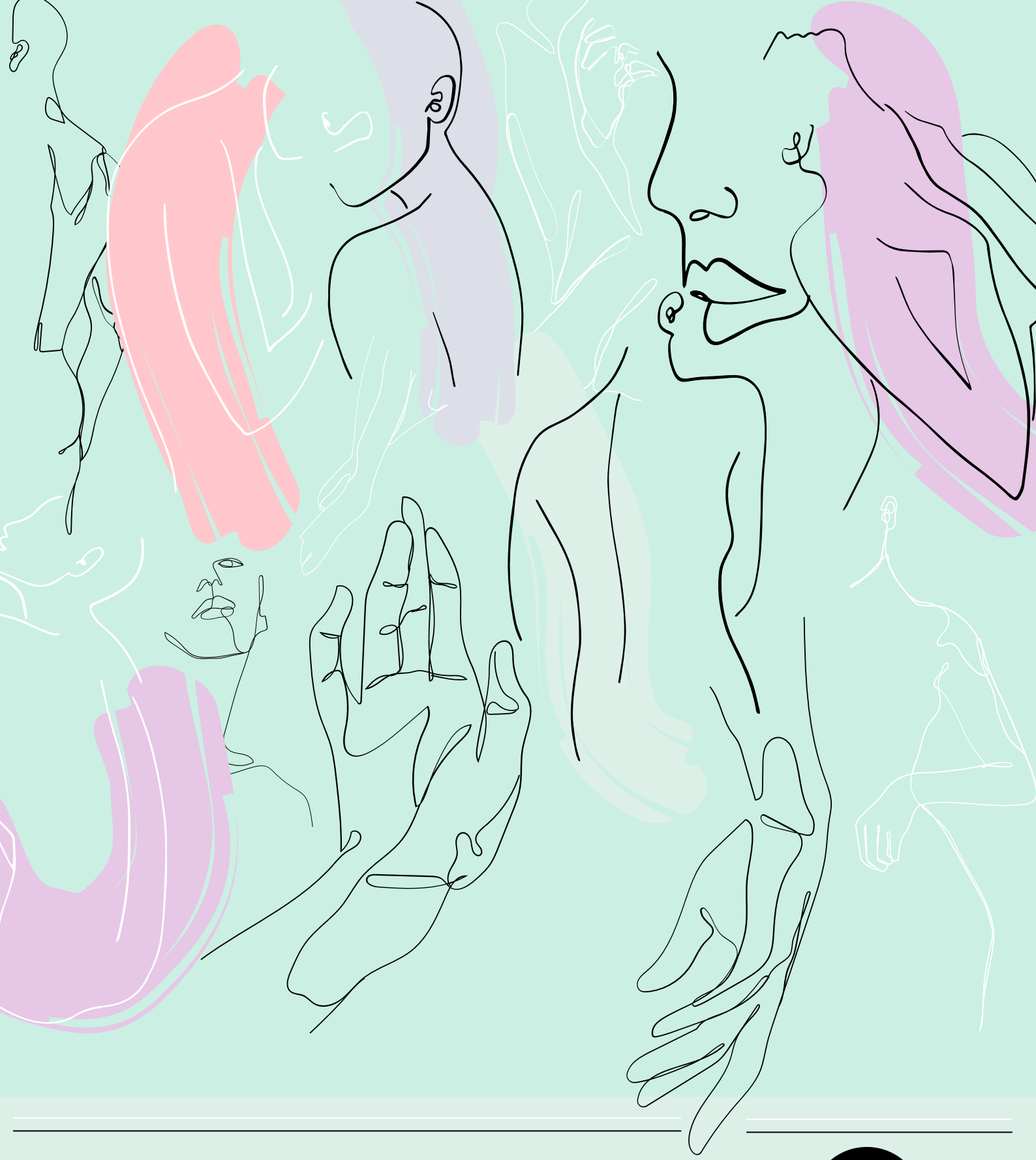

PANDORA'S BOX

2020: THE LAW AND THE HUMAN CONDITION

Cover: Rachel Moss

Pandora's Box

2020

The Law and the Human Condition

Editors

Heidi Moc, Lillian Burgess, Rory Brown, Tian Behenna, Melanie Karibasic and Mitree Vongphakdi

