
IGNITE
A BLACKSTONE PUBLICATION
VOLUME 6
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# IGNITE

The Blackstone Society's
Equity, Diversity and Social Justice
Publication

Volume 6

2022

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## ACKNOWLEDGEMENT OF COUNTRY

*Brianne Yarran*

Blackstone would like to acknowledge the Aboriginal and Torres Strait Islander people as the Traditional Custodians of this country throughout Australia, and their strength, resilience and connection to land and community, most especially to the Whadjuk people of the Noongar nation upon whose land we live, work and study. Sovereignty has never been ceded. It always was and always will be, Aboriginal and Torres Strait Islander land. The Ignite Journal symbolises the wealth of Katitjin (Knowledge) that exists within the Law School and it is particularly fitting that UWA is situated on one of the oldest education sites within the Whadjuk Noongar region.

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## Editor's Preface

*'It is necessary to build human rights in our country and world on the basis of knowledge, education, civil society, political action and social policy.*

*The law gives us a language to express human rights.'*

The Hon Michael Kirby

Welcome to the sixth edition of the Ignite Journal! The purpose of the Ignite Journal is to create conversations about the law with a social perspective. As the above quote from the Honorable Michael Kirby shows, the law is a powerful mechanism to give expression to human rights. This could not be truer. The law is a powerful tool to empower individuals. For many of us, the key reason why we chose to study law was to make meaningful change in society and to ensure everyone is treated fairly and equitably under the law.

As law students and future professionals in the legal field, all of us have a responsibility and should be concerned with whether the law is fostering a fair and equitable society. This journal aims to raise awareness about the operation of the law and how it may be unfair and unequitable towards the people and causes we know and care about. Ignite is one way we can create conversations and ask ourselves 'how can we change the law'. This year's edition spans a wide range of issues, from access to justice, equitable treatment in university, raising the age of criminal responsibility, fundamental human rights, to the tortious activities of corporations and to implications of the landmark case of *Kaurareg v Shire*. By focusing on how the law impacts on an individual and various groups in our society, the sixth edition of the journal raises important insights by legal professionals and the UWA Law School community into prevalent issues in our society today.

I would like to thank Jihoo Lee, Paris McNeil, Helen Do, Annarose Reiley, Quentin Wong, Baran Rostamian, Abigail Gregorio, Prof Julie Falck, Aidan Ricciardo and Prof Kate Offer for their contributions and hard work. I am grateful to Judge Carmel Barbagallo for writing the foreword and her valuable insights. I am also immensely appreciative of the help and guidance I received along the way from Blackstone's Equity Vice President, Eloise Munro. Lastly, thank you to our sponsor DLA Piper and to the Blackstone Society, this journal would not exist without their support.

I hope you will enjoy reading this edition of Ignite as much as I did and that you find it an accessible way to help inform your studies and your future legal practice.

Christie Oey

*Crawley, 12 October 2022*

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## Foreword

*Judge Carmel Barbagallo**

"Be liberal with your talents, generous with your money, charitable with your possessions, and benevolent with your time" is an inspirational quote from Matshona Dhliwayo. Imagine how different the world would be if this was the mantra we all chose to live by. Regardless of what legal subjects we study or where our careers take us, law students and lawyers are, and will usually remain, in a position to give back to our community without any expectation of anything in return.

When I commenced in the legal profession as a vacation clerk at a private firm in 1984, I had no idea that lawyers in private legal firms undertook legal work for no fee or "pro bono". Who would have thought that a firm of lawyers would work for nothing? I learnt very quickly that not only did private law firms do legal work for no fee but also that the volume of such work was significant and it assisted many not-for-profit organisations across the community as well as individuals who were vulnerable and indigent. This was legal utopia. A private law firm that was financially successful and, simultaneously, had a generous spirit. Thankfully, that generosity continues today. Over the years, I have come to know, and appreciate, the generosity of many lawyers in our legal community who have undertaken legal work, oftentimes, complex legal work, on a pro bono basis, for some of the most deserving organisations and individuals in our community. What is also true today as it was almost 40 years ago, is that this "pro bono" work often goes unnoticed in the community because it is done without publicity or fanfare. The silence in which this work is undertaken is, on one hand, a testament to the integrity and generosity of lawyers who do such work. On the other hand, it deprives the broader community appreciating the real and significant contribution lawyers make to the community without any expectation of reward.

As law students and lawyers, we are in an incredible privileged position. I believe we have an obligation to drive positive change in our communities. Be it starting up a Student Legal Advice Centre on campus, championing the review of the age of criminal responsibility, demanding a change to the laws around consent in sexual offences or seeking reform to ensure subsidiary companies do not escape the payment of compensation to successful plaintiffs. We all have a role to play. Whether a change is positive is, of course, a subjective assessment. When change is sought, it is not always brought about with ease. There is often resistance to change particularly where such resistance is underpinned by fear. That is, fear derived from ignorance, lack of information or misinformation. In my experience, the broader community will more readily accept change if the change is based on logic, supported by accepted research and, critically, explained open and honestly. Remember, when pursuing change,

* Judge of the District Court of Western Australia

there will be those one will not be able to reason with because their opposition to the change is not based on reason. After all, you can't reason with the unreasonable.

The articles in this journal reveal a continued commitment from law students and lawyers to give generously to, and make positive changes in, our community. For those law students and lawyers, the words of Matshona Dhliwayo are not just an inspirational quote but a mantra by which to live. It gives us great confidence that our future is in good hands, hearts and minds.

## Student Legal Advice Centre

*Jihoo Lee*

### Introduction

1. On a mid-autumn weekday afternoon in late April – shortly before ANZAC Day – a voice note was exchanged over Facebook Messenger. The voice note began as follows:

> "*Bit of a wild thought and really out of the blue but what are your thoughts on having a low-key community legal centre [*(**CLC**)*] on campus? I know that the [UWA Student Guild* (**Guild**)*] has always really wanted to have a like free legal advice to students. I don't know what your thoughts are – I mean I think if you can bring something like that or use your experience to add some value, I think would be a huge accomplishment … but yeah wild thoughts … I think it'd be huge both for law students, because essentially the CLC on campus they can volunteer at and I guess get experience, but then also feel like [for] the general students as well …"*

2. Fast forward five months, and this voice note has developed into an organisation called the Student Legal Advice Centre Inc. (**SLAC**).

3. At this point, it might be irresistible to ask – why bother with this? How will it work? What are the benefits to students? To other stakeholders? What are the next steps and how will the organisation develop?

4. The purpose of this article is twofold. First, to address the above and other questions. Second, to acknowledge the hard work of all the members of the inaugural SLAC committee in progressing the organisation to this point.

### What is SLAC

5. SLAC is an incorporated association, so that it is legally and commercially separate from its key stakeholders: the Guild, the Blackstone Society (**Blackstone**), the UWA law school (**Faculty**) and industry.

6. We are a not-for-profit organisation that aims to do two things. Firstly, to facilitate the provision of pro-bono legal advice to UWA students. Second, to provide an avenue for UWA law students to upskill themselves, by working as volunteer paralegals.

7. As at the date of drafting this article, we have negotiated a financing and tenancy agreement with the Guild, begun to fit out our office, design our website, and most importantly, progress negotiations with (a) a mid tier law firm; and (b) a CLC, with the goal of forming a partnership for a pop-up legal clinic for a pilot period. The purpose of the pilot period is essentially to collect real data and conduct case studies, and inform the future direction of the organisation.

**Why SLAC**

8. Several good reasons can be proffered.

9. *First*, in the well-known case of *Purvis v New South Wales (Department of Education and Training*) [2003] HCA 62; (2003) 217 CLR 92, McHugh and Kirby JJ said (at [202]) that, "*…in order to treat some persons equally, we must treat them differently*." Their Honours' observation was made in the context of the *Disability Discrimination Act 1992* (Cth) but nonetheless has equal force to the access of justice. Those who are disadvantaged in our community deserve assistance. And those who have the privilege to assist should aspire to do so. It is trite to say that the general community has the perception that everyone at UWA is of privilege. But is that actually the case? In the lead up to starting-up SLAC, we commissioned a survey with the Guild and conducted numerous stakeholder consultations. Those incontrovertible statistics told us that there are over 3,300 low socio-economic students enrolled, a 20% increase since 2017. One in six to one in seven students have said that they have encountered a need for legal advice at some point during their studies. The most common barriers identified were financial and geographical. Guild Student Assist workers are replete with anecdotes about enquiries for legal assistance, particularly in relation to tenancy, employment, family law and discrimination.

10. *Second*, from an organisational perspective, Blackstone's vision is to represent all law students. There is more to law than commercial law – and I say this as a future commercial grad. In order to stay ahead of the curve, and ensure we effectively cater for the needs of all students, it is imperative that we not only maintain the status quo, but we also diversify what we do for student experience. I know our Careers and Equity teams have been hard at work in the last few years regarding this – think the Beyond Commercial Law Careers Fair, which was significantly revamped this year; SLAC is another species of this umbrella.

11. *Third*, the importance of giving back. Here is what one of our committee members had to say:

> "*My interest in SLAC is two-fold. Firstly, I view my future role as a lawyer as being part of a larger profession: that is, the law. As such, I believe we all have an obligation to use our privileged position to assist those around us, in whatever capacity we can, and ensure that justice is accessible by all. Secondly, all going well, I will one day become an experienced member of the profession. I equally will have a responsibility to assist those who are called to the law after me in their own journey of becoming a part of the profession. I believe SLAC allows me to achieve both elements. That is, I am able to play my small role in assisting vulnerable people, and also present an opportunity for more junior students to gain experience in the law and learn what it means to be a part of the profession*."

12. *Fourth*, to provide a forum for students to upskill themselves. Not only for the student paralegals who will hopefully, gain a sense of reward from helping the community and quenching their own thirsts for experience, but also for the SLAC committee members. In the relatively short period of five months, we've been exposed to very diverse experiences – from negotiating with entities with far greater power and importance than us, to legal research, to reflecting the research and negotiations in contractual drafting, to managing people, to fostering a team, to collectively experiencing the highs and lows of achievements, thrills and setbacks that a start-up organisation has.

13. *Fifth*, there is a demonstrated history of UWA law students giving back to the community. Did you know that there used to be an informal CLC, before CLCs were mainstream, called '47 Fairway'? It later became '8 Parkway', and then 'Parkway Legal Advice Centre' – and lasted all the way from the 1977 to the early 2000s. Other initiatives of a similar vein existed at various times – for example, Law Student Community Support, the Unrepresented Criminal Appellants Scheme, and the Law Action Group. There is also a demonstrated history of UWA law students being involved in innovative projects and organisations. Did you know that in the early 1970s, two UWA alumni, named George Winterton and Robert French had a leading role to play in the foundation of the Aboriginal Legal Service? Messrs Winterton and French, of course, went on to become *the* Professor George Winterton and *the* Honourable Robert French AC. I'm not bringing this up in a vane effort to compare the SLAC team with

these two icons of Australian jurisprudence and legal academy – far from it – but rather to illustrate the precedent that permeates the history of our law school.

**The road ahead**

14. A lot of work still needs to be done to get SLAC up and going. We need to push hard on the negotiations and lock in a deal. We need to finish fitting out the office. We need to get an ABN, get ACNC status, and get our own emails. We're currently working on a partnership with the wonderful Kate Offer and her Legal Literacy Project, to figure out innovative ways of disseminating community legal education throughout the UWA student community. The list goes on. But I'm resolutely hopeful that we will launch by the end of the year. It will be a massive achievement for the team, for Blackstone, and I hope, for students in general.

**Shout outs**

15. It would be most remiss of me to write this article without acknowledging the hard work of our team. So, in my trademark sentimental soppy style, here I go. In no particular order – to Joey, Rhys, Bella, Georgios, Saleem, Aliyah, David, Tim and Bree – thank you for all of your blood, sweat and tears. We've had our fair share of long nights, banging our heads against the wall and experiencing the highs and lows from riding the start-up rollercoaster. But your resolute commitment to the organisation has progressed it this far and will continue to progress it into the future. And to the Faculty (in particular, Nat and Kate) – who Blackstone, as always, is very grateful to have such a close working relationship with – thank you for your unwavering support of SLAC.

Jihoo Lee

2022 Blackstone President and SLAC Executive Officer

# Raising the Minimum Age of Criminal Responsibility in Western Australia

*Paris McNeil and Helen Do**

## I INTRODUCTION

In Western Australia, children as young as ten are arrested, held in police custody and imprisoned. The minimum age of criminal responsibility (**'MACR'**) in Western Australia (**'WA'**) is one of the lowest in the world, against the recommendations of the community, stakeholders and the United Nations. WA's MACR is far below the global median of 14 years and the global average of 13.5 years,[2] falling behind China, Russia and Sierra Leone, which have all set their MACR to 14 years in line with United Nations recommendations.[3]

'Raise the Age' is a national campaign calling for legislative change to raise the MACR from 10 to at least 14 years old. The detrimental effects of WA's current MACR on children at both an individual and societal level have been recognised by medical, legal and human rights professionals. The movement to raise the age is evidence-based and is supported by medical research, economic considerations and Australia's human rights obligations.

WA has the highest rate of Indigenous overrepresentation of any Australian state or territory, with Indigenous young people being 54 times more likely than their non-Indigenous peers to be in detention.[4] The link between systemic racism and the overrepresentation of Indigenous people in detention was described by former WA Supreme Court Chief Justice Wayne Martin:[5]

> The system itself must take part of the blame. Aboriginal people are much more likely to be questioned by police than non-Aboriginal people. When questioned they are more likely to be arrested rather than proceeded against by summons. If they are arrested, Aboriginal people are much more likely to be remanded in custody than given bail. Aboriginal people are much more likely to plead guilty than go to trial, and if they go to trial, they are much more likely to be convicted. If Aboriginal people are convicted, they are much more likely to be imprisoned than non-Aboriginal people, and at the end of their term of imprisonment they are much less likely to get parole than non-Aboriginal people. Aboriginal people are also significantly over-represented amongst those who are detained indefinitely under the Dangerous Sexual Offenders

*Paris McNeil and Helen Do are Advocacy Officers at WAJA and Bachelor of Law students at Curtin University.

[2] Australian Human Rights Commission, *Children's Rights Report 2016* (Report, 2016), 187.

[3] Western Australian Justice Association, *Raise the Age Campaign Report* (Report, 2020) 4.

[4] Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2021,* (Report, 14 December 2021), 18.

[5] Chief Justice Wayne Martin, 'Indigenous Incarceration Rates: Strategies for Much Needed Reform' (Speech, Law Summer School, 2015).

legislation. So at every single step in the criminal justice process, Aboriginal people fare worse than non-Aboriginal people.

