as to act as the killer has acted.'

²² *R v Allwood* (1975) 18 A Crim R 120. Ian Leader-Elliott has likened enraged men who engineer a confrontation, lose all self-control and then kill to being 'morally speaking, murderers'. Ian Leader-Elliott, 'Sex, Race and Provocation: In Defence of *Stingel*' (1996) 20 *Criminal Law Journal* 72, 85.

²³ Jonathan Clough and Carmel Mulhern, *Criminal Law* (2004) 17.

a jury are magnified where the full test for provocation comprises both a subjective and an objective component. The objective limb is to be found in s 34(2)(d) above as to whether an ordinary person similarly circumstanced would have acted in the same or a similar way. The Supreme Court of the Northern Territory developed its own jurisprudence in relation to 'an ordinary person similarly circumstanced' (as compared with 'ordinary person' in s 160(2) *Criminal Code* 1924 (Tas) in *Stingel*) as Kearney J explained in *Jabarula v Poore*:²⁴

*The Territory has developed its own jurisprudence in relation to the 'ordinary person', who constitutes the objective standard which an accused must meet, both for loss of self-control in the definition of 'provocation' in s.1, and for the nature and degree of retaliation in s.34(1)(d). It stems from the path-breaking judgments of Kriewaldt J, as his Honour gradually adapted the common law of provocation, which then applied in the Territory, to the cultural patterns of Aboriginal life in the Territory.*²⁵

Kearney J in *Jabarula v Poore* followed Kriewaldt J in considering that an 'ordinary person' for the purposes of s.34(1)(d) of the *Criminal Code* (NT) meant 'an ordinary Aboriginal male person living today in the environment and culture of a fairly remote Aboriginal settlement, such as Ali Curung'.²⁶ *Jabarula v Poore* was decided a year before the High Court decision in *Stingel v R*,²⁷ but *Mungatopi v The Queen*²⁸ was decided just after *Stingel v R* (only age can be imported into the objective test) where the Northern Territory Court of Criminal Appeal confirmed previous Northern Territory jurisprudence that the ordinary person test was not to be applied in a vacuum and without regard to the accused's personal characteristics, which was justified on the

²⁴ *Jabarula v Poore* NTSC 24 (9 June 1989).

²⁵ *Jabarula v Poore* NTSC 24 (9 June 1989) [33]. Kearney J referred to a string of judgments of Kriewaldt J in the 1950's. These included the 1951 judgment of *R v Patipatu* (1951 - 1976) NTJ 18, 20 in terms of the reaction to a provocation of 'an ordinary reasonable (Aboriginal) person in that vicinity and of that description'; the 1953 judgment in *R v MacDonald* (1951 - 1976) NTJ 186, 190 where the test of 'the average reasonable (Aboriginal) native of Australia' was used; in 1956 in *R v Muddarubba* (1951 - 1976) NTJ 317, 322 Kriewaldt J spoke of 'a standard which would be observed by the average person in the community in which the accused person lives'; and in both the 1959 case of *R v Jimmy Blair* (1951 - 1976) NTJ 633, 637, and the 1956 case of *R v Nelson* (1951 - 1976) NTJ 327, 335, Kriewaldt J clearly stated that it was open to the jury to take the view that an ordinary Aboriginal might take longer to cool down and might retaliate in a different way after being provoked.

²⁶ *Jabarula v Poore* NTSC 24 (9 June 1989) [38].

²⁷ *Stingel v R* (1990) 171 CLR 312.

²⁸ *Mungatopi v The Queen* (1992) 2 NTLR 1 (Court of Criminal Appeal).

grounds of differences between the *Criminal Code* (NT) and the *Criminal Code* (Tas).²⁹

As will be discussed in the next part, the new s. 158(2)(b) uses the words 'ordinary person' rather than 'ordinary person similarly circumstanced' in an attempt to confine the objective test to age only as per *Stingel v R*. However, it took the Northern Territory legislature some 16 years post *Stingel v R* to counter judicial expansion of the partial defence of provocation through the dilution of the objective person test in s. 34(2)(d). This article contends such judicial expansion is a function of the open-ended nature of the partial defence of provocation.

Section 34(2)(c), which required the accused to have acted on the sudden and before there was time for his passion to cool, reflected the essence of the anger defence of provocation. In *Parker v The Queen*, Dixon CJ considered the history of the defence of provocation through an examination of classic legal texts, citing East's *Pleas of the Crown* as authority for the law presuming a provocation might 'heat the blood to a proportionable degree of resentment, and keep it boiling to the moment of the fact: so that the party may rather be considered as having acted under a temporary suspension of reason, than from any deliberate malicious motive'.³⁰ His Honour continued by noting that the manner of life and moral relations were remote from those of today, citing Holdsworth's observation as to 'the readiness with which all classes resorted to lethal weapons to assert their rights'.³¹

Dixon CJ was writing in 1963 and in the context of a killing that occurred some 20 minutes after the initial provocation when the appellant chased after his wife and her lover such that his Honour was

²⁹ Yeo criticised this line of cases on the basis that 'their decisions had the effect of promoting a greater evil, namely, a negative stereotype of Aborigines being at a lower order of evolutionary scale than other ethnic groups'. Stanley Yeo, 'Sex, Ethnicity, Power of Self-Control and Provocation Revisited' (1996) 18 *Sydney Law Review* 304, 316. De Pasquale has also attacked the *Mungatopi* view of the ordinary person test as sexist because the Court used the standard of an ordinary Aboriginal male and did not question whether what was presented as 'culture' was contested within indigenous communities. Santo De Pasquale, 'Provocation and the Homosexual Advance Defence: The Deployment of Culture as a Defence Strategy' (2002) 26 *Melbourne University Law Review* 110.

³⁰ *Parker v The Queen* (1963) 111 CLR 610, 627, citing East's *Pleas of the Crown* (1803) Vol 1, 238.

³¹ *Parker v The Queen* (1963) 111 CLR 610, 627, citing Sir W. S. Holdsworth, *History of English Law*, Vol. 8, 302. Failure to retaliate to an affront to a man's honour was seen as cowardly. See G.R. Sullivan, 'Anger and Excuse: Reassessing Provocation' (1993) 13 *Oxford Journal of Legal Studies* 421, 422-423.

of the view that ‘a provocation [was] still in actual operation when Parker [the appellant] came upon Dan Kelly [the deceased] with his wife’.³² However, the above extract bears close scrutiny because it is illuminating in support of the argument that provocation is an historical anachronism that should be abolished.

Firstly, there is the comment that the blood has been heated to a ‘proportionable degree of resentment’, which clearly indicates that the provocation had to be severe. As will be discussed in the following section, this historical criterion of proportionality has been explicitly excluded under s. 158(6)(a) *Criminal Code* (NT). Secondly, there is the intriguing observation, more reminiscent of the defence of diminished responsibility than the defence of provocation, that the defendant was acting ‘under a temporary suspension of reason than from any deliberate malicious motive’. By contrast, the modern day defence of provocation is explicitly based on the defendant possessing the fault element of intention for murder and is quite separate from the defences of mental impairment or diminished responsibility. Thirdly, there is the reference to duelling and the community’s acceptance of the use of lethal weapons to defend one’s honour³³ in a bygone age.

The High Court in *Pollock v The Queen*³⁴ discussed the related concepts of ‘suddenness’ and there being time ‘for passion to cool’ and noted ‘they can be traced to the emergence of the doctrine [of provocation] as the conceptual basis for reducing murder to voluntary manslaughter in the 17th century ... at a time when duelling was commonplace’.³⁵ The High Court cited the 1666 trial of Lord Morley where it was decided that if two parties ‘suddenly fight’ and one is killed this is manslaughter because ‘it is combat betwixt two upon a sudden heat’.³⁶

³² *Parker v The Queen* (1963) 111 CLR 610, 628. Ian Leader-Elliott has suggested that prior to the nineteenth century it was necessary for the defendant to literally catch the adulterers in the act. Ian Leader-Elliott, ‘Passion and Insurrection in the Law of Sexual Provocation’ in Rosemary Owens and Ngaire Naffine (eds), *Sexing the Subject of Law* (1997) 153.

³³ See above New South Wales Law Reform Commission, n 6, 2.3 and footnote 3. ‘These categories [of conduct which the courts regarded as sufficiently grave to constitute provocation] consisted of: gross insult accompanied by an assault; an attack upon one’s friend, relative, or kinsman; unlawful deprivation of liberty; and witnessing a man in the act of adultery with one’s wife. This last category was later expanded to include witnessing a man committing sodomy on one’s son.’

³⁴ *Pollock v The Queen* [2010] HCA 35 [48] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

³⁵ *Pollock v The Queen* [2010] HCA 35 [48] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), citing *Parker v The Queen* (1963) 111 CLR 610, 625 – 628 (Dixon CJ); 650 – 652 (Windeyer J).

³⁶ *The Trial of Lord Morley* (1666) 6 St Tr 770, 771.

whereas if two men argue and then after a time when 'their heat might be cooled' they fight and one dies this is murder because it was presumed 'to be a premeditated revenge upon the first quarrel'.³⁷

Thus, while 'suddenness' and time 'for passion to cool' have both 'undergone development in the modern law',³⁸ they are rooted in the 17th century and came to Australia from the outset with the adoption of English common law. The common law doctrine of provocation was then adopted in the Griffith Codes. As the High Court noted in *Pollock v The Queen*,³⁹ '[t]he use of the expression "sudden provocation" [in s 304 of the *Criminal Code 1899* (Qld)] was intended to import well-established principles of the common law concerning the partial defence in the law of homicide'.

It is not without significance that the least satisfactory section dealing with the partial defence to murder of provocation is s. 304 of the *Criminal Code* (Qld)⁴⁰ minted circa 1899, and, at the time of writing, unchanged since then. Presently, s. 304 is more reflective, compared to any other equivalent provocation section in Australian criminal law jurisdictions, of a nineteenth century that condoned the use of weapons (or a greater tolerance of physical violence)⁴¹ than a twenty-first century that embraces equality of women and respect for human rights. At least the now repealed s. 34(2) of the *Criminal Code 1983* (NT) attempted to put some limited boundaries around the partial defence

³⁷ *The Trial of Lord Morley* (1666) 6 St Tr 770, 771 – 772.

³⁸ *Pollock v The Queen* [2010] HCA 35 [48] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

³⁹ *Pollock v The Queen* [2010] HCA 35 [47] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). The High Court observed in footnote 15 that: 'Sir Samuel Griffith considered c312 of his draft (s 304) to embody the common law: Griffith, *Draft of a Code of Criminal Law*, (1897) at xii.'

⁴⁰ See above S 304 *Criminal Code 1899* (Qld), n 16. S 304 is being interpreted as relying upon the principles pertaining to provocation as they develop at common law (see above Kenny, n 14). See also *R v Rae* [2006] QCA 207 (9 June 2006) [58] (Fryberg JJ). 'It is now settled in Queensland that "provocation" in s 304 of the Code is defined ... by the common law ... the focus of the word is upon the conduct of the deceased and the qualities which that conduct must possess to permit the defence at common law.' The language of s 304 *Criminal Code* (Qld) is unhelpful to battered women when 'the underlying emotion of fear may explain the choice of weapons by women, the timing of the homicidal act, the stealth in carrying out and the apparent calmness and deliberation displayed by these women before and after the killing'. S Yeo 'Sex, Ethnicity, Power of Self-Control and Provocation Revisited' (1996) 18 *Sydney Law Review* 304, 315.

⁴¹ For example, Judith Allen has noted: 'Sampling police charge and summons books from Newtown Bench (a suburb of Sydney) in the 1890s suggested that approximately half of the assaults listed concerned cohabiting couples.' Judith Allen, 'Policing Since 1880: Some Questions of Sex', in Mark Finnane ed., *Policing in Australia: Historical Perspectives* (1987) 208.

of provocation.⁴² This article contends that of the two Griffith Codes, the *Criminal Code 1899* (Qld) and the *Criminal Code 1902* (WA), the Western Australian Government has made the correct decision in abolishing the partial defence of provocation and amending its mandatory life sentence for murder. As will be discussed in a later section, the Queensland Government has introduced legislation to amend s. 304 rather than to abolish the partial defence of provocation.⁴³

Section 304 of the *Criminal Code* (Qld) has been the subject of very recent High Court consideration in *Pollock v The Queen*,⁴⁴ and in particular the Queensland Court of Appeal's seven-part test,⁴⁵ any element of which it was said would, if proved beyond reasonable doubt, exclude the defence of provocation. The seven propositions set out by McMurdo P are as follows:

1. The potentially provocative conduct of the deceased did not occur; or
2. An ordinary person in the circumstances could not have lost control and acted like the appellant acted with intent to cause death or grievous bodily harm; or
3. The appellant did not lose self-control; or
4. The loss of self-control was not caused by the provocative conduct; or
5. The loss of self-control was not sudden (for example, the killing was premeditated); or
6. The appellant did not kill while his self-control was lost; or
7. When the appellant killed there had been time for his loss of self-control to abate.

⁴² Similarly, the new s 158 removes the requirement for the defendant to have acted on the sudden and before there was time for his passion to cool which denied the defence to victims of domestic violence, and restricts the defence where the conduct of the deceased consisted of a non-violent sexual advance.

⁴³ On 24 November 2010, the Queensland Attorney-General introduced the Criminal Code and Other Legislation Amendment Bill 2010 (Qld).

⁴⁴ [2010] HCA 35.

⁴⁵ *The Queen v Pollock* [2008] QCA 205 [7] (McMurdo P).

The focus of the appeal in *Pollock v The Queen* was on the fifth and seventh propositions. The High Court reviewed the history of the law of provocation as detailed above in *Parker v The Queen*⁴⁶ and noted that ‘East’s use of the expression “sudden provocation” [used in s. 304] was to connote the absence of premeditation’.⁴⁷ The High Court then observed that the language of s. 304 was reflective of ‘the way provocation was explained to the jury in *R v Hayward*’,⁴⁸ and that when Sir Samuel Griffith was writing s. 304, the current edition of Russell’s *Crimes and Misdemeanours* ‘stated the law of provocation in terms that were drawn from East’.⁴⁹ The High Court then examined the fifth proposition above (the loss of self-control was not sudden) in the context of the trial judge’s directions to the jury:

The difficulty with the fifth proposition is that it is susceptible of being understood as requiring that the loss of self-control immediately follow the provocation. The directions given in answer to the jury’s question referred to meanings of the word ‘sudden’ which included ‘unpremeditated’. However, other meanings of ‘sudden’ including ‘immediate’ were given. It was left to the jury to decide what ‘sudden’ meant when applied to the appellant’s loss of self control.

The law requires the killing to occur while the accused was in a state of loss of self-control that was caused by the provocative conduct, but this does not necessitate that provocation is excluded in the event that there is any interval between the provocative conduct and the accused’s emotional response to it.⁵⁰ The fifth proposition is misleading in the absence of further explanation.⁵¹

The High Court then addressed proposition seven which ‘assumes the loss of self-control and directs attention, objectively, to whether there had been time for the loss to abate’⁵² noting that s. 304 pre-dated ‘the

⁴⁶ *Parker v The Queen* (1963) 111 CLR 610.

⁴⁷ *Pollock v The Queen* [2010] HCA 35 [49] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), citing East, *Pleas of the Crown* (1803) Vol 1, 241.

⁴⁸ *Pollock v The Queen* [2010] HCA 35 [50] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), citing *R v Hayward* (1833) 6 Car & P 157, 159 (Tindal CJ). Chief Justice Tindal directed the jury to consider ‘whether there had been time for the blood to cool, and for reason to resume its seat, before the mortal wound was given’.

⁴⁹ *Pollock v The Queen* [2010] HCA 35 [50] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), citing Russell, *A Treatise on Crimes and Misdemeanours*, 6th ed (1896) Vol 3, 54.

⁵⁰ *Parker v The Queen* (1964) 111 CLR 665, 679.

⁵¹ *Pollock v The Queen* [2010] HCA 35 [56] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). (Emphasis in the original.)

⁵² *Pollock v The Queen* [2010] HCA 35 [53 – 54] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

emergence of the "ordinary person" objective test [which] was not part of the law at the time Tindal CJ formulated his classic direction in *Hayward*.⁵³ The High Court then explained how an objective requirement was to be read into the language of s. 304.

*The words of s 304 that require that the act causing death is done 'in the heat of passion caused by sudden provocation, and before there is time for the person's passion to cool' are the expression of a composite concept incorporating that the provocation is such as could cause an ordinary person to lose self-control and to act in a manner which encompasses the accused's actions. It is the last-mentioned objective requirement that keeps provocation within bounds. The concluding words beginning 'and before' are not the statement of a discrete element of the partial defence.*⁵⁴

It then followed that if the jury was not satisfied that the prosecution had negated beyond reasonable doubt that the appellant did not kill in a state of loss of self-control in response to conduct that had the capacity to cause an ordinary person to lose self-control 'and to act as the appellant acted ... it was not open to proceed to proposition seven and to exclude provocation upon a view that, objectively, there had been time for the appellant's loss of self-control to abate'.⁵⁵ Essentially, in keeping with the 'slow boil' in *Parker v The Queen*, the jury was wrongly invited in *Pollock v The Queen* to exclude provocation if they found there had been any interval between the provocative conduct and the act causing death.

For the purposes of this article, there are two matters of significance. The first is the language of s. 304 of the *Criminal Code* (Qld), which the High Court considered to be rooted in the 1833 case of *R v Hayward*. The High Court has implied an objective test by virtue of the two words 'and before' in s. 304. With respect, importing the common law into s. 304 in such a strained manner is impermissible⁵⁶ given s. 304 is clearly drafted not to reflect an objective test, but the law of murder

⁵³ *Pollock v The Queen* [2010] HCA 35 [58] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

⁵⁴ *Pollock v The Queen* [2010] HCA 35 [65] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

⁵⁵ *Pollock v The Queen* [2010] HCA 35 [66] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

⁵⁶ Cf *Pollock v The Queen* [2010] HCA 35 [47] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). 'In interpreting the language of s 304 it is permissible to have regard to decisions expounding the concept of "sudden provocation" subsequent to the Code's enactment', citing as authority *Boughey v The Queen* (1986) 161 CLR 10, 30 (Brennan J); *R v LK* (2010) 84 ALJR 395, 422 (Gummow, Hayne, Kiefel, Crennan and Bell JJ).

and manslaughter in the 19th century. When Sir Samuel Griffith drafted s. 304, murder was defined as malice aforethought, and hence, absent premeditation and present passion, then manslaughter is the result.

The second matter of significance is the limitation of a section of a Code some three lines in length. The author has previously written⁵⁷ on the subject of criminal codes being too sparsely written, and, due to inadequate definitional detail or statement of the appropriate tests to be applied, judges being required to have recourse to the common law to 'fill in the blanks'⁵⁸ left by the code. Judicial examination of s. 304 of the *Criminal Code* (Qld) discussed above reinforces such a view, and points to the overdue need for the Queensland Government to amend this section, especially the gender bias reflected in the language of 'in the heat of passion caused by sudden provocation, and before there is time for the person's passion to cool'.

However, the last word in this part should be left to the architect of the *Criminal Code* 1983 (NT), Mr Sturgess, who was also the first Queensland Director of Public Prosecutions, who acknowledged in his preface that too many years had passed since 1899 when the *Criminal Code* (Qld) had come into operation and that 'time and cases, as must be expected, have both revealed and created problems, and moral values, which the criminal law must reflect, have much changed'.⁵⁹

III. SECTION 158 OF THE CRIMINAL CODE (NT)

*All anger is not sinful, because some degree of it, and on some occasions, is inevitable. But it becomes sinful and contradicts the rule of Scripture when it is conceived upon slight and inadequate provocation, and when it continues long.*⁶⁰

A. Retention of Provocation

As mentioned in the Introduction, while the Northern Territory is in the process of adopting Chapter 2 of the *Criminal Code* 1995 (Cth) in stages and which contains no defence of provocation, the Northern Territory Government specifically retained the partial defence of provocation in 2006 for the stated reason of the Northern Territory's mandatory life sentence for murder. In introducing the legislation, Dr Peter Toyne, the Attorney-General, gave the following justification for

⁵⁷ Andrew Hemming, 'When is a Code a Code?' *Deakin Law Review* (2010) 15(1) 65.

⁵⁸ H. L. A. Hart (ed), Jeremy Bentham, *Of Laws in General* (Athlone Press, 1970) 246.

⁵⁹ D.G. Sturgess, Preface to the Criminal Code, 12 August 1983, 1.

⁶⁰ Wilson Mizner (1876-1933), US screenwriter.

retaining the partial defence of provocation in his Second Reading Speech.

Although the existing partial defences of provocation and diminished responsibility are not contained in the Model Criminal Code, it is necessary to retain them in Northern Territory criminal law because of the existence of the mandatory life imprisonment penalty for murder. However, the defences have been redrafted to clarify and, in the case of provocation, to restrict their operation ...

*The redrafted provocation provision in this bill restricts the application of the defence to cases of murder only and adopts the High Court's recent statement on the appropriate test [a reference to *Stingel v R*]. The revised provision also removes the requirement for the defendant to have acted on the sudden and before there was a time for his passion to cool [a reference to the now repealed s 34(2)(c)]. This requirement has, to date, made the defence unavailable in cases where there has been a history of serious abuse inflicted on the defendant which ultimately leads them into attacking their abuser. This is the situation in what is commonly referred to as 'battered women cases'.⁶¹*

The above passage from the Second Reading Speech can be reduced to two basic propositions. Firstly, there is the assertion that 'it is necessary' to retain the defence of provocation because of the mandatory life imprisonment penalty for murder. Secondly, there is the claim that the defence of provocation has been restricted in its operation by specifically adopting the High Court's two part test in *Stingel v R*⁶² and excluding consideration of the defendant's cultural or ethnic background in the objective limb of the test.⁶³ Both these propositions will now be critically examined and it is contended will be found lacking in substance because either the lack of merit of the defence of provocation has been ignored, or the technical limitations of the defence have been overlooked.

Turning first to the vexed question of sentencing regimes dictating the availability of defences to reduce criminal responsibility, with respect, in 2006 the question the Attorney-General should have considered at the outset was whether the partial defence of provocation had any

⁶¹ Northern Territory, *Parliamentary Debates*, Second Reading Speech: *Criminal Reform Amendment Act (No 2) 2006* (NT), Legislative Assembly, 31 August 2006 (Dr Peter Toyne, Attorney-General).

⁶² *Stingel v R* (1990) 171 CLR 312.

⁶³ *Mungatopi v The Queen* (1992) 2 NTLR 1 (Court of Criminal Appeal).

place at all in the criminal responsibility sections of the *Criminal Code* (NT).

On what basis can it be justified that a loss of self-control is a circumstance of mitigation sufficient to reduce murder to manslaughter? Why should the defence of provocation put a premium on homicidally violent anger through the requirement to have lost self-control? Is there in fact a phenomenon as a loss of self-control given the Law Commission of England and Wales found 'there is no satisfactory definition of loss of self-control'?⁶⁴ If the central feature of the partial defence defies definition, then on what reasoned basis does the defence exist? Even overlooking this deficiency, why does a person (predominantly male) have to have 'lost it' at 7.5 on a notional Richter Scale⁶⁵ of anger before triggering the defence? Faced with all the possible responses to a provocation why should the selection of homicidal violence be partly excused?

The crucial question to be asked in the context of an allegedly provoked killing (the victim is of course a silent witness) is how does a society in the 21st century respond to such violence? This article contends the answer is with the full weight of the law for murder, because there is no justification or excuse for an intentional killing being downgraded to manslaughter, as the ordinary person, whatever the gravity of the alleged provocation, does not kill in response to provocative conduct.⁶⁶ Such a statement is grounded both in moral principle and public policy.

⁶⁴ The Law Commission of England and Wales, *Partial Defences to Murder*, Law Com No 290 (2004) [3.26].

⁶⁵ The Richter magnitude scale assigns a single number to quantify the amount of seismic energy released by an earthquake on a base-10 logarithmic scale. Jeremy Horder has suggested that the doctrine of provocation reinforces male perceptions as natural aggressors and 'in particular women's natural aggressors'. Jeremy Horder, *Provocation and Responsibility* (1992), 192.

⁶⁶ As Csefalvai has pointed out there is a paradox in constructing a reasonable person test for people who kill after being provoked, suggesting it is a term of art and a legal fiction. Kristof Csefalvai, 'Taunts, Chapati Pans and the Case of the Reasonable Glue-Sniffer: An Examination of the Normative Test in Provocation After *Smith* and *Holley*', *Cambridge Student Law Review* [2006] 45, 46. 'Who is the reasonable man? It is strange that we come to talk of him in the context of provocation, a defence specifically for murder. Common sense leads to the perception that this is paradoxical: surely "reasonable people" do not kill, even if provoked. This suggests that the "reasonable man" of the law of provocation is a term of art, rather than a manifestation of the common sense perception of "reasonability". This, in turn, raises the necessity of conveying the concept of this legal fiction to a jury of twelve average citizens who find it their duty to measure the conduct of a defendant. This is the *prima facie* discrepancy between the everyday term and the legal term of art that the courts have attempted to bridge.'

In 2006, the Attorney-General for the Northern Territory had the advantage of reading the Victorian Law Reform Commission's 2004 Final Report on Defences to Homicide, which recommended the abolition of provocation and that relevant circumstances of the offence, including provocation, should be taken into account at sentencing.⁶⁷ The Commission made some telling points that go to the heart of the inherent flaws contained in the very existence of the partial defence of provocation:

*The partial defence of provocation sends the message that in some situations people (who are not at risk of being killed or seriously injured themselves) are not expected to control their impulses to kill or seriously injure another person. While extreme anger may partly explain a person's actions, in the Commission's view it does not mean such behaviour should be partly excused ... Historically, an angry response to a provocation might have been excusable, but in the 21st century, the Victorian community has a right to expect people will control their behaviour, even when angry or emotionally upset.*⁶⁸ [Emphasis in the original text.]

The above passage essentially makes two powerful observations, which the author respectfully endorses. Firstly, the very existence of the partial defence of provocation sends entirely the wrong message to the community about control of violent impulses, both as an expression of the law and as a matter of practical deterrence. Secondly, that angry responses resulting in homicide are completely unacceptable to the community in the 21st century. As such, this article rejects the unconvincing argument advanced by the New South Wales Law Reform Commission that 'the defence of provocation should not be regarded as condoning violence in our society'.⁶⁹ This then begs the question why have other jurisdictions not followed suit and abolished the partial defence to murder of provocation which flies in the face of common sense questioning as to its availability only for the most serious offence in the criminal calendar? The answer, apart from New

⁶⁷ Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) [xlv].

⁶⁸ *Ibid* [xxi].

⁶⁹ See above New South Wales Law Reform Commission, n 6, 2.36. The New South Wales Law Reform Commission justified this view on the basis that manslaughter carried a possible 25 year term of imprisonment and therefore the partial defence still recognised a provoked killing as wrongful and unjustified. At the same time, the Commission persisted in its view that provoked killings 'committed as a result of a loss of self-control, do not fall within the worst category of unlawful homicide, and therefore should not be classified as "murder" '.

South Wales and the Australian Capital Territory, appears to lie in the mandatory life sentence for murder.

B. Sentencing Regimes for Murder

It is now necessary to turn to the respective sentencing regimes for murder in Australia. The table below lists the sentence, non-parole period and availability of partial defences to murder for all Australian State and Territory jurisdictions. The final column ranks each jurisdiction out of a score of 4, with 1 being the most effective and 4 being the least effective. This score is based on a comparison with the absence of either of the partial defences of provocation and diminished responsibility in the Model Criminal Code, which finds expression in Chapter 2 of the *Criminal Code 1995* (Cth), which this article takes as the most desirable and effective regime for murder, and therefore as the appropriate external measure of 'effectiveness'.

The lowest ranking has been allocated to those jurisdictions that have a discretionary sentencing regime for murder, but persist in allowing both defences to operate. This is because, with the singular exception of the New South Wales Law Reform Commission,⁷⁰ Law Reform Commissions have considered the primary obstacle to the abolition of the partial defence of provocation to be the existence of a mandatory life sentence for murder. The ranking is open to the criticism that either there should be no difference between the four jurisdictions that retain both partial defences, or that in fact the two with discretionary sentencing regimes (NSW and ACT) should be ranked higher than the two with mandatory sentencing regimes (Qld and NT) because in practical terms the former are more likely to abolish provocation given mandatory life for murder is not an obstacle. This article takes the position that jurisdictions that retain the partial defences within a discretionary sentencing regime for murder have no objective basis for so doing, and warrant especial criticism for being inconsistent with the other discretionary sentencing regimes for murder in Australia and New Zealand.⁷¹ Queensland has been ranked higher than the Northern

⁷⁰ See above New South Wales Law Reform Commission, n 6.

⁷¹ In 2004, MacKay stated: 'As far as is known, unlike diminished responsibility, there are no empirical studies on the operation of the plea of provocation in English law. The reason for this may be to do with the difficulty of identifying such cases.' See R.D. Mackay, 'The Provocation Plea in Operation – An Empirical Study', Law Commission of England and Wales, *Partial Defences to Murder*, Law Com No 291 (2004), Appendix A, 110. MacKay acknowledged that in his five year study between 1997 and 2001 of 71 cases where the defence of provocation had been raised, 'the team was unable to examine all "multiple defence" cases some of which may or may not have used the provocation plea as part of a defence strategy'. However, Marie

Territory because the Queensland Government introduced legislation in November 2010 to place the onus of proof on a defendant who raises the partial defence of provocation.

Viruda and Jason Pine, 'Homicide in Australia: 2007-08 National Homicide Monitoring Program Annual Report', Monitoring Report 13 (2010) *Australian Institute of Criminology*, Appendix C, 37, have produced Table A2 Most serious charge 2007 - 2008, broken down by Australian criminal jurisdiction. This table, which distinguishes murder and manslaughter charges by jurisdiction for 2007-08, is arguably helpful, if the assumption is made that the respective DPPs have declined to accept a plea of manslaughter based on either provocation or diminished responsibility, as a guide to the potential success of these two partial defences. The figures for the most serious charge in 2007-08 for the four jurisdictions that allow both partial defences were as follows: NSW: 81 Murder Charges and 7 Manslaughter Charges; Qld: 48 Murder Charges and 4 Manslaughter Charges; NT: 16 Murder Charges and 2 Manslaughter Charges; and ACT: 1 Murder Charge and 2 Manslaughter Charges. Comparing the two larger jurisdictions of NSW (discretionary sentencing regime for murder) with Qld (mandatory life sentence for murder): for NSW, the 7 manslaughter charges are 9% of the 81 murder charges; for Qld, the 4 manslaughter charges are 8% of the 48 murder charges. These raw figures of manslaughter to murder charges of 9% for NSW and 8% for Qld, provide limited empirical support for the proposition that the sentencing regime makes no difference to the operation of the two partial defences to murder, and therefore in turn support the argument made in this article that the partial defence of provocation should be abolished irrespective of sentencing regime.

State or Territory	Sentence	Non-Parole Period	Partial Defences to Murder	Similarity to Model Criminal Code ⁷²
Western Australia	Life Imprisonment	10 years (Mandatory) ⁷³	Nil	1
Tasmania	Life Imprisonment	Discretionary ⁷⁴	Nil	1
Victoria	Life Imprisonment	Discretionary. 10 years (average) ⁷⁵	Defensive Homicide (domestic violence)	1
South Australia	Life Imprisonment	20 years (Mandatory) ⁷⁶	Provocation	2
Queensland	Life Imprisonment	15 years (Mandatory) ⁷⁷	Provocation, Diminished Responsibility, Killing in an abusive domestic relationship	3A
Northern Territory	Life Imprisonment	20 years (Mandatory) ⁷⁸	Provocation, Diminished Responsibility	3B
New South Wales	Life Imprisonment	Discretionary. 10 years (sentencing guideline) ⁷⁹	Provocation, Diminished Responsibility	4
Australian Capital Territory	Life Imprisonment	Discretionary ⁸⁰	Provocation, Diminished Responsibility	4

⁷² A score of 1 being most effective, and a score of 4 being least effective.

⁷³ Section 279(4) *Criminal Code* (WA); s 90 of the *Sentencing Act* 1995 (WA).

⁷⁴ Section 158 *Criminal Code* (Tas); s 17 *Sentencing Act* 1997 (Tas).