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FOREWORD

Carly Dennis[1] and Emma Phillips[2]

The intersection between law and psychology is an evolving and convoluted landscape, navigated by lawyers and advocates on behalf of their clients in pursuit of justice and equality before the law. Upholding individual human rights and liberties in this environment continues to be a significant challenge. Over the past five years, Queensland has welcomed the enactment and amendment of various legislative instruments which serve to codify human rights, strengthen equality, protect, and mandate a least restrictive approach to safeguard the rights and liberties of individuals, including those with mental illness and/or intellectual and cognitive disability with impaired decision-making capacity.[3]

Notwithstanding the significant steps that have been forged through law and policy reform, the purpose of which is to strengthen and uphold the rights of individuals within our community; the practical implications for those affected by these complex policies and laws that invariably deprive people of their rights, liberty, and freedom, is that the protective aspects of the law do little to uphold the fundamental human rights most of the population enjoy and take for granted.

Queensland Advocacy Incorporated (QAI) is privileged to advocate for some of the most vulnerable people in Queensland with mental illness and disabilities, providing legal advice and representation to individuals experiencing a myriad of human rights issues including those extending to involuntary treatment orders, guardianship orders and restrictive practices. QAI's Mental Health Advocacy Practice advocates on behalf of people subject to involuntary treatment orders such as Forensic Orders (Mental Health or Disability) where the Mental Health Court has made a finding of unsoundness of mind or unfitness for trial

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[2] Principal Solicitor, Human Rights Advocacy Practice, QAI.

[3] *Mental Health Act 2016* (Qld); *Human Rights Act 2019* (Qld), amendments to the *Guardianship and Administration Act 2000* (Qld).

(temporarily or permanently) or for those subject to Treatment Authorities[4] deemed to lack capacity to consent to treatment for their mental illness.

Individuals subject to involuntary treatment experience significant restrictions on their human rights. These include but are not limited to, constraints on freedom of movement and cultural rights, indefinite detention and seclusion, and forcible medical treatment including pharmacological intervention and regulated treatments such as electroconvulsive therapy. Prior to the commencement of the *Mental Health Act 2016* (QLD) (*'MHA2016'*), there was no requirement under relevant law to engage legal representation for individuals subject to involuntary treatment or for mental health law matters generally.[5] In response to and in recognition of the complexity of the health law interface, and the significant limitations placed on the rights and liberties of vulnerable individuals with mental illness and disability, changes were effected to mental health law in Queensland, strengthening individual rights and protections. The *MHA2016* and policies made under the Act[6] promote least restrictive practices for the delivery of treatment and care of people who have mental illness and lack capacity to consent to be treated; enable persons to be diverted from the criminal justice system if found to be unsound of mind or unfit for trial; and protect the community if persons diverted from the criminal justice system may be at risk of harming others.[7]

One of the significant changes was provision for greater safeguards for the rights of individuals with mental illness and disability, including the appointment of a legal representative for certain categories of matters.[8] Notwithstanding this monumental change,

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[4] Treatment Authorities, formerly known as Involuntary Treatment Orders, are orders sanctioned under the *Mental Health Act 2016* (Qld) and reviewed by the Mental Health Review Tribunal (MHRT) at scheduled intervals for the duration of the order as determined by the *MHA2016*.

[5] *Mental Health Act 2000* (Qld).

[6] The Chief Psychiatrist's policies are made by the Chief Psychiatrist, an independent statutory officer with functions, powers and responsibilities under the *Mental Health Act 2016*, including the ability to make policies to facilitate its proper and efficient administration. The Chief Psychiatrist Policies are mandatory for anyone performing functions under the Act.