A number of organisations in WA are advocating to raise the MACR including Social Reinvestment WA (**'SRWA'**), Wungening Aboriginal Corporation, and Community Legal Western Australia. Law students also have a voice in this important cause, through student-led organisations such as the WA Justice Association (**'WAJA'**). These groups are communicating with WA politicians and stakeholders by outlining the health, social and economic costs associated with incarcerating children, as well as the benefits of alternatives to imprisonment. Stakeholders across WA recommend that the WA Government acts immediately and follows the Australian Capital Territory by committing to raise the MACR to 14 years of age.

## II Reasons to Raise the Minimum Age of Criminal Responsibility

For meaningful change to occur, the MACR must be raised from 10 to at least 14 years of age, both at a state and federal level. This involves amending s 29 of the *Criminal Code Act Compilation Act 1913* (WA), ss 4M and 4N of the *Crimes Act 1914* (Cth) and s 7.2 of the *Criminal Code Act 1995* (Cth). This section explores the evidence and arguments explaining why the MACR should be raised from 10 to 14 years of age.

### A *Science and Health*

#### 1 *Neurological Immaturity*

72% of Australians believe Australian politicians should be guided by medical experts when legislating responses to children's behaviour.[6] Medical research and empirical evidence overwhelmingly indicate that the MACR should be raised, in part because the human brain is not fully developed until a person reaches their mid-twenties.[7] Specifically, a child's neurological immaturity means that their critical thinking, planning, and decision-making skills are underdeveloped.[8] Children, particularly those under 14, do not have sufficient neurological development to adequately comprehend or predict the consequences of an action before it occurs.[9] Nor can children under 14 effectively rationalise whether that action is appropriate or correct.[10] Children under the age of 14, due to their neurological immaturity, lack the capacity to form the criminal intent required to be found criminally responsible for their

[6] Social Reinvestment WA, 'Let's Raise the Age of Criminal Responsibility to at least 14', *Raise the Age* (Web Page) <https://www.socialreinvestmentwa.org.au/raise-the-age>.
[7] Chris Cunneen, *Arguments for Raising the Minimum Age of Criminal Responsibility* (Research Report, 2017) 6.
[8] Ibid 5-6.
[9] The Royal Australasian College of Physicians, *The health and well-being of incarcerated adolescents* (Report, 2011).
[10] Social Reinvestment WA (n 5).

actions.[11] The average child also lacks impulse control, leaving them susceptible to peer pressure and risk-taking behaviours, including breaches of criminal law.[12]

This is the case for all children, however this neurological immaturity is compounded and has a greater impact on children who also face the additional burdens of socioeconomic disadvantage, entrenched trauma, mental health issues and cognitive disabilities.[13] While around a third of children offenders will be involved in some form of serious delinquent behaviour, many will simply grow out of this behaviour.[14] However, incarcerating a child interrupts this maturation and replaces it with increased exposure to criminogenic behaviours, resentment toward the criminal justice system, lost childhood experiences, and limited future opportunities;[15] all of which encourage recidivism. The WA criminal justice system holds children under the age of 14, who lack neurological maturity, the capacity to reason, and the ability to predict the consequences of their actions, to the full weight of the law. Our system cannot claim to deliver justice when it holds children legally responsible for the decisions they make when they are incapable of understanding the implications of those decisions.

2 *Cognitive Difficulties*

In 2016, the Telethon Kids Institute found that nearly nine out of ten children (89%) incarcerated at Banksia Hill Detention Centre in WA had at least one form of severe neurodevelopmental impairment.[16] A further 36% of the 99 children in the study were diagnosed with Foetal Alcohol Spectrum Disorder (‘**FASD’**).[17] Of the 36 children diagnosed with FASD, only 2 had previously been diagnosed as a result of participating in a previous study, not through routine public services or interaction with the justice system.[18] The types of impairments identified in the children at Banksia Hill Detention Centre suggest many incarcerated children do not have critical executive functioning abilities that allow them to discern right from wrong and to learn from experiences.[19] Amongst other things, these children may experience difficulties with communication, susceptibility to peer pressure, inability to control anger or impulses, and displays of inappropriate sexual behaviour.[20] Mental illness and impairment amongst youth are key

[11] Social Reinvestment WA, ‘Why Raise the Age?’, *Raise the Age* (Factsheet) <https://static1.squarespace.com/static/59c61e6dbebafb0293c04a54/t/615bf2c03cbb9e47af948d02/1633415874242/Why+14+Raising+the+Age+Fact+Sheet.pdf>.
[12] Cunneen (n 6) 6.
[13] Western Australian Justice Association (n 2) 7.
[14] Ian Lambie and Isabel Randell, ‘The impact of incarceration on juvenile offenders’ (2013) 33(3) *Clinical Psychology Review* 448, 451.
[15] Ibid.
[16] Telethon Kids Institute, ‘Nine out of ten young people in detention found to have severe neuro-disability’, *News and Events* (Web Page, 13 February 2018) <https://www.telethonkids.org.au/news--events/news-and-events-nav/2018/february/young-people-in-detention-neuro-disability/>.
[17] Ibid.
[18] Telethon Kids Institute, *Implications and recommendations from the Telethon Kids Banksia Hill Project* (Summary Report, 2016) 1.
[19] Ibid.
[20] Cunneen (n 6) 9.

contributing factors to both offending and recidivism.[21] Early contact with the criminal justice system due to the low age of criminal responsibility entrenches these vulnerable children in a cycle of incarceration instead of recognising and treating their individual psychological needs.[22]

Young people with FASD may struggle to understand cause and effect, have difficulty learning from past encounters and experience impaired decision-making.[23] The 2016 study of Banksia Hill Youth Detention Centre mentioned above found that 47% of imprisoned Indigenous children had FASD.[24] The prevalence of FASD amongst these incarcerated children was significantly higher than even the most generous estimates of non-incarcerated children: at most 19%.[25] Whilst there was a high rate of impairment found in Indigenous young people, non-Indigenous young people also demonstrated severe impairment.[26] For many of the young people assessed, this study was the first time they had had a comprehensive assessment to examine their strengths and difficulties, despite attending school, prior engagement with the justice system and, in many cases, prior engagement with child protection services.[27]

In WA, FASD-affected children may be considered unfit to stand trial under the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA), which can result in the child facing indefinite detention.[28] Young people may therefore be encouraged to plead guilty rather than raise fitness as an issue to avoid this outcome.[29] People with FASD may be prone to suggestibility, making them more inclined to accept and perpetuate facts presented by others, including false information. This disadvantages young offenders when giving evidence, being interviewed by police, and when explaining their behaviour.[30]

Instead of addressing the root causes of these children's offending behaviour and providing tailored support and treatment, the WA criminal justice system imposes sentences of imprisonment without sufficient access to rehabilitation and therapeutic interventions to facilitate their personal development. Proactive diagnosis and assessment of young people with FASD can prevent their involvement in the criminal justice system entirely or guide their rehabilitation more effectively than incarceration.[31]

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[21] Australian Medical Association, 'Position Statement on Health and the Criminal Justice System', *Australian Medical Association* (Position Statement, 2012) 8 <https://ama.com.au/position-statement/health-and-criminal-justice-system-2012>.
[22] Cunneen (n 6) 10.
[23] Carol Bower et al, 'Fetal Alcohol Spectrum Disorder and Youth Justice: a Prevalence Study among Young People Sentenced to Detention in Western Australia' (2018) 8(2) *BJM Open* 1, 7.
[24] Ibid.
[25] Ibid.
[26] Telethon Kids Institute, *Implications and recommendations from the Telethon Kids Banksia Hill Project* (n 17) 1; Western Australian Justice Association (n 2) 8.
[27] Ibid.
[28] Harry Blagg, Tamara Tulich and Zoe Bush, 'Indefinite Detention Meets Colonial Dispossession: Indigenous Youths with Fetal Alcohol Spectrum Disorders in a White Settler Justice System' (2017) 26(3) *Social & Legal Studies* 333, 343.
[29] Ibid 344.
[30] Ibid 342.
[31] Bower (n 22) 8.

### B *Economic Costs*

There are significant direct and indirect costs of imprisoning young people that provide an economic incentive to raise the MACR from 10 to 14 years of age. In 2019-20, it cost $1,339 per day to imprison one child at Banksia Hill Juvenile Detention Centre, equating to roughly $488,735 to imprison each child every year.[32] This has resulted in the WA State Government spending $95.7 million on the youth justice system in 2019-20.[33] By contrast, a community-based supervision order costs $93 per day, equating to roughly $44,945 per child for one year,[34] and one-on-one support from a youth worker costs on average $282 per child per day, equating to roughly $102,766 per child for one year.[35] Significant savings in the State Budget could be achieved by diverting offenders from short periods of imprisonment to community correction orders.[36] These direct costs of imprisonment are significant and demonstrate considerable sums of taxpayer funds which could be diverted to alternatives that are more effective than incarceration.[37]

There are also indirect economic and social costs which result from imprisonment. Lost productivity and earnings are a significant cost for a child who is imprisoned as their incarceration creates barriers to future earning potential as an adult. The loss of employment and skills is particularly relevant for juvenile detainees, as imprisonment interrupts schooling and prevents them from developing valuable skills which help them obtain future employment.[38] The resulting financial insecurity places pressure on social services that provide support for housing, health and welfare.[39] Incarceration can also be detrimental to personal wellbeing and social relationships, leading to isolation and recidivism and creating further direct costs for the criminal justice system.[40] The criminogenic effect of prison renders many children significantly more likely to commit crimes upon release, thereby generating further costs associated with that criminal activity.[41] This includes future costs to victims of crime. This broad array of costs is not only shouldered by the individual, but also their family, the government, and taxpayers within the broader community.[42]

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[32] The Government of Western Australia, '*Western Australia State Budget 2020-21*', (Budget Paper No. 2 Volume 2, 8 October 2020) <https://www.ourstatebudget.wa.gov.au/2020-21/budget-papers/bp2/2020-21-wa-state-budget-bp2-vol2.pdf>.
[33] Social Reinvestment WA (n 5).
[34] *Western Australia State Budget 2020-21* (n 31).
[35] Social Reinvestment WA, 'Why Raise the Age?', *Raise the Age* (Factsheet) <https://static1.squarespace.com/static/59c61e6dbebafb0293c04a54/t/615bf2c03cbb9e47af948d02/1633415874242/Why+14+Raising+the+Age+Fact+Sheet.pdf>.
[36] Anthony Morgan, *How much does prison really cost? Comparing the costs of imprisonment with community corrections* (Research Report, 24 April 2018) 65.
[37] Western Australian Justice Association (n 2) 9.
[38] Senate Legal and Constitutional Affairs Committee, Commonwealth of Australia, *Value of a justice reinvestment approach to criminal justice in Australia* (Report, 20 June 2013) 21.
[39] Ibid 21.
[40] Ibid 23.
[41] Morgan (n 35) 2.
[42] Western Australian Justice Association (n 2) 9.

The direct and indirect costs of imprisoning children are significant. A majority (65%) of Australians believing that the public funds spent on incarcerating children would be better spent on social services.[43] Hence, there are clear incentives for the MACR to be raised from 10 to 14 years of age, and for the Department of Justice to implement diversionary measures as opposed to incarceration.

### C *Human Rights*

A MACR lower than 14 years of age is overtly out of step with the United Nations Convention on the Rights of the Child (**'UNCRC'**), under which Australia has binding obligations. The United Nations Committee on the Rights of the Child has specified that, in light of scientific findings, parties to the Convention must raise their MACR to at least 14.[44] The fact that a 10-year-old child can receive a criminal record is at odds with article 37 of the UNCRC, which provides that imprisonment should only be used as a measure of last resort for the shortest appropriate time.[45] The exposed abuse and mistreatment of children in detention[46] is also blatantly discordant with article 3(3) of the UNCRC, which requires that the best interests and rehabilitation of the child be the paramount consideration.[47] A low age of criminal responsibility is inconsistent with established standards of appropriate behaviour regarding the treatment of children and is in stark contrast with much of the international community which has a median MACR of 14 years of age.[48] For these reasons, Australia has been repeatedly criticised by the United Nations and advised by the United Nations Committee on the Rights of the Child to raise the MACR 'to an internationally accepted level'[49] on three occasions, including as recently as 2019.[50]

Another relevant human rights instrument is the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**'OPCAT'**). Australia is a party to the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (**'CAT'**).[51] CAT sets out substantive rules prohibiting torture and other forms of mistreatment. OPCAT uses a preventative approach to ensure a state is complying with the substantive rules in CAT in the specific context of places of detention.[52] If OPCAT were implemented, it would not rely on affected individuals making complaints, but rather introduced a proactive monitoring system.[53] OPCAT requires

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[43] https://www.socialreinvestmentwa.org.au/raise-the-age
[44] United Nations Committee on the Rights of the Child, *General Comment No. 24 on children's rights in the child justice system*, UN Doc CRC/C/GC/24 (18 September 2019).
[45] Western Australian Justice Association (n 2) 9.
[46] Roxanne Moore, 'The abuse of children in Don Dale and other prisons is a national shame', The Guardian (online, 20 November 2017) <https://www.theguardian.com/commentisfree/2017/nov/20/the-abuse-of-children-in-don-dale-and-other-prisons-is-a-national-shame>.
[47] Western Australian Justice Association (n 2) 10.
[48] Australian Human Rights Commission, *Children's Rights Report 2016* (n 1) 187.
[49] United Nations Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Australia*, UN Doc CRC/C/AUS/CO/5-6 (1 November 2019) [48].
[50] Ibid [47].
[51] Australian Human Rights Commission, *Implementing OPCAT in Australia* (Report, 2020) 13.
[52] Ibid.
[53] Ibid.

member countries to create a coordinated and independent inspection system for all places of detention within that country, including police watch houses, juvenile detention facilities, immigration detention facilities, aged care facilities and secure disability facilities.[54] It does not rely on affected individuals making a complaint before action is taken.[55] Countries are required to establish an independent National Preventive Mechanism to conduct inspections of all places of detention and to allow for United Nations inspections.[56] Australia signed OPCAT in 2009 and ratified it in 2017.[57] However, a declaration was made under Article 24 delaying OPCAT obligations for three years. On 20 December 2021, Australia formally requested a postponement of one additional year. This postponement was granted by the United Nations Committee Against Torture, extending Australia's OPCAT compliance date to 20 January 2023.[58]

Once the OPCAT obligations come into force, Australia will adopt a multi-level monitoring system; each State and Territory will designate a National Preventive Mechanism with the Commonwealth Ombudsman designated as both the Commonwealth National Preventive Mechanism and National Preventive Mechanism Co-ordinator. The treatment of detained people has been the subject of three Royal Commissions,[59] demonstrating that the public continues to be concerned with the functions of our places of detention. While the ratification of OPCAT is an important first step, the delayed implementation of the OPCAT obligations continues to put people in places of detention at risk. Considering OPCAT recognises the powerful link between inspecting places of detention and improving the situation of those detained,[60] if implemented effectively it would serve to identify and address harm in detention before this harm becomes more serious, widespread or systemic.[61]