⁷⁵ Section 3 *Crimes Act* 1958 (Vic). Between 1997/98 to 2001/02, most people convicted of murder in Victoria received a total effective sentence in the range of 15–20 years, with a non-parole period of 10 years or more. See above n 67, [7.18-7.19]. Between 2003-04 and 2007-08, the average sentence for murder ranged between 18 years and 20 years and 5 months. Of the 117 people convicted of murder, two people received a sentence of less than 14 years imprisonment. Sentencing Advisory Council, *Sentencing Trends in the Higher Courts of Victoria, Murder 2003-04 to 2007-08*, cited in Victorian Department of Justice, *Review of the Offence of Defensive Homicide*, Discussion Paper (August 2010), 47, [197].

⁷⁶ Section 11 *Criminal Law Consolidation Act* 1935 (SA); s 32(5)(ab) of the *Criminal Law (Sentencing) Act* 1988 (SA).

⁷⁷ Section 305(1) *Criminal Code* 1899 (Qld); s 181(3) *Corrective Services Act* 2006 (Qld).

⁷⁸ Section 157(1) *Criminal Code* 1983 (NT); s 53A(6) *Sentencing Act* 1995 (NT).

⁷⁹ Section 19A *Crimes Act* 1900 (NSW); s 21(1) *Crimes (Sentencing Procedure) Act* 1999 (NSW).

⁸⁰ Section 12 *Crimes Act* 1900 (ACT); s. 10 *Crimes (Sentencing) Act* 2005 (ACT). For the ten year period between 1998 and 2008 there was no upheld conviction for murder in the ACT. See Victor Violante, 'Suddenly, a City Wakes up to Homicide', *The Canberra Times*, 13 September 2008.

The common sentencing feature for murder in the three States that have abolished the partial defence of provocation, namely Tasmania,⁸¹ Victoria⁸² and Western Australia,⁸³ and for that matter New Zealand,⁸⁴ is that while there is provision for a life sentence, this is only imposed in very serious cases. The flexibility of the above four sentencing regimes for murder (and effectiveness in having no partial defences to murder of either provocation or diminished responsibility) yields a joint ranking of 1 for most effective regime for murder.

The sentencing situation in the NT, which is similar to that in South Australia, is governed by s. 157(1) of the *Criminal Code* 1983 (NT), which mandates imprisonment for life for the crime of murder. Under s. 53A(6) of the *Sentencing Act* 1995 (NT), '[t]he sentencing court may fix a non-parole period that is shorter than the standard non-parole period of 20 years referred to in subsection (1)(a) if satisfied there are exceptional circumstances that justify fixing a shorter non-parole period'.⁸⁵ Given that exceptional circumstances in s. 53(A)(7) encompass 'the victim's conduct and condition substantially mitigating the conduct of the offender', it is possible that extreme provocations could fall within this provision.

An example of sentencing guidelines that should apply to manslaughter convictions in successful provocation cases can be found in the United Kingdom where the Sentencing Advisory Panel has

⁸¹ Provocation was abolished by the *Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003* (Tas) which repealed s 160 of the *Criminal Code Act 1924* (Tas). This change came into effect on 9 May 2003.

⁸² *Crimes (Homicide) Act 2005* (Vic).

⁸³ *The Criminal Law Amendment (Homicide) Act 2008* (WA). This followed a report by the Law Reform Commission of Western Australia which believed that the only justification for retaining provocation was the continued existence of mandatory life imprisonment for murder. However, as the Commission also recommended that the mandatory penalty for murder be abolished, the Commission concluded that the partial defence of provocation under s 281 *Criminal Code* (WA) should be repealed. See Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Final Report, Project No 97 (2007) 222.

⁸⁴ New Zealand abolished the mandatory life sentence for murder in 2002 and now has a discretionary sentencing regime for murder. Under s 103 *Sentencing Act* (NZ) the minimum term of imprisonment for murder is 10 years. New Zealand abolished the partial defence of provocation in 2009 with the passage of the *Crimes (Provocation Repeal) Amendment Act 2009* (NZ). By contrast, under s 745 of the Canadian Criminal Code murder carries mandatory life imprisonment and under s 231(2) parole eligibility arises after 25 years.

⁸⁵ The *Sentencing Act* 1995 (NT) s 53A(7) defines 'exceptional circumstances' as the offender otherwise being of good character and unlikely to reoffend, and the victim's conduct and condition substantially mitigate the conduct of the offender .

given advice to the Sentencing Guidelines Council that sentences should be broadly as follows: Low degree of provocation – sentencing range of 9 to 15 years; Substantial degree of provocation – sentencing range of 4 to 9 years; High degree of provocation – sentencing range of up to 4 years.⁸⁶ Similarly, in Victoria, which has abolished the partial defence of provocation, the Victorian Sentencing Advisory Council (VSAC) has identified the central issues in determining to what extent an offender's culpability should be reduced by provocation as being: the degree of provocation in terms of the offender having a justifiable sense of being wronged taking into consideration the nature, context and duration of the provocation; the degree to which the offender's response was disproportionate; and whether the provocation was and remained the operative cause of the offence.⁸⁷

The VSAC was concerned to ensure 'that the problems and flaws of the pre-existing law not be transferred from the substantive criminal law into the law of sentencing'.⁸⁸ The author respectfully agrees, but even though 'life' rarely means 'life', there is a prior hurdle to be overcome which is the apparent nexus between the mandatory life imprisonment for murder and the retention of provocation. Indeed, 'mandatory' may also be a misnomer in the Northern Territory given the presence of 'exceptional circumstances' in the *Sentencing Act 1995* (NT), and 'discretionary' could be a more appropriate description.

In the event that it is considered that 'exceptional circumstances' is defined too narrowly to accommodate a serious provocation, the better view for the Northern Territory is rather than retain the partial defence of provocation solely because of the mandatory life sentence for murder, to amend s 53A(7) of the *Sentencing Act 1995* (NT) to specifically allow greater consideration of provocation in mitigation by including language similar to s 21A(3)(c) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) that 'the offender was provoked by the victim'.

An alternative would be to follow New Zealand and Western Australia, both of which have recently abolished the partial defence of provocation, and adopt a presumptive sentence of life imprisonment unless, given the circumstances of the offence and the offender, such a sentence would be manifestly unjust.

⁸⁶ Law Reform Commission of England and Wales, *Murder, Manslaughter and Infanticide*, Law Com No 304 (2006), 5.4.

⁸⁷ Felicity Stewart and Arie Freiberg, *Provocation in Sentencing* (2009) Victorian Sentencing Advisory Council, [10.1.10].

⁸⁸ *Ibid*, [1.1.4].

Section 102 of the *Sentencing Act 2002* (NZ) provides:

102 *Presumption in favour of life imprisonment for murder*

- (1) *An offender who is convicted of murder must be sentenced to imprisonment for life unless, given the circumstances of the offence and the offender, a sentence of imprisonment for life would be manifestly unjust.*
- (2) *If a court does not impose a sentence of imprisonment for life on an offender convicted of murder, it must give written reasons for not doing so.*

Section 279(4) of the *Criminal Code* (WA) provides:

- (4) *A person, other than a child, who is guilty of murder must be sentenced to life imprisonment unless –*
 - (a) *that sentence would be clearly unjust given the circumstances of the offence and the person; and*
 - (b) *the person is unlikely to be a threat to the safety of the community when released from imprisonment, in which case the person is liable to imprisonment for 20 years.*

The conclusion to be drawn from the foregoing analysis of the various sentencing regimes for murder in Australia is that the Northern Territory and South Australia can be bracketed together with a minimum non-parole period of 20 years, followed by Queensland where the offender is required to serve 15 years before being eligible for parole.⁸⁹ The remaining States can be grouped around a 10 year minimum non-parole period, either as a mandatory minimum (Western Australia), an average sentencing statistic (Victoria), or as a standard non-parole guideline (New South Wales).

If severity of sentencing for murder is the touchstone for the retention of the partial defence of provocation, then New South Wales should be the next State (and the Australian Capital Territory the next Territory) to abolish the defence, followed by Queensland, especially as both States (and the ACT) also allow the partial defence of diminished

⁸⁹ The mandatory 15 years for murder can be compared to 'decided cases demonstrated that a range of sentence upon a plea of guilty in cases of manslaughter of a woman where the killing was not murder by reason of provocation was between nine and twelve years'. See *R v Mills* [2008] QCA 146, [17], (Keane JA) citing as authority Holmes JA in *R v Sebo* [2007] QCA 426.

responsibility. However, this is to miss the point. Whatever the differences in the sentencing regimes for murder in Australia, they do not justify the continued existence of the flawed defence of provocation. This article contends that the partial defence of provocation should have no place in Australian criminal law irrespective of sentencing regime.

As a second best solution to the preferred straight out abolition of provocation as a defence, which is no more than a pragmatic fallback position and is not inconsistent with the primary position of this article that provocation is a totally flawed defence and gender biased, the mandatory sentencing regimes for murder in the Northern Territory, South Australia and Queensland could be readily adjusted to allow extreme provocations to be considered as a mitigating or an 'exceptional circumstance' if this proved to be the price to abolish the partial defence of provocation. This adjustment could be achieved by using a standard non-parole guideline of 15 years for murder. To qualify as an extreme provocation sufficient to trigger an 'exceptional circumstance' for sentencing purposes, the provocation could be defined to exclude an insult or gesture, could exclude non-violent sexual advances, and exclude disproportionate responses to the provocation of the deceased. In this way, the offender would be categorised as a murderer and sentenced according to the proposed standard non-parole guideline of 15 years for murder, with very tight boundaries placed around an 'exceptional circumstance' of extreme provocation.

Legislatures bent on promoting their tough stance on homicide through mandatory life imprisonment for murder need to consider the defences they allow to intentional killings rather than the length of the non-parole period for murder *per se*.⁹⁰ The standard against which regimes should be judged is the Model Criminal Code. Jurisdictions like Western Australia, Tasmania and Victoria offer the most cogent and effective regimes for the proper classification of killings as murder since none of these States allows either of the partial defences of provocation or diminished responsibility. Conversely, jurisdictions like the Northern Territory, Queensland, New South Wales and the Australian Capital Territory display the least cogent and most ineffective regimes for murder as they all allow both partial defences

⁹⁰ For example, in 2005-06 in the Northern Territory there were 16 homicides of which 12 (75%) were classified as murder and 4 (25%) were classified as manslaughter. This can be compared to the Australia wide homicide figures of 256 for murder (90%) and 26 (9%) for manslaughter (there was 1 infanticide). See above 2005-06 *National Homicide Monitoring Program (NHMP)*, n 8, 37.

and thereby skew the statistical split between murder and manslaughter. New South Wales and the ACT cannot even rely on mandatory sentencing regimes for murder to justify the retention of these partial defences.

C. Deconstructing Section 158 of the Criminal Code (NT)

Thus far, this article has focused its attack on the partial defence of provocation on the flawed nature of the defence and the weakness of the mandatory life sentence for murder argument as a justification for the retention of the defence. This section will focus on the technical side of the defence and will deconstruct s. 158 of the *Criminal Code* (NT), which replaced the now repealed s. 34(2) discussed earlier, and came into operation on 20 December 2006. In the preceding Background section, several issues were flagged for discussion such as the definition of provocation, incited provocations, proportionality, the removal of 'on the sudden', and most importantly the two part subjective and objective test. This article now turns to a detailed discussion of these more technical issues, commencing with setting out s. 158 in full below.

158 *Trial for murder – partial defence of provocation*

- (1) *A person (the defendant) who would, apart from this section, be guilty of murder must not be convicted of murder if the defence of provocation applies.*
- (2) *The defence of provocation applies if:*
 - (a) *the conduct causing death was the result of the defendant's loss of self-control induced by conduct of the deceased towards or affecting the defendant; and*
 - (b) *the conduct of the deceased was such as could have induced an ordinary person to have so far lost self-control as to have formed an intent to kill or cause serious harm to the deceased.*
- (3) *Grossly insulting words or gestures towards or affecting the defendant can be conduct of a kind that induces the defendant's loss of self-control.*
- (4) *A defence of provocation may arise regardless of whether the conduct of the deceased occurred immediately before the conduct causing death or at an earlier time.*
- (5) *However, conduct of the deceased consisting of a non-violent sexual advance or advances towards the defendant:*
 - (a) *is not, by itself, a sufficient basis for a defence of provocation; but*

- (b) *may be taken into account together with other conduct of the deceased in deciding whether the defence has been established.*
- (6) *For deciding whether the conduct causing death occurred under provocation, there is no rule of law that provocation is negatived if:*
- (a) *there was not a reasonable proportion between the conduct causing death and the conduct of the deceased that induced the conduct causing death; or*
- (b) *the conduct causing death did not occur suddenly;*
or
- (c) *the conduct causing death occurred with an intent to take life or cause serious harm.*
- (7) *The defendant bears an evidential burden in relation to the defence of provocation.*

Note for subsection (7)

Under section 43BR(2), the prosecution bears a legal burden of disproving a matter in relation to which the defendant has discharged an evidential burden of proof. The legal burden of proof on the prosecution must be discharged beyond reasonable doubt - see section 43BS(1).

- (8) *A defendant who would, apart from this section, be liable to be convicted of murder must be convicted of manslaughter instead.*

Starting with subsection (1) above, this subsection utilises the standard language of the modern day partial defence of provocation such that, but for the defence of provocation, the defendant would be guilty of murder. The fault element for murder is intention under s. 156(1)(c) of the *Criminal Code* (NT). So there is no question that the defendant was acting 'under a temporary suspension of reason than from any deliberate malicious motive'⁹¹ which in any event is the language of the equally flawed partial defence of diminished responsibility.⁹²

Given that the defendant had the intention to kill, it is strange that supporters of the retention of the partial defence of provocation stress the need for fair labelling, by which is meant that somehow a provoked killing is less culpable than an unprovoked killing sufficient to avoid the label 'murderer'. The unsatisfactory nature of such an argument is demonstrated by the case that triggered the abolition of the partial

⁹¹ *Parker v The Queen* (1963) 111 CLR 610, 627 (Dixon CJ).

⁹² See Andrew Hemming, 'It's Time to Abolish Diminished Responsibility, the Coach and Horses' Defence Through Criminal Responsibility for Murder' (2008) 10 UNDLAR 1.

defence of provocation in New Zealand. Clayton Weatherston, a tutor at Otago University, argued he was provoked into stabbing his girlfriend Sophie Elliott 216 times. Weatherston pleaded guilty to manslaughter but the jury found him guilty of murder.⁹³ Although Weatherston failed in his attempt to invoke the partial defence of provocation, his use and its very presence on the statute book created such an adverse reaction in the community that it was subsequently abolished.⁹⁴ In this sense, the response of the New Zealand government was very similar to that of Victoria's following Ramage's successful use of the defence.

Proponents of the partial defence of provocation respond to this attack by claiming that the abolition of the defence amounts to a lack of trust in the jury system.⁹⁵ This argument presupposes that there is a satisfactory and clear test to be put to the jury rather than one designed to bring glazed looks into jurors' eyes as they grapple with the judge's explanation of the widely adopted two part subjective and objective test for provocation which finds expression in s. 158(2) of the *Criminal Code* (NT). In any event, there is 'no reason why provocation as a mitigating factor for murder should be singled out as one issue requiring community input via the jury'.⁹⁶

⁹³ Weatherston was sentenced to a non-parole period of 18 years. Sophie Elliott's body was so badly mutilated that the family were advised not to view the body for the funeral.

⁹⁴ See, for example, Kerri Ritchie, 'Brutal stabbing case sparks debate on provocation defence', ABC News, 26 July, 2009. <http://www.abc.net.au/news/stories/2009/07/26/2636553.htm> viewed 27 January 2011. See also Edward Gay, 'Partial defence of provocation set to be dumped', New Zealand Herald, 23 July 2009. http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10586155 viewed 27 January 2011. Gay's article cites Justice Minister Simon Power as saying 'he did not believe the defence of provocation had any place in law' and that the defence 'wrongly enables defendants to besmirch the character of victims, and effectively rewards a lack of self-control'.

⁹⁵ See above New South Wales Law Reform Commission, n 6, 2.33. 'While the defence of provocation is no longer necessary for the purpose of providing judges with a discretion in sentencing for unlawful homicide, the defence remains vitally important in terms of gaining community acceptance of reduced sentences for manslaughter rather than murder. The defence of provocation remains necessary as a means of involving the community, as represented by the jury, in the process of determining the degree of an accused's culpability according to his or her loss of self-control in response to provocation. It also means that people who kill with reduced culpability as a result of a loss of self-control under provocation are not misleadingly and unfairly stigmatised by the label "murderer".'

⁹⁶ Law Reform Commission of Western Australia, n 83, 217.

In turning to the two part test in s. 158(2), in the earlier extract from the Attorney-General's Second Reading Speech⁹⁷ it was mentioned that the revised provision removed the previous requirement for the defendant to have 'acted on the sudden and before there was a time for his passion to cool'. The stated reason for this change was to allow 'battered women cases' to come within the partial defence of provocation. However, the Attorney-General appears to have paid insufficient attention to the position taken by Tasmania, the first jurisdiction in Australia to abolish provocation. In introducing the Bill abolishing provocation as a defence, the Minister for Justice made the highly pertinent comment that it was better to abolish the defence than engage in a fictional attempt to distort the defence's operation to accommodate differences in gender behaviour:

[T]he defence of provocation is gender biased and unjust. The suddenness element of the defence is more reflective of male patterns of aggressive behaviour.⁹⁸ The defence was not designed for women and it is argued that it is not an appropriate defence for those who fall into the 'battered women syndrome'. While Australian courts and laws have not been sensitive to this issue, it is better to abolish the defence than to try to make a fictitious attempt to distort its operation to accommodate the gender behavioural differences.⁹⁹

Of course, the Attorney-General also had Victoria's example of introducing excessive self-defence (defensive homicide) in 2005¹⁰⁰ as an alternative to the defence of provocation to protect abused women. In Victoria, defensive homicide is an alternative verdict to murder (20 years maximum imprisonment) where domestic violence is alleged and is available even if the harmful actions to which the defendant is reacting are not immediately harmful and even if the defendant's conduct involves excessive force.¹⁰¹ It is here contended that the

⁹⁷ See above Northern Territory, *Parliamentary Debates*, n 61.

⁹⁸ During 2005-06, a total of 74 intimate homicides occurred of which 59 (80%) involved a male offender killing his female partner. See above n 8, NHMP, 24. Arguably, for intimate homicides 'the real "loss of control" is that the men have lost control of their women'. See Graeme Coss, 'The Defence of Provocation: An acrimonious divorce from reality' (2006) 18(1) *Current Issues in Criminal Justice* 51, 52.

⁹⁹ Tasmania, *Parliamentary Debates*, House of Assembly, 20 March 2003, 60 (Judy Jackson, Minister for Justice).

¹⁰⁰ *Crimes (Homicide) Act 2005* (Vic).

¹⁰¹ Section 9AD Defensive Homicide of the *Crimes Act 1958* (Vic) is qualified by s 9AC Murder - self-defence, which requires the person to believe that the conduct was necessary to defend himself or herself or another person from the infliction of death or really serious injury. The Victorian Law Reform Commission had recommended a lower bar in s 322(1)(c) that the person believes the conduct is necessary to defend himself or herself or another person. See above n 67, 319.

Northern Territory could consider introducing similar legislation to that in Victoria or Queensland¹⁰² as part of a legislative package, which includes amending the 'exceptional circumstances' provision of the mandatory life sentence for murder, if both legislative changes are political imperatives to abolish the partial defence of provocation.

However, it is recognised that there are concerns as to the operation of the Victorian legislation. At the time of writing, there have been thirteen defensive homicide cases since the legislation was introduced in 2005, and all the offenders were male. Twelve cases involved a male victim, and one involved a female victim.¹⁰³ Ten of the thirteen defensive homicide convictions have been the result of pleas of guilty.¹⁰⁴ The average sentence imposed for the offence of defensive homicide is 8.8 years,¹⁰⁵ with the highest sentence to date being 12 years imprisonment with a non-parole period of 8 years¹⁰⁶ in the case of *R v Middendorp*.¹⁰⁷ There is a danger that defensive homicide is provocation in a new guise.

The two part test contained in s. 158(2) follows the unanimous High Court decision in *Stingel v R*.¹⁰⁸ Section 158(2)(a) requires the defendant to have a loss of self-control induced by conduct of the deceased, but fails to distinguish between which values or beliefs can form the basis of the defence.¹⁰⁹ This section is open-ended for four reasons. Firstly, by virtue of s. 158(3) conduct can encompass grossly insulting words or gestures. Secondly, s. 158(4) provides that the conduct of the deceased may occur at any time before the conduct causing death. Thirdly, there is no specific qualification that the defendant had not incited the

¹⁰² See the *Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Act 2010* (Qld) which introduced a new s 304B Killing in an abusive domestic relationship into the *Criminal Code 1899* (Qld). Section 304B allows a partial defence of manslaughter where a person kills in response to family violence. Under s 304B(1) the deceased must have committed acts of serious violence against the person who believes it is necessary for their own preservation to do the act that causes death and who has reasonable grounds for such a belief.

¹⁰³ Victorian Department of Justice, *Review of the Offence of Defensive Homicide*, Discussion Paper (August 2010), 33, [120].

¹⁰⁴ Victorian Department of Justice, n 103, 48, [200].

¹⁰⁵ Victorian Department of Justice, n 103, 34, [125].

¹⁰⁶ Victorian Department of Justice, n 103, 34, [126].

¹⁰⁷ [2010] VSC 202. This case raised major concerns as to the operation of the partial defence of defensive homicide. Luke Middendorp who stands 186-centimetres tall and weighs more than 90 kilograms stabbed Jade Bownds, who weighed 50 kilograms, four times in the back.

¹⁰⁸ *Stingel v R* (1990) 171 CLR 312.

¹⁰⁹ 'For instance, by allowing all of the accused's values or beliefs to be taken into account, it can lead to the acceptance of prejudiced views as providing an excuse for lethal force.' See above Victorian Law Reform Commission, n 67, 34.

provocation, which instead has to be implied into the phrase loss of self-control.¹¹⁰ Fourthly, the High Court has allowed all of the characteristics of the defendant into the subjective test of the gravity of the provocation for the purpose of loss of self-control:

*Even more importantly, the content and extent of the provocative conduct must be assessed from the viewpoint of the particular accused. Were it otherwise, it would be quite impossible to identify the gravity of the particular provocation. In that regard, none of the attributes or characteristics of a particular accused will be necessarily irrelevant to an assessment of the provocation involved in the relevant conduct. For example, any one or more of the accused's age, sex, race, physical features, personal attributes, personal relationships and past history may be relevant to an objective assessment of the gravity of a particular wrongful act or insult. Indeed, even mental instability or weakness of an accused could, in some circumstances, itself be a relevant consideration to be taken into account in the determination of the content and implications of particular conduct.*¹¹¹

Thus, short of unimpeachable evidence of premeditation, the proverbial drover's dog¹¹² of a defence counsel should have little difficulty in satisfying the subjective first limb of the partial defence of provocation as per s. 158(2)(a), notwithstanding the High Court's

¹¹⁰ The now repealed s 34(2)(a) expressly excluded self-induced provocation where the accused 'incited' the provocation, but the new s 158 is silent on this question. It would appear the aspect of incitement and provocation, which is related to premeditation, is to be dealt with by implication under s 158(2)(a) and 'loss of self-control' given loss of self control is inconsistent with going around to the victim's house and deliberately picking a quarrel. Nevertheless, by not being explicit, s 158(2)(a) risks importing all the inconsistencies of the common law on inciting the provocation which the repealed s 34(2)(a) expressly excluded. However, one academic textbook in discussing s 23(2)(a) *Crimes Act 1900* (NSW) which is written in similar language to s 158(2)(a) *Criminal Code* (NT) states: 'The former s 23(2)(a) and the common law were clear that the provocation defence was not available where the accused invited or induced the provocation from his or her victim. The new s 23 is silent on this matter, but it is likely that the position remains the same and that the principles laid down in *Edwards* [1973] AC 648 apply.' See David Brown, David Farrier, Sandra Egger, Luke McNamara and Alex Steel, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (2006) 598. In *Edwards* (658) the Privy Council held that a blackmailer cannot rely on the predictable results of his own blackmailing conduct for a provocation defence unless the victim's reaction goes to extreme lengths in which case it is a question of degree for the jury.

¹¹¹ *Stingel v R* (1990) 171 CLR 312, 326.

¹¹² On 3 February 1983, Mr Bill Hayden, then the leader of the Federal Opposition was replaced by Mr Hawke. At a press conference Mr Hayden famously remarked that 'a drover's dog could lead the Labor Party to victory at the present time'.

description of the process as ‘an objective assessment’.¹¹³ Trial judges are reluctant to withhold a defence from the jury given the obvious likelihood of an appeal. A good example is *R v Rae*.¹¹⁴ The defence was run on the basis of the accused’s intoxication and whether the Crown had established the necessary intention for murder. After the close of evidence and before the addresses to the jury, the defence counsel submitted that provocation should be left to the jury. The trial judge refused to leave provocation to the jury because there was no evidence as to what was said by the victim immediately before the accused killed him.

On appeal, McMurdo P, in dissent,¹¹⁵ would have allowed the appeal, citing statements in *R v Buttigieg*¹¹⁶ in support.¹¹⁷ Her Honour drew attention to various authorities collected in *R v Buttigieg* including ‘whether provocation should be left to the jury falls to be resolved by reference to the version of events most favourable to the accused’;¹¹⁸ provocation should be withheld if ‘no reasonable jury could hold the evidence sufficient to raise a reasonable doubt’¹¹⁹ but should be left with the jury if the trial judge is ‘in the least doubt whether the evidence is sufficient’;¹²⁰ failure of the accused to testify ‘is not fatal to provocation and a jury is able to infer provocation from evidence’¹²¹ that might suggest the possibility of loss of self-control; and finally, if there is evidence of provocation the judge has a duty ‘to leave the question of provocation to the jury notwithstanding that it has not been raised by the defence and is inconsistent with the defence which is raised’.¹²²

¹¹³ For a different perspective, see above New South Wales Law Reform Commission, n 6, 2.37. ‘With the abolition of unsworn statements, if an accused wishes to give evidence of provocation at trial, that evidence can be properly tested through cross-examination. The jury should therefore be in a better position to assess the genuineness or otherwise of an accused’s claim that he or she was provoked into losing self-control so as to form an intention to kill or cause grievous bodily harm or to act with reckless indifference to human life. This should greatly reduce the risk that a false claim of provocation succeeds.’

¹¹⁴ [2006] QCA 207 (9 June 2006).

¹¹⁵ Fryberg J and Douglas J in separate judgments dismissed the appeal because there was no evidence for a jury to rationally and objectively conclude that an ordinary person might have reacted in the same way as the accused.

¹¹⁶ (1993) 69 A Crim R 21.

¹¹⁷ *R v Rae* [2006] QCA 207 (9 June 2006) [35].

¹¹⁸ *Stingel v R* (1990) 171 CLR 312, 318.

¹¹⁹ *R v Rose* [1967] Qd R 186, 192; *R v Stingel* (1990) 171 CLR 312, 333.

¹²⁰ *Van Den Hoek v The Queen* (1986) 161 CLR 158, 161-162, 169; *R v Stingel* (1990) 171 CLR 312, 334.

¹²¹ *Lee Chun-Chuen v The Queen* [1963] AC 220, 233; *Van Den Hoek v The Queen* (1986) 161 CLR 158, 169.

¹²² *Stingel v R* (1990) 171 CLR 312, 333, 334.

The above catalogue of cases provides adequate testimony to the very low bar required to satisfy the evidential onus for provocation. Furthermore, leaving provocation to the jury where the trial judge is in the 'least doubt whether the evidence is sufficient' does not accord with the definition of an evidential onus as a 'reasonable possibility'.¹²³ Rather, the standard appears to be the barest possibility. As such, this article rejects the overly sanguine view of the New South Wales Law Reform Commission that the mere abolition of unsworn statements will greatly reduce the risk that a false claim of provocation will succeed.¹²⁴ Instead, it is contended that the very low evidential bar for the admission of the defence of provocation should be substantially raised by reversing the onus of proof.

Having accepted the relevance of the defendant's characteristics for the purpose of assessing the gravity of the deceased's conduct, the High Court then excluded these subjective considerations, except for age, when judging the effect of this conduct on the powers of self-control of the ordinary person, which finds expression in s. 158(2)(b). The question then becomes whether the ordinary person faced by that degree of provocation could (not would) have killed the deceased. The High Court approved the following passage from Wilson J in *R v Hill*:¹²⁵

The objective standard ... may be said to exist in order to ensure that in the evaluation of the provocation defence there is no fluctuating standard of self-control against which accuseds are measured. The governing principles are those of equality and individual responsibility, so that all persons are held to the same standard notwithstanding their distinctive personality traits and varying capacities to achieve the standard.

In his Second Reading Speech, the Attorney-General for the Northern Territory described provocation as a 'complex doctrine'.¹²⁶ This is an understatement for a test that requires mental gymnastics or as the Model Criminal Code Officers Committee (MCCOC) wryly observed the ordinary person in the law of provocation has 'developed a split personality'.¹²⁷ A better view is that the test for provocation is

¹²³ See, for example, s 43BT Evidential burden of proof, *Criminal Code 1983* (NT).

¹²⁴ See above New South Wales Law Reform Commission, n 6 and n 113.

¹²⁵ *R v Hill* (1986) 1 SCR 313, 343.

¹²⁶ See above Northern Territory, *Parliamentary Debates*, n 61.

¹²⁷ Model Criminal Code Officers Committee (MCCOC), *Fatal Offences Against the Person*, Discussion Paper (1998) 79.

conceptually confused, complex and difficult for juries to understand and apply.¹²⁸ Professor Yeo has pointed out why jurors find the distinction between the subjective and objective components of the test so difficult:

*[The test] bears no conceivable relationship with the underlying rationales of the defence of provocation ... The defence has been variously regarded as premised upon the contributory fault of the victim and, alternatively, upon the fact that the accused was not fully in control of his or her behaviour when the homicide was committed. Neither of these premises requires the distinction to be made between the characteristics of the accused affecting the gravity of the provocation from those concerned with the power of self-control.*¹²⁹

While the use of 'ordinary person' in s. 158(2)(b) as opposed to 'ordinary person similarly circumstanced' in the now repealed s. 34(2)(d) is an improvement, s. 158(2) does little to alleviate the potential for judicial expansion of the defence, especially when subsection (2) is considered in the context of the whole of s. 158. Reference has already been made to four reasons why the partial defence of provocation is open ended, to which can be added s. 158(6)(a), which states that there is no rule of law that provocation is negated if there is no reasonable proportion between the provocation and the response.

The overall result under s. 158 is that provocation is widely defined to include insults and gestures; the provocation can occur at an earlier time to the conduct causing death; there is no reference to the defendant not having incited the provocation; 'on the sudden' has been removed; all the characteristics of the defendant can be imported into the subjective test; and the response can be disproportionate to the provocation. All the defence has to do is satisfy an evidential burden under s. 158(7), which under s. 43BT is defined as a reasonable possibility, for the prosecution to then have to negative the defence beyond reasonable doubt.

This article contends that the above situation is most unsatisfactory, and if this flawed defence is to be retained as a third best option, then the above deficiencies in s. 158 need to be addressed. It is further contended that it matters not whether one adopts a loss of self-control

¹²⁸ See above Victorian Law Reform Commission, n 67, 26-35. There is an inherent confusion built into a test that seeks to distinguish between the gravity of the provocation from the perspective of the accused on the one hand, and an objective assessment of the reaction of the accused on the other hand.

¹²⁹ Stanley Yeo, *Unrestrained Killings and the Law* (1998), 61.

(excuse) or a reasons (justification) approach.¹³⁰ The former is followed here because this approach is consistent with *Stingel v R*, which is the test at common law (South Australia) and is the basis of the statutory defence in all jurisdictions that retain the defence.¹³¹

The Law Commission of England and Wales focused on the nature and gravity of the provocation and its impact on the defendant. The gross provocation is seen as giving the defendant a 'justified' sense of being seriously wronged.¹³² The limitation with the reasons or justification based approach is that it focuses on the gravity (subjective) of the provocation. The loss of self-control requirement would disappear under such a formulation and there is no alternative requirement as to the manner in which the defendant must react to the provocation.

The Government of the United Kingdom was not prepared to abandon loss of control when, by virtue of sections 54 to 56 of the *Coroners and Justice Act 2009* (UK), the defence of provocation was abolished and substituted with a new partial defence entitled 'Loss of Control'. Section 54(1)(a) requires a loss of control, subject to the objective test in s. 54(1)(c) of 'a person of the D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D'. In addition, s. 54(1)(b) specifies a qualifying trigger for loss of self-control defined in s. 55 in terms of both fear (fear of serious violence from V against D) and anger (constituted circumstances of an extremely grave character, and caused D to have a justifiable sense of being seriously wronged).