[7] *Mental Health Act 2016* (Qld) s 3.

[8] *Mental Health Act* 2016 (Qld) s 740.

the vast majority of adult Queenslanders subject to Treatment Authorities are not appointed legal representatives for their matters under the *MHA2016*, despite the high frequency of unwellness among this demographic, and in circumstances where a person is detained and treated against their will.

QAI is cognisant of the disadvantage that individuals who do not receive adequate support to understand their legal rights and navigate the complex health law jurisdiction experience, especially persons with disability and mental illness who increasingly experience barriers impacting their human rights. This is a significant access to justice issue. It is particularly concerning, having regard to the acute, unmet legal need for persons with disability and mental illness and compels QAI's continued work in this space.

At QAI we believe that all human beings are equally important, unique and of intrinsic value and as an organisation we seek to bring about a common vision where all human beings are equally valued. In recognition of our mission and values, QAI auspiced the campaign for a Human Rights Act (*HRA*)[9] in Queensland, and exulted the commencement of the widely advocated for and debated Act in 2020,[10] which was a significant milestone for Queensland and the nation. The main objects of the *HRA* are to protect and promote human rights and to create a culture that respects and promotes human rights in Queensland, both within government and more broadly. QAI is proud to be the first non-Government entity to be gazetted as a 'public entity' for the purpose of the *HRA*.[11] QAI references the human rights enshrined in the *UN Convention on the Rights of Persons with Disabilities* (CRPD) as the standard to aspire to, recognising that human rights belong to everyone and are fundamental to an inclusive society.

Many of the human rights protected by the *HRA* are limited by the operation of the *MHA2016* pursuant to the application of section 13 of the *HRA*. This section provides for the limitation of human rights, in circumstances where it is reasonable and can be

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[9] *Human Rights Act 2019* (Qld).

[10] Ibid.

[11] Declaration of a Public Entity (No.1) 2020.

demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

The reality of involuntary treatment for many Queenslanders is the ongoing curtailing of freedoms and liberties, as a consequence of indefinite detention, forcible treatment and significant restrictions placed on individuals which engages their human rights to freedom of movement, protection from torture and cruel, inhuman or degrading treatment and cultural rights. This is particularly problematic for our First Nations People who are already experiencing multiple layers of disadvantage and are further impacted when subject to involuntary treatment and indefinite detention. Our First Nations People are often detained for treatment in locations far removed from community, country and family; and thrust into a system of western medicine, which focuses on diagnosis and treatment and in many instances fails to observe the significance of cultural rights including different cultural healing modalities. This intersectional disadvantage compounds the detrimental effect that long term institutionalisation has on individuals' mental and physical health and psychosocial functioning.

The confluence of law and psychology often results in strong debate between medical professionals and legal professionals when restrictions on human rights are overshadowed by the need to "treat" and "care", at the expense of individual freedoms and liberties. Needless to say, the health law jurisdiction is continually evolving, and involuntary treatment of persons with mental illness and disability is at the 'pointy end' of human rights concerns in current times.

There continues to exist significant systemic issues and shortcomings preventing persons with mental illness and disability from living an inclusive life in the community with requisite support and services catering for individual needs. Despite the positive legislative reform in this jurisdiction, the law continues to sanction significant human rights restrictions, which sit uncomfortably in the context of Australia's international human rights obligations.[12] Mental health law remains the 'elephant in the room' in the health law jurisdiction.

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[12] For example, *UN Convention on the Rights of Persons with Disabilities* art 19, which recognises the equal right of all persons with disability to live independently and be included in the community, and the

QAI continues to advocate to realise the vision and mission held by a small group of passionate Queenslanders with lived experience of disability who established QAI in 1987, to challenge systems that create barriers to inclusion and perpetuate inequality in our community. QAI is foremost a systems advocacy organisation, focused on changing laws, policies and practices to improve the lives of the most vulnerable people with disability in Queensland. While progress has been made, further development is needed to ensure greater human rights protections for people with mental illness and disability in Queensland.

rights enshrined in the *UN Convention Against Torture*, which extends to prohibit cruel, inhuman or degrading treatment.