## III Recent Developments

The Raise the Age campaign has swept the nation as an increasing number of Australians disagree with the current MACR. In November 2021, the State and Territory Attorneys-General agreed to support a proposal to raise the MACR from 10 to 12 years old across Australia.[62] This agreement was echoed again in the Standing Council of Attorneys-General in August 2022, focusing on eliminating the

[54] Australian Human Rights Commission, 'Implementing OPCAT in Australia (2020)', *Publications* (Web Page, 29 June 2020) <https://humanrights.gov.au/our-work/rights-and-freedoms/publications/implementing-opcat-australia-2020>.
[55] Australian Human Rights Commission, *Implementing OPCAT in Australia* (n 50) 13.
[56] Ibid 15.
[57] Australian Human Rights Commission, 'Implementing OPCAT in Australia (2020)', *Publications* (Web Page, 29 June 2020) <https://humanrights.gov.au/our-work/rights-and-freedoms/publications/implementing-opcat-australia-2020>.
[58] Commonwealth Ombudsman, 'What we do' *Monitoring Places of Detention – OPCAT* (Web Page), <https://www.ombudsman.gov.au/what-we-do/monitoring-places-of-detention-opcat>.
[59] Australian Law Reform Commission, *Seen and heard: priority for children in the legal process* (ALRC Report 84, 19 November 1997); Australian Human Rights Commission, *Children's Rights Report 2016* (Report, 29 November 2016); Corruption and Crime Commission, *Review of a WA Police Force investigation into use of force in respect of a child* (Review, 20 April 2020).
[60] Australian Human Rights Commission, *Implementing OPCAT in Australia* (n 50) 21.
[61] Ibid 13.
[62] Social Reinvestment WA, '12 Still Far Too Young When It Comes To Imprisoning Children' (Media Release, 15 November 2021).

overrepresentation of First Nations' children in the criminal justice system.[63] However, this proposal falls short of the United Nations standard of 14 years old. Doctors, lawyers and human rights experts agree that raising the age to 12 will have minimal impact on youth imprisonment rates. The notion of raising the MACR to at least 14 years old has continued to gain traction, with a petition gaining over 200,000 signatures across Australia as of August 2022.[64]

The campaign has also seen a recent spike in support following a series of shocking events. In February 2022, WA's Supreme Court Chief Justice Peter Quinlan and WA's Children's Court President Hylton Quail inspected Banksia Hill Detention Centre following reports of deteriorating conditions and catastrophic staff shortages at the juvenile prison.[65] This news came as a result of poor management and care amid the COVID-19 pandemic, with a finding that only 12.8% of children in Banksia Hill were double vaccinated.[66] In June, the Northern Territory's Acting Children's Commissioner expressed serious concerns following multiple incidents of self-harm inside the infamous Don Dale Youth Detention Centre, where multiple children were taken to hospital over a single weekend.[67] Territory Families confirmed a 500% increase in incidents of self-harm in Don Dale between July 2021 and December 2021 (54 incidents) compared to 2020 (only 8 incidents).[68] The human rights organisation, Change the Record, linked self-harm to the highly stressful, mentally distressing situations children faced inside the facility.[69] Moreover, one of the most extraordinary news stories of 2022 came following the WA Government's decision to move 17 children in Banksia Hill Detention Centre to Casuarina Prison - a maximum-security adult prison. The children were mostly First Nations' children, with the youngest being only 14 years old. The Commissioner for Children and Young People and representatives from Social Reinvestment WA visited Casuarina Prison. They concluded that it was unsuitable for children and called for a community-based alternative solution.[70] However, the suggestion was not heeded by the State Government, and the children were transferred in July 2022.

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[63] The Hon Mark Dreyfus KC MP, 'Meeting of Attorneys-General communiqué' (Media Release, 12 August 2022).
[64] Jess Feyder, '200,000 signatures to raise the age of criminal responsibility', *LawyersWeekly* (online, 7 August 2022) <https://www.lawyersweekly.com.au/politics/35152-200-000-signatures-to-raise-the-age-of-criminal-responsibility>.
[65] Giovanni Torre, 'Children's Court president, Chief Justice probe Banksia Hill as staff 'catastrophe' fears loom', National Indigenous Times (online, 24 February 2022) <https://www.nit.com.au/childrens-court-president-chief-justice-probe-banksia-hill-as-staff-catastrophe-fears-loom/>.
[66] Nicolas Perpitch, 'Banksia Hill Juvenile Detention Centre staff warn facility 'unsafe and inhumane' and getting worse', *ABC News* (online, 17 February 2022) <https://www.abc.net.au/news/2022-02-17/staff-say-banksia-hill-juvenile-detention-centre-unsafe-inhumane/100839344>.

[67] Steve Vivian, 'Self-harm incidents inside Don Dale spark intervention of NT Children's Commissioner', *ABC News* (online, 10 June 2022) <https://www.abc.net.au/news/2022-06-10/don-dale-self-harm-incidents/101141030>.
[68] Ibid.
[69] Ibid.
[70] Grace Burmas, 'Seventeen Banksia Hill juvenile inmates moved to Casuarina Prison', *ABC News* (online, 20 July 2022) <https://www.abc.net.au/news/2022-07-20/seventeen-banksia-hill-inmates-moved-to-casuarina/101256138>; Social Reinvestment WA, 'Banksia Hill / Casuarina Prison Response', *Key Asks: Immediate Action on Banksia Hill/Casuarina* (Web Page, 8 July 2022) <https://www.socialreinvestmentwa.org.au/take-action-raise-the-age>.

Over 75 community organisations have called on the WA Government to enact immediate youth justice reform.[71]

Despite the Attorneys-General agreeing to raise the age to merely 12 years old, individual states and territories have made some more hopeful promises. After the 2020 election, the Australian Capital Territory Government committed to raising the MACR from 10 to 14 years old. WA Labor also passed a motion to raise the age to 14 years old in October 2021,[72] however, the WA Government did nothing further. In other jurisdictions, calls to raise the age have stalled or been shut down. In Queensland, on the same day that the Palaszczuk Labor Government committed to signing a treaty with Queensland's First Nations peoples, a Bill put forward by the Greens to raise the MACR from 10 to 14 was voted down by Labor, the Liberal National Party, One Nation and Katter's Australian party.[73]

## IV What can be Done to Raise the Minimum Age of Criminal Responsibility?

Despite these damning statistics and a slow uptake on reform by State, Territory and Federal governments, there are several steps individuals, including law students, can take to help make meaningful impact on the lives of these children. Students have the power to effect change through many avenues. Firstly, an easy but important step is to sign the Social Reinvestment WA petition advocating for your state government to raise the MACR to 14. With over 200,000 people already having signed the petition and voiced their concern, your signature will help to demonstrate that the WA public will not stand for their inaction on this important issue. Social Reinvestment WA is an organisation with a vision to transform WA's justice system and build safer communities through prioritising the cultural, social and emotional wellbeing of families, using smart justice approaches such as justice reinvestment. Social Reinvestment WA also has a podcast, *Stories from the Inside,* which tells the stories of people who have been incarcerated. Raising awareness within your community, friends and family is a great way to take meaningful action. Similarly, sharing posts on social media from organisations involved in advocacy, including WAJA and Social Reinvestment WA, is an effective way to spark conversations about the evidence-based reasons why raising the age is imperative and requires immediate action. Another important step is to write a letter to your local Member of Parliament. Your local member is there to represent you and the issues that are important to your community. Writing your local member a letter, email or scheduling a meeting is a great way to raise your concerns and

[71] Social Reinvestment WA, 'Children Moved To Casuarina. This Must Never Happen Again. SRWA calls for WA Government to reform youth justice and address the system failings that have sent children to maximum-security adult prison.' (Media Release, 20 July 2022).
[72] Rachael Knowles, 'WA Labor passes motion to raise the age', National Indigenous Times (online, 5 October 2021) <https://www.nit.com.au/wa-labor-passes-motion-to-raise-the-age/>.
[73] Eden Gillespie, 'First Nations campaigner accuses Queensland government of 'hypocrisy' for voting down 'raise the age' bill', *The Guardian* (online, 17 August 2022) <https://www.theguardian.com/australia-news/2022/aug/17/first-nations-campaigner-accuses-queensland-government-of-hypocrisy-for-voting-down-raise-the-age-bill>.

hopefully inspire them to take action in parliament. Social Reinvestment WA has a template which you can use to draft your first letter.[74]

## V FINAL REMARKS

Raising the MACR is beneficial for WA children and the wider community. Imprisonment at a young age creates significant economic costs for the State and does not effectively reform young offenders with many becoming entrenched in a cycle of recidivism. Western Australia's criminal justice system's structures are inherently flawed. Children, who are neurologically underdeveloped, bear the consequences of actions that medical research tells us they cannot understand. This is especially the case for Indigenous children, who are vastly overrepresented in WA prisons, are already particularly vulnerable to criminalisation and subject to numerous factors that compound their likelihood of entering the justice system. At a minimum, the WA government must act now and commit to raising the MACR to 14 years old. Raising the age will greatly improve the protection afforded to some of our most vulnerable Western Australian and pave the way for a fairer criminal justice system.

[74] Social Reinvestment WA, 'Children don't belong in WA's Prisons, let's Raise the Age!', *Email Your Local MP!* (Web Page) <https://socialreinvestmentwa.good.do/raisetheagewa/MP/>.

**The role of private law firms in the pursuit of "access to justice"**

*Quentin Wong*[1]

'*The bottom line is that law is not just a business. Never was. Never can be so. It is a special profession. Its only claim to public respect is the commitment of each and every one of us to equal justice under law*. – Justice Michael Kirby [2]

As a pro bono lawyer within an international commercial law firm, it can often be difficult to explain to others (i.e other corporate lawyers) what one actually does for a living. In short, I am employed by the Responsible Business (RB) team at DLA Piper to facilitate and engage in the pro bono activities of the firm, and assist in the implementation of the firm's pro bono strategy. As the quote by Justice Kirby demonstrates the law is more than a business it is a profession. The RB team is unique (and arguably made better) by non-lawyers, many of who practice as corporate consultants specialising in ESG, business and human rights and social impact. There aren't many of us in this field, but it is growing.[3]

Fundamentally, the provision of pro bono legal services contributes to the administration of justice in an important way, but what impact does that have for private law firms? As private law firms become more aware of their clients' expectations, there is an increasing appreciation of the perceived "social licence to operate" and how the practice of pro bono can be used as a tool in promoting greater access to justice. There are countless benefits for firms and lawyers (and yes, even law students!) involved in this space, including greater employee satisfaction,[4] greater staff retention,[5] and increasingly, the requirements set by clients in order to sit on their panel. The structure of this article follows a typical conversation the author has at networking events.

[1]Pro bono solicitor at DLA Piper. The author wishes to thank the pro bono team at DLA, particularly to Austyn Campbell and Cate Martin, for their kind review and comments.
[2] The Hon Michael Kirby AC CMG, Law Firms and Justice in Australia, 7 March 2002, http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_award.htm.
[3] Sanjay Alapakkam (2021), The Rise of Pro Bono in Australian Commercial Law Firms available online at https://www.linkedin.com/pulse/rise-pro-bono-australian-commercial-law-firms-bookatz-consulting/?trk=organization-update-content_share-article.
[4] Naomi Neilson (2019), Pro bono work key to job satisfaction, Lawyers Weekly available online at https://www.lawyersweekly.com.au/biglaw/26168-pro-bono-work-key-to-job-satisfaction.
[5] Paula Davis, Money Doesn't Lead To Happiness In Law – Here Is What Does (2020), Forbes , available online at https://www.forbes.com/sites/pauladavislaack/2020/10/08/money-doesnt-lead-to-happiness-in-law--here-is-what-does/?sh=56253a9b4c81.

*So, what do you even do?*

Pro bono comes from the Latin phrase *pro bono publico* which means "for the public good" and can be traced back to early Roman Tribunals and thirteen to fifteenth century Scottish and English legal proceedings.[6] In the 21st legal context, the accepted definition generally means the provision of legal services on a free or significantly reduced fee basis, with no expectation of a commercial return.[7] As increasing attention is being placed on pro bono strategies, long gone are the days of pro bono meaning doing a partner's friend's country club constitution. Rather, it now means broadly providing:

- Operational advice for not-for-profits and charities.
- Assisting not-for profits, charities and UN agencies with law and justice projects.
- Advising governments in post-conflict and developing countries.
- Advising vulnerable individuals.
- Referral schemes (clinics) in partnerships with Community Legal Centres (CLCs).
- Training and workshops.

Australia has one of the most mature and established pro bono sectors globally. In particular over the last 5 years there has been significant growth in dedicated pro bono teams in mid-tier and boutique firms. In fact there are now more than 18 Australian-based Pro Bono Partners at firms who are responsible driving the practice and strategy (some firms, even have two Pro Bono Partners!) Supporting the Pro Bono Partners are the often-unsung heroes, local pro bono coordinators (lawyers who take on the responsibility outside of their general day to day practice areas), will then go on to promote and implement the strategy on the ground; leveraging their local connections where appropriate. My role, and that of other dedicated pro bono lawyers, centres around bridging the gap between pro bono partners, directors and these local coordinators. Personally, I focus on sourcing environmental and climate conservation opportunities which involves a lot of Zoom catch ups with not-for-profits, reading up on the latest cases before the courts and placing referral requests within our firm. Private law firms are obviously uniquely positioned (and resourced) to provide pro bono services that traditional CLCs cannot. One such example is DLA Piper's "New Perimeter" initiative; a not-for-profit organisation established in 2005 which provides pro bono legal assistance in underserved regions around the world to support access to justice, social and economic development, and sound legal institutions.

Increasingly at some firms, there is a shift away from describing the services that my team and others provide, as "simply pro bono". Rather as described above, we use the term Responsible Business to

[6] Rhode, DL. 2005. Pro bono in principle and in practice: public service and the profession, Standford University Press, California.
[7] Australian Pro Bono Centre (n.d), Definition of Pro Bono, available online at https://www.probonocentre.org.au/information-on-pro-bono/definition/.

describe the role of our team at the firm. The meaning, and more importantly the expectations of pro bono services, have changed dramatically. Pro bono is now synonymous with the growing trend of recognising that there is in fact a social license is required to operate. Pro bono lawyers,, with their expertise working with NGOs across different sectors, can be helpful in identifying and mitigating a wide range of ESG risks. Similarly, pro bono services often lead into new service offerings – for example in areas such as business & human rights, modern slavery, impact investing and climate.

*Oh yeah, what about that 35-hour aspirational and voluntary target stuff?*

In Australia, the National Pro Bono Target is a voluntary and aspirational target of at least 35 hours of pro bono legal services (20 hours for in house and government) per lawyer per year. There is no doubt that some of you mentioned this in your clerkship interviews and turned your mind to how many hours you have done come performance review time, but have you ever considered what impact this had on the profession? In short, despite a firm's involvement being entirely voluntary and unenforceable, becoming a signatory to the target prompts involvement in pro bono work and helps each lawyer or firm set a goal for the amount of pro bono work they will undertake each year. It also… just works. Since the target was established in 2007, almost 5 million hours of pro bono legal work has been recorded by signatories to the target.[8] The target has also arguably kick-started a national movement of recognising the importance of pro bono by governments who have now introduced pro bono requirements in certain tender processes.