As Alan Norrie has pointed out, the change in the law in the United Kingdom marks a shift from one of excuse to one of justification. 'In sum, if the moral mark of the new Law Commission approach is that conduct is imperfectly rightful, and therefore both condemned and partially vindicated, the mark of the old law was that conduct was partially excused, both wrongful and partially condoned on ground of

¹³⁰ See above New South Wales Law Reform Commission, n 6, 2.15. 'The excuse-based rationale explains the defence of provocation in terms of partially excusing provoked killers because their mental state is impaired by a loss of self-control, and for that reason they are less culpable than killers who act with premeditation. The justification-based rationale explains the defence of provocation in terms of recognising that the victim's own blameworthy conduct has contributed to the killer's actions in circumstances which could have moved an ordinary person to retaliate.'

¹³¹ See above Kenny, n 14.

¹³² See above Law Reform Commission of England and Wales, n 86, 5.11. For a similar approach see also Bernadette McSherry 'It's a Man's World: Claims of Provocation and Automatism in "Intimate" Homicides' (2005) 29 *Melbourne University Law Review* 905, 917.

compassion.¹³³ The view taken here is that both an excuse and justification approach to provocation are similarly flawed, and the new law in the United Kingdom, while attempting to narrow the partial defence of provocation, also opens up both fear and anger qualifying triggers which unnecessarily introduces defensive homicide into provocation.

Professor Yeo has proposed a two-part test by distinguishing capacity from response. Yeo's first part is the capacity for self-control expected of an ordinary person, which excludes gender and ethnic origin, with only age being taken into account. The second part is the response pattern of an ordinary person who is deprived of self-control. 'Within this framework of ordinary capacity for self-control, the law recognises that ordinary people who lose their self-control might behave in different ways.'¹³⁴ Thus, under the Yeo formulation, it is the second part that allows different response patterns based on gender or ethnicity to be taken into account. With respect, this is just another way of reformulating the confusing test in *Stingel* and is insufficiently objective.

There are three essential changes required to be made to narrow the defence of provocation and leave it available to only the most serious of provocations. Firstly, provocation should be narrowly defined. Secondly, the test for provocation should be solely objective and all reference to the gravity of the offence should be removed.¹³⁵ Thirdly, the defence should bear the legal onus of proof.

What is the rationale for a reversal of the onus of proof and what justification is there for the State placing a legal burden of proof on the defendant? The lurking spectre of *Woolmington v DPP*¹³⁶ and the lustre of the famous golden thread speech of Viscount Sankey inevitably appears whenever the onus of proof is raised. In this context, it should be recalled that Viscount Sankey qualified 'one golden thread' as 'subject also to any statutory exception'.¹³⁷

¹³³ Alan Norrie, 'The Coroners and Justice Act 2009 – Partial Defences to Murder (1) Loss of Control' (2010) *Criminal Law Review* 275, 279.

¹³⁴ See above Yeo, n 29, 310-311.

¹³⁵ Ian Leader-Elliott supports the High Court's two part test in *Stingel* on the grounds that 'the distinction between the issues of gravity and self control is essential if the principle of equality is to be realised in practice'. See above n 22, 96. This article rejects the two part test as inherently confusing and contends that female defendants are more appropriately dealt with under a separate defence of excessive self-defence.

¹³⁶ *Woolmington v DPP* [1935] AC 462.

¹³⁷ *Woolmington v DPP* [1935] AC 462, 481.

However, as has been pointed out in '*A guide to framing Commonwealth offences, civil penalties and enforcement powers*',¹³⁸ the Senate Scrutiny of Bills Committee 'usually comments adversely on a bill which places the onus on an accused person to disprove one or more of the elements of the offence with which he or she is charged'.¹³⁹ Significantly, for the purposes of this article, whilst the matter being within the defendant's knowledge has not been considered sufficient justification, the Senate Committee 'is most inclined to support reversal where the defence consists of pointing to the defendant's state of belief'.¹⁴⁰ Given that a sudden and temporary loss of self-control is at the heart of the partial defence of provocation, the Committee view appears to be promising. In any event, the Queensland Government recently announced its intention to amend the partial defence of provocation to place the onus of proof on the defendant, in accordance with a recommendation in the Queensland Law Reform Commission's 2008 report by introducing legislation before the end of 2010.¹⁴¹

The Queensland Attorney-General, on 24 November 2010, duly introduced the *Criminal Code and Other Legislation Amendment Bill 2010* (Qld). Part 2, Clause 5 deals with the proposed amendment of s 304, and the proposed subsection (7) states: 'On a charge of murder, it is for the defence to prove that the person charged is, under this section, liable to be convicted of manslaughter only.' The proposed subsection (7) of s. 304 of the *Criminal Code 1899* (Qld) is similar to the proposed subsection (10) of s. 158 of the *Criminal Code 1983* (NT) below.

More generally, while the proposed amendments to s. 304 are designed to address the gender bias of provocation,¹⁴² regrettably the Queensland Government has not heeded the perceptive approach of the Tasmanian Minister for Justice who, when introducing the legislation which abolished provocation in Tasmania, observed that 'it is better to abolish the defence than to try to make a fictitious attempt

¹³⁸ *A guide to framing Commonwealth offences, civil penalties and enforcement powers*, Attorney-General's Department, Australian Government, December 2007.

¹³⁹ *A guide to framing Commonwealth offences*, n 138, 30.

¹⁴⁰ *A guide to framing Commonwealth offences*, n 138, 31.

¹⁴¹ The Honourable Cameron Dick, Attorney-General, 'State Government to amend laws relating to accident and provocation', Ministerial Media Statement, 12 September 2010. 'As the report stated, placing the onus upon the defendant strikes the right balance between the rights of the individual and the wider interests of the community.'
<http://www.cabinet.qld.gov.au/mms/StatementDisplaySingle.aspx?id=71527>
viewed 27 January 2011.

¹⁴² See *Criminal Code and Other Legislation Amendment Bill 2010* (Qld), below n 148 and n 151.

to distort its operation to accommodate the gender behavioural differences'.¹⁴³

In keeping with the tenor of the analysis of provocation in this article, s. 158 has been rewritten accordingly below (but it should be stressed that it has been rewritten only as a pragmatic fallback position to the total abolition of the fundamentally flawed and gender biased partial defence to murder of provocation):

158 *Trial for murder – partial defence of provocation*

- (1) *A person (the defendant) who would, apart from this section, be guilty of murder must not be convicted of murder if the defence of provocation applies.*
- (2) *The defence of provocation applies only to a serious wrong, defined as a fear of serious violence towards the defendant or another, and if the conduct of the deceased was such as could have induced an ordinary person of the defendant's age and of ordinary temperament, defined as ordinary tolerance and self-restraint, to have so far lost self-control as to have formed an intent to kill or cause serious harm to the deceased.*
- (3) *To lose self-control is defined as meaning a sudden and temporary loss of self-control, rendering the defendant so subject to passion as to make him or her for the moment not master of his or her mind.¹⁴⁴ The loss of self-control due to resentment, grievance or revenge¹⁴⁵ is specifically excluded.¹⁴⁶*
- (4) *The defendant must not have incited the provocation.¹⁴⁷*
- (5) *Grossly insulting words or gestures towards or affecting the defendant are excluded from conduct of a kind that induces the defendant's loss of self-control.¹⁴⁸*

¹⁴³ See Tasmania, *Parliamentary Debates*, above n 99.

¹⁴⁴ Taken from Devlin J's classic definition in *R v Duffy* [1949] 1 All ER 932. See also Tindal CJ in *R v Hayward* (1833) 6 C & P 157, 159 who described the provocation defence as 'while smarting under a provocation so recent and so strong that the prisoner might not be considered at the moment the master of his own understanding'.

¹⁴⁵ See above Law Reform Commission of England and Wales, n 86, 5.11, where the Law Reform Commission of England and Wales recommended that the partial defence should not apply where (a) the provocation was incited for the purpose of providing an excuse to use violence, or (b) the defendant acted in considered desire for revenge.

¹⁴⁶ *Van Den Hoek v The Queen* (1986) 161 CLR 158.

¹⁴⁷ This has the effect of reintroducing the now repealed s 34(2)(a).

- (6) A defence of provocation may only arise if the conduct of the deceased occurred immediately before the conduct causing death and not at an earlier time.¹⁴⁹
- (7) Conduct of the deceased consisting of a non-violent sexual advance or advances towards the defendant is not a sufficient basis for a defence of provocation.¹⁵⁰
- (8) Conduct of the deceased consisting of the deceased's choice about a relationship with the defendant is not a sufficient basis for a defence of provocation.¹⁵¹
- (9) For deciding whether the conduct causing death occurred under provocation, there is a rule of law that provocation is negatived if:
- (a) there was not a reasonable proportion¹⁵² between the conduct causing death and the conduct of the deceased that induced the conduct causing death; or
 - (b) the conduct causing death did not occur suddenly.
- (10) The burden of establishing a defence of provocation is a legal burden and lies on the defence.¹⁵³

¹⁴⁸ Subsection (2) of the proposed amendment to s 304 *Criminal Code* (Qld) in the Criminal Code and Other Legislation Amendment Bill 2010 (Qld) states: 'Subsection (1) does not apply if the sudden provocation is based on words alone, other than in circumstances of a most extreme and exceptional character.' Subsection (6) states: 'For proof of circumstances of a most extreme and exceptional character mentioned in subsection (2) or (3) regard may be had to any history of violence that is relevant in all the circumstances.'

¹⁴⁹ This subsection specifically ousts authority to the effect that the provocation should be considered in the light of the whole history of the relationship. See for example *Moffa v The Queen* (1977) 138 CLR 601.

¹⁵⁰ 'Homosexual advance' provocation has been criticised for condoning violence against homosexuals. See for example Celia Wells, 'Provocation: The Case for Abolition' in Andrew Ashworth & Barry Mitchell, *Rethinking English Homicide Law* (2000) 85, 101.

¹⁵¹ The ordinary person does not respond to a relationship breakdown by killing his or her partner. 'Men who kill when affronted by their intimate partners are truly extraordinary.' See Graeme Coss, 'The Defence of Provocation: An acrimonious divorce from reality' (2006) 18(1) *Current Issues in Criminal Justice* 51, 53. Subsection (3) of the proposed amendment to s 304 *Criminal Code* (Qld) in the Criminal Code and Other Legislation Amendment Bill 2010 (Qld) states: 'Also subsection (1) does not apply, other than in circumstances of a most extreme and exceptional character, if - (a) a domestic relationship exists between 2 persons; and (b) one person unlawfully kills the other person (the deceased); and (c) the sudden provocation is based on anything done by the deceased or anything the person believes the deceased has done - (i) to end the relationship; or (ii) to change the nature of the relationship; or (iii) to indicate in any way that the relationship may, should or will end, or that there may, should or will be a change to the nature of the relationship.'

¹⁵² Proportionality was absorbed into the ordinary person test which insisted 'that the mode of retaliation be objectively proportionate to the provocation'. *Masciantonio v The Queen* (1995) 183 CLR 58, 80, 67 (Brennan, Deane, Dawson and Gaudron JJ). See above Stewart and Freiberg, n 87, 8.7.2 and footnote 277.

- (11) *A defendant who would, apart from this section, be liable to be convicted of murder must be convicted of manslaughter instead.*

It is instructive to run some of the high profile provocation cases that have reached the High Court through the proposed s. 158 above, particularly s. 158(2), which places a double hurdle in front of the defendant of being provoked by a serious wrong and the sole objective test of the ordinary person. In *Stingel v R*,¹⁵⁴ the defendant stalked his ex-girlfriend and killed her lover, while in *R v Ramage*¹⁵⁵ (the case that led to the abolition of provocation in Victoria) the defendant killed his wife after she told him she was leaving the marriage. In both cases, s. 158(8) limits the operation of the partial defence of provocation as the deceased's choice about a relationship will not found the defence. If Ramage argued that he was provoked not because of the deceased's choice of relationship but because of other things she said or did, then s. 158(5) excludes grossly insulting words or insults. If Ramage argued that he faced a serious wrong, then he would have to prove it on the balance of probabilities under s. 158(10) which in practice would likely mean showing the deceased had attacked him with a knife or sharp instrument.¹⁵⁶

¹⁵³ See above Queensland Law Reform Commission, n 5, 11. The Queensland Law Reform Commission recommended that s 304 *Criminal Code* (Qld) should be amended by adding a provision to the effect that the defendant bears the onus of proof of the partial defence of provocation on the balance of probabilities. See also above Law Reform Commission of England and Wales, n 86, 5.11, where the Law Reform Commission of England and Wales recommended that a judge should not be required to leave the defence of provocation to the jury unless there is evidence on which a reasonable jury, properly directed, could conclude that it might apply.

¹⁵⁴ *Stingel v R* (1990) 171 CLR 312. Stingel was convicted of murder and the High Court held that the trial judge was correct in not allowing the defence of provocation to go to the jury. This was scarcely surprising as Stingel, who was restrained by a court order from approaching or talking to his seventeen year old ex-girlfriend (an order he was convicted of breaching), stabbed the deceased with a butcher's knife while he was sitting in a car with Stingel's ex-girlfriend. A clearer case of premeditation would be hard to imagine.

¹⁵⁵ *R v Ramage* [2004] VSC 508. There was a legal sequel to this case when Phil Cleary wrote a book entitled 'Getting Away with Murder' published by Allen and Unwin in 2005 which suggested that Dyson Hore-Lacy SC had provided a fabricated defence of provocation to James Ramage. In 2010, Hore-Lacy was awarded \$630,000 in damages for defamation.

¹⁵⁶ Given the physical strength differences between men and women, it is unsurprising that in 2005-06 the NHMP found that not one female killed an intimate partner by beating with hands or feet, and that 80% of male victims were killed with a knife or sharp instrument. See above 2005-06 *National Homicide Monitoring Program (NHMP)*, n 8, 25.

In *Green v The Queen*¹⁵⁷ the defendant killed a friend who had allegedly initially made a non-violent homosexual advance. Without more, this case would have failed under s. 158(7). Green further alleged that the deceased then mounted a determined sexual assault following his clear rejection of the alleged sexual advance. Green would have to overcome s. 158(2) and show on the balance of probabilities that he was in fear of serious violence. Given the age and size difference between the defendant and the deceased, Green would have a monumental task in convincing a jury even if the jury accepted it was not the sexual advance but the history of sexual abuse by his father that caused the death.

In *Masciantonio v The Queen*,¹⁵⁸ the defendant killed his son-in-law in a two stage attack with the second stage occurring while the deceased lay defenceless on the ground and despite the attempted intervention of two bystanders. This defence would have run foul of lack of proportionality under s. 158(9)(a). To the extent that killing is always a disproportionate response to a provocation, then either there is no place at all for the partial defence of provocation or it is a question of degrees of disproportionality.

The whole objective of the proposed s. 158 is to severely limit the defence to extreme provocations that involve physical conduct and not mere words or gestures, such that 'there would not be much left [and] what would remain is violent provocative conduct and other criminal behaviour'.¹⁵⁹ The conduct has to be spontaneous and there can be no suggestion of premeditation. If rewriting the partial defence of provocation to make it harder for men to avail themselves of the defence is seen as leaving women subjected to domestic abuse without an additional defence to self defence, then it is better to follow Victoria's example and introduce excessive self defence than widen the defence to accommodate gender differences.

Finally, as the victim is the silent witness in court with the defendant putting unanswered words into the mouth of the deceased, placing the onus of proof on the defence is entirely appropriate. In this way, provocation will only be available under 'exceptional circumstances', albeit a very poor substitute for the total abolition of the defence with or without the amendment to s. 53(A)(7) of the *Sentencing Act 1995* (NT) to widen 'exceptional circumstances' to allow extreme provocations to be a mitigating factor when sentencing for murder. A

¹⁵⁷ *Green v The Queen* (1997) 191 CLR 334.

¹⁵⁸ *Masciantonio v The Queen* (1995) 183 CLR 58.

¹⁵⁹ See above Law Reform Commission of Western Australia, n 83, 219.

viable sentencing alternative would be to follow the example set by New Zealand and Western Australia, two jurisdictions that have recently abolished the partial defence to murder of provocation, and adopt a presumptive sentence of life imprisonment unless such a sentence would be manifestly unjust.

IV. CONCLUSION

*Trigger-happy: Apt to shoot on slightest provocation.*¹⁶⁰

This article has reviewed the partial defence of provocation and concluded that loss of self-control is not a sufficient reason to distinguish those who kill under provocation from cold-blooded killers. Andrew Ashworth has championed the principle of fair labeling, which is a reference to fairness in the legal categorisation of an offence, as demanding ‘that offenders be labelled and punished in proportion to their wrongdoing [as] the label is important both for public communication and, within the criminal justice system, for deciding on appropriate maximum penalties’.¹⁶¹ It is here argued that on the above test, there is no proportionate difference between provoked and unprovoked killings sufficient to distinguish the label ‘murderer’ attaching to both types of killing.

Every major review of the partial defence of provocation, with the exception of the New South Wales Law Reform Commission Report in 1997, has concluded that it is flawed and unacceptable in a modern society. The only identified impediment to the abolition of provocation is mandatory life imprisonment for murder. This article challenges that position at three levels. The first level is to advocate the abolition of provocation irrespective of sentencing regime because it is a totally flawed defence, gender biased, and is devoid of any merit. Intentional killings mean malice aforethought which means murder.¹⁶² Abolition of the partial defence of provocation is the essential position taken in this article, and the remaining two levels are pragmatic fallback positions.

¹⁶⁰ The Concise Oxford Dictionary, 1980, 1241.

¹⁶¹ Andrew Ashworth, *Principles of Criminal Law* (2003) 89 – 90.

¹⁶² The abolition of provocation as a defence shifts the burden of proof to the sentencing stage. ‘Provocation is likely to be raised by the defence as a factor in mitigation of the offender’s sentence, in which case the defence will have the onus of proving, on the balance of probabilities, that the offender was provoked.’ See above Stewart and Freiberg, n 87, [5.3.7].

The second level is to recognise that there may be political imperatives that require a legislative package to secure the abolition of the partial defence of provocation in the three jurisdictions that have mandatory life imprisonment for murder, namely, the Northern Territory, South Australia and Queensland. This legislative package could include either a minor adjustment to the mandatory sentencing regime to permit extreme provocations to come within 'exceptional circumstances' as a mitigating factor within a 15 year minimum sentencing guideline for murder or a presumptive sentence of life imprisonment, and possibly the introduction of defensive homicide to protect women in abusive relationships subject to the outcome of the review of the partial defence of defensive homicide in Victoria. There is no excuse for the retention of the partial defence of provocation in New South Wales and the Australian Capital Territory both of whom have discretionary sentencing regimes for murder.

The third level is to amend the partial defence of provocation such that it is narrowly defined, is comprised of a totally objective test, and the onus of proof is on the defence. This article has proposed a new s. 158 of the *Criminal Code* (NT), which while the least preferred option at least removes the most objectionable aspects of this flawed defence.

There is tide of legislative reform running against the partial defence of provocation such that since 2003 four jurisdictions have abolished the defence (Tasmania, Victoria, Western Australia and New Zealand). It is to be earnestly hoped that this impetus will not be lost either through inertia or vested interests preventing the removal of this unacceptable defence from the statute books of all Australian jurisdictions.

NOT SEEN AND NOT HEARD: PROTECTING ELDER HUMAN RIGHTS IN AGED CARE

MICHAEL BARNETT* AND ROBERT HAYES**

I. INTRODUCTION

This article argues that there are significant shortfalls in the care and treatment of the elderly in aged care facilities in Australia and in the protection of their human rights. Moreover, elderly people have special vulnerabilities that make comprehensive and effective legal protection essential. This special vulnerability has been recognised by the courts:

Experience shows that in the case of boarding schools, prisons, nursing homes, old people's homes, geriatric wards, and other residential homes for the young or vulnerable, there is an inherent risk that indecent assaults on the residents will be committed by those placed in authority over them, particularly if they are in close proximity to them and occupying a position of trust.¹

The relevant provision of the UN *Principles of Older Persons* (1991) states:

14. *Older persons should be able to enjoy human rights and fundamental freedoms when residing in any shelter, care or treatment facility, including full respect for their dignity, beliefs, needs and privacy and for the right to make decisions about their care and the quality of their lives.*

Elderly people should have a right not to be exposed to violence and abuse, cruel, inhumane or degrading treatment, poor hygiene and neglect, indignity, and invasion of privacy. Indeed, the paramount, if not sole, objective of any aged care system should be to guarantee that elderly people have high quality care and quality of life. Government

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¹ *Lister & Ors v Hesley Hall Limited* [2001] 2 All ER 769, 800.

and the community should ensure that there are sufficient resources and that there is in place effective management and regulation to achieve that objective. Anything less should be regarded as a failure that ought to be rectified as expeditiously as possible. As much as is possible in all countries, elderly people's independence, participation, care, self-fulfilment and dignity must be advanced.² However, breaches of elderly rights appear to occur quite regularly in Australia within aged care facilities, even on official data released by the Department of Health and Ageing (the "Department") and, if anecdotal evidence from consumers and their advocates is at all reliable (as reported in governmental inquiries and in the media), such abuse is both widespread and frequent. As discussed further below, official Department figures for 2008-09 reveal the following:

- the Department received 7,962 complaints that were considered by the Department to be about an Approved Provider's responsibilities under the Act. In total, the Aged Care Complaints Investigation Scheme received 12, 573 contacts.
- of those complaints, there were 1,411 alleged reportable assaults and of those, 1,121 were recorded as alleged unreasonable use of force, 272 as alleged unlawful sexual contact, and 18 as both.
- the Department found that 1,093 investigations it carried out resulted in a finding of a breach by a Service Provider with 925 of those breaches being dealt with by a negotiated outcome or referral to another agency, eg. the police or a professional standards and disciplinary body for nurses or other professionals, and the remaining 168 resulting in a Notice of Required Action to the Service Provider.
- the Department identified 303 homes as being non-compliant with one or more of the expected outcomes of the accreditation standards after which they were then placed on a timetable for improvement, thus giving them the opportunity to comply.
- the Department imposed 30 sanctions on approved providers in respect of which 23 involved the Department determining that there was an immediate and severe risk to the health, safety or well being of the residents, and the other 7 involved

² Core principles as identified by UN *Principles of Older Persons* (1991).

continuing non compliance by a provider in relation to Accreditation Standards (that is, the non-compliance had continued even after the Department had identified the breaches).

- the Department issued a further 163 notices of non-compliance which had not as yet proceeded to sanctions but which might if non compliance continued.³

In the writers' view, these figures in themselves are a cause for concern, but as will be discussed below, there are a number of reasons to believe that these figures may underestimate significantly the level of abuse, neglect, and breaches of standards by aged care facilities.

For the purposes of this article, by 'elderly' we mean people whose physical and mental capacities are deteriorating primarily due to advanced age, such that they are incapable of independent living or will soon be in that position. 'Aged care' broadly means where elderly people are accommodated in residential care institutions, or who receive significant assistance in their care from external sources such as government, charities or community organisations.

We argue that a growing number of elderly people in Australia are being placed at serious risk of systemic human rights abuse because of a combination of factors including the following: their significant vulnerabilities; the fact that protecting the elderly is currently a relatively low governmental and community priority with a consequent lack of adequate funding and oversight;⁴ negative and stereotypical community attitudes towards ageing;⁵ the diffuse and problematic nature of aged care; inadequate planning and coordination of services; the weaknesses of the current Federal regulatory system; and the significant gaps and weaknesses of current legal responses to human rights abuses of the elderly in both the common law and statute.

³ Department of Health and Ageing *Report on the Operation of the Aged Care Act 1997*, Annual Report 2008-2009 Chapter 9 Regulation and Compliance 69, 71-73; Ch 10 Complaints Investigation Scheme 77-83.

⁴ This low priority and lack of funding are common problems across the world, eg see I Doron, S Alon & N Offir, 'Time for Policy: Legislative Response to Elder Abuse and Neglect in Israel' 16 (4) (2004) *Journal of Elder Abuse and Neglect* 63-82, 66, 77-78; UN Madrid International Plan of Action on Ageing 2002, 8-12 April 2002 United Nations New York; United Nations *Programme on Ageing Road Map* para 17, <http://www.un.org/esa/socdev/ageing/roadmap.html>.

⁵ Australia House of Representatives Standing Committee on Legal and Constitutional Affairs *Inquiry Into Older People and the Law* Australian Parliament, 2007, para 6.1.

The article will make recommendations that would provide more effective, enforceable rights for the elderly in aged care and indeed more generally. We make a number of specific recommendations to improve the regulatory system including the process of accreditation, quality assurance, complaints, investigation and compliance.

We further suggest that a comprehensive Australia-wide review of elder abuse and elder rights is necessary. We identify major issues that such a review should address. In addition, we suggest that the Commonwealth should legislate to introduce *The Rights of the Elderly in Aged Care Act*. This Act should include enforceable rights for the elderly in aged care facilities, including rights to participate in decision making, a right to privacy, to dignity, and to appropriate accommodation, care and treatment. The Act should also have specific provisions for creating penalties and civil liability for breaches of such rights with the potential for graduated penalties and sanctions to deal with the range of breaches. We also argue that the Act should provide that a Federal Commissioner of the Aged (to be appointed as a Commissioner of the Human Rights Commission) may bring criminal and civil actions on behalf of individuals or groups or on behalf of the Human Rights Commission and should oversee the complaints and investigation system relating to aged care.

The remainder of the article consists of the following parts: Part II examines why elder abuse is important and will become increasingly pressing as an issue; Part III provides an overview of Federal aged care provision and a profile of people who use this system and highlights the acute vulnerability of the elderly in aged care; Part IV discusses the controversial area of the actual level and type of elder abuse in aged care; Part V evaluates the current regulatory system for aged care including accreditation, quality assurance, complaints, investigation and enforcement and concludes that there are a number of significant issues and weaknesses; Part VI deals with other current legal options for dealing with elder abuse both at statute and common law and examines their significant deficiencies; Part VII discusses proposed reforms including a comprehensive review of elder abuse and elder rights throughout Australia entailing all government laws and policies, and new legislation and institutional support; lastly, Part VIII forms the conclusion.

II. IMPORTANCE OF ELDER RIGHTS PROTECTION

The phenomenon of elder abuse has been a subject of increasing concern in Australia since the 1990s.⁶ Prior to that time, public concern and interest was minimal. Elder abuse can include 'physical abuse, psychological abuse, medical abuse, economic abuse, violation of rights, sexual abuse, neglect and self neglect'⁷ or a combination of these factors.

One estimate is that about 4.6% of older people are victims of physical, sexual or financial abuse.⁸ In many cases the perpetrators of this abuse are family members, or people who have a duty of care in relation to the elderly person. Risk factors of abuse in a domestic relationship include a long history on ongoing unresolved conflict, reciprocal dependency, and the influence of drugs or alcohol. This article will not directly deal with these types of abuse, although the introduction of human rights legislation such as the *Convention on the Rights of Persons with Disabilities*⁹ (CRPD) would obviously impact favourably on this group. However, another significant area for potential abuse is the provision of aged care, particularly where elderly people live in aged care institutions commonly known as nursing homes. That issue is the focus of this article.

The most recent Federal intergenerational report estimates that the Australian population will reach 35.9 million by 2050 and that a quarter of that population will be aged over 65, compared with 13% as at 2009.¹⁰ Further, half of government spending would be used by health, age related pensions and aged care in 2050 compared with one quarter in 2009.¹¹ In relation to NSW it is estimated that by 2030 the proportion of people 65 years and over will have almost doubled (from

⁶ S Ellison et al, *The legal needs of older people in NSW* Law and Justice Foundation of NSW, Sydney 2004, Ch 8.

⁷ P Kinnear and A Graycar 'Abuse of Older People: Crime or Family Dynamics? Trends and Issues in Crime and Criminal Justice' 1, 12 May 1999, 2; S Ellison et al, above n 6, Ch 8.

⁸ A Graycar and M James 'Crime and Older Australians: Understanding and responding to Crime and Older People' (2000) Paper presented at the 7th Australian Institute of Family Studies Conference, 5-6.

⁹ Discussed below.

¹⁰ Productivity Commission *Economic implications of an ageing Australia* Commonwealth of Australia, Canberra, 2005, see Overview for general trends; Campbell Research Consulting *A literature review and description of the regulatory framework to support the project for the evaluation of the impact of accreditation on the delivery of quality care and quality of life to residents in Australian Government subsidised residential aged care homes*, November 2005, 11.

¹¹ Australian Government, Treasury, *The 2010 Intergenerational Report*, Australian Government, Canberra, released February 2, 2010, Executive Summary 2.B.

14% to 22%), while the number of centenarians will increase eight-fold. And for the first time, 65 years olds will outnumber 14 year olds.¹²

It is further predicted that dementia in Australia will become increasingly common with one estimate being a four fold increase from 245 000 in 2009 to around 1.13 million by 2050.¹³ Moreover, many more elderly people will increasingly have some form of cognitive impairment as longevity rates increase. The number of older people living alone is also likely to continue to increase as it has done so historically, with one fifth of people over 65 living alone in 1971 as compared to one quarter in 2001.¹⁴ This may mean that an increasing number of elderly people will not have significant direct social support.

The above statistics indicate clearly that the number of elderly people in aged care is highly likely to increase significantly, which will also greatly increase the challenge for protecting their rights.¹⁵ The demand for residential aged care is predicted to increase by more than threefold by 2045.¹⁶ This problematic situation is in addition to the inherent vulnerabilities of elderly people to human rights abuses.

Of course, besides these social, legal, medical and economic challenges, there is a moral imperative that Australian should take all appropriate measures to encourage and protect its elderly citizens and provide them with opportunities to live happy and meaningful lives because the elderly as a group have contributed to the history, advancement and prosperity of the nation. Moreover, at some stage many of the community will face the same issues, as they themselves enter aged care.

III. AUSTRALIA'S AGED CARE SYSTEM

¹² New South Wales Government, *Towards 2030: planning for our changing population*, (April 2008) 1. (<http://www.dadhc.nsw.gov.au/NR/rdonlyres/A5EB541E-00F3-4A12-BCB9-1995DFDF82DA/3675/towards2031.pdf>)

¹³ Access Economics, *Keeping dementia front of mind: incidence and prevalence 2009-2050*, (August 2009), 23

http://www.alzheimers.org.au/upload/Front_of_Mind_Full_Report1.pdf ; Australian Institute for Health and Welfare, *Dementia in Australia: national data analysis and development*, (2007), <http://www.aihw.gov.au/publications/age/dandad/dandad.pdf>.

¹⁴ Australia House of Representatives Standing Committee on Legal and Constitutional Affairs *Inquiry Into Older People and the Law* Australian Parliament, 2007, para 1.3.

¹⁵ For some general approaches to these challenges see Parliament of Australia House of Representatives Standing Committee on Health and Ageing *Inquiry into long term strategies to address the ageing of the Australian population over the next 40 years* March 2005.

¹⁶ Campbell Research Consulting above n 10, para 2.4.

TYPES OF CARE AND PROVIDERS

There are two basic types of aged care assistance, namely residential and community based care. Residential aged care is for frail or disabled older people who can no longer live in their own homes or independently and is provided for under the *Aged Care Act 1997* (Cth). The Act's main role is to regulate the use of Commonwealth money in the provision of aged care services. However, attached to that core funding role are principles and rules that introduce standards with respect to the quality of care provided. These standards are further discussed in Part V.

Facilities are intended to provide suitable accommodation and related services (such as laundry, meals and cleaning) and personal care services (such as assistance with the activities of daily living). Nursing care and specialised equipment is provided to residents requiring such assistance. The Australian Government subsidises the provision of residential aged care to those approved to receive it, with aged care residents also contributing to the cost of their care. As at 30 June 2008, there were 2,830 mainstream residential aged care services with approved places in Australia providing a total of 172,657 places.¹⁷

Community based care is provided within an elderly person's home or within a community setting. The largest source of community care assistance is provided through the Australian Government and State/Territory funded Home and Community Care (HACC) program administered under the *Home and Community Care Act 1985* (Cth).