In Western Australia, since July 2020, law firms who provide legal services to Western Australian government agencies must comply with the WA Pro Bono Model.[9] Under the WA Pro Bono Model, law firms that undertake legal services for the State Government are required to:

- subscribe to the National Pro Bono Target (35 hours);
- undertake pro bono services for "approved causes" - which include the provision of legal services for "individuals"[10] - for at least 10 per cent of the value of its Government legal work; and
- report annually on the total fee charged to Government and the types of pro bono services delivered.

[8] Australian Pro Bono Centre (2021), Record Breaking Year for Pro Bono, Media release, available online at https://www.probonocentre.org.au/wp-content/uploads/2021/09/2021.09.22_Media-Release-Pro-Bono-Target-Report-2021_FINAL.pdf.
[9] Western Australian Pro Bono Services Model (n.d), available online at https://www.wa.gov.au/system/files/2022-08/sso-pro-bono-model.pdf.
[10] For example, assisting individuals with court appearances, document preparation and lodgement, legal advice, legal research, litigation settlement, mediation services and negotiation.

Western Australia is unique in the sense that the requirements go further by requiring a specific focus on individuals from disadvantaged and marginalised backgrounds.[11] In WA, the model has leant assistance to Aboriginal people, domestic violence survivors, elderly people, people with disabilities, people with limited English language skills, people with mental illness, and homeless people.[12]

What this has effectively done is institutionalise pro bono into private practices. This has been truly well received by not only the community, but private law firms as well. In 2020-21, 15 law firms across Western Australia, contributed almost 13,000 hours of legal work (well and truly above the aspirational target of 35 hours per year).[13] This is the equivalent of more than $4.8 million in pro bono legal services. In private law firms, this has resulted from greater resourcing for pro bono initiatives, and an increased emphasis on recording of the number of hours spent on pro bono. [14] Clearly, the model works; pro bono is now being incentivised across private firms and meaningful long-term engagements (and building dedicated pro bono teams) are being prioritised.

*So, are you putting yourself out of a job?*

Ideally but hopefully not. For those in this space, ensuring access to justice fundamentally means that we aspire to be in a position where our roles are not needed. In an ideal world, access to justice would be obtained by those most vulnerable without the assistance of a private law firm. Unfortunately, this is not the case. Now is an opportune time to remind the reader (and HR if you're reading this) that access to justice is complex and multifaceted, and that there is still a critical place for pro bono lawyers in private practice for many years to come. Pro bono, whilst an essential tool in the pursuit of access to justice, is not the only answer. This approach is reflected in the homelessness space, where there is a growing focus on putting those at risk in a home first, before providing the necessary wrap around support services.[15] Pro bono services should be seen as adjacent to, and never a substitute for, publicly funded legal aid. It cannot replace the responsibilities of State and national governments to provide legal assistance. Further, it is ultimately only when government, not-for-profits and the corporate sector work together that true access to justice can be achieved, and I am so grateful to be playing my part. Now, whatever your motivations for engaging in pro bono, or views on pro bono practices in private

[11] For a review and comparison of government pro bono provisions visit https://www.probonocentre.org.au/wp-content/uploads/2022/02/APBC-Panel-Arrangements-table.pdf.
[12] Hon John Quigley LLB JP MLA (2021), Community benefits from 13,000 hours of pro bono legal work, Government of Western Australia, Media Statements available online at https://www.mediastatements.wa.gov.au/Pages/McGowan/2021/11/Community-benefits-from-13000-hours-of-pro-bono-legal-work.aspx.
[13] Ibid.
[14] Ibid.
[15] All Paths Lead to a Home: Western Australia's 10-Year Strategy on Homelessness 2020–2030.

law firms, a gentle reminder that "[i]f justice is not accessible to ordinary Australians, the rule of law becomes mythical".[16]

And lastly, *Do you even get paid?*

Yes – and at the same rate as my corporate colleagues.

[16] The Honourable Wayne Martin AC, Chief Justice of Western Australia (2012), Creating a Just Future by Improving Access to Justice, Community Legal Centres Association WA Annual Conference 2012, available online at https://www.supremecourt.wa.gov.au/_files/Creating%20a%20Just%20Future%20by%20Improving%20Access%20to%20Justice%20Martin%20CJ%2024%20Oct%202012%20v.2.pdf.

# The Unforeseen Consequences of the *Salomon* decision on Australian Corporate Groups

*Annarose Reilly*

## I INTRODUCTION

The limited liability principle established over a century ago in the decision of *Salomon v A Salomon & Co Ltd*[1] (***Salomon***), allows holding companies to avoid liability when an insufficiently financed subsidiary faces claims from tort victims who have been injured as a result of the subsidiary's negligence. In such circumstances, the separate legal entity in conjunction with limited liability, enables a parent company to avoid liability for the subsidiary's tortious conduct by tactically utilising the corporate shield to hide group assets from the claims of the subsidiary's creditors.[2] This allows tort claimants to go uncompensated while parent companies are insulated from liability for their subsidiary's risky or harmful activities. Over the years, there has been increased global support for the broader liability of corporate groups in relation to tortious activity.[3] This has been particularly evident in other jurisdictions such as France and Switzerland, where steps have been taken to strike a favourable balance between ensuring corporations understand their duties, whilst safeguarding the principles of separate legal entity and limited liability in their application to contract creditors.[4]

## II. PUBLIC SENTIMENT TOWARDS LIMITED LIABILITY AND TORTIOUS ACTIVITY

*Salomon's* enduring landmark decision which entrenched the separate personality doctrine and its consequential application to corporate groups (which were virtually unknown at the time of the decision) has had severe and adverse repercussions in our community, particularly upon mass tort claimants when a tortfeasor subsidiary is insufficiently capitalised to provide compensation.[5] The decision in *Salomon* was handed down over a century ago in reflection of the prevailing economic philosophy of laissez-faire capitalism and the English values of entrepreneurship and commercial risk taking, over the interests of creditors.[6] Thus, the decision is now inconsistent with Australian values and its perception of justice in the 21st century: the Australian community does not wish to see innocent

[1] [1897] AC 22 (HL).
[2] Hugh Collins, '*Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Integration*' (1990) 53 *Modern Law Review* 731, 736–8.
[3] Martin Petrine and Barnali Choudhury, *'Group Company Liability*' (2018) *European Business Organisation Law Review* at page 784.
[4] Ibid.
[5] Commissioner D.F Jackson Q.C '*Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation'* (2004), Volume 1, discussing the implications of the James Hardie Group in isolating its liability in tort to sufferers of asbestos diseases, 30.66.
[6] Phillip Lipton, *'The Mythology of Salomon's Case And The Law Dealing with the Tort Liabilities of Corporate Groups: An Historical Perspective'* (2014) 40(2) *Monash University Law Review* 453.

tort victims go uncompensated by corporations who hide behind the corporate veil.[7] This public sentiment was evident in the aftermath of the notorious case of *Briggs v James Hardie*[8] which highlighted the 'significant deficiencies in Australian corporate law' as the Hardie group was able to divest itself of liability in funding asbestos-related compensation claims.[9]

## III. LIMITED LIABILITY AIMED TO PROTECT CONTRACT CREDITORS, NOT TORT CREDITORS

Exacerbating these issues is the uncertainty in the case law as to whether tort claimants can pierce the corporate veil.[10] This uncertainty lies in the fact that such cases are placed 'at the hazy intersection of company and tort law, where bedrock principles such as limited liability, separate corporate personality, and negligence collide.'[11] It is also important to recognise that tort creditors are vulnerable involuntary creditors with no ability to choose the company that is responsible for injuring them.[12] Furthermore, relations with tort creditors are neither consensual nor contained in a contract and therefore can be distinguished from contract creditors who decide whether to do business with the subsidiary and can protect themselves by obtaining parent company guarantees.[13] As these options are not open to the injured claimant, limited liability has no relevance to tort creditors.

## IV. THE UNCERTAINTY IN THE LAW

At present, Australian courts may pierce the veil if a holding company is found to have a level of control over the subsidiary so as to be deemed directly responsible for the activities of the subsidiary.[14] However, there is no unifying principle assisting tort claimants as to the actions they may take. Such uncertainty is exacerbated by the reluctance of the courts to pierce the corporate veil as '*Even the complete domination or control exercised by a parent over a subsidiary is not a sufficient basis for lifting the corporate veil*'.[15] Furthermore, under the *Corporations Act 2001* (Cth), there are no obligations on companies to maintain their financial position in order to meet potential tortious liability.

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[7] Catherine Waiter, *'Directors Can Shape Regulation or Get Hemmed In'* (2004*) Australian Financial Review* at 63; '*Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation'* (2004), Volume 1.
[8] *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549, 577.
[9] David Jackson QC, cited in Marcus Priest & Fiona Buffini, '*Carr Rejects Asbestos Compo Scheme*' (2004) *Australian Financial Review*, 6.
[10] *Chandler v Cape PLC* [2012] 3 All ER 640, *CSR Ltd v Wren* (1997) 44 NSWLR 463, *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549.
[11] Martin Petrin, '*Assumption of Responsibility in Corporate Groups: Chandler v Cape plc'* (2013) 76 *Modern Law Review* 603, 603.
[12] *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549, [578–9] (Rogers AJA).
[13] Helen Anderson, *'Piercing The Veil on Corporate Groups in Australia: The Case for Reform'* (2009) *Melbourne Law Review* 33(2), citing Robert Thompson, *'Piercing the Corporate Veil: An Empirical Study'* (1991) 76 *Cornell Law Review* at 1687-70.
[14] Helen Anderson, *'Challenging the Limited Liability of Parent Companies: A Reform Agenda for Piercing the Corporate Veil'* (2012), *Australian Accounting Review* Volume 22, Issue 2, 133, citing John Kluver '*Entity vs. Enterprise Liability: Issues for Australia'* (2004) *Connecticut Law Review*, 37: 765–84.
[15] *Varangian Pty Ltd v OFM Capital Limited* [2003] VSC 444 [142], quoting *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549, [578–9] (Rogers AJA).

Whilst s 588V of the *Corporations Act* sets out when a holding company is liable, it is unclear whether a negligence action can be considered a debt under s 588V[16], as a claim in negligence is not a deliberate debt nor a quantifiable amount.[17]

## V. CONCLUSION

Both corporations and the courts require clear guidance as to what constitutes parent company liability for the tortious acts of subsidiaries. Specifically, the *Corporations Act*[18] requires an amendment which distinguishes between tort victims and contract creditors, thereby ensuring the principles of limited liability and separate legal entity remain intact in relation to contract creditors for whom such principles were made to protect. Such an amendment should seek to strike a favourable balance between ensuring corporations understand their duties whilst safeguarding the principles of separate legal entity and limited liability in their application to contract creditors.

[16] *Corporations Act 2001* (Cth).

[17] Edwina Dunn, *'James Hardie: No Soul to be Damned and No Body to Be Kicked'* (2005) Sydney Law Review 27(2), referring to a definition of what amounts to a debt under s 588V at page 349.

[18] *2001* (Cth).

# Influence of Landmark Case *Kaurareg v Shire* on Viability of Traditional Owners Obtaining Injunctive Relief

*Baran Rostamian*

Traditional Owners do not consider land rights synonymous with economic gain, instead feeling obligated to preserve Aboriginal and Torres Strait Islander law within the spirit of country.[1] To be removed from one's country is to be removed from oneself, as land is intertwined with the culture and spirituality of Indigenous Australians.[2] It is important to consider the manner in which the Kaurareg Native Title Aboriginal Corporation RNTBC (Registered Native Title Body Corporate), managed to acquire an interim injunction to prevent cultural devastation. The injunction Application was detailed despite the material being prepared on an urgent basis.[3] It was applied for alongside an originating application, to which the Torres Shire Council was respondent.[4]

## I AN AFFIDAVIT DETAILING THE FRAUGHT NATURE OF EXCHANGES

The Honourable Justice Logan's depiction of balancing 'public interests' in *Kaurareg Native Title Aboriginal Corporation RNTBC v Torres Shire Council* (*Kaurareg*) was informed by documentary evidence that the Kaurareg Prescribed Body Corporate had done their best to avoid court, whilst the council had not sufficiently engaged in dialogue with them. His Honour considered the fact that the council would incur costs as well as the present being a 'particularly useful time' to commence works, before emphasising that it was always 'fraught' to begin in the 'absence of closure' regarding Native Title.[5] He further stated that the applicants' affidavit was appropriately fulsome. It demonstrated that, instead of following the right process, the council applied for a section in the *Native Title Act* (*NTA*) which outlined that they did not need consent of the Traditional Owners, and could simply start to build.[6] The only tangible option that remained to prevent the commencement of works was the urgent application for an injunction.[7] Improvidently, the appropriate mechanism for mediation within the Indigenous Land Use Agreement had not been engaged.[8]

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[1] Vicki Grieves, 'Aboriginal Spirituality: Aboriginal Philosophy the Basis of Aboriginal Social and Emotional Wellbeing' (Discussion Paper No 9, Cooperative Research Centre for Aboriginal Health, 2009) 7, 13.
[2] See ibid.
[3] Shane Roberts and Graham Carter, 'Native Title: protecting culturally significant sites from development' (2021) 77 *Law Society of New South Wales Journal* 82, 83.
[4] *Kaurareg Native Title Aboriginal Corporation RNTBC v Torres Shire Council* [2019] FCA 746, 1.
[5] Ibid [16].
[6] Wendy Searle, 'Sacred site protected in Torres Strait after landmark federal Court ruling', *The Wire* (online, 9 Mar 2021) <https://www.thewire.org.au/story/sacred-site-protected-in-torres-strait-after-landmark-federal-court-ruling/>.
[7] Roberts and Carter (n 3) 83.
[8] *Kaurareg* (n 4) [13]–[14].

In 2001, the Kaurareg Prescribed Body Corporate obtained a determination of Native Title rights over an area including Muralag Island. An Indigenous Land Use Agreement was entered into between the council and Kaurareg Prescribed Body Corporate in October 2000. Central to their success was criticism of the council's breach of the NTA, rather than an argument centred around the impending injustice if the planned works were to go ahead.

The Kaurareg Prescribed Body Corporate were able to demonstrate that the council had not consulted with Native Title holders. The council also failed to provide any documentary evidence of consultation and consent, or proof they had negotiated, implemented or monitored Native Title agreements.

This allowed the Kaurareg Prescribed Body Corporate to assert a breach of the Indigenous Land Use Agreement by the council, as they planned to undertake public works in the area.[9] It can be noted that other Traditional Owners may prioritise obtaining Native Title determinations as a safety measure in case applying for injunctive relief becomes necessary. The Kaurareg Prescribed Body Corporate were fortunate to have an existing determination alongside the new claim prompted by the threat of works commencing at the relevant site.

Also discussed in the affidavit provided by the solicitor of the Kaurareg Prescribed Body Corporate, were the **'**very particular associations' between Muralag Island and the Kaurareg People.[10]

Warrior 'Waubin', the first of the Kaurareg, is believed to have resided on the sacred ground of Muralag Island.[11] One key story details the amputation of Waubin's leg in battle, his blood flowing downhill. The fast tides are believed to be created by him as he walked into the sea. The visible reddish tinge is considered the spilled blood of the giant, and the rocks seen during low tide are the bodies of him and his wives.[12]

The Torres Shire Council's manner in their exchanges with the applicants made His Honour less disposed to weighing the balance of convenience in their favour. Viewing the one-sided

[9] Roberts and Carter (n 3) 82.
[10] *Kaurareg* (n 4) [9].
[11] Roberts and Carter (n 3) 82.
[12] Nick Wiggins and Damien Carrick, 'How Native Title holders won their fight to save a sacred site on a Torres Strait island', *ABC Radio National* (online, 9 Mar 2021) <https://www.abc.net.au/news/2021-03-09/native-title-and-legal-fight-save-sacred-torres-strait-site/13206542>.

communications between the council and the applicants, the council were perceived unfavourably as Justice Logan asserted that while the applicants had tried their best to avoid court, they had been left with no choice.[13] He specifically criticised the council's incurring of costs for the positioning of work equipment, despite the lack of certainty regarding the absence of Native Title by agreement or extinguishment.[14] In consideration of the balance of convenience, an interim injunction was granted.[15]

Torres Strait Islander peoples in particular might feel they now have another remedy to implement in protecting totemic sacred sites, however Aboriginal peoples hailing from the mainland also hold totemic affiliations. Injunctive relief may be a viable method of sacred site protection, capable of being sought by other Traditional Owners by preparing detailed and similarly reasoned affidavits.[16]

## II INDEPENDENTLY SELECTED LEGAL AID

A significant problem with the NTA agreement making process is the imbalance of power weighted in favour of proponents. The solicitors of the applicants in *Kaurareg* were independently selected, enabling the Kaurareg Prescribed Body Corporate's informed consent in their dealings with the council. A key reason for their success was as they sought external support for the 'immense burden' of legal obligations.[17] Agreement with proponents can be a lengthy process resulting in documents some hundreds of pages long. Prescribed Bodies Corporate often struggle to understand these documents and may require legal assistance.[18] Inadequate funding is a core problem inhibiting the ability of Prescribed Bodies to function, thus it cannot be guaranteed that other Traditional Owners may also succeed in securing injunctive relief due to the numerous preceding legal processes involved, and their lack of resources.[19]

As Prescribed Bodies Corporate are not funded by the government, despite overwhelming workloads, most are simply unable to negotiate on a level playing field with proponents when they approach.[20]

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[13] *Kaurareg* (n 4) [15].
[14] Ibid [18].
[15] See ibid.
[16] Wiggins and Carrick (n 12).
[17] Lorena Allam, 'Aboriginal groups and investors form new alliance to protect heritage sites', T*he Guardian* (online, 13 October, 2021) <https://www.theguardian.com/australia-news/2021/oct/13/aboriginal-groups-and-investors-form-newalliance-to-protect-heritage-sites>.
[18] Joint Standing Committee on Northern Australia, Parliament of Australia, *Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge* (Report, October 2021) 170 [6.56].
[19] Ibid 170 [6.57].
[20] See ibid.

This disproportionate power balance usually leads to agreements that are heavily partial to proponents, and which place pressure on Prescribed Bodies. One manner in which this happens during the agreement making process is through timelines being forced on Prescribed Bodies. Since many Prescribed Bodies are not in a position where they can deal with future acts, this usually leads to issues not being processed in time for relevant actions to take place.[21]

In instances of local governments undertaking public works a notice is usually sent to the Prescribed Body Corporate, who have 'limited power to comment'.[22] The NTA has been designed to reduce the ability of Traditional Owners to enact any of their rights.[23] For example although Aboriginal and Torres Strait Islander cultures are still alive and adapting, the NTA does not sufficiently recognise this.[24] Despite these challenges, the Kaurareg Prescribed Body Corporate succeeded.[25]

It is important to note that they did not have the council select and allocate them legal support, and the legal representation of the applicants was commercial, although not independent.[26] Some proponents do fund legal expenses for Prescribed Bodies Corporate, however this also raises questions as to the independency of these processes and whether they result in desired cultural heritage outcomes.[27] Agreement making is a major source of funding for Prescribed Bodies, and compensation forming part of agreements may often contribute to administrative costs. In instances where Prescribed Bodies proceed without external support, they are more likely to approach heritage agreements as a central source of revenue.[28] Injunctive relief remains an adequate remedy due to its granting of time, which is especially crucial in the absence of sufficient resources.[29]

[21] Ibid 171 [6.64].
[22] Wiggins and Carrick (n 12).
[23] Joint Standing Committee (n 18) 173 [6.70].
[24] Grieves (n 1) 13.
[25] Joint Standing Committee (n 18) 173 [6.71].
[26] *Kaurareg* (n 4) [2].
[27] Joint Standing Committee (n 18) 171 [6.61].
[28] Ibid 171 [6.62].
[29] Ibid 171 [6.59].

## III REFRAINING FROM PRESENTING A SUM FOR DAMAGES

The Kaurareg Prescribed Body Corporate's approach of not naming a sum was potentially crucial to saving their sacred site, and this win was significant, however it is unlikely that such an approach could have prevented the recent destruction of Juukan Gorge.[30] Ordinarily a sum of damages is provided to the court when seeking an injunction.[31] The applicants were not disposed to providing any sum, and this could have been viewed as deviating from required procedure.[32] The council's submissions response was that the common law had, for centuries awarded 'damages for torts'.[33] As the Kaurareg Prescribed Body Corporate and the Kaurareg Elders were not ultimately required to give an undertaking as to damages,[34] the case is believed to have set 'a form of precedent' for injunctions not being able to be refused on the basis that damages are an adequate remedy.[35]

Justice Logan's recognition that money is not always the solution was welcomed by Traditional Owners, as it further emphasised that compensation was no longer considered a sufficient remedy for the destruction of a sacred site.[36] The landmark case has been deemed a 'good example' for Native Title groups, of what legal mechanisms are available to them in instances where public works could potentially affect sites which hold significance.[37]

The chair of the Kaurareg Prescribed Body Corporate says despite the process being a 'waste of taxpayers' money', and although it cannot be deduced that other Native Title holders will be able to ensure securing injunctive relief by adopting this approach, it has 'set a precedent' that when there is a dedicated method of approaching Native Title land, there is an expectation to adhere to it.[38] The success of the protection of the creation story site on Muralag offers hope for other significant cultural heritage sites being similarly protected.[39]

[30] Wiggins and Carrick (n 12).
[31] Roberts and Carter (n 3) 83.
[32] *Kaurareg* (n 4) [8].
[33] Roberts and Carter (n 3) 82.
[34] See ibid.
[35] See ibid.
[36] Wiggins and Carrick (n 12).
[37] See ibid.
[38] See ibid.
[39] Roberts and Carter (n 3) 83.

# A Fairer Transition to Law School: Moving to 'Ungraded Pass/Fail' Assessment in Foundations of Law and Lawyering

*Aidan Ricciardo and Julie Falck*

## I INTRODUCTION

*Foundations of Law and Lawyering* (LAWS4101) is the foundational unit in the UWA Juris Doctor (JD) degree. Each year's incoming student cohort is diverse – students come to the JD with various backgrounds, experiences, and skills. LAWS4101 aims to prepare students to commence their legal studies by building their knowledge, skills and confidence.

The authors of this article coordinate and co-teach LAWS4101. In 2021, we changed the assessment method in the unit to 'ungraded pass/fail' (UP/F). We returned all assessment items in the unit with marks and feedback, but all students who passed overall had only 'ungraded pass' recorded on their transcripts. Our motivation for the change stemmed from a desire to improve the first-year experience by cultivating an environment where students felt supported to learn, develop skills, and form connections. In particular, we were keen to create a fair learning experience that helped to 'level the playing field' by ensuring that all students – irrespective of their background before coming to the JD – could succeed in the JD after taking LAWS4101.

This article discusses key findings from a study that sought to understand how students perceived and experienced the UP/F aspect of LAWS4101. Comprehensive results will be published in a scholarly peer-reviewed journal.

## II BACKGROUND

A solid body of literature has established that law students 'are most engaged and on-topic in an environment where they are not stressed or in fear of humiliation', and that positive learning environments are characterised by an absence of pressure, stress and despair.[1] The importance of creating such a learning environment is 'particularly stark' when teaching new law students who experience heightened levels of anxiety and stress.[2]

[1] Kate Galloway et al, 'Approaches to Student Support in the First Year of Law School' (2011) 21(2) *Legal Education Review* 235, 243 citing Sarah Moore and Nyie Kuol, 'Matters of the Heart: Exploring the Emotional Dimensions of Educational Experience in Recollected Accounts of Excellent Teaching' (2007) 12(2) *International Journal for Academic Development* 87, 92.
[2] Nikki Bromberger, 'Enhancing Law Student Learning – The Nurturing Law Teacher' (2010) 20(1) *Legal Education Review* 45, 54–5.

Scholarship has also established that grading can have a variety of negative impacts on student wellbeing and learning: it focuses student attention on superficial learning necessary to receive a good grade and can have a negative impact on overall learning outcomes.[3] However, feedback is valuable and supports student learning.[4]

This scholarship informed our move to UP/F assessment in LAWS4101. We wanted to create a positive and effective learning environment for diverse cohorts of new law students.

## III THE STUDY

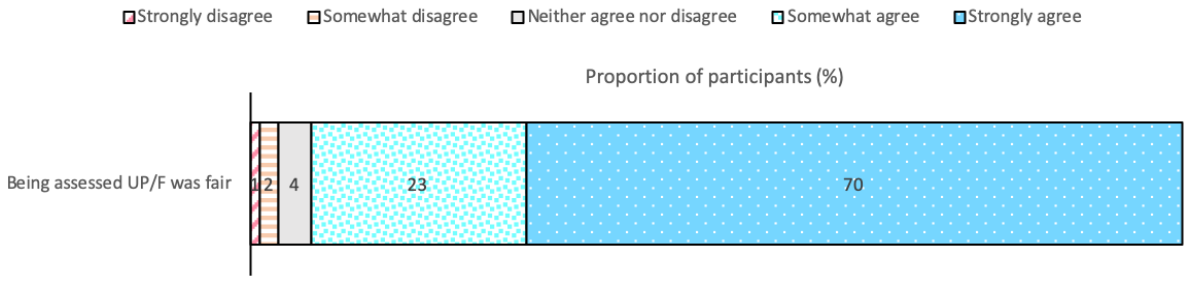
We obtained ethics approval to run an anonymous online survey in 2021 and 2022 which sought to understand how LAWS4101 students perceived and experienced the UP/F aspect of the unit. We were especially keen to understand whether different demographic groups within the LAWS4101 student cohort had differing views.

Ultimately, we had 214 participants – 119 responses in 2021 (40% of the 2021 cohort) and 95 responses in 2022 (43% of the 2022 cohort).

## IV RESULTS

We asked participants whether being assessed UP/F was fair. As shown in Figure 1, a large majority – 93% of participants – thought that UP/F assessment was fair (with 70% of participants 'strongly agreeing'). Only 3% of participants thought it was unfair (notably, no participants in 2022 thought it was unfair).

Figure 1. *Fairness*:




[3] Annemette Kjærgaard, Elisabeth N Mikkelsen and Julie Buhl-Wiggers, 'The gradeless paradox: Emancipatory promises but ambivalent effects of gradeless learning in business and management education' [2022] *Management Learning* 1, 2.
[4] Susan Armstrong and Michelle Sanson, 'From Confusion to Confidence: Transitioning to Law School' (2012) 12(1) *QUT Law & Justice Journal* 21, 40; Gerald F Hess, 'Heads and Hearts: The Teaching and Learning Environment in Law School' (2002) 52(1–2) *Journal of Legal Education* 75.

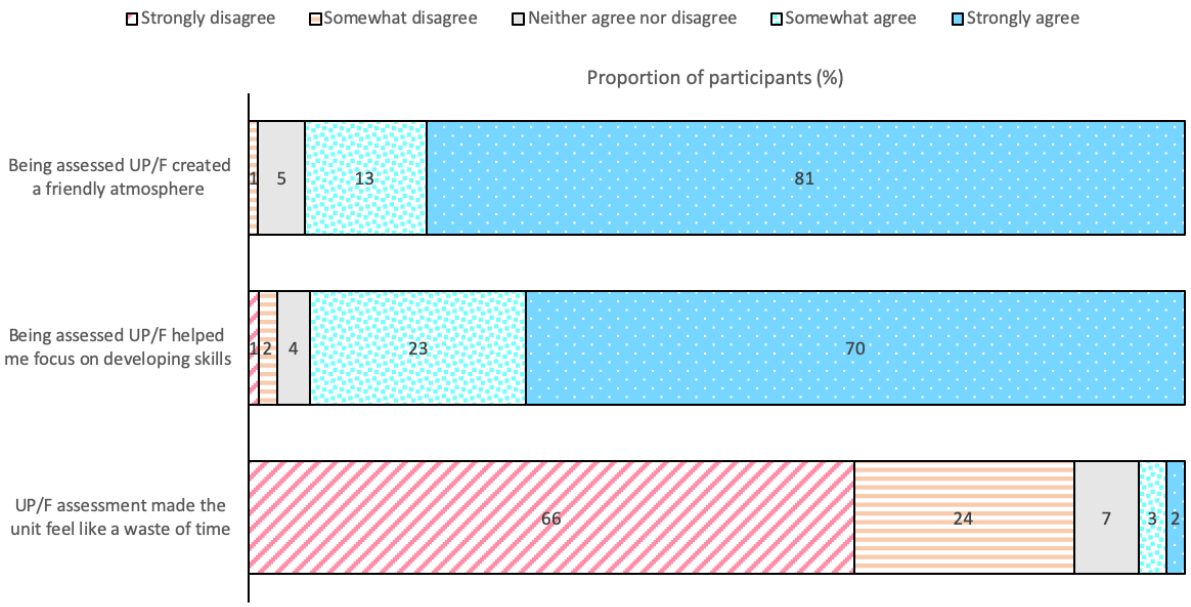
There was slightly more agreement that being assessed UP/F was fair amongst participants who did not hold a law-related undergraduate qualification (96%) than those who had previously studied a Business Law or Law and Society major (89%). Students older than 24 or last enrolled in a university course over three years ago were more likely to perceive UP/F assessment as fair.