At a national level, the main providers of residential aged care services are religious organisations (29%), private providers (28%), community-based providers (17%) and charitable organisations (16%).¹⁸ Thus there is no homogeneity in the objectives, background or philosophy of the various facilities. Of particular concern is the research that suggests that overall, profit based organisations may provide lower quality care than non profit service providers.¹⁹ There may be a real incentive or

¹⁷ The data discussed are derived from Department of Health and Ageing *Report on the Operation of the Aged Care Act 1997*, above n 3, see Executive Summary.

¹⁸ Australian Government, Australian Institute of Health and Welfare *Residential Aged Care in Australia 2007-08* Canberra June 2009 Aged Care Statistics Series No 28. Ch 3.

¹⁹ R Vikram et al, 'Quality of care in for-profit and not-for-profit nursing homes: systematic review and meta-analysis,' *British Medical Journal* 2009 online bmj.com, 1-15.

temptation for those for profit facilities to 'cut corners' and to reduce both the number of services and also their quality to obtain greater efficiencies, particularly if government funding and supervision are inadequate. The writers stress that these financial incentives and pressures and the responses to them by aged care providers need to be further investigated.

However, aged care is made even more complex because there are a range of Commonwealth and State regulated and funded services. State legislation for the aged is found in community welfare legislation and nursing home and retirement village regulation. States may have their own anti-discrimination legislation, building standards and legislation, occupational health and safety laws, health service complaints system and consumer protection legislation that may be relevant to aged care facilities. The position of each State and Territory with respect to the Federal system needs to be examined on a case by case basis.²⁰ For example, most retirement villages operate outside the standard definition of aged care even though they are intended to have social and health benefits and provide accommodation for elderly people. However, generally retirement villages do not cater for older people who require high levels of care and supervision.²¹ There still is no unified, national system for policy, planning, funding and service delivery.²²

A PROFILE OF PEOPLE IN RESIDENTIAL AGED CARE

Overall, usage rates for permanent residential aged care increase with age. They are higher for women than men, particularly among older age groups. At 30 June 2008, those aged 85 years and over had the highest rate of use, at 235.5 persons per 1,000. The corresponding measures for the age groups 80-84 and 75-79 were 78.5 and 32.3 per 1,000, respectively.²³

²⁰ P Hanks and L De Ferrari *Regulation of Residential Aged Care. Review of legislation: Commonwealth, State and Territory* Commonwealth Department of Health and Ageing, 30 April 2003.

²¹ I Hardy 'Aged Care' [2002] *ElderLaw* Rw 2. See for example the *Retirement Villages Act 1999* (NSW).

²² I Hardy 'Aged Care' [2002] *ElderLaw* Rw 2.

²³ Australian Government, Australian Institute of Health and Welfare *Residential Aged Care in Australia 2007-08* above n 18, para 3.1 These data on compiling a profile of residential people in care are derived from Chapters 2, 3 and 4 of Australian Government, Australian Institute of Health and Welfare *Residential Aged Care in Australia 2007-08* above n 18.

The distribution of length of stay for existing permanent residents at 30 June 2008 was towards longer periods of stay. Only 7% of permanent residents had been in residential aged care for less than 3 months, while 19% had been resident for between 3 months and 1 year, 52% for 1 to 5 years and 21% for 5 years or more.²⁴ There were 105,030 admissions to residential aged care between 1 July 2007 and 30 June 2008, of which 51% (53,737) were for permanent care.²⁵

The reasons for leaving aged care are given in the data collection system as "death, return to community, admission to hospital, move to another aged care service and other". In 2007–08, for those persons whose reason for separation was specified, death accounted for separation for 89%, while 3% returned to the community, 4% moved to a different residential aged care setting and 4% were discharged to hospitals.²⁶

There were 160,250 residents in mainstream residential aged care services at 30 June 2008, compared with 156,549 residents in aged care services at 30 June 2007 and 135,991 residents at 30 June 2000. Over half (55%) of the residents in aged care services at 30 June 2008 were aged 85 years and over, and over one-quarter (27%) were aged 90 years and over.²⁷

About 98% of permanent residents at 30 June 2008 had their marital status recorded at their admission time. Excluding those with unknown status, 56% were widowed at the time of admission, 26% were either married or in a de facto relationship, 10% had never married and 8% were divorced or separated.²⁸

A high proportion of permanent residents were in receipt of a government pension, with 71% receiving a Centrelink pension, and 18% an Australian Government Department of Veterans' Affairs (DVA) pension.²⁹

Diagnoses of dementia and other mental illnesses are recorded separately from other illnesses in the Department database. Excluding missing data, 63% of residents had at least one diagnosis of dementia.³⁰

²⁴ Ibid para 3.4

²⁵ Ibid para 3.4, 3.6.

²⁶ Ibid para 3.6.

²⁷ Ibid para 4.1.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

People with special needs are identified under the Act and include people from Aboriginal and Torres Strait Islander communities, people from non-English speaking (culturally and linguistically diverse) backgrounds, people who live in rural or remote areas, people who are financially or socially disadvantaged, and veterans (including spouses, widows and widowers of veterans) and some with psychiatric disorders.

It is clear that the elderly in residential care are particularly vulnerable to serious abuse. There is certainly the potential for significant systemic abuse. Indeed, it would be difficult to think of more vulnerable groups within our society: many with dementia or other cognitive deficits; many with significant physical illnesses and disabilities, including for example, anxiety and depression, and often immobile; often poor; living in relatively closed environments; and often without much support or even direct contact with the outside world. In addition, they may have personal difficulties in communication and in memory and, to exacerbate these difficulties, avenues for complaint and investigation of those complaints appear to lack necessary accessibility, clarity and rigour. Moreover, quite naturally, many residents may feel reluctant to question policies or make complaints, concerned that they will be victimised or even be in jeopardy of losing their places. As noted below, there are anecdotal reports that such retribution is indeed quite common.

IV. WHAT IS THE LEVEL OF ABUSE OF ELDERLY PEOPLE IN AGED CARE?

There is no empirically based data about the frequency or the type or level of problems faced by elderly people in residential care. Problems could range from unjustified and excessive restrictions on personal freedoms such as freedom of movement, restrictions on autonomy, poor or substandard food, accommodation and hygiene, physical or mental abuse and humiliation.

Anecdotal and media reports certainly suggest that there may be widespread abuse. These reports have been made over a long period of time, are consistent in their criticisms and come from a variety of sources. A number of aged care advocates suggest that abuse is very prevalent if not rife with the problem being exacerbated by poor staff

levels and inadequate training.³¹ It is argued that increasing workloads, high stress and low pay are causing aged care nurses to leave the aged care sector. Poorly qualified and poorly trained hands on staff are employed who often lack the necessary communication skills in English to communicate effectively with residents and to comprehend written case notes and care plans. These personal care workers comprise about 60% of the aged care workforce, but according to the Australian Nursing Federation they do not have the training to deal with complex patient care. This is significant because about 70% of the people in aged care had high care needs.³² Those people need highly qualified staff.

Braithwaite *et al* in their fieldwork study of Australian aged care facilities report that a state advocacy agency suggested that they believed that sexual assaults by staff to have occurred at 22% of the nursing homes in their jurisdiction.³³ It is also believed that many of these assaults do not result in criminal prosecution because nursing homes act to cover them up. There have been numerous media reports of sexual abuse allegations.

The consultations of the Human Rights Consultation Committee report³⁴ expressed widespread unease about the vulnerability of elderly people, particularly in aged care. As the report noted:

*Many people are becoming increasingly concerned about the inadequacy of services for the ageing, the conditions inside retirement hostels and nursing homes, and the general vulnerability of people who become invisible because they are elderly.*³⁵

The report recorded that a nursing home worker resigned after less than a month because she was horrified by the human rights abuses she witnessed: 'I worked there for a while and it changed my life. When you are old you are ... tossed on the hay and forgotten'.³⁶

³¹ B Packham Herald Sun Brisbane December 13, 2009 at

<http://www.heraldsun.com.au/news/victoria/abuse-allegations-on-the-rise-in-nursing-homes/story-e6frf7kx-1225809984812>

³² R Browne 'Alarm at violence in aged care' Sydney Sun Herald March 28, 2010, 8-9.

³³ J Braithwaite, T Makkai and V Braithwaite *Regulating aged care: ritualism and the new pyramid* Edward Elgar Publishing, Cheltenham 2007, 186.

³⁴ National Human Rights Consultation Committee *Report on the Consultation into Human Rights in Australia* Commonwealth of Australia 2009 (report handed down on 30 September 2009), 33-34.

³⁵ Ibid 33-34.

³⁶ Ibid 33.

Many participants told the Committee more attention must be paid to the needs and care of people as they age and that mechanisms must be introduced to alert responsible authorities if conditions fail to meet expectations. The ACT Disability, Aged and Carer Advocacy Service commented to the Committee

Advocacy groups concerned with the rights of frail older people and people with disabilities say protections existing in Australian law in relation to their rights [are] woefully inadequate.³⁷

The report continued:

The right to be free from degrading treatment is especially pertinent to older people living in aged care facilities and nursing homes. This is because they are entirely dependent on facility staff and their carers. Seniors Rights Victoria echoed a commonly expressed fear: 'Older people have limited ability to protect themselves and assert their rights in an environment where efficiency is often the main priority of caregivers'.³⁸

Organisations such as the Aged Care Crisis Team attempt to monitor conditions in nursing homes. The Aged Care Crisis Team maintains data which seems to reflect the reality that current protections against abuse in nursing homes are failing to reduce it in any significant way.³⁹ It has argued that standards in aged care facilities are actually declining and that there is evidence that aged care residents regularly go without proper pain relief and palliative care. Problems include the following: poor infection control; inadequate clinical care; failure to provide safe medicine, adequate nutrition and hydration; painful and avoidable bed sores; and inappropriate use of physical and chemical restraints.⁴⁰

The Australian Nursing Federation Federal Secretary has said that the aged care system is under pressure and that 'awful stories were coming out'.⁴¹ She also said that incidents could be prevented if there was adequate staffing, adequate numbers of qualified staff, and if the workloads were manageable and reasonable. The Dieticians

³⁷ Ibid 34.

³⁸ Ibid.

³⁹ Aged Care Crisis Team, *Elder Abuse*, (2008) <<http://www.agedcarecrisis.com/elder-abuse>> at 22 June 2008.

⁴⁰ R Browne 'Alarm at violence in aged care' Sydney Sun Herald March 28, 2010, 8.

⁴¹ Ibid.

Association reported that one in two aged care residents was malnourished increasing their risk of falls and fractures.⁴²

As further discussed below it is imperative that the real level of abuse be formally investigated and that this investigation should include some empirically based studies.

V. CURRENT REGULATORY RESPONSES TO ABUSE AND REFORMS

The *Aged Care Act 1997* (Cth) ("*Aged Care Act*") introduced a number of reforms to the regulation of aged care. The current regulatory system as developed by that Act has a number of components, including the following: an accreditation process for service providers; a complaint and investigation process; and the potential for sanctions against clearly recalcitrant service providers.

The Department has also established a Community Visitors Scheme for volunteer visitors to assist residents who may be isolated or lonely. This is a very worthwhile project, but it cannot be properly described as forming part of a complaints and investigation process. In fact, community visitors are directed not to become involved in matters of compliance or legal conflicts.⁴³

In addition, there is a Charter of Resident Rights and Responsibilities, which includes basic rights of residents, but has no enforcement or compliance mechanisms and is therefore exhortatory. There is also an advocacy service which is further discussed below.

While these reforms are welcome and worthwhile, a number of deficiencies need to be rectified. Above all, these processes do not confer rights on abused individuals to a legal remedy. Instead, the official response and framework is patchy and under-resourced, the response is discretionary and difficult to legally challenge by the ordinary citizen.

ACCREDITATION OF SERVICE PROVIDERS

All service providers must be accredited under the *Aged Care Act*. The Aged Care Standards and Accreditation Agency Ltd (the Agency)

⁴² Ibid.

⁴³ Braithwaite et al above n 33, 186.

accredits all Australian Government funded aged care homes, with 91.6 per cent of homes accredited for at least three years.⁴⁴

During 2008-09, the Agency identified 303 homes as being non-compliant with one or more of the 44 expected outcomes of the Accreditation Standards and 2.4 per cent of homes (68 homes) were identified as not meeting one or more of the expected outcomes of the Accreditation Standards.⁴⁵

It is beyond the scope of this article to give a detailed analysis of accreditation system and regulatory systems generally. A 2007 report commissioned by the Department of Health and Ageing found that the accreditation system was fundamentally sound, but that the implementation of measures to assess quality improvement was desirable.⁴⁶ While accreditation systems are used widely as a form of regulation there are issues concerning their evaluation, including a lack of evidence as to their effectiveness, concerns that accreditation that focuses on minimum standards will only produce limited performance and not excellence, and that accreditation can be costly, administratively burdensome and time consuming.⁴⁷ The Australian system has been the subject of some criticism, for example, for fostering tokenism or ritualistic compliance that does no more than achieve the bare minimum standard and may in fact encourage less than the minimum.⁴⁸ While the standards of aged care facilities have improved because of accreditation,⁴⁹ there is still significant room for improvement, for example, in dealing with long term systemic problems.⁵⁰ One area to consider is that Departmental assessors and inspectors need further training on the application of standards as there are concerns about their consistency of approach and that they overall tend to be lenient in relation to breaches.⁵¹

⁴⁴ Report on the operation of the *Aged Care Act 1997*, 2008-2009 above n 3, 70.

⁴⁵ *Ibid* 88. For the primary responsibilities of approved service providers see *Aged Care Act 1997*, s 63.1. The 44 outcomes relate to 4 main standards or areas: management systems, staffing and organisational development; health and personal care; residential lifestyle; and physical environment and safe systems.

⁴⁶ Department of Health and Ageing *Evaluation of the impact of accreditation in the delivery of quality care and quality of life to residents in Australia* Commonwealth of Australia 2007, Executive Summary i.

⁴⁷ Campbell Research Consulting above n 10, Executive Summary xv.

⁴⁸ Braithwaite et al above n 33 Chapter 6, pp 176-215.

⁴⁹ *Ibid* 195.

⁵⁰ L Gray *Two year review of aged care reforms*, Commonwealth of Australia Department of Health and Aged Care, Canberra 2001.

⁵¹ Parliament of Australia Senate *Quality and Equity in Aged Care* Canberra, Commonwealth of Australia 2005 para 3.27-3.36.

It is also argued that there are mandated staffing levels for child care centres, kindergartens, schools and hospitals and the same requirement should exist for aged care.⁵² The Aged Care Crisis Team has reported that it was told that one nursing home had only one person on duty for 80 residents.⁵³ What would be desirable would be the development of very clear benchmarks for key indicia such as staff-client ratios, the level of expertise of staff, and reasonable standards for health, accommodation and hygiene that do reflect quality care and treatment. A failure to achieve these minimum levels should be responded to with expeditious action including where infringements are serious, sanctions such as suspension or revocation of accreditation.

BEST PRACTICE GUIDELINES AND STANDARDS

The Department of Health and Ageing in its last annual report relating to aged care indicates that it has designed the Encouraging Best Practice in Residential Aged Care (EBPRAC) program to support the uptake of existing evidence-based guidelines by funding organisations to translate this evidence into practice for staff to use in everyday practice. The best practice guidelines are exhortatory only. There are no enforcement mechanisms for best practice and there is no comprehensive, ongoing supervisory role of each service provider in relation to best practice and quality care. Developing an environment of continuous improvement for facilities is clearly worthwhile and can be fostered by rewards and, on occasions, re-integrative shaming that encourages facilities and their staff to do better.⁵⁴ It is clear that greater resources and efforts need to be allocated to improving the quality of facilities and care and that, for example, accreditation decisions need to more clearly consider staff-client ratios and the quality and training of staff.

However, this positive system of incentives must be balanced with an effective enforcement system. Thus, the aged care system needs two models that can complement each other: a regulatory model supported by effective enforcement to achieve and maintain minimum standards; and a strengths based best practice model supported by rewards.⁵⁵

COMPLIANCE

⁵² R Browne 'How less qualified workers are taking up the slack' *Sydney Sun Herald* March 8.

⁵³ Ibid.

⁵⁴ Braithwaite et al above n 33, 199-214.

⁵⁵ Ibid 330.

The Office of Aged Care Quality and Compliance (the Office) within the Australian Government Department of Health and Ageing is responsible for ensuring the quality and accountability of Australian Government-subsidised aged care services. The Office manages national programs that seek to ensure the safety and security of people in aged care services; promotes good practice in delivery of aged care; enhances the skills and availability of the aged care workforce; and ensures the financial security of aged care residents.

The Office's key responsibilities include: managing the Aged Care Complaints Investigation Scheme, the Community Visitors Scheme and the National Aged Care Advocacy Program; promoting the aged care sector's awareness of the importance of providing high quality of care; and the prudential regulation of approved providers charging accommodation bonds.⁵⁶

The role of the Office is commendable, but the issue is whether there is sufficient funding for programs to ensure the quality of care across the nation, and covering all service providers. The rate and number of complaints and the concerns about accreditation, and the feedback from various consumers and advocacy groups discussed in this article, strongly suggest that there is insufficient funding.

This quality assurance system is intended to be reinforced by a program of unannounced visits, and audits for residential care and follow-up action as appropriate for all aged care services.

COMPLAINTS INVESTIGATION SCHEME

The Aged Care Complaints Investigation Scheme (CIS) establishes a process for investigating complaints made under the *Aged Care Act*. It commenced operation on 1 May 2007 and was established through changes to the *Aged Care Act* and the introduction of regulations under the Act, namely the *Investigation Principles 2007*.

The CIS is based on alternative dispute resolution principles, is free, and allows a complaint to be made independently from a residential facility.⁵⁷ Resolution processes under the Scheme include the following: preliminary assessment handled by complaints resolution officers prior to the acceptance or non-acceptance of a complaint; negotiation by

⁵⁶ For an overview of these functions see Report on the operation of the *Aged Care Act 1997, 2008-2009* above n 3, Ch 8, 9, 10.

⁵⁷ This description of the CIS is based upon the analysis of the Senate 2005 Inquiry above n 51 para 3.127-3.135.

complaints resolution officers; mediation by qualified, external officers; determination of complaints conducted by committees, which are constituted of independent members with skills in aged care; and complaints resolution if complaints cannot be resolved through negotiation or mediation. Oversight of the Scheme is conducted by the Commissioner for Complaints.

For 2008-09, 63 per cent (or 7,962) of these complaints were considered 'in-scope' cases, that is, relating to an Approved Provider's responsibilities under the Act and subsequently investigated. Breaches of an Approved Provider's responsibilities were identified in 1,093 cases (which includes where a Notice of Required Action was issued).⁵⁸ The CIS made 1,629 referrals to external agencies more appropriately placed to deal with the matters raised; conducted 3,151 site visits during the course of investigating a case; and issued 181 Notices of Required Action where Approved Providers were found in breach of their responsibilities under the Act and had not already taken action to address the breach.⁵⁹

The position of Aged Care Commissioner has also been created under the *Aged Care Act*.⁶⁰ The Commissioner can in response to a complaint, or on their own initiative, examine the Secretary's processes and decisions in relation to complaints and their investigation. The introduction of the Aged Care Commissioner is a welcome reform, but it does have some limitations. The Commissioner is within the portfolio of the Minister for Health and Ageing and there may still be perceptions at least that the external oversight process is not at arms length. In addition, the Commissioner has a recommendatory role only and cannot make any decisions. Moreover, while the Commissioner has an 'own motion' power, the Departmental 2008-09 annual report noted that there had been no 'own motion' reviews.⁶¹ There is a danger that the Commissioner will neither have the resources, nor the committed support of the Department, to make frequent and wide-ranging investigations of complaints or suggested problem areas. The role could be essentially limited to 'paper' reviews of complaint processes conducted by the Department. Moreover, the Aged Commissioner may not have a human rights focus but instead adopt a more bureaucratic modus operandi. It is for these reasons that we have suggested below that a Federal Human Rights Commissioner for the Aged should have the role of external oversight of the complaints and

⁵⁸ Report on the operation of the *Aged Care Act 1997*, 2008-2009 above n 3, 73-80.

⁵⁹ *Ibid* 81-83.

⁶⁰ *Aged Care Act 1997* (Cth) s 95A1(2).

⁶¹ Report on the operation of the *Aged Care Act 1997*, 2008-2009, above n 3, p 84-85.

investigation process with a dedicated and properly funded investigatory staff.

PROBLEMS WITH THE COMPLAINTS AND REGULATORY SYSTEM

The Senate Inquiry Report of 2005 concluded that the complaints system was not user friendly, that the mechanisms were unclear, and that it was unresponsive to the needs of many complainants.⁶² Aged care advocates said to the Inquiry that many family members gave up on complaining because their complaints are trivialised. Concerns were also expressed that some complainants were actively discouraged by service providers and/or the Department. The 'culling' of complaints by the Department may not always be justified or transparent.⁶³ The report recommended a review of the complaints system, that there be greater differentiation made on the basis of the severity of the complaint (eg serious, moderate and minor complaint), and that the mediation process be made more responsive and open and with greater support for complainants.⁶⁴ Moreover, complainants could feel shunted from one agency to another with no clear pathway of procedures or information.⁶⁵

The Walton Review was subsequently requested by the Federal Government to identify areas of improvement to ensure the CIS scheme achieves best practice aged care complaints management arrangements.⁶⁶ The Review summarised concerns about the scheme from the perspective of complainants as follows:

- Difficulty of accessing the complaints scheme;
- Complainants not involved or engaged in the complaint processes;
- Inadequate information about the complaint process and lack of transparency;
- A failure to adequately explain the reasons for the CIS decisions;

⁶² Parliament of Australia. *Senate Quality and Equity in Aged Care* Canberra, Commonwealth of Australia 2005 ('Senate 2005 Inquiry'), para 3.136-3.148; also see Braithwaite et al above n 33, 185.

⁶³ See, for example, the Senate 2005 Inquiry para 3.140.

⁶⁴ Rec 16, Senate 2005 Inquiry.

⁶⁵ See, for example, Senate 2005 Inquiry para 3.84-3.90, 3.18-19.

⁶⁶ M Walton *Review of the Aged Care Complaints Investigation Scheme* October 2009 Department of Health and Ageing Canberra 2009.

- Inadequate information on the outcome of an investigation;
- Inadequate protections for staff who are complainants;
- Fear of reprisals from the service if a person makes a complaint;
- The weight given to the complainant (family/friend) is less than that given to the provider;
- The standard of proof is unreasonably high; and
- The 14 day time frame to lodge an appeal to the Aged Care Commissioner is unnecessarily restrictive.⁶⁷

The Walton Review made a number of recommendations with the main ones being

- That the aged care complaint scheme be restructured into the following three divisions: Assessment and Early Resolution (essentially to deal with non serious complaints); Investigations (to deal with serious complaints); and Communications and Stakeholder Relations.
- The establishment of an independent Aged Care Complaints Commission and the creation of the position of Aged Care Complaints Commissioner who would report directly to the Minister for Ageing.⁶⁸

The Aged Care Complaints Commission would replace the current CIS and be a statutory body headed by the Aged Care Complaints Commissioner who would be appointed as a statutory office holder appointed by and reportable to the Minister for Ageing. Thus, the new Commission and Commissioner would be separate from the Department and therefore reduce concerns that the complaints process was not impartial and was too tied to the Department of Health and Ageing.⁶⁹

We are of the view that these recommendations, and the other

⁶⁷ Ibid para 4.3.

⁶⁸ Ibid. For a list of the recommendations see Ch 3.

⁶⁹ Ibid.

recommendations of the Walton Review about matters such as recruitment and training of complaints officers and development of better investigation standards and better promotion of the complaints system, are all useful and to be welcomed. We would also submit that the recommendations made by the Walton review are unlikely to deal satisfactorily with all of the concerns expressed about the complaints system as described above. We would assert that more is needed. In particular, the Aged Care Commission and its Commissioner would still report to the Minister for Ageing and not be completely external to the Department. The Commission and its Commissioner would be limited to a broad investigatory role and the non-litigious resolution of disputes that relies on the parties coming to a negotiated agreement. It could not initiate, conduct or supervise any litigation arising from complaints or investigations. Nor would it would a have a clear human rights focus as would the Human Rights Commission.

The complaint system in Australia is not rights focussed and complaints tend to be steered to dispute resolution strategies thereby excluding sanctions and enforcement.⁷⁰ Care must be taken to ensure that dispute resolution methods do not coerce or otherwise pressure complainants into agreeing to negotiated settlements. Mediation can be problematic when there are serious power imbalances between the parties. This is likely to be the case in such disputes where the elderly person may have physical and psychological disabilities, and may feel dependent on the goodwill of the aged care facility. There has been a lack of rights based culture in aged care homes and it lags behind the broader disability sector.⁷¹ Our recommendations advocating the introduction *The Rights of the Elderly in Aged Care Act* and the role of the Federal Human Rights Commissioner for the Aged would assist to make the complaints and investigation process more rights orientated.

There is also a need to examine the internal complaints processes of the Service providers. The Aged Complaints Resolution Scheme provides that at first instance complaints are to be processed through the internal process of the provider and only then to proceed to the external scheme, although it is possible for a complainant to by-pass the internal scheme. There is a mixed response to the effectiveness and fairness of such procedures.⁷² It would be worthwhile for there to be a study on the fairness and effectiveness of these internal processes to see, for example, the number of internal complaints made, the nature

⁷⁰ Braithwaite et al above n 33, 185.

⁷¹ C Ronalds, P Godwin and J Fiebig *Residents' Rights in Nursing Homes and Hostels: Final Report* Canberra, Australian Government Publishing Service 1989.

⁷² eg see Senate 2005 Inquiry above n 51, para 3.31-3.32.

and seriousness of such complaints, how they are resolved and dealt with, and the numbers that proceed to external system. It may be that some human rights infringements are not being identified and processed by the Department system at all. We also suggest that there should be some regular reporting mechanism on the number and nature and resolution of internal complaints that do not proceed to the external system.

Extra efforts also must be made to ensure that continuing information about the right to complain is made available to residents, to their friends and relatives. Staff should also be subject to a continuing process of being made aware of the complaints process and of their duty to cooperate in the complaints process. The legislation should contain offence provisions about intentionally or recklessly hindering or interfering with the making of a complaint or the investigation of a complaint, and there should also be a provision making it mandatory for all staff to report breaches of human rights. These obligations should be regularly discussed and reinforced.

The ACT Disability, Aged and Carer Advocacy Service said to the Senate Inquiry that complaints were 'chilled' by provider retribution against complainants, reporting 55 instances of actual retribution in aged care facilities in the Act between 2001-2004.⁷³ The 2005 Senate report recommended that there should be an investigation of allegations of retribution and intimidation against those who make complaints or who intend to make complaints.⁷⁴ There needs to be comprehensive whistleblower protection provisions in the Aged Care Act.⁷⁵

The investigation process needs to be timely and where possible interviews of parties and witnesses should take place separately and as soon as possible. Our consultations have indicated that many complaints, even ones containing serious allegations such as assault or neglect are done 'on the papers' with no interviewing of victims or witnesses. For example, in a recent allegation of a nurse spanking a dementia patient, the victim was not interviewed.⁷⁶ Concerns about limited 'paper' investigations are borne out by the Department's report that site visits were only undertaken in 40% of all complaints

⁷³ Braithwaite et al above n 33, 186.

⁷⁴ Senate 2005 Inquiry report above n 51, Rec 18.

⁷⁵ T Faunce and S Bolsin 'Three Australian whistleblowing sagas: lessons for internal and external regulation (2004) 181 *Medical Journal of Australia* 44-7; Braithwaite et al above n 33, 187.

⁷⁶ Our consultations with seniors' groups in 2009-10.

concerning providers' responsibilities. Moreover, 41% of these visits that were made were announced, that is the service provider was given notice that the visit was to occur.⁷⁷

Most Australian complaints do not result in a visit to the nursing home, unlike the situation in the United States.⁷⁸ Resolving complaints 'on the papers' should be avoided, particularly where the allegation is at all serious. Appropriate records of incidents must be kept by service providers. There is a special need in the investigation of complaints for investigators to have face to face contact with complainants and other potential witnesses and also staff and all relevant records. The vulnerability of elderly people and their potential cognitive and physical deficits means that care, sensitivity and persistence, and skills and experience may be necessary to investigate the matter properly. Family members and friends may need to be given information on the need to take photographs of injuries or defects in the residence and to get the names and identities of witnesses and staff.

Specific concerns⁷⁹ expressed about the regulatory system include the following:

- Many audits and impending visits by the accreditation agency are known by the service provider ahead of time, allowing them to prepare and, if necessary, change practices for the duration of the visit including, for example, increasing the number of staff and improving the quality of the resources (eg. food and hygiene).
- Audits are not conducted in a manner calculated to reveal any abuse. The guidelines allow the accreditation body to merely follow a paper trail. For example, for dental care, the guidelines require that there be a plan. However, there is not enough consideration of what the plan contains. For example, the guidelines do not require a dental nurse.
- Service providers engage consultants to improve their services and use the right jargon to prepare for accreditation without engaging in real or sustained improvements to their practices.

⁷⁷ Report on Operation of the *Aged Care Act 1997*, 2008-2009 above n 3, 81.

⁷⁸ Braithwaite et al above n 33, 186.

⁷⁹ Agedcarecrisis.com *How effective is the complaints process?* at <http://www.agedcarecrisis.com/aged-care-complaints?tmpl=component&print>.

- Service providers may attempt to persuade or coerce staff not to communicate concerns to assessors or investigators.
- Resident records about the frequency of care and medication may not reflect actual everyday practice and this may make it difficult for residents and their families to justify complaints when the formal figures do not reflect the allegation.
- Some records may be 'lost or hidden' or sent to head office when assessment occurs.
- Many working in nursing homes have received no training.⁸⁰ Pushing and hitting patients may be common place. Measures such as surveillance cameras are not used.
- Service providers may respond to deficiencies by formulating plans and reforms that are then never put into practice or soon lapse.⁸¹
- If an agency or investigation find some serious deficiency, service providers are often given great leeway in making changes.
- Investigators and assessors may face pressure, both direct and more subtle, to 'go easy' on service providers, both from service providers and from their superiors in the Department.⁸² This assertion is supported by the fieldwork of Braithwaite et al which indicates that assessors may fail to include negative findings in reports where such a finding is justified or where their negative findings are later changed by superiors without a reason being given. These situations breed cynicism from the assessors and a reluctance to report non-compliance.⁸³
- Talented accreditation assessors may be lured into private sector positions.⁸⁴

Consultations and the views of many advocates and workers at aged care centres indicate that poorly trained and inexperienced staff

⁸⁰ Writers' consultations with National Seniors organisation.

⁸¹ Agedcarecrisis.com *How effective is the complaints process?* at <http://www.agedcarecrisis.com/aged-care-complaints?tmpl=component&print>.

⁸² Eg see Senate 2005 Inquiry above n 51, para 3.27-34.

⁸³ Braithwaite et al above n 33, 193.

⁸⁴ Ibid 197.

continue to be employed and that there is an increasing 'casualisation' of the work force that exacerbates those problems and reduces the quality of care.⁸⁵

Each of these above allegations or assertions needs to be thoroughly investigated, preferably by an independent body. Measures must be taken to ensure, for example, that audits are random and unknown to service providers beforehand, and that they are thorough and professional.

In 2008-09, the Agency conducted 7,595 visits to homes, which represents an average of 2.7 visits per home. According to the Department, all homes received at least one unannounced visit from the Agency during the year.⁸⁶ In relation to audits in 2008-09 there were 1, 622 accreditation site audits which give the service provider notice of the audit. There were in addition 104 review audits of which only 57 were unannounced. There were also 5, 8699 'support contacts' of which 3, 481 were unannounced.⁸⁷

This would suggest that only on 57 occasions was there a full audit into a service provider which was unannounced. In all other cases there was either no full investigation or audit of the provider's service provision or if there was, the relevant service provider was given prior notice. As mentioned, there are 2,830 mainstream residential aged care services so a figure of 57 unannounced full audits seems to be a very low figure, particularly given the vulnerability of residents and the consistent anecdotal reservations about the audit, complaints and investigation processes. There is clearly a need for a significant increase in the number of un-announced audits, visits, inspections and investigation of complaints.

SANCTIONS

Where providers are found not to be meeting their responsibilities under the Act and fail to remedy the situation, there is the possibility of regulatory action by the Department, such as the imposition of sanctions.⁸⁸ As noted above, in 2008-09, the Department took action against 27 Approved Providers, issuing 30 Notices of Decision to Impose Sanctions. At 30 June 2009, 13 of the sanctions remained in place. The Department also issued 163 Notices of Non-Compliance.

⁸⁵ Senate 2005 Inquiry above n 51, para 3.84-3.90, 3.18-19.

⁸⁶ Report on the operation of the *Aged Care Act 1997*, 2008-2009 above n 3, 69.

⁸⁷ *Ibid*, 81-83.

⁸⁸ *Aged Care Act 1997*, s 65.1, 65.2, 66.1.

A comparative study of the United States, English and Australian aged care systems by Braithwaite, Makkai and Braithwaite found that the Australian system, particularly with the new accreditation system after 1997, was 'more captured by the aged care industry' than either the United States or England.⁸⁹

As Braithwaite et al conclude:

Things have to be bad for non compliance to be recorded or strong criticisms to be made in an accreditation report. Over 99% of occasions when compliance with an expected outcome is assessed, compliance is the finding. In the very few cases where non compliance is found, sanctions are rare.⁹⁰

Under accreditation if non compliance is found the agency has to put in place a timetable for improvement. During this phase a series of 'support contacts' are scheduled to assess the agency's progress.⁹¹ It is only if progress lags behind expectations that a review audit, that is, a full inspection covering all standards, will be undertaken. It is only after the end of the defined period to remedy defects that sanctions might be imposed if there is still non compliance or there is evidence of a serious risk to the health, safety or well being of a person receiving care.

If sanctions are contemplated, the Department sends out a compliance team to visit the home and make recommendations to the Department's legal section. There are multiple occasions for a home to rectify a situation or put in a place a plan to rectify non compliance before sanctions are actually imposed (unless the non compliance is an immediate and severe risk - in which in 80% of sanctions cases it is).⁹² The home then has to show that it has a sustainable system to ensure that non compliance will not re-occur. There will be regular checks (often weekly) to ensure that the home is removing the risk.

The most used sanction is a notice to revoke the home's status as an approved provider for federally funded residents (most residents). However, revocation can be deferred if an approved adviser (mostly an outstanding director of nursing) is appointed by the home and the Department jointly to resolve the compliance issues. The second most

⁸⁹ Braithwaite et al above n 33, 176.

⁹⁰ Ibid.

⁹¹ This description of the process for sanctions is derived from Braithwaite et al above n 33, 178-180.

⁹² Ibid.180.

common sanction is suspension of government funding support (normally for six months, although many are lifted before that period).

The Department apparently does not regard the imposition of sanctions as serving a deterrent purpose, nor does it see sanctions as part of an enforcement strategy but instead only as a strategy of ensuring compliance by the relevant provider.⁹³ Only 3 homes were closed by the Federal Government from 1997-2007 by revoking the accreditation of an approved provider for federally funded residents.⁹⁴ There are no punitive sanctions and no attempts to use sanctions as a general deterrent. Homes that are found to infringe even in admittedly serious ways may well not have their accreditation revoked or suspended, nor will they necessarily be subject to any significant sanctions.

Recent cases in which sanctions have been imposed include a case of a severe outbreak of gastroenteritis at one nursing home,⁹⁵ concerns about the lack of proper medical treatment and hygiene at a number of nursing homes,⁹⁶ insufficient qualified staff at various homes,⁹⁷ inadequate pain relief management,⁹⁸ poor wound management,⁹⁹ attacks by vermin,¹⁰⁰ and failure to have proper clinical care plans.¹⁰¹ The cases generally involve breaches of a number of standards that are

⁹³ bid 178-179.

⁹⁴ Ibid 179.

⁹⁵ The Hon Justine Elliot MP Minister for Ageing at <http://www.health.gov.au/internet/ministers/publishing.nsf/Content/mr-yr09-je-je013.htm?OpenDocument&yr=2009&mth=2> at Bangalor Retreat Nursing Home in February 2009 that resulted in severe illness for 44 residents and 13 staff including the death of one resident, three hospitalisations. About 60% of gastroenteritis attacks occur in nursing homes.

⁹⁶ The Hon Justine Elliot MP Minister for Ageing at <http://www.health.gov.au/internet/ministers/publishing.nsf/Content/mr-yr09-je-je020.htm?OpenDocument&yr=2009&mth=3>

⁹⁷ The Hon Justine Elliot MP Minister for Ageing at <http://www.health.gov.au/internet/ministers/publishing.nsf/Content/mr-yr09-je-je028.htm?OpenDocument&yr=2009&mth=3>

⁹⁸ The Hon Justine Elliot MP Minister for Ageing at <http://www.health.gov.au/internet/ministers/publishing.nsf/Content/mr-yr09-je-je125.htm?OpenDocument&yr=2009&mth=10>

⁹⁹ The Hon Justine Elliot MP Minister for Ageing at <http://www.health.gov.au/internet/ministers/publishing.nsf/Content/mr-yr09-je-je067.htm?OpenDocument&yr=2009&mth=5>

¹⁰⁰ The Hon Justine Elliot MP Minister for Ageing at <http://www.health.gov.au/internet/ministers/publishing.nsf/Content/mr-yr09-je-je059.htm?OpenDocument&yr=2009&mth=4>

¹⁰¹ The Hon Justine Elliot MP Minister for Ageing at <http://www.health.gov.au/internet/ministers/publishing.nsf/Content/mr-yr09-je-je070.htm?OpenDocument&yr=2009&mth=5>

long running, have not been properly addressed by the service provider, and involve significant risks to the well being and health of residents. In addition, many serious risk cases appear to be activated not by audits but by informants, sometimes by anonymous informants.

A stronger enforcement environment and culture needs to be developed. It should be expected that any serious case of non compliance by a residential facility will be the subject of a sanction; that minor breaches that continue after the facility has been put on sufficient notice of the breach should also be met with a sanction, and that there should be regular monitoring of any facility that has been found to have committed a serious breach or minor breach. Assessors must be given clearer guidelines and training to ensure that breaches are treated in this way and the Department as a whole should support such action.

PART VI. OTHER CURRENT AVENUES FOR COMPLAINT AND REDRESS

There is a patchwork of potential protection for certain human rights in Australia which creates concerns that there can be gaps in protection, ambiguities, confusion and duplication. This patchwork includes the following: a few limited rights under the Australian Constitution;¹⁰² specific human rights acts in the ACT and Victoria; Federal and State anti-discrimination legislation; international conventions and treaties; and the common law.

This limited and diffuse patchwork means that there is an overarching problem of access to justice for the elderly in residential care. Access to justice is a fundament requirement for an adequate or effective human rights system as identified by the Human Rights Consultation Committee report¹⁰³ and it is the marginalised and the disempowered (such as elderly people with disabilities) who will require considerable additional resources and support to achieve effective access to justice.

COMMON LAW

¹⁰² There are some limited Constitutional protections that have little relevance to human rights issues in aged care eg freedom of religious expression under s 116 of the Constitution and freedom of political communication as implied under the Constitution (eg see *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520).

¹⁰³ Human Rights Consultation Committee Report above n 34, 126.

The common law, especially in the areas of tort and crime, could provide legal remedies for various types of abuse of the elderly. For example, torts for trespass and assault for unlawful physical interference to an elderly person, or negligence for cases where the service provider has failed in its duty of care to provide a safe and healthy environment for an elderly resident. Physical assault can constitute both a civil wrong and a crime.

However, there are a number of limitations in relying upon torts or the criminal law as a form of redress. First, torts may not cover all aspects of elderly abuse. For example, humiliation and patronising comments and treatment are unlikely to be categorised within the current array of torts, but they may be common forms of abuse of the elderly in aged care. Generally, invasions of dignity and privacy, and degrading treatment, are not such as to constitute physical assaults justifying criminal or civil action. Secondly, the common law can be overridden by the legislature at any time.¹⁰⁴ Thirdly, the common law is less accessible for laypeople and will generally require the services of a lawyer to identify the issue and pursue a matter. Elderly people in residential care are unlikely to have the skill, financial resources or opportunity to use the common law without a great deal of assistance. Fourthly, taking common law action is expensive and time consuming and matters may not come to trial for a number of years. This problem is exacerbated by the advanced age of the plaintiffs. Fifthly, the common law may have a slow and uneven development as it can be affected by the type and number of cases brought, whether matters are settled before trial, and whether courts consider they are constrained by precedent, or whether constrained to make their decisions limited to the particular factual situation before them. Courts may be reluctant to make general statements of principle or declarations of human rights. Moreover, criticisms can be made of activist courts that appear to develop the law, particularly within the context that judges are unelected and also may lack the skills and evidence before them to make sensible policy judgments.

Our initial research indicates that very few common law actions are taken by aged residents against government or against service providers.¹⁰⁵

In relation to using the criminal law elderly people may have difficulties in that the prosecution will have to prove matters to the

¹⁰⁴ Ibid 122.

¹⁰⁵ Including case searches using various legal search engines.

criminal standard of beyond reasonable doubt. Elderly people may be reluctant to make statements or give evidence. They may also find it difficult to give such evidence given their possible mental and physical disabilities. Moreover, criminal prosecution is run by the State and the focus is on punishment of the offender and not providing a remedy to the victim. In fact, it is claimed that there has been no criminal prosecution for neglectful care.¹⁰⁶

ANTI-DISCRIMINATION LEGISLATION

The Australian Human Rights Commission under Federal legislation can investigate complaints and attempt to conciliate them under the various anti-discrimination and human rights Acts, but there are numerous criticisms of the role of the Commission as discussed in the Human Rights Consultation Committee Report. Those concerns include a narrow definition of human rights, limited enforcement powers, limited rights of a complainant to initiate court action themselves, Commonwealth-State demarcations of power allowing for confusion and gaps in enforcement, and the Commission not having any compulsory powers in terms of changing Government legislation or policy.¹⁰⁷

Moreover, in relation to discrimination based on age there are significant specific concerns. While Commonwealth and State statutes are applicable to a potentially wide area of discrimination based upon age,¹⁰⁸ age discrimination as an issue has lagged considerably behind other areas such as gender or race.¹⁰⁹ The legislation and case law has focussed on age discrimination in the workforce that, while likely to gain in importance as older people stay in the workforce or rejoin the workforce, does not cover the many other forms of discrimination against the elderly, including in aged care facilities. There have been comparatively few complaints made to the Human Rights Commission in relation to aged based discrimination, and most of those are about employment issues.¹¹⁰ This apparent underuse is in part at least due to the restricted definitions of discrimination and harassment. For example, the definitions of discrimination based upon age under the *Age Discrimination Act 2004* (Cth) refer to the discriminator treating an

¹⁰⁶ Braithwaite et al above n 33, 191.

¹⁰⁷ Ibid 124-125.

¹⁰⁸ *Age Discrimination Act 2004* (Cth); *Anti-Discrimination Act 1977* (NSW) s 49ZYA. *Equal Opportunity Act 1995* (Vic) s 6.

¹⁰⁹ S Encel, 'Age Discrimination in Law and Practice' [2004] *ElderLaw Rw* 7, 7-10.

¹¹⁰ Australia House of Representatives Standing Committee on Legal and Constitutional Affairs *Inquiry Into Older People and the Law* above n 14, para 6.13.

aggrieved person less favourably than they would treat a person of a different age. This presupposes that aged people are involved in activities that other people may be involved in. However, in relation to aged care there is no real comparator with other groups because age care is really only provided to elderly people. In addition, laws relating to prohibiting discrimination on the basis of age in the workforce are of almost no use to elderly people in aged care who do not, and in most cases could not, work. The House of Representatives Standing Committee on Legal and Constitutional Affairs has recommended a review of the effectiveness of the *Age Discrimination Act 2004* (Cth) including exemptions from the operation of the legislation.¹¹¹

In relation to human rights concerning the elderly these concerns are exacerbated by the fact that there is no focus or leadership for human rights protection for the aged. For example, there is no Federal Human Rights Commissioner for the Aged, a new position that we suggest be established.

ADMINISTRATIVE LAW

In general terms, administrative law in Australia provides little direct protection of human rights for a number of reasons. First, while administrative review may result in challenging the lawfulness of administrative decision or, in some cases, the merits of the decision, it will not usually result in an individual remedy of for example, damages for a breach of human rights. Secondly, most decision making by private based organisations is not subject to review. Thirdly, many decisions by government and its agencies are outside the scope of merit based administrative review because they do not come within the scope of the *Administrative Appeals Tribunal Act 1975* (Cth). Fourthly, judicial review of administrative decisions is limited to the lawfulness of the process and not the merits of a decision.¹¹² Fifthly, the basic principles for 'standing' give only limited capacity for an individual to intervene to compel government or a public authority to exercise a power to protect a vulnerable class, for example, to investigate a nursing home against which a complaint of a human rights abuse is made.

In relation to the rights of the elderly in aged care, administrative law offers limited scope for challenge based upon human rights

¹¹¹ Ibid para 6.39 rec 44.

¹¹² *Administrative Decisions (Judicial Review) Act 1977* (Cth); eg see J McMillan & N Williams 'Administrative law and human rights' in D Kinley ed *Human rights in Australian Law* Federation Press Sydney, 1998, 63-91.

infringements. Administrative law has been criticised as providing only ritualistic and ineffective protection for the rights of aged care residents.¹¹³ Some decisions relating to decisions by government about residential health care do fall within the jurisdiction of the Administrative Appeals Tribunal (AAT) (such as some decisions about accreditation). However, it is claimed that these decisions are relatively infrequent and add little to effective enforcement.¹¹⁴ Decisions about complaints and investigations are not subject to merits review by the AAT.

INTERNATIONAL LAW AND CONVENTIONS

Justice Kirby has said of international declarations and their impact on Australian domestic law:

*Putting it bluntly, we have so far largely ignored, or rejected, the relevance for our own legal system of the great change that came about in the protection of basic rights, following the Second World War and the creation of the United Nations.*¹¹⁵

That comment certainly applies to the area of elderly human rights protection. There are a number of international instruments that can deal with rights of the elderly, but of particular relevance are the UN's Madrid International Plan of Action on Ageing in 2002, the Principles of Older Persons in 1991, and the Proclamation on Ageing in 1992. However, these instruments tend to be general, setting out exhortatory principles, but not containing any specific requirements as to enforcement, compliance and sanctions. In any event, none of these instruments are binding domestically in Australia unless put into legislation and there is no scope for enforcement in Australia without that happening. However, member states are expected to cover the rights of older persons to promote respect for the human rights of older persons in their laws, policies and actions, and to take measures to realise them in practice. Certainly the international instruments play an educative role and encourage international scrutiny and comparisons but they thus far have not had a significant effect upon Australian domestic law.

¹¹³ Braithwaite et al above n 33, 185, L Meyer (2006) 'The shame of aged care in Australia', www.agedcare.crisis.com.

¹¹⁴ Braithwaite et al above n 33, 191.

¹¹⁵ The Hon Michael Kirby, AC, CMG, 'The ALJ @ 80: Past, Present and Future', Paper delivered to a conference to celebrate the 80th Anniversary of the Australian Law Journal, 16 March 2007, unpublished.

PART VII. MAJOR REFORMS

A COMPREHENSIVE AND CO-ORDINATED REVIEW OF ELDER ABUSE AND ELDER RIGHTS IN AUSTRALIA

One of the major weaknesses thus far in the development of effective protection of elderly rights is the lack of a co-ordinated approach that covers all major aspects of the topic. Instead the response has been piecemeal with a complex and overlapping set of Federal and State initiatives, laws and policies operating with resulting confusion, gaps and duplications. Thus a national review is necessary that examines evidence and investigates matters such as the level and types of elder abuse and the range of policies and laws that can prevent and deter human rights infringements and where necessary punish them. Each of the Commonwealth, the States, and the Territories should co-operate in developing and implementing a best practice approach to human rights that preferably results in uniform legislation and approach, or at least in the development of national standards. State and Federal laws need to be examined and, where necessary, harmonised.

A Federal Human Rights Commission that is supported with dedicated additional funding to undertake the task is likely to be the best organisation to lead such an inquiry. However, the review must include State and Territory representatives and involve elder rights groups and the community. One important part of that inquiry must be a review of elder rights in aged care including empirical study of the level and nature of elderly abuse in aged care facilities across Australia and in relation to the full spectrum of care that is provided. That Federal inquiry should also consider legal and other methods of prevention of abuse in aged care including a whole of government approach.¹¹⁶

This review should also consider the operation and effectiveness of Federal and State laws that deal with discrimination against the elderly including definitions of discrimination, exemptions, investigation, enforcement and remedies. The laws should encourage empowerment of the elderly and not merely be a form of paternalistic legislation. In particular, the elderly and the groups that represent them must be continuously consulted in the development of law and policies in relation to them.

¹¹⁶ C Hastie 'Progress in the Fight Against Elder Abuse' [2004] *ElderLaw Rw* 4, 4.

Such a review should also consider other legislation and protections of elderly rights including disability rights legislation. Most of the human rights issues in the area under discussion arise from the person's vulnerability because of declining mental and physical capacity, that is the onset of disabilities. The relevance of age to rights is not in age itself, but in the reduced capacity which can onset in old age.

One significant aspect of this consideration of disability legislation would be the introduction into Australian domestic law of the Convention on the Rights of Persons with Disabilities (CRPD) which has been ratified by Australia.¹¹⁷ Ratification does not mean that provisions of the CPRD are enforceable at a domestic law level. International law is not enforceable unless incorporated into domestic law via statute. This principle was explained by Mason CJ and Deane J in *Minister for Immigration and Ethnic Affairs v Teoh*.¹¹⁸ The Commonwealth could clearly implement the treaty domestically under the external affairs power of the Constitution.¹¹⁹

The CRPD is a comprehensive set of rights for persons with a disability and is widely regarded as having the potential to bring about very significant improvements in the protection of people with a disability.¹²⁰ The Federal Attorney-General has signed a declaration under the *Human Rights and Equal Opportunity Act 1986* to enable the Australian Human Rights Commission to conciliate complaints based on breaches of the CPRD. However, this has the fundamental deficiency that it confers no legal right to a civil remedy for compensation.

Another further reform to consider for all jurisdictions would be the introduction of the statutory office of Senior Practitioner, such as established under the Victorian *Disability Act 2006*, and who is charged with ensuring that disability service providers comply with

¹¹⁷ Commonwealth Attorney-General's Department, 'Australia Ratifies UN Disabilities Convention' (Media release, 18 July 2008) http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/MediaReleases_2008_ThirdQuarter_18July2008-AustraliaRatifiesUNDisabilitiesConvention.

The final research paper submitted to the Departments of Families, Housing, Community Services, and Indigenous Affairs, and Attorney-General on whether to ratify the CRPD can be found here: <http://www.disabilityrightsnow.org.au/node/2>.
¹¹⁸ [1995] HCA 20, 25.

¹¹⁹ For a discussion of the external affairs power see A Blackshield and G Williams *Australian Constitutional Law and Theory. Commentary and Materials* 5th abridged ed Ch 19.

¹²⁰ B McSherry 'International Trends in Mental health laws: Introduction' *Law in Context Special Issue International Trends in Mental Health Laws* ed B McSherry 26(2) Federation Press 2008.

appropriate standards in relation to restrictive and compulsory treatment stipulated in the Act.

THE INTRODUCTION OF THE RIGHTS OF THE ELDERLY IN AGED CARE ACT

The protection of elderly rights because of the combination of difficulties as discussed in this article requires a robust and proactive system of human rights protection. Elderly persons may have particular problems in making complaints, seeking assistance, instructing lawyers and may have suffered no economic loss. The clear risk of abuse, degrading treatment, and invasions of dignity and privacy in nursing homes and other institutional environments for the elderly means that independently enforceable statutory protections are required.

The current compliance and enforcement environment is defective in responding to the inherent challenges. The system as a whole does little to encourage long term compliance and the maintenance of at least minimum standards. There is little deterrent power in the current complaints and regulatory system. First, the risk of infringement by service providers or their employees is great, considering the number of institutions and the range of skills and experience of staff. Secondly, as noted, there can also be financial incentives and pressures to cut corners and reduce services and quality. Thirdly, caring for elderly people, many of whom are suffering severe physical and mental disabilities can undeniably be challenging and require experienced staff and ample resources. As discussed above, there is already considerable unease about staffing levels and the experience and qualifications of staff. Fourthly, as discussed above, the potential group of victims is acutely vulnerable. Added to this is a largely bureaucratic method of enforcement and compliance with apparently a wide opportunity to avoid detection or, if detected, to avoid any sanction or to receive only lenient and short term sanctions. Infringing service providers are generally given a series of opportunities to eventually comply. The complaints system is also relatively inaccessible, lacks institutional support, and is clearly geared to mediating disputes rather than also offering the capacity of sanctions and enforcement. This comparatively lax and inadequate compliance and enforcement environment needs to be energised and given a more human rights focus.

There needs to be a set of legally enforceable rights out of which there is a legitimate ground for litigation. We are of the view that the protection of elders' human rights will best be protected not by a generalist charter of non enforceable rights, but by a specific human

rights Act that deals with aged care facilities. Many general statutory Bills of Rights, as in the ACT and Victoria¹²¹, do not create rights in that the courts are not able to strike down laws that are inconsistent with human rights enshrined within them.¹²² These types of Bills provide no damages remedy for breach of their provisions. Moreover, overseas developments suggest that the elderly need specific human rights legislation dealing only with them because if they are subsumed under more general rights legislation they will tend to be ignored or given low priority or be so stigmatised as to be regarded as helpless.¹²³ In addition, there is already in place a statutory complaints and regulatory process for aged care and the human rights protection needs to be directly linked to that existing legislation to create a coherent system.

The Act should state a series of civil obligations, which if breached, may be remedied through a civil process initiated in the Federal Court. The civil obligations would protect the human interests of the subject group, including to privacy, dignity, and protection from physical and emotional cruelty. The penalty for breach of any such civil obligations should be paid to the person violated. The Act should also make available opportunities and mechanisms to mediate and negotiate suitable disputes with criteria to be considered for when disputes are considered suitable for alternative dispute resolution.

We would suggest that such an Act would be constitutionally valid since the establishment of a regulatory scheme for aged care was upheld by the High Court in *Alexandra Private Geriatric Hospital Pty Ltd v The Commonwealth*.¹²⁴ The Court held, inter alia, that given that the Commonwealth had power to provide for the provision of sickness and hospital benefits to patients in nursing homes, some kind of scheme to ensure that the provision was effective in meeting the needs of such patients was essential and hence within the Federal power. Therefore, we would submit that providing for the human rights of such patients and the enforcement of such can be regarded as

¹²¹ *Charter of Human Rights and Responsibilities Act 2006 (Vic)*.

¹²² See Evans C & Evans S, *Australian Bill of Rights: The Law of the Victorian Charter and ACT Human Rights ACT*, Butterworths, Sydney, 2008 (Speaking also of the ACT Charter) at p 1. The ACT and Victorian Acts protect human rights by requiring the proponents of legislation and the Parliament to consider the rights-impact of their legislation; requiring courts (where possible) to interpret legislation in accordance with human rights; and by expressly or implicitly requiring government and public authorities to comply with human rights.

¹²³ I Doron, S Alon & N Offir, above n 4, 78; also see S Biggs, C Phillipson & P Kingston *Elder Abuse in Perspective* Buckingham, Open University Press 1995.

¹²⁴ (1987)162 CLR 271.

sufficiently connected to such a regulatory scheme and its major objective of meeting the needs of aged care residents.¹²⁵

APPOINTMENT OF A HUMAN RIGHTS COMMISSIONER FOR THE AGED AND A
DEDICATED INVESTIGATION AND COMPLIANCE UNIT

The Act should add a Commissioner for the Aged to the Human Rights Commission. The Commissioner should conduct a full audit of the current legislative regime that regulates aged care facilities including Federal, State and Territory law. The Commissioner should be given standing to initiate or intervene in any proceedings, prosecutions, and administrative decision-making, relating to breaches of the subject group's existing legal rights under any Australian law, or protection of the subject group. The Commissioner should report annually to the public, the Parliament and the government, on the complaints and investigation process and the extent to which inadequate funding of sectors, including nursing homes, providing for the subject group limits their ability to meet their human rights obligations under the Act.

The Commissioner should have the power to oversight and intervene in any complaints investigation undertaken under the Aged Care Act. The Commissioner should also have a power to investigate any complaint of his or her own motion. A comparable model would be the Ombudsman's power and role in relation to complaints made against the police.

A different approach to having a Human Rights Commissioner for the Aged within the Human Rights Commission would be the introduction of a completely separate office, such as a Commissioner for Older Persons with a broad mandate to deal with a vast range of matters relating to older people including breaches of their human rights in aged care facilities and elsewhere. While the writers can see the long term value of having one co-ordinated, institutional response to elder issues, we are of the view that the introduction of such a general Office with sufficient resources to undertake effectively such a broad role is highly unlikely in the short to medium term. Instead building upon an existing institution with a human rights focus is currently a preferable option, particularly given that there is already in place much of the legislative and institutional infrastructure that would be necessary for developing a Human Rights Commissioner for the Aged.

¹²⁵ Also see Campbell Research Group above n 10, 19-20.

NEED TO DEVELOP PROACTIVE, RESOURCED AND ON SITE LEGAL ADVICE
AND SERVICES

The Department of Health and Ageing funds an advocacy service across Australia called the National Aged Care Advocacy Program (NACAP), which provides advocacy and information as well as also fulfilling an educational role. In 2008-09, the NACAP undertook 3,638 advocacy cases, handled 5,261 general enquiries and provided 1,618 face to face education sessions.¹²⁶ There is no doubt that the NACAP is a welcome reform. However, there are questions about its scope and range. There were as at 30 June 2008, 2,830 mainstream residential aged care services, but the NACP conducted only 1,618 face-to-face education sessions. This would indicate that perhaps over 1,000 service facilities did not receive one such education session in the entire year. Moreover, on-site education sessions by advocates are not enough. A system of regular visits to all aged care facilities by lawyers with appropriate training and skills for dealing with elderly people is needed.¹²⁷ The NACAP ought to be developed and expanded so that it can achieve such an objective.

It is important that there is an opportunity for elderly people and their friends and relatives to discuss any complaint or any legal matters with a trained lawyer who can provide advice and referral and, where appropriate, act for elderly people. It will not be sufficient given the vulnerabilities of the elderly for such an advice and referral system to be located or to operate outside the aged care facilities. It needs to be face to face and provide regular contacts. Legal aid prisoner advice services that visit gaols provide a useful comparator. In general in relation to elderly rights, legal, social and medical professionals need an effective liaison and networking service for the dissemination of materials, education and co-ordination. A specific form of human rights advocacy and jurisprudence for the elderly is also needed.

OTHER REFORMS

Without wishing to preempt the results of such a review, we would submit that there needs to be a multidisciplinary approach to the

¹²⁶ Report on the Operation of the *Aged Care Act* 2008-2009 above n 3, 66.

¹²⁷ One service that provides some assistance and advocacy for NSW residents and carers is the Aged-care Rights Inc (TARS) but this does not regularly provide services in the aged care facilities; see S Newell 'The Aged-care Rights Service including the Older Person's Legal Service (OPLS)' [2009] *ElderLaw* *Rw* 3.

prevention, identification and control of elderly abuse in aged care facilities. This needs to include Federal and State regulators, service providers, legal medical and social work professionals (including, for example, community legal services and legal aid commissions), and elderly rights interests groups. The complaints and investigation system needs to be reformed as suggested above and then information about it disseminated widely and continuously. There is a need for a well resourced and coordinated program of lifting community awareness of elder rights in aged care and the dangers of abuse. As much as possible, elder people should be given appropriate and targeted information about their rights and the means by which they can protect and vindicate those rights, including in aged care facilities. Much of this information should be provided by face to face means because of the physical and cognitive disabilities of many residents.

Professionals and service providers involved in aged care must be given appropriate human rights training. Allegations or complaints about financial abuse within aged care facilities need to be investigated and addressed and this will need the collaboration of relevant governmental and community organisations involved in areas such as guardianship and the protection of the mentally ill. Also, research across the world indicates that guardianship can sometimes be granted far too readily in relation to the elderly without sufficient attention to the rights of autonomy of the elderly or to their capacity for independent decision making.¹²⁸

We recommend that consideration be given to the development of a website in similar fashion to the recently developed MySchool.Com for Australian high schools which would allow consumers and others to gain information about the relative merits of each aged care facility.¹²⁹ Data should be available about the services and facilities offered and their costs, available in each, the number and experience of staff, the quality of service, level and nature of complaints, results of audits and official visits, and surveys undertaken. Greater information and assistance should be given to members of the public to consider their options with respect to aged care.

VIII. CONCLUSION

¹²⁸ I Doron, S Alon & N Offir, above n 4, 67.

¹²⁹ This option builds on the 2005 Senate Inquiry report (see above n 51) that a ratings system be developed – see recommendation 11 of that report.

Protection of fundamental human rights is considered vital for all people, even more so as they move towards the vulnerable state of total incapacity. Elderly people in aged care should not be denied access to justice for breach of a human right because of their loss of capacity to understand what is happening to them and what is going on around them. To do this effectively and meaningfully, there needs to be a rights statute that reflects the human value that they remain human, and deserve to be treated as though they remain fully capable.

The current policy and legal response is clearly deficient in a number of key areas, including in planning, co-ordination and funding, in its complaints and regulatory system, and in the current legal avenues for redress. We have proposed a number of reforms across those areas that will make a significant difference and give the human rights system muscle and sinew with an investigation and complaints system that is focussed on human rights protection.

Effective protection of human interests should wherever possible include viable access to a judicial process resulting in a legal remedy or legal consequence. A system of human rights protection will provide aged care residents with an appropriate range of remedies including financial compensation, apologies, remedial action, mediation and negotiation. It offers an effective and direct means of righting or assuaging wrongs and vindicating the rights and feelings of aged care residents. It also offers significant protection in response to aged care residents' clear vulnerabilities. It will assist residential facilities and government decision makers and assessors to identify what are acceptable standards of conduct, care and treatment and what are not. It will assist to create legal, cultural and moral norms in the diverse aged care sector. In addition, it will also act as a deterrent to those who may otherwise infringe such rights. Such a system can also help to raise community consciousness about the elderly and their rights in aged care facilities.

It is difficult to avoid the conclusion that our society's treatment and response thus far to the elderly in aged care has been inadequate, if not shabby. A frequent comment from elderly people in aged care is that that they lose their identity and sense of worth – they become invisible and anonymous. It is time for them to be seen and heard.

CONSPIRACY, A JURY, THE CONSTITUTION AND A SWISS BANK ACCOUNT: *THE QUEEN v LK; THE QUEEN v RK* [2010] HCA 17

DUNCAN BRAKELL*

I. INTRODUCTION

*The Queen v LK; The Queen v RK*¹ has all the ingredients of a John Grisham best seller. There is an alleged conspiracy, large sums of money, a jury, the Constitution² and a Swiss bank account. What of the twist? The indictment brought against LK and RK did not disclose an offence known to law.

On 19 May 2008 LK and RK were charged with offences under ss. 11.5 and 400.3(2) of the *Criminal Code*³ with conspiring to deal with money worth \$1 million or more, and being reckless as to the money the subject of the conspiracy being proceeds of crime. The money was part of a larger sum of about \$150 million of which the Commonwealth Superannuation Scheme had been defrauded.

Section 11.5 is in the following terms:

- (1) *A person who conspires with another person to commit an offence punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, is guilty of the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed.*
- (2) *For the person to be guilty:*
 - (a) *the person must have entered into an agreement with one or more other persons; and*

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¹ [2010] HCA 17 (26 May 2010) ('LK and RK').

² *Commonwealth of Australia Constitution Act* ('Constitution').

³ *Schedule to Criminal Code Act 1995 (Cth)* ('the Code').

- (b) *the person and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement; and*
- (c) *the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement. (emphasis added)*

...

Section 400.3(2) provides that:

- (2) *A person is guilty of an offence if:*
 - (a) *the person deals with money or other property; and*
 - (b) *either:*
 - (i) *the money or property is proceeds of crime; or*
 - (ii) *there is a risk that the money or property will become an instrument of crime; and*
 - (c) *the person is reckless as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires); and*
 - (d) *at the time of the dealing, the value of the money and other property is \$1,000,000 or more. (emphasis added)*

The appeals were brought by special leave application to the High Court of Australia against the order of the NSW Court of Criminal Appeal. The appeals raised issues related to the construction and operation of the *Criminal Code*, relevantly that that the Court of Criminal Appeal fell into error in the interpretation of s. 11.5 of the Code. The issue for determination was whether the Crown had to prove that LK and RK intended to deal with money which was proceeds of crime, or only that there were reckless as to the money being proceeds of crime. The Crown's case, as set out in its application for special leave before the High Court, was that the respondents intentionally agreed to commit an offence (conspiracy, s. 11.5 of the

Criminal Code), “for which a fault element of recklessness is prescribed.”