We asked participants to explain why they thought UP/F assessment was fair or unfair. The following statements are representative of the responses we received:

- 'Fair; it's a good opportunity for students to get a feel for the subject rather than being thrown in the deep end. The ungraded pass reduces the stress substantially.'
- 'It was a low pressure way to engage with new material without starting off the year with immense stress in what is already an intimidating unit for some.'
- 'It made me feel like I wasn't being punished for doing a non-law undergraduate degree.'
- 'Everyone [had] an equal playing field to try new things. For a lot of people this would be the first time writing in a certain style… it gives them a chance to adapt without harsh penalties.'
- 'Despite studying really hard for the exam, I still failed because it was completely different to anything I'd ever done. The UP/F gives me a chance to fix my marks and not have this affect my transcript.'
- 'It starts everyone on the same level going into the JD when they might not necessarily have a background in law.'

We also asked participants whether being assessed UP/F created a friendly atmosphere, whether it helped them focus on developing skills, and whether it made the unit feel like a waste of time. As shown in Figure 2, there was strong agreement that it assisted with creating a friendly atmosphere and fostering skill development. It is, therefore, unsurprising that there was strong disagreement that it made the unit feel like a waste of time.

Figure 2. *Unit experience*:




When we asked if there was anything else that participants wanted to share about their experience of UP/F in LAWS4101, many students made comments about how it created a friendly atmosphere and helped with skill development. For example:

- '[It] felt like we were all in it together, [it] encouraged friendships and teamwork.'
- '[It] was a clever strategy to introduce students to law and each other before the inevitable competitiveness begins - this unit has enabled us to see each other as fellow students rather than potential competition in the long run.'
- 'It gave us a chance to learn without the intense pressure of failure…so this was a great way to develop skills.'
- 'It really lessened my anxiety and allowed me to focus on learning... I retained so much more because the pressure was off. I feel very well placed to tackle my other units this semester because I was given this solid foundation in a low-pressure environment.'
- 'I found I put more effort into learning and understanding how concepts would apply later in my degree rather than memorising facts for the sake of passing a unit.'
- 'We could focus on learning to do what we needed to do without fear that we were doing it wrong.'
- 'It took a lot of stress off my shoulders and allowed me to genuinely learn and also make some really good friends from day 1.'

## V. CONCLUSION

This study shows that students overwhelmingly approved of UP/F assessment in LAWS4101. They thought this change was fair, helped create a level playing field, and fostered a friendly atmosphere. They found it allowed them to focus on developing their skills and did not think that UP/F assessment made the unit feel like a waste of time. Our experiences and perceptions as teachers in LAWS4101 align with the student perspectives shown through this study. Overall, this research suggests that moving to UP/F assessment contributes to a positive learning experience, reduces stress, and assists diverse student cohorts in transitioning to legal studies.

# The Defenders versus the Balancers: A Comparative Study of Victorian and Swedish Laws Relating to Conscientious Objection to Abortion

*Eloise Munro*

## I INTRODUCTION

Religion and the law clash fiercely in questions of life. The Western world has seen a wave of abortion decriminalisation since the second wave of feminism in the 1970s. Despite this, the issue of conscientious objection continues to attract debate. The Australian Medical Association describes conscientious objection as:

> When a doctor, as a result of a conflict with his or her own personal beliefs or values, refuses to provide, or participate in, a legal, legitimate treatment or procedure which would be deemed medically appropriate in the circumstances under professional standards.[1]

This essay will compare the law on conscientious objection in Victoria and Sweden. These jurisdictions have been selected due to their antagonistic approaches, with the Victorian law permitting conscientious objection, and the Swedish law forbidding it. After establishing the link between conscience and religion, especially Christianity as the dominant religious grouping in both jurisdictions, this essay will present the legislative framework relating to conscientious objection in both Victoria and Sweden. It will seek to investigate these differences by comparing the ways rights are prioritised in each jurisdiction and the place of religion within the context of abortion decriminalisation. By analysing these issues, it becomes clear that an emphasis on balancing civil and socioeconomic rights alongside the position afforded to the Catholic Church combine in Victoria to separate its stance from Sweden's. The essay will conclude by considering the place of conscientious objection in both jurisdictions in light of demographic change.

## II. CONSCIENCE AND CHRISTIANITY

A religious understanding of conscience is critical in understanding the relationship between religion and conscientious objection in abortion law. Conscience is central to many moral systems, including religions.[2] The Catechism of the Catholic Church describes conscience as 'a judgement of reason which at the appropriate moment enjoins him to do good and to avoid evil'.[3] All Catholics are to follow their conscience, which is shaped through religious teaching, as doing otherwise is 'an error in moral agency and a sin against God'.[4] The importance of conscience is echoed in other Christian denominations.

[1] 'Conscientious Objection—2019', *Australian Medical Association* (Web Page, 27 March 2019) 1.2 <https://ama.com.au/position-statement/conscientious-objection-2019>.
[2] Edmund D Pellegrino, 'The Physician's Conscience, Conscience Clauses, and Religious Belief: A Catholic Perspective' (2002) 30(1) *Fordham Urban Law Journal* 221, 226.
[3] *Catechism of the Catholic Church* pt 3 s 1 ch 1 art 6 para 1777 <http://www.vatican.va/archive/ccc_css/archive/catechism/p3s1c1a6.htm>.
[4] Ibid para 1782.

Martin Luther highlighted its gravity, stating that 'it is neither safe nor right to go against conscience'.[5] For Christians, conscience involves following the teachings of God and the church on a range of matters, especially those related to life and death. The Catholic Church is clear in its views on abortion and how doctors should behave. Life is sacred from the moment of conception,[6] making abortion equivalent to the taking of a life and a 'supreme dishonour to the Creator'.[7] The choice for Catholic doctors is between opposing local abortion laws through conscientious objection,[8] or performing an abortion and facing excommunication.[9]

Non-Catholic Christian denominations have diverse views on abortion, with some creeds supporting it in some circumstances. In Australia, the Anglican Church was critical of changes in New South Wales, in contrast to the Uniting Church, which emphasised the sanctity of life, alongside 'compassion and generosity' towards women.[10] Similarly, the Church of Sweden, an Evangelical Lutheran church, supports the laws legalising abortion in the country.[11] These views would suggest that abortion may not go against the conscience of medical practitioners belonging to some non-Catholic Christian churches. This is reflected in the differing laws in Australia and Sweden.

## III. ABORTION LAW IN VICTORIA AND SWEDEN

### A. *Victoria's Balancing Act*

Before Federation, the colonies largely enacted English laws, including the *Offences Against the Person Act 1861* (UK),[12] which made both providing and procuring abortions a criminal offence.[13] The 1946 referendum gave the Commonwealth power over medical services,[14] but abortion continued to be viewed as belonging to the criminal sphere and within the remit of the states.[15] As a result, the states and territories have had mixed paths in changing abortion laws. For instance, South Australia amended

[5] Miles Hopgood, 'Consciences Bound and Liberated' (2019) 58(2) *Dialog* 131, 131.
[6] Catechism of the Catholic Church (n 3) pt 3 s 2 ch 2 art 5 para 2258 <http://www.vatican.va/archive/ccc_css/archive/catechism/p3s2c2a5.htm>.
[7] Pope Paul VI, *Gaudium et Spes* (Second Vatican Council, 7 December 1965) ch 2 para 27 <http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_cons_19651207_gaudium-et-spes_en.html>.
[8] Pope John Paul II, *Evangelium Vitae* (Papal Encyclical, 25 March 1995) ch 3 para 73 <http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae.html>.
[9] *Code of Canon Law* (Roman Catholic Church) book VI pt II title VI canon 1398 <http://www.vatican.va/archive/cod-iuris-canonici/eng/documents/cic_lib6-cann1364-1399_en.html#TITLE_VI.>.
[10] Alexandra Smith, 'Churches Divided Over Bill to Decriminalise Abortion', *Sydney Morning Herald* (online, 4 August 2019) <https://www.smh.com.au/politics/nsw/churches-divided-over-bill-to-decriminalise-abortion-20190803-p52djw.html>.
[11] 'Position on Sexual and Reproductive Health and Rights (SRHR)', *Church of Sweden* (Policy Document, 20 March 2017) 13-14.
[12] *Offences Against the Person Act 1861* (UK).
[13] Mark Rankin, 'The Disappearing Crime of Abortion and the Recognition of a Woman's Right to Abortion' (2011) 13(1) *Flinders Law Journal* 1,1.
[14] Caroline Costa et al, 'Abortion Law Across Australia—A Review of Nine Jurisdictions' (2015) 55(2) *Australia and New Zealand Journal of Obstetrics and Gynaecology* 105, 106.
[15] Ibid.

legislation in 1969 to include defences to the crime of abortion,[16] but abortion was only available under New South Wales common law until September 2019.[17] For the ease of comparison with Sweden, this essay will rely on Victoria. The law in Tasmania,[18] and the new legislation in NSW,[19] have inherited provisions similar to Victoria in relation to conscientious objection. The *Abortion Law Reform Act 2008* (Vic), decriminalises abortion in Victoria up to 24 weeks gestation,[20] and provides for circumstances allowing abortion beyond this period.[21] Section 8 compels registered health practitioners to inform women of their conscientious objection if they are asked to 'advise on, perform, direct, authorise or supervise an abortion'.[22] Following this, the practitioner must refer the woman to a counterpart who does not have an objection.[23] Julian Burnside argues that the word 'refer' only requires a practitioner to informally direct a woman to another provider.[24] Although its inclusion of conscientious objection reflects the 'conventional compromise' position,[25] the legislation compels registered medical practitioners and registered nurses to perform or assist with abortions where it is 'necessary to preserve the life of the pregnant woman'.[26]

### B. *Guaranteed Access in Sweden*

While Victoria has opted for a compromise model, Sweden has taken an unorthodox approach. *The Abortion Act 1974* guarantees access to abortion up to 18 weeks gestation for citizens and legal residents,[27] with abortion after 18 weeks requiring special approval.[28] In contrast to the Victorian law, the Swedish legislation provides medical practitioners no ability to conscientiously object. Sweden's position, along with that of Finland, Bulgaria and Czechia, makes it an outlier in Europe.[29] The law defies Resolution 1763 of the Council of Europe which, although not binding, emphasises that no medical practitioner should be compelled to perform an abortion against their ethical or religious

[16] Rankin (n 13) 7.
[17] Maani Truu, 'Abortion Has Been Decriminalised in NSW, and Here's What Will Actually Change', *SBS* (News Article, 30 September 2019) <https://www.sbs.com.au/news/abortion-has-been-decriminalised-in-nsw-and-here-s-what-will-actually-change>.
[18] *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 6(1).
[19] *Reproductive Health Care Reform Bill 2019* (NSW) s 9.
[20] *Abortion Law Reform Act 2008* (Vic) s 4.
[21] Ibid s 5.
[22] Ibid s 8(1)(a).
[23] Ibid s 8(1)(b).
[24] Anne O'Rourke, Lachlan de Crespigny, and Amanda Pyman, 'Abortion and Conscientious Objection: The New Battleground' (2012) 38(3) *Monash University Law Review* 87, 108.
[25] Louise Anne Keogh et al, 'Conscientious Objection to Abortion, The Law and its Implementation in Victoria, Australia: Perspectives of Abortion Service Providers' (2019) 20(1) 1, 2.
[26] *Abortion Law Reform Act* (n 20) ss 8(3), (4).
[27] *The Abortion Act 1974* (Sweden) 19 May 2005, SFS 1974:595, s 1 [tr Legislation Online] <https://www.legislationline.org/download/id/3381/file/Sweden_Abortion%20Act_1974_amended_until_2005_en.pdf>.
[28] Ibid s 3.
[29] Anna Heino et al, 'Conscientious Objection and Induced Abortion in Europe' (2013) 18(4) *European Journal of Contraception and Reproductive Health Care* 231, 232.

beliefs.[30] In Australia there is no case law relating to abortion and conscientious objection,[31] however, Sweden's position on conscientious objection has been validated by the courts. Ellinor Grimmark, a midwife, challenged the law after her employment offers at three hospitals were revoked when she explained that her religious beliefs prevented her from performing abortions.[32] It was argued that Sweden's law is distinct from other European nations and that it forced midwives to participate against their beliefs.[33] However, the District Court found that the Swedish law necessitates guaranteed access to abortion and conscientious objection would obstruct this.[34] The judges affirmed that providing abortions is an essential duty of a midwife.[35] As such, gynaecology and obstetrics departments can refuse to employ practitioners who would refuse to perform abortions on religious or other grounds.[36] These clearly diverging approaches will be accounted for by comparing rights in each jurisdiction, the place of religion in society and the context of abortion law reform.

### C. To Balance or Prioritise Rights?

Victoria and Sweden's contrasting approaches to conscientious objection are reflective of emphases placed on different rights. In Victoria, freedoms of religion, conscience and belief are explicitly protected in the *Charter of Human Rights and Responsibilities Act 2006* (Vic).[37] Section 14(2) states that 'a person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching'.[38] However, this provision did not need to be considered in the abortion debate. Section 48 of the Charter, which states that 'nothing in this Charter affects any law applicable to abortion or child destruction'[39] nullified the freedom of conscience provision in this context. Nevertheless, the abortion debate still saw an emphasis on freedom of conscience. Maxine Morand, the introducer of the bill, stated that:

> Clause 8 has been carefully crafted in order to strike an appropriate balance between the rights of registered health practitioners to conduct themselves in accordance with their religion or beliefs, and to freedom of expression, and the right of women to receive the medical care of their choice.[40]

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[30] *The Right to Conscientious Objection in Lawful Medical Care,* Council of Europe Parliamentary Assembly Res 1763 (Assembly debate 7 October 2010, 35th sitting, adopted 7 October 2010) s 1 <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17909>.
[31] O'Rourke, de Crespigny and Pyman (n 24) 108.
[32] Valerie Fleming, Beate Ramsayer and Teja Skodic Zaksek, 'Freedom of Conscience in Europe? An Analysis of Three Cases of Midwives with Conscientious Objection to Abortion' (2017) 44(1) *Journal of Medical Ethics* 104,106.
[33] Ibid.
[34] Ibid.
[35] Ibid.
[36] Christian Fiala et al, 'Yes We Can! Successful Examples of Disallowing 'Conscientious Objection' in Reproductive Health Care' (2016) 21(3) *European Journal of Contraception and Reproductive Health Care* 201, 202.
[37] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 14.
[38] Ibid s 14(2).
[39] Ibid s 48.
[40] O'Rourke, de Crespigny and Pyman (n 24) 97.