The Crown was committed to proving recklessness at trial as that was the charge on indictment. Before Sweeney DCJ in the District Court, LK and RK demurred and sought an acquittal by direction submitting in application that there was no case to answer. Her Honour upheld the application and directed the jury to acquit LK and RK on the basis that the indictment did not disclose an offence known to law. The Crown appealed to the Court of Criminal under s. 107 of the *Crimes (Appeal and Review) Act 2001* (NSW) (which provides for appeals against directed acquittals). The Court dismissed the appeal, holding that the Crown had to prove the respondents knew the facts constituting the offence the object of conspiracy. The Court held that the trial judge’s conclusions were correct.

Special leave to appeal to the High Court was granted on 19 June 2009. The High Court concluded that the trial judge’s direction, and the conclusions reached by the Court of Criminal Appeal were correct and that the Crown’s appeals should be dismissed. It was incumbent on the Crown to prove *intention* in relation to each physical element of the offence particularised as the object of the conspiracy; not recklessness. The High Court concluded that Chief Justice Spigelman proceeded correctly on the basis that the *Criminal Code* imported the common law concept of conspiracy. So a person cannot enter into a conspiracy under the Code without knowing the facts that make the agreed conduct unlawful. The Crown’s appeal was unanimously dismissed.

The respondents argued that no appeal lay to the Court of Criminal Appeal because s. 107 could not operate retrospectively. This argument was rejected. The respondents also argued that an appeal by the Crown against a directed verdict of acquittal infringed the guarantee in s. 80 of the *Constitution* of the trial by jury. This argument was also rejected.

II. THE CASE IN CONTEXT

On 24 December 2003, a fraudulent set of instructions purporting to be those of the Commonwealth Superannuation Scheme’s Fund Manager was transmitted by facsimile to its investment bank, JP Morgan. JP Morgan was instructed to transfer a sum in the order of \$150 million to four nominated overseas bank accounts. Just as in any best seller, JP Morgan was instructed to transfer, and did transfer, approximately \$25 million to a Swiss bank account operated by RK. Before these events began to unfold, LK (who was acting at the requested a third person,

RM) had approached RK and asked if his Swiss bank account could be used for the transfer of funds from Australia. RK agreed.

Following the transfer of the money to RK's account, there were frequent communications between the three men. On 30 December 2003, RK gave a direction to transfer 23 million Swiss francs to a New York bank account. However, the funds transfer was never completed. On the same day, JP Morgan contacted the Swiss bank and advised that the funds in RK's accounts were the subject of fraud and should be returned. RK allegedly retained attorneys in Switzerland for the purpose of providing a power of attorney to the bank to effect the transfer of the funds. However, the funds were subsequently frozen. Unbeknown to LK and RK, they were to be arrested and charged with conspiracy.

III. CONSPIRACY: A PROCEDURAL PATH TO THE HIGH COURT

THE DISTRICT COURT ACQUITS

It was not said that either LK or RK was a party to the fraud or that either had knowledge of it. However, on 16 August 2005 LK and RK were arrested. On 18 October 2006 they were served with an indictment (court attendance notice)⁴. A first indictment was filed with the District Court on 13 September 2007, but was substituted by a further court attendance notice filed on 26 May 2008. That court attendance notice charged LK and BK as follows:

... between about 1 December 2003 and about 1 February 2004 at Sydney in the State of New South Wales and elsewhere [they] did conspire with each other, [RM] and with diverse other persons to deal with money to the value of \$1,000,000 or more being the proceeds of crime which those persons who were to deal with the

⁴ Pursuant to s. 5 of the *Criminal Procedure Act 1986* (Cth) ("CPA") an offence must be dealt with on indictment unless it is an offence that under the CPA or any other Act is permitted or required to be dealt with summarily. All offences shall be prosecuted by information (to be called an indictment) in the Supreme Court or the District Court on behalf of the Crown (s. 8(1)). Such an indictment may be presented or filed whether or not the person to whom the indictment relates has been committed for trial on respect of an offence specified in the indictment (s. 8(2)). Indictment includes a court attendance notice or any other process or document by which criminal proceedings are commenced (s. 15(2)). Committal proceedings for an offence are to be commenced by the issue and filing of a court attendance notice (see ss. 47(1), 50 and 51). All proceedings are taken to have commenced on the date on which a court attendance notice is filed in the registry of the relevant court (s. 53).

money pursuant to the conspiracy were reckless as to the fact that the money was the proceeds of crime.

LK and RK were charged with offences under ss. 11.5 and 400.3(2) of the *Criminal Code*. The Crown also alleged that RK was aware of a substantial risk that the money was proceeds of crime. On 17 July 2007 LK and RK were committed to stand trial in the District Court of New South Wales.⁵ LK and RK were tried together before Sweeney J and a jury in the District Court. The trial commenced on 30 June 2008 and evidence was completed on 4 July 2008.

Before the jury, LK and RK demurred to the indictment,⁶ contending that it did not disclose an offence that was known to law. At the close of the Crown's case, LK and RK each sought an acquittal by direction submitting that there was no case to answer. Sweeney DCJ upheld these applications and directed the jury that as a matter of law they should acquit LK and RK of the charge on the indictment. The direction was based not upon any insufficiency in the evidence adduced for the Crown, but upon her Honour's conclusion that the indictment did not disclose an offence known to the law. At her Honour's direction, the jury returned a verdict of not guilty and LK and RK were discharged.

COURT OF CRIMINAL APPEAL AFFIRMS LOWER COURT

An appeal by the Crown against the acquittals was brought in the Court of Criminal Appeal pursuant to s. 107 of the *Crimes (Appeal and Review) Act 2001* (NSW). The section provides for an appeal by the

⁵ A committal hearing is conducted before a Magistrate. When all the prosecution evidence and any defence evidence have been taken in committal proceedings, the Magistrate must consider all the evidence and determine whether or not in his or her opinion, having regard to all the evidence, there is a reasonable prospect that a reasonable jury, would convict the accused of an indictable offence (s. 64, CPA). If the Magistrate is of the opinion that there is a reasonable prospect that a reasonable jury, properly instructed, would convict the accused of an indictable offence, the Magistrate must commit the accused for trial (s. 65, CPA).

⁶ Demurrer refers to a pleading which asserts that, even accepting that the facts alleged in an indictment are true, the indictment does not disclose an offence: *R v Boston* (1923) 33 CLR 386. Pursuant to s. 17(1) of the CPA an objection to an indictment for a formal defect apparent on its face must be taken, by demurrer or motion to quash the indictment, before the jury is sworn. The court before which the objection is taken may cause the indictment to be amended and, in that case, the trial is to proceed as if there has been no defect. If an indictment is defective it does not mean that it is automatically held to be invalid. The court can order the indictment be amended so as to cure the defect: see, eg, *Stanton v Abernathy* (1990) 19 NSWLR 656.

State Attorney-General or the Director of Public Prosecutions for the State against, inter alia, the acquittal of a person “by a jury at the direction of the trial judge”⁷.

The judgment of the Court dismissing the appeal was delivered by Spigelman CJ, with whom Grove and Fullerton JJ agreed.⁸ The Chief Justice said the trial judge had correctly distinguished *R v Ansari*⁹ (“*Ansari*”) (a case where it was found that persons could conspire to commit an offence with respect to which recklessness was the fault element) and had correctly concluded that the Crown case disclosed no offence known to the law.¹⁰ The Crown’s appeal was dismissed.

HIGH COURT DISMISSES THE APPEALS

The Crown lodged applications to the High Court for special leave to appeal on 19 January 2009. Special leave was granted on 19 June 2009. The single ground of appeal in each case was that:

The Court of Criminal Appeal erred in interpreting s 11.5 of [the Code], such that to be guilty of conspiracy to commit an offence that has a physical element for which a fault element of recklessness is prescribed, it must be proved that the offender intended that physical element.

Each of the respondents filed a notice of contention in substantially similar terms with the following grounds:

1. *The Court below failed to decide that as a matter of law no appeal lay to it because s 107 Crimes (Appeal and Review) Act 2001 did not come into operation until 15 December 2006, after the proceedings against the respondent had commenced by court attendance notice served on the respondent 18 October 2006. This point was taken in the Court below but not decided in the Court’s reasons for judgment.*
2. *In their combined operation, sub-sections (1)(a), (2) and (5) of s107 [of] that Act are invalid because, contrary to s 80 of the Commonwealth*

⁷ Sections 107(1)(a) and 107(2), *Crimes (Appeal and Review) Act 2001* (NSW).

⁸ *R v LK and RK* [2008] NSWCCA 338; (2008) 73 NSWLR 80.

⁹ (2007) 70 NSWLR 89 (*‘Ansari’*).

¹⁰ *R v LK and RK* [2008] NSWCCA 338; (2008) 73 NSWLR 80 at 94.

Constitution, they purport to empower the Court of Criminal Appeal to disregard an essential characteristic of trial by jury of an indictable offence against a law of the Commonwealth viz, the inviolability of a jury's verdict of acquittal. This point was also taken in the Court below but not decided in the Court's reasons for judgment: see paragraph (1) above.

French CJ concluded that the trial judge's direction, and that the conclusions reached by the Court of Criminal Appeal were correct, and that the Crown's appeals should therefore be dismissed.¹¹ Gummow, Hayne, Crennan, Keifel and Bell JJ held that the Court of Criminal Appeal was correct to uphold Sweeney DCJ's ruling on each of the 'no case' applications, and also dismissed the appeals.¹² Heydon J held the appeals should be dismissed and the appellant's arguments against that course should be rejected because the reasoning of the Court of Criminal Appeal was correct.¹³

IV. LEGAL FRAMEWORK

CRIMINAL RESPONSIBILITY AND CONSPIRACY

The appeals were brought by special leave application against the order of Court of Criminal Appeal upon a single ground: that the Court erred in its interpretation of s. 11.5 of the *Criminal Code*. The appeals raise the question of whether s. 11.5(2)(b) requires that the prosecution prove intention in relation to each physical element of the substantive offence, even if the fault element prescribed for that offence is a lesser fault element, such as recklessness. The controversy was that the Crown contended that the elements of the offence were wholly contained in s. 11.5(1) of the *Criminal Code* whereas LK and RK contended that the elements were to be found in s. 11.5(2). The High Court concluded that the elements of the offence were found in s. 11.5(1), but resolution of that issue was not determinative of the outcome of the appeal. The issue for determination was whether, in the substantive proceedings, the provisions of s. 11.5 required the Crown to prove that LK and RK actually held the intention to deal with money which was proceeds of crime.

¹¹ *LK and RK* at 79.

¹² *Ibid* at 142.

¹³ *Ibid* at 145.

*CRIMINALITY OF CONSPIRACY AND MONEY LAUNDERING UNDER THE CODE**(a) The elements of criminal responsibility*

The purpose of Chapter 2 of the Code is to codify the general principles of criminal responsibility under laws of the Commonwealth.¹⁴ Part 2.2 deals with the elements of offences. Fault elements are dealt with under Division 4 and physical elements under Division 5. A fault element for a particular physical element may be intention, knowledge, recklessness or negligence. A person is said to have intention if he or she intends to engage in conduct, or believes a circumstance exists, or will exist, or means to bring about a result that will occur in the ordinary course of events.

(b) Conspiracy

Part 2.4 of the Code concerns extensions of criminal responsibility. Division 11, among other things, deals with conspiracy.¹⁵ The relevant parts of s. 11.5 relating to the offence of conspiracy are worth stating at this point. Section 11.5(1) states, "A person who conspires with another person to commit an offence punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, is guilty of the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed." Subsection 11.5(2)(b) states, "For the person to be guilty: the person and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement." Part 2.6 concerns proof of criminal responsibility. The standard of proof is beyond reasonable doubt¹⁶ and it is for the prosecution to prove every element of an offence relevant to the guilt of the person charged.¹⁷

(c) Money laundering

The offence that was the subject of the conspiracy charge in the present case, money laundering, was that created by s. 400.3(2) in Part 10.2 of the *Criminal Code*. That section principally requires the money or property in question to be proceeds of crime, or risk of becoming an instrument of crime, that the person(s) is reckless as to that fact, and the value of the money or property to be greater than \$1,000,000.

¹⁴ Section 2.1, Criminal Code.

¹⁵ Section 11.5, Criminal Code.

¹⁶ See s 141(1) *Evidence Act 1995* (NSW).

¹⁷ Section 13.1(1), Criminal Code.

(d) *Intention is a necessary fault element*

In 1990, following the release of the Gibbs Committee report,¹⁸ the Standing Committee of Attorneys-General, through the Model Criminal Code Officers Committee, set out then proposed s. 405 of the Model Code, now reflected in s. 11.5 of the *Criminal Code*. The provisions of s. 11.5 were drafted to separate clearly the agreement component of the conspiracy from the intent to commit an offence pursuant to that agreement. Recklessness was not held to be a sufficient fault element. The fault element necessary for the offence of conspiracy was the intention to make an agreement. However, to understand the full purpose of s. 11.5 it is necessary to acknowledge that it imports the common law concept of conspiracy.

(e) *Conspiracy at common law*

The common law considers the agreement to be the *actus reus*, and the intention to do the unlawful act pursuant to the agreement as the *mens rea*.¹⁹ Conspiracy evolved as a common law offence in England and by 1330 it was prosecuted pursuant to the *Statute of Westminster* as a criminal offence. By the early 1570s, the combination to commit or procure the commission of a crime was prosecuted as a conspiracy.²⁰ The interaction between statute law and the common law developed over the next 300 years and by 1868 a concise enunciation of the elements of conspiracy was given by the Court of Queen's Bench in *Mulcahy v The Queen*²¹ when it was determined that a conspiracy consists not only in intention, but also in agreement. That is, an alleged conspirator must intend to carry into effect the common design of the agreement.²²

¹⁸ The origins of the *Criminal Code* relating to conspiracy date back to 1987 when the Commonwealth Attorney-General established a Committee chaired by Sir Harry Gibbs to undertake a review of Commonwealth criminal laws. The third of the Committee's reports dealt with conspiracy and recommended it should be made clear that the mental element required to commit a crime of conspiracy is an intention on the part of the conspirators to agree to commit an offence and that the offence should be committed.

¹⁹ See, for example, *Peters v The Queen* (1998) 192 CLR 493 (McHugh J) ('*Peters*').

²⁰ See, for example, *Poulterer's Case* [1572] EngR 448.

²¹ (1868) LR 3 HL 306 ('*Mulcahy*').

²² *Mulcahy* was accepted and applied by the High Court of Australia in *R v Kidman* (1915) 20 CLR 425 at 446-446 (Isaacs J); *R v Boston* (1923) 33 CLR 386 at 396 (Isaacs and Rich JJ); and by the Supreme Court of Canada in *R v O'Brien* [1954] SCR 666 at 668 (Taschereau J).

In the United Kingdom the House of Lords in *Director of Public Prosecutions v Nock*²³ (“Nock”) that divided the offence of conspiracy at common law into *actus reus* and *mens rea*. In *Peters v The Queen*²⁴ McHugh J, however, was of the opinion that such division was fraught with difficulty because, as he noted, the agreement which is the *actus reus* necessarily includes a mental element.²⁵ At the very least there must be an intention to enter into the agreement to commit an unlawful act, and there can be no conspiratorial agreement unless it was also intended that the common design should be carried out. But is it necessary that the crime, the subject of the conspiracy, be capable of being carried out? The House of Lords in *Nock*²⁶ drew the conclusion that it was. If it was in fact impossible to carry out the crime, the offence of conspiracy could not be made out. This proposition elucidates the association between conspiracy and attempt.²⁷ At common law, an agreement to do a thing which is impossible of performance is not a criminal conspiracy. But it is under the *Criminal Code*!²⁸ Notwithstanding possibility or impossibility of carrying out the subject crime, intention is a necessary element to establish.

In the present case, the Crown contended that the respondents were “reckless”. The association between attempt and conspiracy assists in consideration of whether conspiracy to commit an offence can be made out by the Crown where it does not propound, as part of its case, the existence of a physical element, or circumstance.²⁹ At common law a reckless state of mind is not sufficient to constitute the *mens rea* for the offence of contempt. For many offences sufficient intent is found in law but arguably it is better described as recklessness. The High Court in *Giorgianni v The Queen*³⁰ held the view that attempt and conspiracy are not offences in which it is possible to speak of recklessness as constituting a sufficient intent to carry out the subject crime.³¹ Participation by the person must be intentionally aimed at the commission of the acts that constitute the elements of the offence. Intention is required, and the intention must be based upon knowledge or belief of the necessary facts that constitute the offence. In *Ansari*, the

²³ [1978] AC 979.

²⁴ (1998) 193 CLR 493.

²⁵ *Peters* at 516 per McHugh J.

²⁶ [1978] AC 979 at 996 (per Lord Scarman).

²⁷ See, for example, *DPP v Nock* [1978] AC 979; *Giorgianni v The Queen* (1985) 156 CLR 473 at 506 (per Wilson, Deane and Dawson JJ) (“*Giorgianni*”); *Rogerson* (1992) 174 CLR 268 at 275 (Mason J), at 297 (McHugh J).

²⁸ Section 11.5(3)(a), *Criminal Code*.

²⁹ *LK and RK* at 66 (French CJ).

³⁰ (1985) 156 CLR 473

³¹ Cited in *LK and RK* at 67 (French CJ).

Court of Criminal Appeal held that a person could be charged with conspiring to commit an offence, the mental element of which was recklessness, when the Crown relied upon knowledge to prove the element of recklessness.³² However, in the present case, recklessness was not the requisite mental element of the offence; intention was.

NOVEL JURISDICTION: COMMONWEALTH JUDICIARY ACT
AND APPEALS AGAINST ACQUITTALS

Section 107 of the *Crimes (Appeal and Review) Act* provides for appeals against directed acquittals and acquittals without juries; to the acquittal of a person “by a jury at the direction of the trial judge”.³³ The Court of Criminal Appeal was also granted statutory leeway to hear appeals against acquittals applying to persons acquitted before the commencement of the amending Acts. An acquittal may be affirmed or quashed, or a new trial can be ordered. However, the Court of Criminal Appeal cannot convict or sentence a person for the offence charged, nor can it direct the lower court conducting the new trial to do so.

Jurisdiction of the Court of Criminal Appeal to hear an appeal against a directed verdict of acquittal derives from s. 68(2) of the *Judiciary Act 1903* (Cth), read with s. 107 of the *Crimes (Appeal and Review) Act*. Federal jurisdiction is conferred upon State and Territory courts by ss. 39 and 68 of the *Judiciary Act*. The appeal to the High Court in the present matter focused on the operation of s. 68 which vests State courts with the power to administer criminal justice in relation to federal offences. Section 68 as first enacted substantially reproduced ss. 2 and 3 of the *Punishment of Offences Act 1901* (Cth), containing no reference to appeals.³⁴ As the legislative precursor to s. 68 of the *Judiciary Act*, the *Punishment of Offences Act* operated as a temporary measure conferring federal jurisdiction in criminal matters on State courts and applying State laws of a procedural character to the trial on indictment of persons charged with offences against the laws of the Commonwealth.

³² *Ansari* is an example of a factual situation in which persons could conspire to commit an offence with respect to which recklessness was the fault element attributed to a physical element of that offence. That could occur where the physical element was to be carried out by a person not a party to the agreement.

³³ Section 107(1)(a). Section 107 was introduced into the *Crimes (Appeal and Review) Act* by the *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006* (NSW) (*‘amending Acts’*).

³⁴ Section 4 of the *Punishment of Offences Act* conferred appellate jurisdiction on State courts, an aspect not reproduced in s. 68 of the *Judiciary Act*.

The High Court in *Ah Yick v Lehmert*³⁵ (“*Lehmert*”) considered the question of whether s. 39 of the *Judiciary Act* conferred appellate, as well as original, federal criminal jurisdiction on State courts. It held that it did. Twenty seven years later, the High Court was again asked to consider the issue and in *Seaegg v The King*³⁶ cast doubt over *Lehmert*, expressing the view that s. 39(2) of the *Judiciary Act* might be insufficient to effect the conversion of appellate jurisdiction conferred by the *Criminal Appeal Act 1912* (NSW) into federal jurisdiction over the different subject matter of appeals against convictions on indictment under federal law. Parliament consequently amended s. 68(1) and (2) of the *Judiciary Act*. State courts with appellate criminal jurisdiction in relation to offences against State law were given like jurisdiction in relation to federal offences. The amended legislation, however, while establishing procedural changes for appeals against convictions under federal law, did not make specific reference to appeals against acquittals for Commonwealth offences. But, as French CJ noted, “the ambulatory character of the amended s. 68 was able to pick up novel appellate jurisdictions created under State law.”³⁷

*Williams v The King [No 2]*³⁸ brought one such novel jurisdictional issue to the High Court for consideration – whether s. 68 as amended conferred federal jurisdiction in the terms of the *Criminal Appeal Act 1912* (NSW) providing for a Crown appeal against sentence to the Court of Criminal Appeal. Dixon J held it did, but conceded that such an appeal was a “marked departure from the principles theretofore governing the exercise of penal jurisdiction”.³⁹ Thirty-seven years later, the issue was again the subject of debate before the High Court in *Peel v The Queen*⁴⁰ (“*Peel*”) The Court held by majority⁴¹ that s 68(2) operated upon s 5D of the *Criminal Appeal Act 1912* (NSW) to confer jurisdiction on the NSW Court of Criminal Appeal to hear an appeal by the Commonwealth Attorney-General against the inadequacy of a sentence imposed for an offence against a Commonwealth law. Seventeen years on, *Peel* was applied by the High Court in *Rhode v Director of Public Prosecutions*.⁴²

³⁵ (1905) 2 CLR 593.

³⁶ (1932) 48 CLR 251.

³⁷ *LK and RK* at 16.

³⁸ (1934) 50 CLR 551 (“*Williams*”).

³⁹ *Williams* *Ibid* at 561. His Honour added, however, that it was a “departure sanctioned by State law, and it had already been made when the amendment in the provisions of s 68(2) was introduced.

⁴⁰ (1971) 125 CLR 447

⁴¹ Per Owen, Gibbs and Windeyer JJ adopting the reasons of the majority in *Williams*. Particular reference was given to the judgment of Dixon J. Barwick CJ dissented.

⁴² (1986) 161 CLR 119.

The parties to the appeals before the High Court did not contend that, as a matter of construction, s. 68(2) could not confer like jurisdiction to hear an appeal against a directed verdict of acquittal as is conferred upon the NSW Court of Criminal Appeal by s. 107 of the *Crimes (Appeal and Review) Act*. French CJ affirmed the contentions of the parties to the present matter that s. 68(2) conferred jurisdiction.⁴³ Further, the trial commenced after s. 107 came into effect and the question of retrospectivity in the application of s. 107 to the directed acquittals, as raised by the respondents, was dismissed.⁴⁴

A DIRECTED VERDICT OF ACQUITTAL AND
THE CONCEPT OF TRIAL BY JURY: A CONSTITUTIONAL QUESTION

In their notices of contention each of the respondents contended that in their combined operation, sub-sections (1)(a), (2) and (5) of s 107 [of] that Act are invalid because, contrary to s. 80 of the *Constitution*, they purport to empower the Court of Criminal Appeal to disregard an essential characteristic of trial by jury of an indictable offence against a law of the Commonwealth viz, the inviolability of a jury's verdict of acquittal.

THE CONSTITUTIONAL VALIDITY OF S. 107

(a) *Section 80 – Court of Criminal Appeal Validly Hears Appeal*

Andrew Inglis Clark's first draft of the *Constitution* in 1891 provided, in cl 65 that "[t]he trial of all crimes cognisable by any Court established under the Authority of this Act shall be by jury".⁴⁵ Today that is not the operational effect of s. 80 of the *Constitution*. Section 80 reads, "[t]he trial on indictment of any offence against any law of the Commonwealth shall be by jury". The respondents relied on the long standing proposition set down in *R v Snow*⁴⁶ ("*Snow*") that the finality of a verdict of acquittal, even a directed verdict of acquittal, is an essential function of trial by jury that is protected by s. 80. However, a fortiori, *Snow* did not determine the present case, which turned solely upon questions of law. The present case involved the question of whether the Court of Criminal Appeal could validly exercise a statutory jurisdiction to hear and determine an appeal against a

⁴³ *LK and RK* at 20.

⁴⁴ *LK and RK* at 23 (French CJ).

⁴⁵ Reproduced in John M. Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press: Vic, 2005), p. 89.

⁴⁶ (1915) 20 CLR 315 (*Snow*).

directed verdict of acquittal on an indictment for an offence against the Commonwealth. The Court concluded that the grounds of contention disclosed no error by the Court of Criminal Appeal.⁴⁷

(b) *Directed verdict of acquittal*

The legal foundation of the principle of verdict by direction dates back to the 15th century English procedural mechanism of a 'demurrer'.⁴⁸ It was a mechanism for taking a case away from the jury because, as a matter of law, a conviction was not open. It was for the court to decide, not the jury. Over time, the practice of demurrer became a procedural mechanism for a non-suit, or no case to answer, and the non-suit began to resemble a directed verdict.⁴⁹ As a general proposition, and one that extends to offences against the Commonwealth, a no case to answer may be satisfied where the prosecution has failed to make out a prima facie case.⁵⁰ It is a trial judge's duty to direct a jury to return a not guilty verdict where there is no evidence upon which a jury could convict.

French CJ opined that such a judicial direction is an expression of the judge's power and duty to decide questions of law, and the position is the same where the direction is made upon the basis that the indictment does not disclose an offence known to the law.⁵¹ *Yager v The Queen*⁵² supports the proposition that a trial judge's power to direct a jury to return a particular verdict, whether it is guilty or not guilty, is an incident of the duty of the judge to decide questions of law and to direct the jury accordingly. It is no part of the function of a jury to exercise and discretion in the face of direction to acquit. It is no interference with a jury's function for the law to provide for an appeal against a verdict of acquittal where in obedience to the judge's direction.

(c) *Federal jurisdiction conferred*

In the present case the provisions of the *Criminal Procedure Act*, a NSW statute, applied by virtue of the operation of s. 68(1) of the *Judiciary Act* to LK's and RK's trial in the District Court. In *R v Murphy* the High

⁴⁷ *LK and RK* at 40 (French CJ).

⁴⁸ See above, note 6.

⁴⁹ This procedural mechanism survives in civil practice today: Uniform Civil Procedure Rules r29.9.

⁵⁰ See, eg, *Doney v The Queen* (1990) 171 CLR 207 and *May v O'Sullivan* (1955) 92 CLR 654.

⁵¹ *LK and RK* at 29.

⁵² (1977) 139 CLR 28.

Court was of the view “the relationship between committal proceedings and the trial of an indictable offence is such that they are part of the matter which the trial ultimately determines”.⁵³ LK’s and RK’s directed acquittals in the District Court were the outcome of their trial on indictment for conspiracy. The appellate jurisdiction conferred by s. 107 is a jurisdiction that relates to the outcome of a trial on indictment. When the condition set down in s. 80 of the *Constitution* is satisfied - “indictment” and “law of the Commonwealth” - the law cannot provide for the trial to be other than by jury.⁵⁴

Section 107 is part of the law of the State of NSW and has no application to Commonwealth offences. The constitutional issue, as French CJ saw it, related to the operation of s. 68 of the *Judiciary Act*.⁵⁵ The question for determination before the High Court was, “whether the guarantee of trial by jury given by s. 80 of the *Constitution* would be infringed by a law of the Commonwealth, having the same content of s. 107, conferring a right of appeal from a directed acquittal of an indictable offence against a law of the Commonwealth.”⁵⁶ The respondents contended that, having regard to s. 80 of the *Constitution*, it cannot validly do so with respect to directed acquittals. French CJ did not accept this contention. In his Honour’s opinion, s. 68 was capable, as a matter of construction in relation to Commonwealth offences, of conferring federal jurisdiction in terms created by s. 107. If the Court accepted the respondent’s contention then s. 68 could not be construed as conferring that jurisdiction.

V. OBITER

The Crown presented its case against LK and RK (the respondents) on the basis that they agreed to deal with money in RK’s account that was proceeds of crime, and that the respondents were reckless that the money was the proceeds of crime. Sweeney DCJ found that the Crown’s evidence was overwhelmingly capable of proving that the respondents entered into the alleged conspiracy and were reckless as to the money being proceeds of crime. But to the contrary, the Crown’s case, as set out in its application for special leave, was that the respondents intentionally agreed to commit an offence (conspiracy, s. 11.5 of the *Criminal Code*), “for which a fault element of recklessness is prescribed.” For the Crown, what transpired on appeal was something

⁵³ (1985) 158 CLR 596 at 616.

⁵⁴ See, for example, *Kingswell v The Queen* (1985) 159 CLR 264; *Cheng v The Queen* (2000) 203 CLR 248.

⁵⁵ *LK and RK* at 25.

⁵⁶ *LK and RK* at 25.

quite different; it had wrongly interpreted that s. 11.5(2)(b) imported recklessness from s. 400.3(2)(c) as the requisite fault element. In interpreting codes, it is important to contemplate the notion that certain words and expressions may be used that have an accepted legal meaning and that meaning may not be specifically set out in the code.⁵⁷

The case advanced by the Crown therefore committed it to proving that the respondents were “reckless”. Recklessness, however, is not the prescribed fault element under s. 11.5. Rather, the *Criminal Code* imports the common law concept of conspiracy. Following *Ansari*, her Honour was of the opinion the charge offended the longstanding principle of criminal liability that an accused must know of all the facts that would make his conduct criminal. Her Honour concluded that the *Criminal Code* does not displace *Ansari*, but because of the final form of the charge relied on by the Crown the offence with which the respondents were charged was unknown at law.

The appellant’s case before the Court of Criminal Appeal was that the trial judge’s interpretation of the decision in *Ansari* was incorrect. The Court rejected this contention and held her Honour to be correct. The primary question on appeal for the Crown was whether the offence of conspiracy can be committed when there is an agreement to commit the offence of dealing with money the proceeds of crime where *recklessness* as to the fact that money is proceeds of crime is an element of the substantive offence. The Court of Criminal Appeal upheld the trial judge’s direction,⁵⁸ and concluded that it could not.

Chief Justice Spigelman concluded that the Crown case, as presented, could not have succeeded. His Honour’s conclusion was based on the reasoning that the words “to commit an offence” in s. 11.5(1) and the words “intended that an offence would be committed” in s. 11.5(2)(b) were to be interpreted by reference to the common law.⁵⁹ Spigelman CJ supported the view that a person *cannot* be found guilty of an offence under s. 11.5(1) unless he/she knows the facts that make the act unlawful. The Court concluded that the law creating the offence of conspiracy is s. 11.5(1). The offence has a single physical element of conduct: conspiring with another person to commit an indictable offence. The fault element in s. 11.5 for this physical element of conduct is intention; not recklessness.

⁵⁷ Pearce and Geddes, *Statutory Interpretation in Australia* cited in *LK and RK* at 96 (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁵⁸ Spigelman CJ with whom Grove and Fullerton JJ agreed.

⁵⁹ *LK and RK* at 94 (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

The Court also decided that the District Court had validly exercised federal jurisdiction, and that the jurisdiction of the Court of Criminal Appeal derived from s. 68(2) of the *Judiciary Act 1903* (Cth), read with s. 107 of the *Crimes (Appeal and Review) Act 2001* (NSW), provided a right of appeal from a directed acquittal involving a question of law alone. This point of appeal raised by the respondents was rejected.

The Crown brought before the High Court the complaint that Spigelman CJ wrongly interpreted the requirement in s. 11.5(2)(b) for necessity of proof of intention in respect of each physical element of the substantive offence, regardless of the fault element that the law creating the substantive offence specifies. In the High Court's opinion the Crown misconceived Spigelman CJ's reasoning and held that His Honour's analysis of the law creating the offence was consistent with the analysis in *Ansari*. It was incumbent on the Crown to prove *intention* in relation to each physical element of the offence particularised as the object of the conspiracy; not recklessness. In Chief Justice French's opinion, "the formulation of the [Crown's] question throws up a fault line in the Crown's argument."⁶⁰

The High Court concluded that Chief Justice Spigelman proceeded correctly on the basis that the *Criminal Code* imported the common law concept of conspiracy. So a person cannot enter into a conspiracy under the Code without knowing the facts that make the agreed conduct unlawful. The Crown did not put forward the case that the respondents *knew* the money was proceeds of crime; only that they were reckless as to whether the money was proceeds of crime. The Crown's appeal was unanimously dismissed. On this basis the High Court said his Honour rightly concluded, consistent with *Ansari*, that Sweeney DCJ was correct to find that the Crown case disclosed no offence known to the law.