Victoria's balancing act has its limitations, however. In accordance with Section 7 of the Charter,[41] and Article 18 of the *International Covenant of Civil and Political Rights*,[42] a medical practitioner's right to freedom of conscience is outweighed by the woman's right to life in an emergency situation.[43]

The Swedish law does not attempt to balance rights in the same way. While Victoria's legislation accommodates both civil and socioeconomic rights, the latter category is cardinal in Sweden. The Swedish Constitution protects religious freedom,[44] however, the prohibition of conscientious objection under the belief that the 'patient is paramount',[45] indicates that socioeconomic rights are the primary consideration. Sweden's law can be seen as reflecting the argument that conscientious objection restricts access to abortion, and thus the fulfilment of a woman's right to healthcare and privacy.[46] Socioeconomic rights are found in international law, including the *Convention on the Elimination of All Forms of Discrimination Against Women*, which compels signatories to eliminate gender discrimination in 'access to health services, including…family planning'.[47] By focusing solely on the rights of women, Sweden's system easily facilitates access to abortion services. Abortion is inexpensive and accessible throughout the country.[48] Christian Fiala et al argue that accessibility promotes other rights, suggesting that countries without conscientious objection have higher gender equality, lower teenage birth rates and higher female employment.[49] Sweden's liberal law, and the rights it promotes, has resulted in the description of it as the most 'woman-centred' abortion law.[50] In contrast, it has been argued that the Australian model restricts the rights of women. One major concern is that women in rural areas are disadvantaged.[51] Anna Heino et al argue that 'conscientious objection puts women in an unequal position depending on their place of residence, socioeconomic status, income and their ability to travel long distances'.[52]

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[41] *Charter of Human Rights and Responsibilities Act* (n 37) s 7(3).
[42] *International Covenant of Civil and Political Rights,* opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18(3).
[43] *Abortion Law Reform Act* (n 20) s 8 (3).
[44] *The Constitution of Sweden: The Fundamental Laws and the Riksdag Act* (Sveriges Riksdag, 2016) 30 <https://www.riksdagen.se/globalassets/07.-dokument--lagar/the-constitution-of-sweden-160628.pdf>.
[45] O'Rourke, de Crespigny and Pyman (n 24) 91.
[46] Ronli Sifris, 'Tasmania's Reproductive Health (Access to Terminations) Act 2013: An Analysis of Conscientious Objection to Abortion and the 'Obligation to Refer'' (2015) 22(4) *Journal of Law and Medicine* 900, 910.
[47] *Convention on the Elimination of All Forms of Discrimination Against Women,* opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) art 12(1).
[48] Fiala et al (n 36) 202.
[49] Ibid 204.
[50] Annulla Linders, 'Victory and Beyond: A Historical Comparative Analysis of the Outcomes of the Abortion Movements in Sweden and the United States' (2004) 19(3) *Sociological Forum* 371, 383.
[51] Elizabeth Shi and Ariella Gordon, 'Why Women Will Find it Harder to Get an Abortion if the Religious Discriminational Bill Becomes Law', *SBS* (News Article, 13 September 2019) <https://www.sbs.com.au/news/why-women-will-find-it-harder-to-get-an-abortion-if-the-religious-discrimination-bill-becomes-law>.
[52] Heino et al (n 29) 232.

## IV. THE PLACE OF RELIGION

### A. *Church-State Relationships*

As the stances on conscientious objection and the weight given to categories of rights differ in Sweden and Victoria, so does the place of religion. When compared to Sweden, it is clear that the position occupied by religion in Australia is shrouded in greater ambiguity. Although heavily debated,[53] the common law implies that Australia did not have an established church prior to Federation,[54] and the Constitution prevents the Commonwealth from establishing one now.[55] Mirroring Roscoe Pound's distinction between the law in the books and the law in action,[56] the actual relationship between religion and state is complicated. Section 116 can be viewed as 'a limit on Commonwealth power rather than as a guarantee of freedom of religion or the separation of church and state'.[57] In practical terms, Commonwealth education expenditure is higher for private schools,[58] and religious organisations are given tax exemptions under Commonwealth law.[59] Christianity is highly visible, as the Parliament recites the Lord's Prayer before sitting, and Christian celebrations are made public holidays. If Australia conforms to any model of church-state relations, it is the pluralist model, not separation. In accordance with Jeroen Temperman's characterisations, the Commonwealth interacts with and accommodates different religions without preferential treatment.[60] Through religious education, tax exemptions and the presence of Christianity, religion occupies an identifiable space within the public sphere.

Meanwhile, Sweden resembles separation more closely. Unlike Australia, Sweden used to have a monist relationship with religion, according to Darryn Jensen's paradigm.[61] Before 2000, the Church of Sweden was the established church in Sweden,[62] and enjoyed preferential treatment. For instance, the Church once had a synod with veto power over government laws.[63] Although the relationship between church and state softened throughout the 20th century, separation was cemented in 2000, with the *Communities of Faith Act* denationalising the Church of Sweden.[64] Despite now reflecting Rex

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[53] Renae Barker, *State and Religion: The Australian Story* (Routledge, 2019) 49-67.
[54] *Ex parte The Rev George King* (1861) 2 Legge 1307, 1314 (Dickinson CJ).
[55] *Australian Constitution* s 116.
[56] Jean-Louis Halperin, 'Law in Books and Law in Action: The Problem of Legal Change' (2011) 64(1) *Maine Law Review* 45, 46.
[57] Barker (n 53) 87.
[58] Catherine Hanrahan, 'Here's How Australia's Schools are Funded—And We Promise Not To Mention Gonski', *ABC News* (News Article, 20 April 2018) <https://www.abc.net.au/news/2017-05-30/school-funding-explained-without-mentioning-gonski/8555276>.
[59] Ann O'Connell, 'The Tax Position of Charities in Australia—Why Does It Have To Be So Complicated?' (2008) 37(1) *Australian Tax Review* 17, 22-3.
[60] Barker (n 53) 24, citing Jeroen Temperman, *State-religion Relationships and Human Rights Law: Towards a Right to Religiously Neutral Governance* (Brill, 2010).
[61] Ibid 21, citing Darryn Jensen, 'Classifying Church-state Arrangements' in Nadirsyah Hosen and Richard Mohr (eds) *Law and Religion in Public Life: The Contemporary Debate* (Routledge, 4th ed, 2011) 15.
[62] Erik Sidenvall, 'Church and State in Sweden: A Contemporary Report' (2012) 25(2) *Dominant Churches in Europe* 311, 311-14.
[63] Ibid 313.
[64] *Lag om trossamfund* [Communities of Faith Act] (Sweden) 26 November 1998, SFS 1998:1593 [tr Legislation Online] <https://www.legislationline.org/download/id/5809/file/Sweden_act_religious_communities_signatures_2000_en.pdf>.

Ahdar and Ian Leigh's structural separation model,[65] Sweden gives a degree of preference to the once established Church. In 2000, the Church of Sweden assumed the right to charge membership fees, while other religious groupings had to apply for government approval.[66] Despite this concession and others, the law indicates that church and state occupy separate spheres in Sweden, while the line is blurred in Australia.

The church-state relationship in each jurisdiction had ramifications in the abortion debate, and thus conscientious objection. Despite ambiguous separation, religion occupied a noteworthy space in debates in Victoria and NSW. The abortion debate revealed the indispensable interaction between church and state. In Victoria, Catholic Archbishop Denis Hart threatened the closure of Catholic maternity wards due to his rejection of the obligation to refer in section 8.[67] This threat made clear the influence religions, especially Catholicism, have in Australian society given its reflection of the pluralist model. Catholic organisations manage several hospitals in Victoria,[68] meaning the availability of health services is threatened by disagreement over conscientious objection. Religion has featured heavily in Australian parliamentary debates, demonstrating the sway it has over the decisions of representatives. In relation to conscientious objection, many NSW representatives argued that the compromise position still compels doctors to go against their religious beliefs. For example, Dominic Perrottet argued that the obligation to refer had the effect of 'making them a participant in an act they disagree with'.[69] The influence of religion within the legislature was evident on both sides of the abortion debate, however. In endorsing abortion generally, Jenny Aitchson quoted Matthew 7:1-2 in the New South Wales debate, which states, 'judge not, that ye be not judged'.[70]

Religion did play a role in the abortion debate in Sweden, however, the force of religion relative to Australia was marginal. A crisis involving a woman travelling to Poland for an abortion in the 1960s sparked the movement to decriminalise abortion.[71] Committees recommended legal change, coming to fruition in 1974.[72] Within these committees, the Church of Sweden took a pro-life position, despite initial indications of a pro-choice position encouraged by the sexual liberation movement.[73] Widespread public support for decriminalisation and sexual liberation, alongside a conception of abortion as a socioeconomic issue rather than a reckless sin, defeated the pro-life minority.[74] Since the 1970s, the Church's position has altered significantly as it provides support to women following abortions and

[65] Barker (n 53) 26, citing Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2nd ed, 2013) 139–140.
[66] Sidenvall (n 62) 314.
[67] Sifris (n 46) 908.
[68] 'Health Care Finder—VIC', *Catholic Health Australia* (Web Page, 2018) <https://www.cha.org.au/health-care-finder-vic>.
[69] New South Wales, *Second Reading Debate,* Legislative Assembly, 6 August 2019, 19:43 (Dominic Perrottet).
[70] Ibid, 21:42 (Jenny Aitchson), quoting Matthew 7:1-2 (King James Version).
[71] Mathilda Tarandi, 'Law Over Mind, and Body?' (Master of Laws Graduate Thesis, Lund University, 2017) 37-43.
[72] *The Abortion Act* (n 27).
[73] Tarandi (n 71) 46.
[74] Linders (n 50) 387.

publicly supports the national laws.[75] Greater support for abortion, and the Church's moderate position, could help explain the position of conscientious objection in Sweden. The Church's role in the political debate was outweighed by other forces, and according to Annulla Linders, an extreme anti-abortion stance was unfeasible.[76] In contrast, religion, and in particular the Catholic Church, has a greater influence in Australia. Although not entirely supported by religious figures, the compromise position was the only viable option in order to prevent the alienation of the Church – a provider of health and education services.

### B. *Religiosity*

Although occupying different areas on the spectrum of church-state relations, Australia and Sweden resemble each other when considering the religiosity of their populations. According to the Swedish Government, 58 percent of Swedes are members of the Church of Sweden.[77] Smaller numbers of Catholics and Orthodox Christians also contribute to the largely Christian-identifying population.[78] In Australia, census data suggests a similar level of affiliation with Christian denominations. In 2016, 52.1 percent of Australians identified as Christian.[79] These inflated statistics may not reflect the actual religiosity of either population, however. The same Swedish Government source indicates that only 19 percent of Swedes actually identify as religious,[80] earning Sweden its label as one of the world's most secular nations.[81] Richard F Tomasson argues that in Sweden, 'beliefs are vague, held with low intensity, and the level of non-belief is high'.[82] Similarly, attendance at Church has steadily declined in Australia since the 1970s,[83] and Australians are seen as 'easygoing about religion'.[84] Although religiosity is broad and can be measured in myriad ways, it appears that religious belief and participation—both key elements of religion—are down in both nations.

Naturally, the religiosity of the population will have an impact on the use of conscientious objection. While levels of religiosity are comparable across the jurisdictions, the desire of Australian practitioners to use conscientious objection may be slightly greater. According to some studies, up to 15 percent of practitioners may have views making them opposed to abortion.[85] However, other studies have

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[75] Church of Sweden (n 11).
[76] Linders (n 50) 385.
[77] Scott Sutherland, '10 Fundamentals of Religion in Sweden', *Swedish Institute* (Web Page, 16 April 2019) <https://sweden.se/society/10-fundamentals-of-religion-in-sweden/>.
[78] 'Pew-Templeton Global Religious Futures Project', *Pew Research Center* (Web Page, 2016) <http://www.globalreligiousfutures.org/countries/sweden/religious_demography#/?affiliations_religion_id=11&affiliations_year=2010>.
[79] '2016 Census Data Reveals "No Religion" Is Rising Fast', *Australian Bureau of Statistics* (Media Release, 27 June 2017) <https://www.abs.gov.au/AUSSTATS/abs@.nsf/mediareleasesbyReleaseDate/7E65A144540551D7CA258148000E2B85>.
[80] Sutherland (n 77).
[81] Richard F Tomasson, 'How Sweden Became So Secular' (2002) 74(1) *Scandinavian Studies* 61, 61.
[82] Ibid.
[83] Tom Frame, *Losing My Religion: Unbelief in Australia* (University of New South Wales Press, 2009) 90.
[84] Ibid 103.
[85] Keogh (n 25) 2.

suggested that many doctors have delayed or deterred women.[86] These statistics are relatively small, however, compelling doctors to provide abortions would cause disagreement within the medical field. Furthermore, the proportion of Catholics in Australia is higher than in Sweden, meaning that more doctors may have views completely opposed to abortion, unlike some non-Catholic Christian churches that take more moderate positions. In Sweden, however, the medical field has fostered a pro-choice culture. Although the Grimmark case provides a strong example of dissent, it is unlikely that many practitioners would be against abortion, and therefore use conscientious objection. This can be explained by the power of departments to fire employees who won't provide abortions, as well as mandatory abortion training in medical schools.[87] The medical field reflects the opinion in *Rex v Bourne* that an objecting doctor 'ought not to be a doctor practising in that branch of medicine'.[88]

## V. DEMOGRAPHIC CHANGE

The interplay between conscientious objection in relation to abortion laws and Christian views has largely been the subject of this essay given the largely Christian populations of both jurisdictions. However, more recent demographic changes may present questions and challenges in the future of conscientious objection to abortion. Since the turn of the century, both Sweden and Australia have seen a rise in followers of Islam. Islam was not included on the Australian census until 2001, when Muslims accounted for 1.5 percent of the population,[89] but in 2016, this increased to 2.6 percent of the Australian population.[90] Migration has similarly increased Sweden's Islamic population to approximately 8.1 percent.[91] These rising figures indicate a developing gap within the largely Christian conscientious objection discourse. Islamic views on abortion are by no means homogenous, rather, they differ depending on sect and the perceived moment of 'ensoulment.'[92] The Qur'an has been interpreted to imply that ensoulment begins at 120 days when 'Allah sends an angel to breathe the soul into his body'.[93] Thus, *fatwa* have been issued allowing abortion up to 4 months in some countries.[94]

[86] Ibid 5.
[87] Fiala et al (n 36) 202.
[88] *Rex v. Bourne* [1939] 1 K. B. 687 (MacNaghten J).
[89] Australian Bureau of Statistics, *Year Book Australia, 2004* (Catalogue No 1301.0, 27 February 2004) <https://www.abs.gov.au/ausstats/abs@.nsf/0/56c35cc256682bc0ca256dea00053a7a?OpenDocument>.
[90] Australian Bureau of Statistics (n 79).
[91] 'Europe's Growing Muslim Population', *Pew Research Center* (News Article, 29 November 2017) <https://www.pewforum.org/2017/11/29/europes-growing-muslim-population/>.
[92] Arif Abdul Hussain, 'Ensoulment and the Prohibition of Abortion in Islam' (2011) 16(3) *Islam and Christian-Muslim Relations* 239.
[93] Yassar Abdullah Alamri, 'Islam and Abortion' (2011) 43(1) *Journal of the Islamic Medical Association of North America* 39, 39.
[94] Leila Hessini, 'Islam and Abortion: The Diversity of Discourses and Practices' (2008) 39(3) *Institute of Development Studies Bulletin* 18, 23.