As to the respondents' contention that the Court of Criminal Appeal could not validly exercise a statutory jurisdiction to hear and determine an appeal against a directed verdict of acquittal, the Court was of the opinion that the appeal did not offend against s. 80 of the *Constitution*.⁶¹ As a question of law it did not infringe upon any of the essential functions of trial by jury.

VI. CONCLUSION

⁶⁰ *LK and RK* at 1.

⁶¹ *LK and RK* at 40 (French CJ).

The Crown's case on appeal was premised on proving LK and RK were reckless as to whether the money was proceeds of crime, but this interpretation of the prescribed fault elements of the offence under the *Criminal Code* was incorrect. The *Criminal Code* imports the common law concept of conspiracy and it was incumbent on the Crown to prove intention. Right from the beginning was there ever a case for LK and RK to answer? Consequently, at law, LK and RK could not have entered into a conspiracy under the *Criminal Code* without knowing the facts that make the agreed conduct unlawful.

The Crown appealed under s. 107 of the *Crimes (Appeal and Review) Act 2001* (NSW). The argument of LK and RK that s. 107 operated retrospectively was rejected by the High Court. However, could the Crown appeal against a directed acquittal? LK and RK also argued that an appeal by the Crown against a directed verdict of acquittal infringed the guarantee in s. 80 of the *Constitution* of the trial by jury. The High Court did not accept this contention and also rejected this argument. In the Court's opinion s. 68 of the *Judiciary Act* is capable, as a matter of construction in relation to Commonwealth offences, of conferring federal jurisdiction on State courts in terms of that created by s. 107.

Against a backdrop of conspiracy, money laundering and constitutional challenge LK and RK's directed acquittal was upheld. The indictment, as issued by the Crown, simply did not disclose an offence known to the law.

**COPYRIGHT INFRINGEMENT AND ISPs: ROADSHOW
FILMS PTY LIMITED V IINET LIMITED [2011] FCAFC
23**

SARA CHAPPLE*

I. BACKGROUND

iiNet Limited (“iiNet”) is an internet service provider that provides an internet connection to thousands of computer users within Australia. In 2009, 34 major motion picture studios (“Copyright Owners”) brought an action against iiNet on the grounds that it had breached copyright by authorising the illegal downloading of movies by its users. The allegation was that iiNet customers used a ‘BitTorrent’ program (“BitTorrent”) in order to communicate copies of copyrighted films to the public over the internet, and that iiNet authorised these infringements.

BitTorrent is a file-sharing program that allows computer users seeking particular data to participate in the distribution of that data. BitTorrent breaks up large files into small pieces in order to transfer those large files efficiently between computers. Pieces are requested by users and reassembled into a whole file. It was through this program that iiNet users copied, and communicated copies, of films to the public. It was not in dispute in the case that iiNet knew that this form of file sharing was occurring.

From July 2008, the Australian Federation Against Copyright Theft¹ issued weekly notices (“AFACT Notices”) to iiNet alleging that infringements had occurred. The AFACT Notices contained details such as the date and time at which infringements took place, and the IP addresses of infringing users. These notices required iiNet to act to

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¹ The Australian Federation Against Copyright Theft (“AFACT”) was established in 2004 to protect the film and television industry, retailers and movie fans from the adverse impact of copyright theft in Australia. AFACT works closely with industry, government and law enforcement authorities to achieve its aims. AFACT members include: Village Roadshow Limited; Motion Picture Association; Walt Disney Studios Motion Pictures Australia; Paramount Pictures Australia; Sony Pictures Releasing International Corporation; Twentieth Century Fox International; Universal International Films, Inc.; and Warner Bros. Pictures International, a division of Warner Bros. Pictures Inc.

prevent its customers from continuing to infringe copyright. iiNet also received hundreds of automatically generated notices from the USA each week, which also alleged infringement (“Robot Notices”).

iiNet required each of its customers to enter into a customer relationship agreement. The conditions of this agreement included a clause that stated that any conduct infringing copyright was a breach of the agreement, and could result in the suspension or cancellation of the customer’s account. This was also stated on the iiNet website. However, it was alleged that when iiNet was notified of the infringements by the AFACT Notices, it did not take any action to terminate or suspend the accounts of users. It was on this basis that the copyright owners alleged authorisation.

II. THE LEGISLATIVE FRAMEWORK

Section 86 of the *Copyright Act 1968* (Cth) (“Copyright Act”) provides that copyright is the exclusive right to:

- make a copy of a film;
- cause the film to be seen in public; or
- communicate the film to the public

The term ‘communicate’ is defined in s. 10 of the Copyright Act to include:

- making a film available online; or
- electronically transmitting a film.

This is further qualified by s. 14 of the Copyright Act, which provides that “a reference to the doing of an act in relation to ... other subject-matter shall be read as including a reference to the doing of that act in relation to a substantial part of the ... other subject matter ...”.

Sections 101(1) and (1A) of the Copyright Act prescribe the conduct that will infringe copyright. These sections are in the following terms:

- (1) *Subject to this Act, a copyright subsisting by virtue of this Part is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Australia, or authorizes the doing in Australia of, any act comprised in the copyright.*

- (1A) *In determining, for the purposes of subsection (1), whether or not a person has authorised the doing in Australia of any act comprised in a copyright subsisting by virtue of this Part without the licence of the owner of the copyright, the matters that must be taken into account include the following:*
- (a) *the extent (if any) of the person's power to prevent the doing of the act concerned;*
 - (b) *the nature of any relationship existing between the person and the person who did the act concerned;*
 - (c) *whether the person took any other reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.*

...

Section 112E of the Copyright Act provides that a carriage service provider (defined in the *Telecommunications Act 1997* (Cth) in such a way as to include the services provided by an internet service provider such as iiNet) “is not taken to have authorised any infringement of copyright in an audio-visual item merely because another person uses the facilities so provided to do something the right to do which is included in the copyright.”

Division 2AA of Part V of the Copyright Act, which consists of sections 116AA to 116AJ (the “Safe Harbour Provisions”), imposes limitations on the remedies against carriage service providers for infringement of copyright. Section 116AC provides for the following:

A carriage service provider carries out a Category A activity by providing facilities or services for transmitting, routing or providing connections for copyright material, or the intermediate and transient storage of copyright material in the course of transmission, routing or provision of connections.

Section 116AG(3) provides that where copyright is infringed in the course of carrying out a Category A activity, the relief that a Court may grant against a carriage service provider is limited to one or more of the following:

- (a) *an order requiring the carriage service provider to take reasonable steps to disable access to an online location outside Australia;*
- (b) *an order requiring the carriage service provider to terminate a specified account*

In deciding whether to make an order under s. 116AG(3), the Court must have regard to:

- (a) *the harm that has been caused to the owner or exclusive licensee of the copyright; and*
- (b) *the burden that the making of the order will place on the carriage service provider; and*
- (c) *the technical feasibility of complying with the order; and*
- (d) *the effectiveness of the order; and*
- (e) *whether some other comparably effective order would be less burdensome.*

The Court may also have regard to any other matters that it considers to be relevant.

In addition, s. 116AG(1) provides that before the limitations set out in s. 116AG(3) apply, a carriage service provider must satisfy certain conditions. These are set out in section 116AH(1). The relevant provisions in respect of Category A activities include the following:

- 1) *The carriage service provider must adopt and reasonably implement a policy that provides for termination, in appropriate circumstances, of the accounts of repeat infringers.*
- 2) *If there is a relevant industry code in force – the carriage service provider must comply with the relevant provisions of that code relating to accommodating and not interfering with standard technical measures used to protect and identify copyright material.*

Section 116AH(2) provides that nothing in those conditions requires a carriage service provider to monitor its service or to seek facts to indicate infringing activity, except to the extent required by an

industry code. It was common ground that there was no relevant industry code at the time of the alleged infringements.

III. DECISION AT FIRST INSTANCE

At first instance in the Federal Court before Cowdroy J, the Copyright Owners argued that iiNet users had communicated films to the public by making copies available online, and by transmitting them electronically via the Internet.² The Copyright Owners alleged that iiNet had authorised such conduct in contravention of s. 101(1) of the Copyright Act.

The Copyright Owners submitted that each time a user who made a copy of a film available online turned on his or her computer, he or she made that copy available, thus committing another infringement. However, the primary judge found that each user who had infringed copyright by making a film available online had breached copyright only once. His Honour stated that to find that a new infringement occurred each time a computer was turned on would result in an “entirely arbitrary and random result, in respect of the number of copyright infringements.”³

Cowdroy J also found that iiNet users had breached copyright in electronically transmitting substantial portions of the films. Although each film was transmitted in thousands of insubstantial fragments (and would therefore not form the whole of the film, or potentially even a ‘substantial part’ of the film), his Honour found that the thousands of fragments “would comprise a substantial part in the abstract”, and that it would be unusual for someone to transmit less than a substantial portion of a film.⁴

In determining whether iiNet infringed copyright by authorising those primary infringements, Cowdroy J relied on the test for authorisation established in *Moorhouse & Angus and Robertson (Publishers) Pty Ltd v University of New South Wales*⁵ (“*Moorhouse*”). That is, that the alleged authoriser is the party that “provided the true ‘means’ of infringement”.⁶ The question therefore was whether iiNet provided the ‘means of infringement’. His Honour found that while iiNet

² *Roadshow Films Pty Ltd v iiNet Limited* (No. 3) [2010] FCA 24 (4 February 2010).

³ *Roadshow Films Pty Ltd v iiNet Limited* (No. 3) [2010] FCA 24 at [292] per Cowdroy J.

⁴ *Roadshow Films Pty Ltd v iiNet Limited* (No. 3) [2010] FCA 24 at [304], [310] – [312] per Cowdroy J.

⁵ (1974) 3 ALR 1

⁶ *Roadshow Films Pty Ltd v iiNet Limited* (No. 3) [2010] FCA 24 at [381] per Cowdroy J.

provided an internet connection, and that such an internet connection was a necessary precondition to infringement, it was not the means of infringement. As such, iiNet could not have authorised the infringements.

His Honour then went on to consider s 101(1A) of the Copyright Act, which (outlined in Section II above) sets out various factors that a Court must consider in determining whether authorisation took place. Section 101(1A) was inserted into the Copyright Act after the decision in *Moorehouse*. Cowdroy J stated that the section “was meant to elucidate, not vary, the pre-existing law of authorisation”.⁷ However, His Honour noted that the section “is phrased as considerations that ‘must’ be considered” and therefore that “the Court is compelled to go into further consideration of the issue of authorisation pursuant to the considerations in [the section]”.⁸

In considering these factors, Cowdroy J held that iiNet did have the power to cancel or suspend the accounts of users, but that it would not have been reasonable for iiNet to have acted on the AFACT Notices. His Honour based this conclusion on the fact that the AFACT Notices did not provide enough information or evidence for iiNet to be certain that infringement had occurred, or by whom. His Honour found that the information was ‘at such a level of abstraction’ to make it difficult to act upon.⁹

Cowdroy J also found that it was not reasonable for iiNet to suspend or terminate internet services on the basis of infringement, as there was no way to know whether the person who infringed copyright was the customer or some other user. His Honour was concerned that the customer would be penalised for the action of a different user.¹⁰

On this basis, Cowdroy J concluded that while there was infringement by iiNet’s users, iiNet itself did not authorise this infringement. This is because iiNet did not provide the means of infringement, nor was it reasonable for iiNet to have prevented infringement by suspending or cancelling the accounts of infringing users.

Finally, Cowdroy J considered whether iiNet would have had the benefit of the Safe Harbour Provisions (if it has been held that iiNet had authorised the copyright infringement). As outlined in Section II

⁷ *Roadshow Films Pty Ltd v iiNet Limited* (No. 3) [2010] FCA 24 at [415] per Cowdroy J.

⁸ *Roadshow Films Pty Ltd v iiNet Limited* (No. 3) [2010] FCA 24 at [416] per Cowdroy J.

⁹ *Roadshow Films Pty Ltd v iiNet Limited* (No. 3) [2010] FCA 24 at [465] per Cowdroy J.

¹⁰ *Roadshow Films Pty Ltd v iiNet Limited* (No. 3) [2010] FCA 24 at [440] per Cowdroy J.

above, the Safe Harbour Provisions limit the remedies available against an internet service provider that is found to have authorised infringement. His Honour concluded that the requirement that the internet service provider have a policy to deal with repeat infringers of copyright was satisfied by iiNet. As such, if there had been authorisation, the Safe Harbour Provisions would have limited any remedies available against iiNet.

The Copyright Owners subsequently appealed to the Full Court of the Federal Court. There were three major areas on appeal. These were:

- The extent of primary infringements;
- Whether iiNet authorised the infringements; and
- The operation of the safe harbour provisions.

IV. PRIMARY INFRINGEMENT

ISSUE ONE: THE NUMBER OF INFRINGEMENTS

On appeal, the extent of the primary infringements was considered by all three judges (Emmett, Jagot and Nicholas JJ). The Copyright Owners argued that when an iiNet user made a film available online, it would remain available only as long as that user's computer remained connected to the internet. The Copyright Owners argued that every time a user connected to the internet, he or she made the film available online. By this interpretation, hundreds of infringements were committed by every infringing user. On the other hand, iiNet contended that each film was made available only once, and the fact that the films were unavailable when a user's computer was switched off did not mean that a new infringement occurred every time the computer was turned back on.

On appeal, it was found by each of Emmett, Jagot and Nicholas JJ that the meaning of 'make available online' should not be influenced by the nature of the computer program, and that each time the computer was switched on, a new infringement occurred. Emmett J found that:

[C]onnection to the internet is an essential element in 'making available online', in that communication cannot occur if there is no connection to the internet ... Every time that a modem is connected to the internet, and makes a Film available, there is a new making of

*the film available online. A separate act is engaged in each time a modem is connected to the internet and goes online.*¹¹

Similarly, Jagot J found that “the person makes the film available online each time he or she connects that computer to the Internet.”¹² Nicholas J also found that

*Copyright material is either available or it is not. When it is stored on a computer that is configured by its user so as to be accessible to others by means of an internet or other online connection then it will no longer be accessible if the user later terminates the connection. At that point it will not be available online. When the user takes steps to restore the connection, the copyright material will once again be available online.*¹³

On this basis, the Full Court held that each user potentially committed a number of copyright infringements in respect of each film because each time that user turned connected to the internet, that user made a film available online.

ISSUE TWO: ELECTRONIC TRANSMISSION

iiNet argued that there had been no ‘electronic transmission’ of the films, as there had been no transmission of a substantial portion of those films pursuant (referring to the definition of an ‘act’ as modified by s. 14 of the Copyright Act, outlined in Section II above). This was because the nature of the BitTorrent program meant that the films were transmitted in very small segments.

This issue was not considered by the Full Court because it was considered that it could not be determined without further evidence and analysis.¹⁴ Notwithstanding this, it was clear to the Court that there had been at least some infringement by iiNet users by making the whole of films available online, and communicating the whole of those films to members of the public. As such, it was not necessary to resolve the question of electronic transmission.

V. AUTHORISATION

¹¹ *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [152] per Emmett J.

¹² *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [329] per Jagot J.

¹³ *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [666] per Nicholas J.

¹⁴ *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [170], [353] and [681].

The main issue on appeal was whether iiNet had authorised these primary infringements. On appeal, all three judges focused directly on the criteria set out in s. 101(1A) of the Copyright Act, rather than relying on the *Moorhouse* test applied by Cowdroy J at first instance. Jagot J explained this course in the following terms:

... although it is apparent that s 101(1A) of the Copyright Act is based on the concept of "authorisation" developed by Gibbs J in Moorhouse, the fundamental obligation is to apply the statute. This is apparent from s 101(1A) itself which prescribes that in determining for the purposes of s 101(1) whether or not a person has authorised any act comprised in a copyright, the nominated matters must be taken into account. The difficulty with the trial judge's approach is that, having already determined that iiNet had not authorised the copyright infringements by reference to another test (the "means of infringement" test), the trial judge then considered the required factors under s 101(1A) (at [415]-[416]). The trial judge's answers to questions posed by the other "means of infringements" test, however, determined his conclusions about the s 101(1A) factors. This is apparent from the trial judge's finding that iiNet had no power to prevent the infringements because it did not control the means of infringement (at [424] and [436]).¹⁵

CONSIDERATION ONE: POWER TO PREVENT

The first consideration required by s. 101(1A) of the Copyright Act is the extent of iiNet's power to prevent the infringement occurring. Each of Emmett, Jagot and Nicholas JJ agreed with the trial judge that iiNet had both the contractual and technical power to warn users about infringement, and to cancel or suspend services on the basis of infringement.

This ability was summarised by Nicholas J as follows:

The respondent has the technical power to prevent copyright infringement by iiNet users by denying them access to the internet using the respondent's facilities. [The customer relationship agreement] provides that the respondent may, without liability, immediately cancel, suspend or restrict the services it provides to a subscriber if the respondent reasonably suspects "illegal conduct" by the subscriber or any other person in connection with such services .

¹⁵ *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [369] per Jagot J. See also [171] per Emmett J and [695] per Nicholas J.

Thus, the respondent has a contractual power to cancel, suspend or restrict its services to a subscriber if it reasonably suspects that they are being used by any person (not merely the subscriber) to infringe copyright. This gives the respondent a wide legal power with which to justify the use of its technical power to terminate or suspend a subscriber's internet access in appropriate cases. It is the combination of these technical and legal powers which comprise the power of the respondent to prevent iiNet users from making the appellants' films available online.¹⁶

CONSIDERATION TWO: NATURE OF THE RELATIONSHIP

The second consideration under 101(1A) of the Copyright Act is the nature of the relationship between the infringing users and iiNet itself.

None of Emmett, Jagot or Nicholas JJ accepted the distinction made by the trial judge between customers and users of the services.¹⁷ This was because the customer relationship agreement provided that iiNet's customers could not use or allow anyone else to use iiNet's service to infringe another person's rights. There was therefore a relationship between iiNet and any person who used the service. As such, none of the appellate judges had any difficulty finding a relationship between iiNet and any users of its services, whether they were customers or not.

CONSIDERATION THREE: REASONABLE STEPS

The final consideration in assessing authorisation under s. 101(1A) is an analysis of any 'other reasonable steps' taken to prevent infringements.

On appeal, each of Emmett, Jagot and Nicholas JJ interpreted this to mean that there would only be authorisation if steps could have been taken to prevent further infringement, and that it was reasonable for those steps to have been taken.

There was no doubt that some steps were taken by iiNet to prevent or avoid copyright infringement by its users. The customer service agreement included terms that copyright infringement was prohibited, and iiNet had a warning to that effect on its website. However, as Nicholas J found, these were:

¹⁶ *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [720] per Nicholas J. See also [183] per Emmett J and [400] per Jagot J.

¹⁷ *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [192], [390], and [728].

[R]easonable steps to take to prevent or avoid copyright infringements ... but, of course, it does not follow that the steps ... were adequate for that purpose or that there were no other reasonable steps that it was also open to the respondent to take.¹⁸

The appeal therefore turned ultimately on whether it would have been reasonable for iiNet to act on the AFACT Notices by warning infringing users, or suspending or terminating their accounts.

Emmett J found that AFACT Notices did not contain sufficient information upon which iiNet could rely. Significantly, His Honour outlined various circumstances in which it would have been reasonable for iiNet to take steps to suspend or terminate a customer's account. Emmett J stated that the AFACT Notices would have had to have contained "unequivocal and cogent evidence" of infringement. On the other hand:

[M]ere assertion by an entity ... with whatever particulars of the assertion that may be provided, would not of itself, constitute unequivocal and cogent evidence of the doing of acts of infringement.¹⁹

Emmett J found that the infringement notices disclosed no more than assertions and that no means of verification were furnished. In addition (and more importantly according to Emmett J), the Copyright Owners did not offer to reimburse iiNet for any costs incurred in complying with the demands made in the AFACT Notices. Accordingly, Emmett J held that it was no reasonable to require iiNet to undertake the work, cost and effort required in order to set out, review, and analyse the allegations contained in the AFACT Notices.²⁰

His Honour also stated that iiNet received so many infringement notices (both the AFACT and Robot Notices), that an automated system of warnings, suspension and termination would be required in order to deal with them. Such a system would have caused great expense to iiNet and Emmett J accepted the evidence that such a system could not be commercially justified.²¹

¹⁸ *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [731] per Nicholas J.

¹⁹ *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [210] per Emmett J.

²⁰ *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [205] per Emmett J.

²¹ *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [206] - [207] per Emmett J.

Like Emmett J, Nicholas J held that the AFACT Notices were not sufficient to provide iiNet with “knowledge that its network was being utilised by users of particular accounts to infringe [the Copyright Owners’] copyright in the identified films”, although His Honour noted that the AFACT Notices “must have given [iiNet] reason to suspect that such infringements had occurred”.²² Nicholas J also doubted the difficulty of establishing a system of warnings, termination and suspension of accounts.²³ Nevertheless, his Honour concluded that:

*I do not think [iiNet] could reasonably be expected to issue warnings, or to terminate or suspend particular accounts, in reliance upon any such notice in circumstances where it has been told nothing at all about the methods used to obtain the information which lead to the issue of the notice. Nor should it be up to [iiNet] to seek out this information from a copyright owner who chooses not to provide it in the first place.*²⁴

In contrast to Emmett and Nicholas JJ, Jagot J found that there was no problem with the quality of the notices provided. Her Honour held that the notices “provided prima facie credible evidence including precise details (such as date, time, IP address, copyright material and percentage of material downloaded) of extensive infringements of copyright by iiNet customers or people customers had allowed to use their iiNet service.”²⁵ According to Jagot J, iiNet could and should have relied on the information provided by the AFACT Notices and that by failing to do so, the infringement was authorised. Jagot J stated that:

*iiNet could have adopted and implemented a general policy or a specific response to the AFACT notices ... The policy could have included a series of reasonable responses by iiNet to credible allegations of copyright infringement including the type of information required before action would be taken, warnings on receipt of such information to customers, the recording of warnings, shaping the customer’s service as well as suspending the customer’s account.*²⁶

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²² *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [763] per Nicholas J.

²³ *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [748] per Nicholas J.

²⁴ *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [764] per Nicholas J.

²⁵ *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [467] per Jagot J.

²⁶ *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [431] per Jagot J.

It was argued by iiNet that it was not able to identify the infringing users from the AFACT Notices because it would have been unlawful to do so. The claim was based on the fact that Part 13 of the *Telecommunications Act* makes it an offence for a carriage service provider or its employees to disclose protected information.

This argument was not accepted by any of Emmett, Jagot, or Nicholas JJ. The Court held that exemptions within the *Telecommunications Act 1997* (Cth) allowed iiNet to use the information. Further, the Court found that the customers had consented to the disclosure of their information for the purposes of managing and administering their accounts.²⁷

VI. SAFE HARBOUR PROVISIONS

The Safe Harbour Provisions operate to limit the available remedies against internet service providers when their users infringe copyright.

In contrast to Cowdroy J at first instance, none of the appellate judges accepted that the safe harbour provisions could apply in this case. For Emmett and Nicholas JJ, the Safe Harbour Provisions were a secondary consideration, as they had found that iiNet had not authorised infringement. In contrast, the Safe Harbour Provisions were a primary consideration for Jagot J because her Honour found that there had been authorisation. In any event, all three judges agreed that any policy that iiNet may have had was not sufficient to attract the protection of the Safe Harbour Provisions.

Emmett J found that iiNet's policy was no more than "a policy to obey the law" and that "iiNet did not establish any processes to facilitate the operation of the so-called policy, in that it did not inform its customers of the existence of the policy."²⁸ Similarly, Nicholas J found that the iiNet policy was not sufficient to attract the Safe Harbour Provisions, and that it only provided for the termination of an account when it was the subject of an admission or a finding in court.²⁹ Likewise, Jagot J held that simply advising customers that infringement would result in termination is not the same as having a policy in place, and is certainly not the same as acting on that policy.³⁰

²⁷ *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [255], [515], and [799].

²⁸ *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [264] per Emmett J.

²⁹ *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [806] per Nicholas J.

³⁰ *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [523] per Jagot J.

VIII. A TEST FOR AUTHORISATION

Nicholas and Emmett JJ affirmed the finding of Cowdroy J at first instance that iiNet did not authorise the copyright infringements. Jagot J stood in the minority, finding that authorisation did occur.

As it was found that the *Telecommunications Act 1997* (Cth) did not prevent iiNet acting on the AFACT Notices, and that the Safe Harbour Provisions had no operation in this case, the appeal turned primarily on the question of whether it was unreasonable for iiNet to fail to terminate or suspend users' accounts on the basis of allegations of infringement.

Emmett J considered 4 factors to be necessary before it was reasonable for an internet service provider to terminate or suspend an account when it received a notification or infringements:

- The internet service provider has received in writing particulars of specific acts of infringement from copyright owners;
- The internet service provider has been requested to take steps in relation to the infringement, including warning the customers of the possibility of suspension or termination;
- The internet service provider has been provided with unequivocal and cogent evidence of the alleged acts of infringement; and
- The copyright owners have undertaken to:
 - a) reimburse the internet service provider for the cost of verifying the primary acts of infringements and maintaining a system to monitor infringements; and
 - b) indemnify the internet service provider against liability reasonably incurred as a consequence of mistakenly suspending or terminating on the basis of allegations made by a copyright owner.³¹

³¹ *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [210] per Emmett J.

Jagot and Nicholas JJ did not go so far as to require indemnification or costs to be paid by the copyright owners alleging infringement. However, all three judges agreed on the importance of three factors in determining whether an internet service provider that fails to act on allegations of copyright infringement of its users has authorised that infringement. These factors are as follows:

- whether the internet service provider has the technical ability to terminate or suspend an account;
- whether the allegation provided by the copyright owner can be relied upon or verified with reasonable ease and expense; and
- whether the allegation can be acted on with reasonable ease and expense.

IX. CONCLUSION

This appeal turned on whether it was reasonable for an ISP to not take steps to warn, suspend or terminate accounts when the ISP was notified that users had infringed copyright. Nicholas J observed that the finding of the primary judge “seem[ed] to imply that an ISP which provides internet connectivity will never be liable for authorisation of its subscribers’ acts of copyright infringement because it could never be said that an ISP had supplied the means of infringement.”³²

However, it is implicit in the reasoning of all three appellate judges that an internet service provider can be found liable for authorising copyright infringements under the right circumstances.

As Emmett J stated:

[I]t does not necessarily follow that there would never be authorisation within the meaning of s 101 of the Copyright Act by a carriage service provider, where a user of the services provided by the carriage service provider engages in acts of infringement such as those about which complaint is made in this proceeding. It does not necessarily follow from the failure of the present proceeding that circumstances could not exist whereby iiNet might in the future be held to have authorised primary acts of infringement on the part of

³² *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [694] per Nicholas J.

*users of the services provided to its customers under its customer service agreements.*³³

In a similar vein, Nicholas J noted the following:

*I accept that a refusal by an ISP to act on infringement allegations made by or on behalf of a copyright owner may be evidence from which authorisation might be inferred. But that will only be so if the refusal is unreasonable. Whether or not a refusal is unreasonable must depend upon the circumstances in which it occurs including the nature and quality of the information upon which the ISP is requested to act by the copyright owner.*³⁴

An internet service provider may be found liable for failing to act on allegations of infringement if that internet service provider has the technical ability to act on the allegations, the allegations can be relied upon or verified with reasonable ease and expense, and the internet service provider can act on these allegations with reasonable ease and expense.

³³ *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [274] per Emmett J.

³⁴ *Roadshow Films Pty Ltd v iiNet Limited* [2011] FCAFC 23 at [781] per Nicholas J.

A PROGRESSIVE COURT AND A BALANCING TEST: *ROWE V ELECTORAL COMMISSIONER* [2010] HCA 46

RUTH GREENWOOD*

I. INTRODUCTION

*Rowe v Electoral Commissioner*¹ (“*Rowe*”) is a case about the legislative curtailment of a right. It demonstrates how the French Court intends to deal with constitutional interpretation as well as how it will determine whether a burden on a right is constitutionally valid or not. The right in question in this case is the right to vote, which is, strictly speaking, a statutory right, although it has become such an integral part of the fabric of Australia’s system of representative government, established by the Constitution, that it is treated by the Court as a constitutional right.

Even though this case elicited six separate opinions, there is a clear preference by the High Court (five justices to two), in terms of constitutional interpretation, for a progressive or “living force” reading of the constitutional text.² This is a reading whereby the evolving standards of society are relevant to the interpretation of the text of the Constitution.³

Rowe is merely the latest in a line of High Court cases that have accepted, in one form or another, this type of constitutional

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¹ [2010] HCA 46.

² For explanations and postulations as to the different types of constitutional interpretation techniques used by the High Court over the years, see Justice Susan Kenny “The High Court of Australia and modes of constitutional interpretation” (FCA) [2007] FedJSchol 11; James A. Thomson, “Constitutional Interpretation: History and the High Court: A Bibliographical Survey” (1982) 5 *U.N.S.W. L. J.* 309; Carl McCamish, “The Use of Historical Materials in Interpreting the Commonwealth Constitution” (1996) 70 *Aust. L. J.* 638; Sir Anthony Mason, “The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience” (1986) 16 *Fed. L. Rev.* 1; and Haig Patapan, “Politics of Interpretation” in *Judging Democracy: The New Politics of the High Court of Australia* (Cambridge: Cambridge University Press, 2000).

³ See, for example, a discussion of the theory of the constitution as a “living force” by Deane J in *Theophanus v Herald & Weekly Times Ltd* (1994) 182 C.L.R 104, 171-4, relying on the explanation of “living force” in Andrew Inglis Clark, *Studies in Australian Constitutional Law*, 21 (first published 1901, 1997 ed).

interpretation with respect to rights jurisprudence.⁴ It is not clear that this method of constitutional interpretation will continue to be used in cases other than those involving constitutional or statutory rights. However, it is clear that this is a legitimate, and currently the most favoured, method for dealing with cases involving legislative infringements on rights, and certainly, the right to vote.

The method of constitutional interpretation used by the High Court is relevant because, as Justice Kenny has shown, “a judge’s choice of preferred interpretive mode matters.”⁵ A progressivist interpretation of the Constitution with respect to cases involving constitutional rights will mean that “discrete and insular minorities”⁶ are more likely to have their rights protected, because modern thinking recognises these minority groups as deserving of equal rights (as opposed to at Federation where white men were generally the only protected class).⁷

In order to determine whether a right has been so curtailed by legislation that the legislation is no longer constitutionally valid, some sort of test must be used. In cases involving rights, the High Court has used various terms to describe the test and the relevant factors that comprise the test. This case ushers in a new wave of thinking about the oft-cited test from *Lange v Australian Broadcasting Corporation*⁸ (“*Lange*”): namely, whether a measure is “reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government.” The justices explain that this test includes concepts such as “proportionality”,⁹ “disproportionality”,¹⁰ “close scrutiny”,¹¹

⁴ This is, of course, subject to debate, but see, for example, *Roach v Australian Electoral Commissioner* [2007] HCA 43; *Sue v Hill* (1999) 199 C.L.R. 462; *Australian Capital Television v the Commonwealth* 177 C.L.R. 106; and *Nationwide News Proprietary Ltd v Willis* (1992) 177 C.L.R. 1. In cases involving federalism, the Court seems rooted in “textualism” or “structuralism”, see, for example, Justice Susan Kenny “The High Court of Australia and modes of constitutional interpretation” (FCA) [2007] *FedJSchol* 11.

⁵ Justice Susan Kenny, “The High Court of Australia and modes of constitutional interpretation” (FCA) [2007] *FedJSchol* 11, note 47 and accompanying text.

⁶ I have borrowed this term from the famous Footnote 4 in *United States v Carolene Products Company* 304 U.S. 144 (1938): this was the case in the US that set up the “levels of scrutiny” test, that the court in Australia, I argue, is moving towards in this case.

⁷ See paras [18]-[22] of French CJ in *Rowe* for a discussion of those who did not have the right to vote at Federation.

⁸ (1997) 189 CLR 520, 561-562.

⁹ French CJ at [24], Gummow and Bell JJ at [161]-[163], Hayne J at [263], Crennan J at [374], and Kiefel J, throughout her judgment discusses proportionality in the Australian and international context, [436]-[466].