Contemporaneously, teachings from the Qur'an on infanticide have been interpreted as prohibiting abortion.[95]

These differing approaches do not necessarily indicate whether Muslim medical practitioners would object to abortion. Studies have demonstrated support for conscientious objection among religious medical practitioners and students. In a study of around 1500 students, 76.2 percent of Muslim students supported the right of doctors to object to providing services on the basis of moral, religious or cultural beliefs.[96] In the same study, roughly half of Catholics and Protestants supported conscientious objection.[97] As Australian law generally allows for conscientious objection, Muslim doctors with a conscientious objection to abortion would be able to refer patients to other services, rather than be compelled to provide the service. Naturally, Muslim doctors, like their Christian counterparts, in opposition to abortion, may believe that the obligation to refer could impede their religious beliefs. For Edmund D Pellegrino, Muslims, Catholics and Jews share the significance of doctrine in their lives, and practicing medicine contra to these teachings would 'subvert conscience'.[98] Based on this survey alone, a greater clash could arise in Sweden where conscientious objection is prohibited. However, as discussed, the medical field currently mandates abortion training and has the power to reject conscientious objectors, meaning objectors from all religious identifications are excluded from medical professions. The future of conscientious objection in each jurisdiction is unpredictable, but naturally, differing viewpoints will need to be considered within the wider context of largely Christian legal systems adapting to diversity.

## VI. CONCLUSION

Conscientious objection to abortion is an issue intrinsically linked to religion, and has been dealt with in numerous ways across jurisdictions. Victoria and Sweden take antagonistic approaches to the issue. Upon analysis, there are some factors explaining these contrasting systems. The prioritisation of rights is a major point of difference. Conscientious objection in Victoria is facilitated by the conviction that civil and socioeconomic rights should be balanced, meanwhile in Sweden, socioeconomic rights are primordial. Women's rights are prioritised over the civil freedoms of practitioners, reflecting Sweden's 'larger social democratic project'.[99] The striking difference between the two jurisdictions is the place of Catholicism. While the dominant Church of Sweden is formally separated from the state, religion, and indeed Catholicism as Australia's largest Christian grouping, occupies an ambiguous space. The

[95] Donna Lee Bowen, 'Respect for Life: Abortion in Islam and The Church of Jesus Christ of Latter-Day Saints' (2001) 40(4) *Brigham Young University Studies Quarterly* 183, 190-1.
[96] Sophie LM Strickland, 'Conscientious Objection in Medical Students: A Questionnaire Survey' (2012) 38(1) *Journal of Medical Ethics* 22, 23.
[97] Ibid.
[98] Pellegrino (n 2) 239.
[99] Linders (n 50) 387.

influence of Catholicism is clear in the funding of religious schools and hospitals, and thus must be considered in the abortion debate. Christian views on abortion are heterogenous, but Catholicism is firmly pro-life. Disallowing conscientious objection in Victoria would alienate a large religious grouping in Australia, as Catholics have an obligation to oppose abortion through conscientious objection. This factor, along with different discourses relating to rights, is key in understanding the laws in Victoria and Sweden. These laws are currently shaped by Christian and secular ideals, and may face challenges in the future as both jurisdictions undergo demographic changes.

## From an idea to reality: CLWA's online referral tool

*Kate Offer**[1]

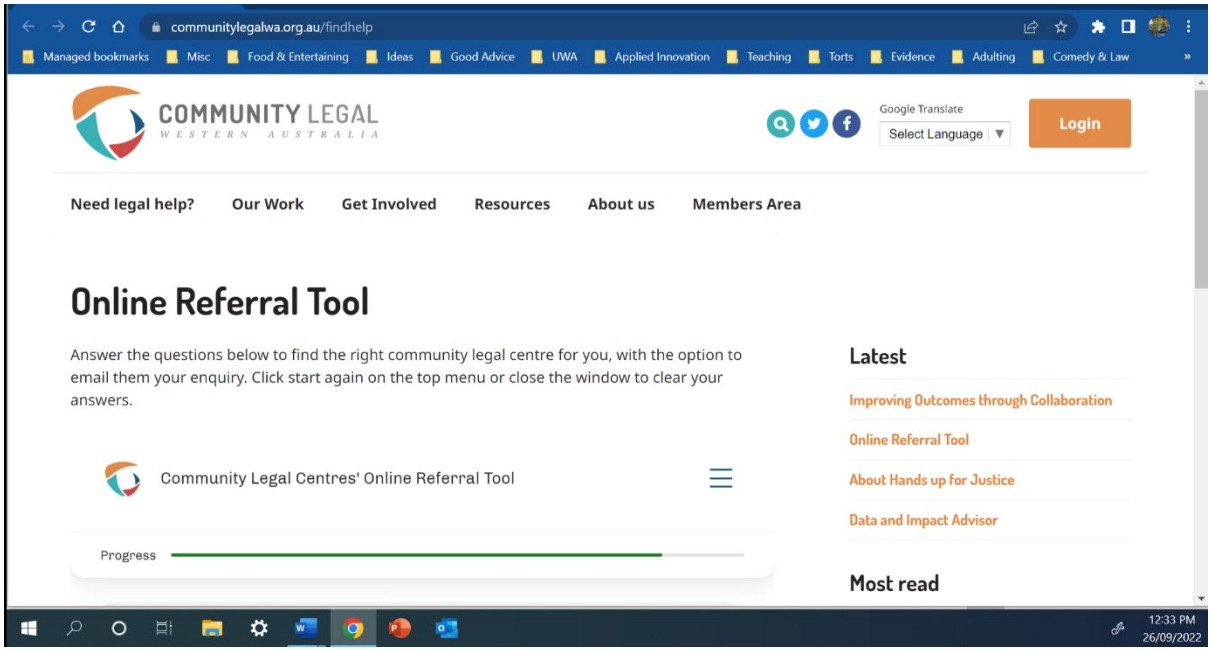
In August 2018, the UWA Law School in conjunction with The Legal Forecast, a not-for-profit organisation, and the Piddington Society, held the inaugural 'Disrupting Law' Hackathon (which has since become an annual event). The primary aim of a hackathon is to get the legal community to think creatively about improving how law is practiced and/or accessed. During the 54-hour weekend competition, teams of Law students are supported by lawyers from sponsoring Law firms, and they work together to create a solution to a legal problem, which is then pitched to a judging panel, 'shark tank' style, in front of a public audience. It's a wonderful weekend and always exciting to see how a group of law students, who will invariably say at the beginning of the hackathon that they don't have any ideas, surprise themselves by coming up with a way to make law better. And, importantly, these good ideas do not necessarily disappear once the weekend is over, as was demonstrated by our inaugural Hackathon!

The 2018 Hackathon winning team, comprised of Astrid Sweeney, Georgina Due, Liam Heldt, Linda Mulenda & Tayla Byatt, came up with 'Lawra', an avatar pop-up for Community Legal WA's (CLWA) website that could direct people to the community legal centre that best suits their needs thus saving the busy CLCs time on the phone redirecting people that they could better spend elsewhere. It was a deceptively simple idea which, although very doable from a technological perspective, had not yet been done! Over the years since (which, of course, included many pandemic related delays), CLWA, the 'Lawra' team, and various student volunteers have collaborated to bring 'Lawra' to life. A prototype was initially completed with the assistance of Coders for Causes (a UWA Computer Science student society, which creates technical solutions for charities) on the original plan to create a 'plug-in' for the CLWA; two students from the original LAWRA team, Astrid Sweeney and Georgina Due, then completed internships at CLWA and worked to develop an intake questionnaire and to map out the decision tree that would be required for the plug-in. In conjunction with CLWA, a decision was made to shift to a no-code software platform, which would enable information to be updated more easily, thereby creating a more sustainable product. In 2021 we began working with Josef, a chatbot software provider, and I recruited a team of volunteer Law students to train in the software and build the chatbot, meeting weekly to collect updated information from the CLCs and to work on the chatbot. Three of those volunteers, Christie Oey, Robyn Hollis-Brown and Sam Dulyba worked further on the chatbot as part of the Legal APPtitude unit in Semester 2 2021.

The chatbot was launched in 2022 and is now featured on the CLWA website. It was a long time from start to finish but that little idea has finally become a reality, one which is helping to improve access to

* Deputy Head of School & Director of Applied Innovation at the UWA Law School

legal services for the community. I am so proud of and grateful to all the students who played a part in this and hope that more and more Hackathon ideas will find their way from the creative brains of our law students into the community!



## First Nations leaders sue Commonwealth over climate change

Elena McNiece*[2]

First Nations leaders from remote islands in the Guda Maluyligal Nation in the Torres Strait are taking the Australian government to court for failing to prevent the impacts of climate change.

Uncle Pabai and Uncle Paul are Traditional Owners of Boigu Island and Saibai Island, respectively, and their ancestors have lived in the Torres Strait for more than 65,000 years. Now, they are on the frontline of the climate crisis and face losing their island homes under rising seas.

**"We are born to these islands, they are our mothers, our identities, who we are. For thousands of years, our warrior families fought off anyone who tried to take our homelands from us. But now we could lose the fight to climate change."**

**- Uncle Pabai**

Uncle Pabai and Uncle Paul have turned to the courts to protect their communities from disaster. They are arguing that the Commonwealth has a duty to protect the people, islands, and culture of the Torres Strait. The duty arises from the common law of negligence, the Torres Strait Treaty (between Australia and Papua New Guinea, providing protection for the way of life of traditional people of the Torres Strait Protected Zone) and the Native Title rights of Torres Strait Islander People.

The Torres Strait is particularly vulnerable to climate change, and unless action is taken to prevent global warming of more than 1.5 degrees, their island homes may disappear under the sea along with 65,000 years of custom and culture which are recognised under Native Title. **Justice Mortimer, the Justice assigned to the case, has already acknowledged that people in the Torres Strait are "watching the march of the sea on a daily basis."** Uncle Pabai and Uncle Paul are asking the Australian Government to take pre-emptive steps to stop the impacts of climate change before they become Australia's first climate refugees.

The case was filed in October 2021 and the hearing has been set for four weeks in June 2023 - including a week of hearings on Country in the Torres Strait. This is an extraordinary step for the Court to take and an important opportunity for the Torres Strait community to participate in the justice process. Expert evidence will be heard at a second stage of the trial towards the end of 2023. The Court hopes to give its decision in the first half of 2024.

* Assistant Campaigner from Grata Fund

Torres Strait Islanders have a long history of fighting for their rights – and some of those battles have transformed the face of modern Australia. Torres Strait Islander man Eddie Mabo, took on the government through the courts and established that terra nullius was a lie, paving the way for land rights for all First Nations People in Australia.

People around the country have also come together to support Uncle Pabai and Uncle Paul in their case and shared their own stories about the climate impacts they have witnessed to show the government that climate change is happening to all Australians. You can show your support for Uncle Pabai and Uncle Paul by adding the climate impacts you've witnessed in your area, big or small.

The Australian Climate Case has been developed in partnership with the Urgenda Foundation, a team of international legal experts who have a proven record of successful climate change litigation.

In 2015, the Urgenda Foundation helped 886 people in the Netherlands take the Dutch government to court for not doing enough to prevent the impacts of climate change. They won the case in the District Court of the Hague and then won again at the two stages of appeal, with a final victory in the Supreme Court in 2019. The case was the first to establish that a government has a duty of care to protect people from climate harm. As a result of the groundbreaking case, the Netherlands now has some of the strongest climate policies in the world. Urgenda's case has become an inspiration for people around the world fighting for climate action through the courts.

Uncle Pabai and Uncle Paul are represented by class action firm Phi Finney McDonald and are partnering with the Dutch Urgenda Foundation. The case is supported by Grata Fund, a not-for-profit that supports marginalised communities to advocate for their legal rights. Grata Fund removes the financial barriers that prevent public interest test cases from going ahead.

**"If we become climate refugees we will lose everything: our homes, community, culture, stories, and identity. We can keep our stories and tell our stories but we won't be connected to Country because Country will disappear. That's why I am taking the government to court, because I want to protect my community and all Australians before it's too late."**

**- Uncle Paul**

Find out more about the case and how you can stand behind Uncle Pabai and Uncle Paul at australianclimatecase.org.au


The Criminal Code
Part
XXXI
Offences against the person and relating to parental rights and duties and against the reputation of individuals
Sexual offe
s. 319
penetrate
which term includes the *labia*
urethra of any person w
dy of another person; or
ulated by another person.
except where the penetration is carried out for proper medical purposes; or
(b) to cause any part of the body of another person to penetrate to any extent the vagina (which includes the *labia majora*), the anus or urethra of the offender by part of the other person's body; or
(c) to introduce any part of the penis of the offender into the mouth of another person; or
(d) to engage in cunnilingus or fellatio; or
(e) to continue sexual penetration as defined in paragraph (a), (b), (c) or (d).
(2) For the purposes of this Chapter —
*consent* means a consent freely and voluntarily given and, without in any way affecting the meaning attributable to those words, a consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deceit, or any fraudulent means;
where an act would be an offence if done without the consent of a person, a failure by that person to offer physical resistance does not of itself constitute consent to the act;
a child under the age of 13 years is incapable of consenting to an act which constitutes an offence against the
(3) For the purposes of this Chapter, a reference to a person indecently dealing with a child or an incapable person includes a reference to a person —
permitting the child or incapable person to
tly with the person; or
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legislation.wa.gov.au
at 24 Dec 2021
SCAN ME

# WA CONSENT

## Intoxication is not sexual consent

**WA is one of the only jurisdictions in Australia that doesn't acknowledge how intoxication affects the ability to consent to sexual acts. WA Consent aims to change this.**

WA Consent began as "Consent On Campus" as it was created for a university assignment in 2021. The original campaign focused on a series of self-illustrated twitter infographics. I also created a petition to accompany the campaign. After submitting the assignment, I restructured the campaign to continue the cause. I wanted to include all people - not just university students. "Consent On Campus" became "WA Consent", and focus of the campaign shifted. Now, WA Consent focuses on gaining support through its petition.

The affects of intoxication on the ability to consent to sexual acts is not contentious. There is an abundance of scientific evidence that supports this sentiment. Furthermore, WA and Queensland are the only jurisdictions to ignore the issue. Every other jurisdiction in Australia acknowledges the topic.

If you cannot walk, you cannot consent.
If you cannot coherently speak, you cannot consent.
If you are highly intoxicated, you cannot consent.

Please sign the petition to show your support. I am working with the Centre for Women's Safety and Wellness to develop the campaign further. I hope to gain the attention of parliament and provide Western Australians with the same protections that most Australians have.

Scan the QR code to sign the petition, view the original infographics, or access the research!