“substantial reason”,¹² “compelling...problem”,¹³ and “discriminatory burden”¹⁴ and in doing so, I argue, implicitly establish a balancing test. *Rowe* suggests that the test for how far the Parliament may curtail a right will involve the balancing of many factors, rather than the interpretation of the unclear “reasonably appropriate and adapted” test from *Lange*.

This article sets out the jurisdiction, facts, and arguments advanced by each side, and then analyses the court’s findings. The analysis of the court’s findings is split into three sections: the methods of constitutional interpretation used; the discussion of the nature of the right at issue; and the factors that are relevant to the “reasonably appropriate and adapted” test. I conclude that the Court has a favoured method of constitutional interpretation for rights cases (a progressivist reading), and the implication of the judgments in this case evidence that a balancing test for cases involving the legislative curtailment of a right has been implicitly established.

II. THE JURISDICTION

On 26 July, 2010 Shannen Alyce Rowe and Douglas Thompson took the Electoral Commissioner, and the Commonwealth of Australia to the High Court, in its original jurisdiction, to argue that Items 20, 24, 28, 41, 42, 43, 44, 45 and 52 of Sched I to the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth) (the “Amendment Act”) (and consequently ss 102(4), 102(4AA) and 155 of the *Commonwealth Electoral Act 1902* (Cth)) (the “CEA”) were unconstitutional. The plaintiffs applied for a declaration and for writs of mandamus. Justice Hayne referred the matter to the Full Court on 29 July, 2010 and the argument was heard by the Full Court on 4 and 5 August, 2010. The application was amended at the hearing so that the declaration sought related to the validity of some other provisions of the Amendment Act. The plaintiffs argued that the provisions were invalid by reason that they were:

- contrary to ss. 7 and 24 of the Constitution (which

¹⁰ French CJ at [2], [24-25], [73], and [78], Gummow and Bell JJ at [161], Heydon J at [268]-[269], [289], Crennan J at [374], and Kiefel J at [402], [429], and [444] ff.

¹¹ French CJ ([24]), Gummow and Bell JJ ([161]) and Kiefel J (429) all quote Gleeson CJ in *Roach* on this issue.

¹² French CJ at [23]-[25], Gummow and Bell JJ at [123], [140], [157], and [166]-[167], Hayne J at [184], [186], [224]-[225], and [248]-[249], Crennan J at [374], [376], [384], and Kiefel J at [403], [406], and [429].

¹³ French CJ at [78], Kiefel J “compelling justification” at [451].

¹⁴ French CJ at [73].

require that members of Parliament be “directly chosen by the people”);

- beyond the legislative powers of the Commonwealth conferred by s. 51(xxxvi) and s. 30 of the Constitution or any other head of legislative power; and/or
- beyond what is reasonably appropriate and adapted, or proportionate, to the maintenance of the constitutionally prescribed system of representative government.¹⁵

On 6 August, 2010 the Court, by a majority, declared the challenged provisions invalid, and extended the finding to include additional sections of the CEA (ss. 94A(4)(a), 96(4), and 95(4)), which relate to enrolment of persons living outside Australia, itinerant electors, and the eligibility of spouses, de facto partners or children of eligible overseas electors for enrolment.

The Court issued its reasons for judgment on 15 December, 2010, and revealed that the decision was a 4-3 split, with the majority being French CJ, Gummow, Bell, and Crennan JJ. French CJ, Gummow and Bell JJ, and Crennan J issued separate judgments, as did Heydon J, Hayne J, and Kiefel J.

III. THE FACTS

The items in question were introduced by the Amendment Act of the Howard government in 2006, and affected the close of electoral rolls once an election has been announced. The Amendment Act changed the deadlines for enrolling to vote and updating one’s enrolment. The new provisions prevented one from enrolling (s. 102(4) of the CEA) after 8pm on the date of issue of election writs, and prevented one from updating one’s enrolment (a “transfer of enrolment” in the language of s. 102(4AA) of the CEA) after 8pm on the day of the close of the electoral roll. Section 155 of the CEA provided that the electoral roll would close on the third working day after the issue of the writs. Section 152(2) of the CEA provided that election writs were deemed to have been issued at 6pm on the day they were released. This meant that new enrolments had a 2 hour period for enrolments, and transfers of enrolments had a 3 day period for action following the issue of an election writ. The law from 1983 to 2006 had allowed for enrolments

¹⁵ Citing *Roach v Australian Electoral Commissioner* [2007] HCA 43.

and transfers of enrolment for seven days following the issue of election writs. From 1902 to 1983 the electoral rolls closed for a federal election on the day of issue of the writs, however there was a practice of announcing elections a significant time before the issue of writs. For example the time between announcement and issue of writs from 1940 and 1983 varied from 5 to 63 days. The practice changed in 1983, when, without notice, the election was announced and the writs were issued that afternoon.¹⁶

The 2010 election was announced by the Prime Minister on Saturday, 17 July, 2010, with the election writs issued on 19 July, 2010. On 23 July, 2010 Rowe attempted to enrol for the first time and Thompson attempted to change his enrolment address. Both were rejected due to ss. 4 and 4AA of the CEA and on 26 July, 2010 they filed their action in the High Court.

IV. THE ARGUMENTS

THE PLAINTIFFS' SUBMISSIONS

The plaintiffs characterised enrolment to vote as a means to achieve a constitutional end of exercising a right to vote. They argued that the Amendment Act affected the substance of the right to vote, rather than being merely a procedural issue. Their submissions addressed the question of how to determine whether a curtailment of a right was constitutionally valid or not.¹⁷

The plaintiffs argued that the Constitution should be interpreted in a dynamic or progressive way, per Gleeson CJ in *Roach v Australian Electoral Commissioner*¹⁸ ("*Roach*") (citing McTiernan and Jacobs JJ in *McKinlay v Commonwealth*¹⁹ ("*McKinlay*")): the term "chosen by the people of the Commonwealth" is to be applied to different circumstances at different times.²⁰ According to the plaintiffs this meant that historically (i.e. up to 1983) the closure of rolls on the day of the issue of writs was not a problem, but as the practice changed in 1983, a new rule had to be enacted in order for the relevant provisions of the CEA to remain constitutional, and as such the change to the rule

¹⁶ Plaintiffs' Amended Outline of Submissions, pp. 1-5.

¹⁷ Plaintiffs' Amended Outline of Submissions, p. 12.

¹⁸ *Roach v Australian Electoral Commissioner* (2007) 233 CLR 162, 174.

¹⁹ *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1.

²⁰ Plaintiffs' Amended Outline of Submissions, p. 12.

in 2006, without a change in practice, made the Amendment Act constitutionally invalid.

The plaintiffs argued that the correct test for whether a legislative curtailment of the right to vote is constitutionally invalid should be that set out in *Roach*. Under *Roach* two questions must be considered:²¹ 1. Whether the impugned provisions disenfranchise any group of adult citizens, and 2. Whether the disenfranchisement is for a “substantial reason” or “disproportionate” as those terms were explained in *Roach*. The first question was swiftly answered by the plaintiffs based on their explanation of the disenfranchisement suffered by a number of people (set out below). The second, they submitted, involved the balancing of a variety of factors.

In relation to the first issue, whether there was a disenfranchisement of a group of adult citizens, the plaintiffs set out the following facts:

- The change in practice to issue a writ on the same day as the announcement of an election, in 1983, resulted in “substantial disenfranchisement” (this assertion was not elaborated on), and the law that introduced a 7 day period between the issue of the writs and the close of the rolls remedied this disenfranchisement.
- The AEC had explained in the Statement of Agreed Facts and in a Report to the Joint Standing Committee on Electoral Matters in 2000 that an early close of rolls would not improve the accuracy of the rolls, in fact it would cause them to be less accurate (due to the spike in enrolments and transfers after the announcement of an election), that identity fraud is not a problem and therefore would not be solved by an early closing of rolls, and that the 7 day period guaranteed the franchise to large numbers of people who might otherwise have missed out on voting.²²
- The disenfranchisement that resulted from the Amendment Act disproportionately affected young, first-time voters, new Australian citizens, itinerant populations, the Indigenous population, those with

²¹ Plaintiffs’ Amended Outline of Submissions, p. 13.

²² JSC EM, “Report on the Conduct of the 2007 Federal Election and Matters Related Thereto” (June 2009), p. 148.

disabilities,²³ and those in rural and remote areas.²⁴

- The plaintiffs were disenfranchised by the 2006 law, and approximately 100,000 adult citizens were in a position analogous to the plaintiffs.

On the second question, that of whether this disenfranchisement caused the law to be invalid, the plaintiffs submitted three standards against which to measure the legislation:²⁵

- whether there was a “substantial reason” for the disenfranchisement;
- whether the disenfranchisement was “proportionate” to the benefit received from the curtailment; and
- whether the disenfranchisement was “reasonably appropriate and adapted to the maintenance of a constitutionally prescribed system of representative government.”

The plaintiffs set out an explanation for why their case met each test: They submitted that there was no “substantial reason” for the removal of the 7 day period - in fact the only reason proffered was to preserve integrity and prevent voter fraud, and there was no evidence of such fraud having occurred. In fact, if anything, there was some evidence that the integrity of the rolls would be weakened by the Amendment Act.²⁶ As there was no mischief to be addressed, the plaintiffs argued that the curtailment of the right to vote was not “proportionate” to any benefit received.

The plaintiffs therefore argued that the impugned provisions operated in an arbitrary and disproportionate manner, and that the provisions were not appropriate and adapted because they served no legitimate end. To the extent they did serve a legitimate end, the provisions were not appropriate and adapted and they affected a particular class of voters which were statistically more likely to vote for particular parties.

²³ Plaintiffs’ Amended Outline of Submissions, p. 10.

²⁴ Plaintiffs’ Amended Outline of Submissions, p. 11.

²⁵ Plaintiffs’ Amended Outline of Submissions, pp. 14-15.

²⁶ Plaintiffs’ Amended Outline of Submissions, p. 7, citing “AEC Submission No 26 to the JSCEM inquiry into the integrity of the electoral roll dated 17 October 2000” at [12.2.5].

THE SECOND DEFENDANT'S SUBMISSIONS

The first defendant appeared before the Court in order to provide any relevant assistance to the Court, but did not provide substantive submissions. The argument opposing the plaintiffs was therefore provided by the second defendant's submissions.

The second defendant characterised enrolling to vote as a condition precedent to exercising the right to vote.²⁷ This, it argued, established the Amendment Act as one relating to the procedural regulation of a right, rather than one affecting the substance of the right. The second defendant did not explain which method of constitutional interpretation should be used, it simply looked to *Roach* and *Lange* for the appropriate test of constitutional validity.

The second defendant agreed with the plaintiffs that the relevant test for whether a legislative curtailment of the right to vote was constitutionally invalid should be that set out in *Roach*.²⁸ It agreed that the first limb of the test should be whether anyone was disenfranchised by the statute. In terms of the second limb of the test, it argued that a two tier system of analysing rights cases had developed.²⁹

Under the two-tier test, the second defendant submitted, one must first distinguish between laws that have the direct purpose of restricting political communication, and those that do so incidentally. The former require "strict" or "close" scrutiny, only being supported where there is a "compelling justification". The second defendant submitted that the laws in *Roach* were like the former, but the laws in *Rowe* were an example of the latter - that is, the Amendment Act only *incidentally* impinged on the right to vote. It submitted that the test for this case should be whether there was some disqualification from adult suffrage, and if so whether the disqualification was for a "substantial reason", rather than requiring a "compelling justification".³⁰

²⁷ Second Defendant's Submissions, p. 8.

²⁸ Second Defendant's Submissions, p. 15.

²⁹ The second defendant gave the following citation for this two tier test: "*Mullholland* 220 CLR 181, 200 per Gleeson CJ (a passage cited in the *Roach* at 199); *Levy v Victoria* (1997) 189 CLR 579, 618-619 per Gaudron J; *Coleman v Power* (1004) 220 CLR 1, 52 per McHugh J. See also *Australian Capital Television Pty Ltd v the Commonwealth* (1992) 177 CLR 106 at 143 per Mason CJ; at 169 per Deane and Toohey JJ; at 234-5 per McHugh J; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 76-77 per Deane and Toohey JJ; *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 299-300 per Mason CJ; at 337-339 per Deane J; 388 per Gaudron J."

³⁰ Second Defendant's Submissions, pp. 15-16.

In answer to the first question, the second defendant submitted that because voters have a duty to enrol and keep their enrolment up to date, there was no disenfranchisement as a consequence of the Amendment Act (rather, the personal actions of the plaintiffs caused the so-called “disenfranchisement”). Perhaps realising that the Court may be against it on this, the second defendant assumed the statute caused disenfranchisement and then looked to whether that harm was justified by a “substantial reason” for the Amendment Act.

The second defendant argued that the purpose of the 2006 Amendment Act was to prevent risk to the integrity of the electoral roll. The JSCEM Report noted that there was no experience of fraud, but the concern was with the opportunity for fraud to be practised. The second defendant argued that the provisions were analagous to those that regulate the time, place, and manner of political communications,³¹ and given that there was evidence of mischief (some level of electoral fraud) the measure was reasonably appropriate and adapted to serve an end consistent with a system of representative government. The second defendant argued that even if the accuracy of the rolls was lessened by the Amendment Act, the integrity of the rolls was a different issue, and as their integrity was enhanced by the legislation, the “end” achieved by the Amendment Act was one which was consistent with the maintenance of a constitutionally prescribed system of government. The “end” being “the orderly conduct of elections in which there can be confidence that persons who are not entitled to vote do not vote”.

The second defendant noted that “[w]hether the provisions are *necessary* for this purpose, and whether other better approaches are possible, are matters for debate” by the Parliament, not for the court to determine.³²

THE PLAINTIFFS’ REPLY

The plaintiffs’ reply contended that there was a less restrictive means of achieving the same end - that is, the date of the close of the rolls could be extended by a few days and then there would be an electoral roll with more integrity and still a low chance of voter fraud, without a significant impact on the franchise.³³

³¹ The Second Defendant referred to the citations set out in an earlier footnote. That footnote is set out in its entirety in note 29 above.

³² Second Defendant’s Submissions, pp 21-22.

³³ Plaintiff’s Outline of Submissions in Reply, p 6.

V. THE FINDINGS

The Court issued six opinions, three in favour of striking down the legislation (French CJ, Gummow and Bell JJ, and Crennan J), and three in favour of upholding the legislation (Heydon J, Hayne J, and Kiefel J). Even though the court was fairly evenly split on the ultimate outcome, the reasoning used by the justices demonstrated a fairly clear preference (5-2) for a progressivist method of constitutional interpretation, and implicit in all the judgments was an acceptance of a balancing test for determining whether a legislative curtailment of rights is constitutionally valid.

The four justices in the majority, and Kiefel J used similar methods of constitutional interpretation and considered similar characteristics to be relevant when weighing the burden and the importance of the right at issue in order to reach their results (with Kiefel J finding a different balance between the burden and importance of the right). Hayne J and Heydon J's use of similar conservative constitutional interpretation and reliance on parliamentary supremacy above evolving standards of the right to vote, caused them to find that the Parliament has a much greater scope for defining rights, even if they have become constitutional rights, than the dynamic constitutionalists on the Court. The differences between the decisions are most usefully analysed in three areas: methods of constitutional interpretation; the nature of the right at issue; and the test used to determine whether a legislative curtailment of a right is constitutionally valid. Each area is addressed below.

METHODS OF CONSTITUTIONAL INTERPRETATION

Five of the High Court justices affirmed their favour for dynamic or progressive constitutional interpretation. The two judges who had served on the High Court for the longest period, Hayne J and Heydon J, each referred to versions of originalism.

Chief Justice French explained that implicit in the authority of s51(xxxvi) "was the possibility that the constitutional concept would acquire, as it did, a more democratic content than existed at federation."³⁴ His Honour found that rather than a condition precedent, the requirement of 'enrolment' was a qualification for voting. Although the right to vote is, strictly speaking, a right

³⁴ *Rowe* at [18].

conferred by statute, French CJ cited with approval Gleeson CJ in Roach (addressing *McKinley*): “the words of ss 7 and 24, because of changed historical circumstances, including legislative history, have come to be a constitutional protection of the right to vote.”³⁵

In line with his preference for a progressivist interpretation of the Constitution, French CJ explained that the right to vote was subject to “the common understanding of the time” (citing McTiernan and Jacobs JJ in *McKinley*) and that that must come from “durable legislative development” not “judicial understanding.”³⁶ In this, French CJ affirmed an adherence to the long established acceptance of parliamentary supremacy as a guiding principle of Australian constitutional interpretation. The Chief Justice later reaffirmed this adherence when he explained that “Parliament has considerable discretion” to determine how it will achieve a stated goal, such that even if the court can find another way to achieve that goal, it will not be proper for the Court to substitute its judgment for the Parliament’s (unless the Parliament actually exceeds the limits of the Constitution).³⁷

Gummow and Bell JJ, like French J, set out a preference for dynamic constitutional interpretation, citing Gleeson CJ in Roach, that “the words ‘chosen by the people of the Commonwealth’ were to be applied to different circumstances at different times”.³⁸ This was also cited with approval by Crennan J (who did not discuss in detail her methodology of constitutional interpretation).³⁹ Like French CJ, Gummow and Bell JJ also accepted the principle of parliamentary supremacy as guiding and fundamental.⁴⁰

Kiefel J voiced support for dynamic constitutional interpretation, explaining that “it is difficult to identify what is essential to representative government, not the least because ideas about it may change over time.”⁴¹ Her Honour explained in support of Gleeson CJ’s view in *Mullholland v AEC*⁴² that “a notable feature of our system of government is how little the detail of it is to be found in the Constitution and how much is left to be filled in by Parliament.”⁴³

³⁵ *Rowe* at [20].

³⁶ *Rowe* at [19].

³⁷ *Rowe* at [29].

³⁸ *Rowe* at [123].

³⁹ *Rowe* at [326].

⁴⁰ *Rowe* at [123], citing Gleeson CJ in *Roach* p 174.

⁴¹ *Rowe* at [417].

⁴² *Mullholland v Australian Electoral Commission* (2004) 220 CLR 181, 188.

⁴³ *Rowe* at [418].

In contrast to the rest of the High Court, Hayne J and Heydon J each favoured more conservative methods of constitutional interpretation. Hayne J adopted a “text and structure” method, not referring to content derived from sources other than the Constitution.⁴⁴ Nevertheless, His Honour noted that (citing Gibbs J in *McKinley*): “The Constitution does not lay down particular guidance on these matters; the framers of the Constitution trusted the Parliament to legislate with respect to them if necessary”⁴⁵ and further that:

*In hindsight, the changes that have been made to the federal electoral system since federation may be described as evolutionary. It may be that hindsight would permit the observer to describe the changes as moving generally in a direction that represents a “development” of the particular form of representative government that practised or established in Australia.*⁴⁶

Nevertheless, Hayne J ultimately found that the evolution of the concept of “representative government” could not evolve into a constitutional norm because there is no textual or structural foundation for it.⁴⁷ Hayne J found that underpinning the Constitution is a firm belief in Parliamentary supremacy, which is evident in the “constitutional intention to permit the Parliament to decide many important questions about the structure and content of the electoral system *without* constitutional restriction beyond the requirement that each house be directly chosen by the People.”⁴⁸ Despite this, His Honour did not feel the need to explain what “directly chosen by the people” meant in detail.⁴⁹ Rather, Hayne J found that there is a difference between factual participation in an election and the legal opportunity for the people to participate,⁵⁰ and that compulsory voting was not a necessary corollary of ss. 7 and 24 of the Constitution.⁵¹ Given these, Hayne J found that the case before him could only have a legal basis if the Constitution required maximum participation and His Honour found that it did not. Hayne J explained that the Parliament could change the acceptable limits to the qualifications of adult suffrage as “common understanding” and “generally accepted Australian standards” are irrelevant, being that they “have not footing

⁴⁴ *Rowe* at [192].

⁴⁵ *Rowe* at [194].

⁴⁶ *Rowe* at [201].

⁴⁷ *Rowe* at [203].

⁴⁸ *Rowe* at [204].

⁴⁹ *Rowe* at [211].

⁵⁰ *Rowe* at [218].

⁵¹ *Rowe* at [219], citing *Judd v McKeon* (1926) 38 CLR 380.

in established doctrines of constitutional interpretation.”⁵² Hayne J concluded that it was up to Parliament to determine what the democratic system of government looked like,⁵³ and given their choices, there was no disqualification from adult suffrage by the Amendment Act.⁵⁴

Heydon J adopted an “originalist” method of constitutional interpretation,⁵⁵ explaining this to mean that “the question is what meaning skilled lawyers and other informed observers considered those words to bear in the 1890s.” His Honour skipped over the fact that there was no indigenous suffrage and a restriction on female suffrage at this time by stating that “[t]he failure of the federation age to offer universally applicable systems of suffrage conforming entirely to the most advanced modern models is not a reason to ignore what the means and applications of the words ‘chosen by the people’ in the federation age were.”⁵⁶

THE NATURE OF THE RIGHT AT ISSUE

The main point of difference between the three majority judgments was in relation to the nature of the infringement on the right to vote. The second defendant argued that *Lange* set up a two tier test, whereby the Court should analyse whether there is a direct infringement of a right or whether the infringement is indirect. If there is a direct infringement, “strict” or “close” scrutiny should be applied, and a law will only survive if there is a “compelling justification for it”. If the infringement on the right is indirect, then there need only be a “substantial reason” for the law. It was accepted that *Roach* was an example of a direct infringement of a right. The justices each addressed whether *Rowe* involved an infringement of a right in the same way as *Roach*.

French CJ agreed with the second defendant that *Rowe* was a fundamentally different case to *Roach*, in that *Roach* was about a direct exclusion of a group of adult citizens from the franchise, while *Rowe* involved a less direct disenfranchisement,⁵⁷ however the Chief Justice did not accept that an indirect or procedural law would always be constitutionally valid, because, as was clear in this case, it could still

⁵² *Rowe* at [266].

⁵³ *Rowe* at [222].

⁵⁴ *Rowe* at [225].

⁵⁵ *Rowe* at [292]ff.

⁵⁶ *Rowe* at [303].

⁵⁷ *Rowe* at [23].

disenfranchise people and therefore required “substantial justification.”⁵⁸

Gummow and Bell JJ disagreed with French CJ on this point. They analysed the difference between a substantive and procedural infringement on a right and concluded that “The interrelation ... between the requirements for enrolment and those for voting entitlement is such that failure to comply with the former denies the exercise of the latter by persons otherwise enfranchised”.⁵⁹

Crennan J differed from both French CJ and Gummow and Bell JJ on this question. Her Honour accepted that the provisions differed from *Roach*, but also found that they operated to “disentitle or exclude persons (otherwise legally eligible) from the right to vote”.⁶⁰ Crennan J also differed from the other justices in the majority in that Her Honour found that the purpose of maintaining integrity of the electoral roll was a purpose compatible with ss. 7 and 24 of the Constitution.⁶¹

Both Hayne J⁶² and Kiefel J⁶³ agreed with French CJ and the second defendant that the case was fundamentally different from *Roach* in that it involved the exercise of the entitlement to vote, rather than a question of disqualification from voting.

Heydon J also found that *Rowe* was a different case from *Roach*,⁶⁴ but found that this was because the plaintiffs failed to comply with simple obligations under the CEA, while Vicki Lee Roach was completely prohibited from voting.

LEGISLATIVE CURTAILMENT OF A RIGHT TEST

The test that was developed in *Lange*,⁶⁵ and relied upon in *Roach*, was cited by all members of the Court:⁶⁶

⁵⁸ *Rowe* at [26]. French CJ later explained that this was still the case even though the plaintiffs contributed to their own disenfranchisement by not enrolling or transferring their enrolment in time [28] (a point which was decisive for Heydon J, see *Rowe* at [284]).

⁵⁹ *Rowe* at [154].

⁶⁰ *Rowe* at [381].

⁶¹ *Rowe* at [381].

⁶² *Rowe* at [185]-[187].

⁶³ *Rowe* at [411].

⁶⁴ *Rowe* at [284].

⁶⁵ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, at 569 per Brennan CJ, Dawson Toohey, Gaudron, McHugh, Gummow and Kirby JJ.

⁶⁶ French CJ at [24], Gummow and Bell JJ at [111], Crennan J at [374], Hayne J at [264], Heydon J at [283], Kiefel J at [425].

Whether the law is “reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of a constitutionally prescribed system of representative government”

The Court found, through its many explanations of what this might mean and what factors could be used to determine whether a law is “reasonably appropriate and adapted” or not, that this test on its own was not sufficient for a Court to determine whether a legislative curtailment of a right was constitutionally valid. The justices set out a variety of factors that they considered relevant to the test. The fact that each justice (with the exception of Crennan J who did not explain the test in any detail) listed a variety of relevant factors, suggests that the message of this case is that in fact the “reasonably appropriate and adapted” test is merely a balancing test, where a number of factors will be relevant to a determination.

French CJ explained the test for the degree to which the Amendment Act could curtail the right to vote in a number of ways:

- Whether there was a “substantial reason for exclusion” (citing Gleeson CJ in *Roach*,⁶⁷ and later Gummow, Kirby and Crennan JJ in *Roach*);⁶⁸
- Whether the exception had a “rational connection with ... the capacity to exercise free choice;”⁶⁹
- Whether the exception was “reasonably appropriate and adapted to serve an end which is consistent or compatible with observance of the relevant constitutional restraint upon legislative power;”⁷⁰
- Whether the exception is “disproportionate or arbitrary” (citing Gummow, Kirby, and Crennan JJ in *Roach*);⁷¹
- Whether the justification for the law is “on balance, beneficial because it contributes to the fulfillment of the

⁶⁷ *Rowe* at [23].

⁶⁸ *Rowe* at [24].

⁶⁹ *Rowe* at [23].

⁷⁰ *Rowe* at [24].

⁷¹ *Rowe* at [24].

mandate” (the mandate being “chosen by the people”);⁷²

- Whether the law addresses a “compelling practical problem;”⁷³

In conclusion French CJ found that, rather than addressing any “compelling practical problem”, the Amendment Act in fact contributed to the enhancement and improvement of the enrolment system. The Chief Justice concluded that the heavy price imposed by the Amendment Act was “disproportionate” to the benefits of a smoother more efficient electoral system to which the amendments were directed.

Gummow and Bell JJ outlined similar factors to those of French CJ for how to determine whether the legislative curtailment of the right was constitutionally valid:

- Whether the “rational connection” between the disqualification and the constitutional imperative has been broken;⁷⁴
- Whether the disqualification is for a “substantial reason;”⁷⁵
- Whether the disqualification is “reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government;”⁷⁶
- Whether upon “close scrutiny” the disqualification is “disproportionate or arbitrary;”⁷⁷
- They noted that a test of “reasonable proportionality” will not always be helpful;⁷⁸
- They agreed with Mason J (as he then was) that “the

⁷² *Rowe* at [25].

⁷³ *Rowe* at [78].

⁷⁴ *Rowe* at [161].

⁷⁵ *Roach*, 219 per Gummow, Kirby and Crennan JJ.

⁷⁶ *Roach*, 219 per Gummow, Kirby and Crennan JJ.

⁷⁷ *Roach*, 219 per Gummow, Kirby and Crennan JJ.

⁷⁸ *Rowe* at [162] citing *Industrial Relations Act Case* (1996) 187 CLR 416, at 487-488, per Brennan CJ, Toohey, Gaudron, McHugh, and Gummow JJ.

motives which inspire legislators are not relevant in the determination of validity;⁷⁹

Given these factors, Gummow and Bell JJ found that a legislative purpose of preventing electoral fraud before it is able to occur did not supply a “substantial reason” for the practical operation of the 2006 Act in disqualifying large numbers of electors.

Crennan J, unlike the other justices, did not go into detail on which test should be used to determine whether the curtailment of the right to vote was constitutionally valid. Her Honour explained the meaning of “chosen by the people” at length,⁸⁰ and in doing so expressed the gravitas of the right to vote to the Australian system of representative government. In conclusion, Crennan J explained that the impugned provisions were not “necessary or appropriate” to achieve their end, and that the Amendment Act constituted a failure to recognise the “centrality of the franchise to a citizen’s participation in the political life of the community.”⁸¹

Hayne J adopted the “reasonably adapted an appropriate” test,⁸² but found that the first step in resolving the question was whether the impugned law “detracted in some significant way” from the existence of the franchise, and whether that detraction was “for a substantial reason.” He explained that a reason would be substantial if it fulfilled the “reasonably appropriate and adapted” test, and it did not have to be “essential” or “unavoidable”. Despite setting out this structure for analysis, Hayne J ended up balancing a variety of factors just as the other judgments had done.⁸³ His Honour noted that there was essentially no difference between the “reasonably appropriate and adapted” test and one of “proportionality.”⁸⁴ Accordingly, Hayne J found that ultimately the factors to be balanced were the relevant end (that is, the intention of the Parliament is crucial to the test)⁸⁵ and any disqualification caused by the legislation.

It was relevant to Heydon J that the plaintiffs had not complied with their statutory duties (to enrol upon turning 18 and to transfer

⁷⁹ *Rowe* at [166] citing *R v Toohey Ex parte Northern Land Council* (1981) 151 CLR 170 at 225-226.

⁸⁰ *Rowe* at [333]-[368].

⁸¹ *Rowe* at [384].

⁸² *Rowe* at [181].

⁸³ *Rowe* at [184].

⁸⁴ *Rowe* at [263].

⁸⁵ This is in direct contrast to Gummow and Bell JJ who found that the intention of the Parliament should not be considered in such analysis, at [166].

enrolment upon moving). His Honour found that their inaction could not form the basis for invalidating the provisions of the Amendment Act. Heydon J also purported to use the “reasonably appropriate and adapted” test, but explained that this meant that if there was a “substantial reason” for the disqualification then the test would be satisfied.

Kiefel J established a new version of the “reasonably appropriate and adapted” test - the “reasonable necessity assessed by the availability of alternative measures” test.⁸⁶ Kiefel J first traced the history of the “reasonably appropriate and adapted” test from the US case of *McCulloch v Maryland*⁸⁷ (although the U.S. version of the test is now quite different to the Australian version).⁸⁸ Her Honour referred to a “reasonable necessity” test, drawn from Stephen J in *Permean Wright Consolidated Pty Ltd v Trewhitt*⁸⁹ (a s. 92 case). Kiefel J then elucidated this test with an explanation that one should look to the “availability of alternative, practicable and less restrictive measures,”⁹⁰ and explained⁹¹ that the reasonable necessity test had been accepted in *Betfair Pty Ltd v Western Australia*⁹² and was consistent with *Cole v Whitfield*.⁹³

Having established the doctrinal underpinning of the “reasonable necessity” test, Kiefel J explained that it fit within the *Lange* rubric and concluded that the relevant test for legislative curtailment of rights cases should be: whether the law is a “reasonable necessity assessed by the availability of alternative measures.”⁹⁴ Her Honour considered other tests of proportionality in Australian law⁹⁵ and in European law,⁹⁶ and finally the tests set out in *Roach* and *Lange* and concluded that they could be described as tests of proportionality as well.⁹⁷

While the reasoning of Kiefel J was very similar to French CJ, and Gummow and Bell JJ, in the end Kiefel J concluded that the “the denial

⁸⁶ Rowe at [443].

⁸⁷ 17 U.S. 316 (1819).

⁸⁸ Rowe at [431]-[432].

⁸⁹ (1979) 145 CLR 1, at 31.

⁹⁰ Rowe at [439], citing Mason J in *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559 at 616.

⁹¹ Rowe at [440].

⁹² (2008) 234 CLR 418.

⁹³ (1988) 165 CLR 360 at 409.

⁹⁴ Rowe at [443].

⁹⁵ Rowe at [445]-[455].

⁹⁶ Rowe at [456-466].

⁹⁷ Rowe at [467]-[478].

of enrolment and voting for an election, for a legitimate reason, does not intrude too far upon the system of voting.”⁹⁸

VI. CONCLUSION

Rowe affirms that the right to vote, free from legislative hindrance, is firmly protected by the Australian Constitution. It also foreshadows the method of constitutional interpretation we are likely to see from the French Court, perhaps only with respect to cases dealing with the legislative curtailment of a right, or perhaps more expansively. The chosen method is clearly part of the progressivist, or living force, school of constitutional interpretation, but what particular iterations of this method will develop remains to be seen.

⁹⁸ *Rowe* at [489].

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