A NOTE FROM THE EDITORS

This year can be characterised in many different ways. It would be accurate to call this year 'challenging' or 'unprecedented'. A sequence of remarkable events, devastating natural disasters, a global pandemic, and civil unrest has left global and local communities feeling dejected and deeply divided. However, throughout the year there have also been stories of hope, in which our shared humanity and kindness have prevailed. On the canvas of 2020, the human condition has been exposed and amplified. Where the COVID-19 pandemic has caused pain, suffering and deep isolation it has also brought stories of courage, selflessness and revealed the community's willingness to make sacrifices for the common good.

In the same way that 2020 has revealed a dichotomy that exists within society, there is also a dichotomy within the law as it reflects the human condition. On one hand, the law can provide certainty and structure, and guide one's pursuit of success. On the other hand, the law can, by virtue of its history, act to consolidate injustice and promote ingrained prejudices. To truly understand the law, we must understand it as a creation of human ingenuity. Where it can reflect humankind's formidable intellect and respectability, it can also unwittingly punish and condemn the most vulnerable. Thus, it is only through the lens of the law as a human endeavour that we can seek to enhance the good achieved by legal institutions, and to reform and transform those laws which do not promote justice.

This edition of Pandora's Box seeks to explore law as a human endeavour. From examining the psychological and philosophical underpinnings of various aspects of the law, it seeks to give readers a cause to reflect on what the law achieves well and what can be improved.

The Editors are grateful to each of the contributors. The Editors would also like to extend their gratitude to Rachel Moss for designing the cover for the journal.

Heidi Moc, Lillian Burgess, Tian Behanna, Rory Brown, Melanie Karibasic and Mitree Vongphakdi

2020 Editors, Pandora's Box

ABOUT PANDORA'S BOX

Pandora's Box is the annual academic journal published by the Justice and the Law Society of the University of Queensland. It has been published since 1994 and aims to bring academic discussion of legal, social justice and political issues to a wider audience.

The journal is not so named because of the classical interpretation of the story: of a woman's weakness and disobedience unleashing evils on the world. Rather, we regard Pandora as the heroine of the story – the inquiring mind – as that is what the legal mind should be.

Pandora's Box is launched each year at the Justice and the Law Society's Annual Professional Breakfast.

Pandora's Box is registered with Ulrich's International Periodical Directory and can be accessed online through *Informit* and EBSCO.

Additional copies of the journal, including previous editions, are available. Please contact pandorasbox@jatl.org for more information or go online at http://www.jatl.org/ to find the digitised versions.

ABOUT THE CONTRIBUTORS

Professor Arie Freiberg is an Emeritus Professor, and former Dean of the Faculty Law at Monash University. Emeritus Professor Freiberg is a fellow of the Academy of Social Sciences, the Australian Academy of Law, and in 2009, was made a Member of the Order of Australia for his service to law. Emeritus Professor Freiberg has published widely, on matters ranging from juvenile justice to environmental protection, and is particularly expert in sentencing, non-adversarial justice and regulation.

Kieran Pender is a visiting fellow at the ANU College of Law and serves on the advisory council of the Global Institute for Women's Leadership. He previously led the International Bar Association's work to address sexual harassment in the legal profession, conducting the largest global survey on bullying and sexual harassment in the legal profession to date. Mr Pender is particularly interested in whistleblower protections, anti-corruption and employment law.

Madeleine Castles is a law clerk at Bradley Allen Love Lawyers. Ms Castles interned at the prestigious International Bar Association Legal Policy and Research Unit and was as a paralegal at Youth Law Centre ACT. She co-authored, with Kieran Pender and Tom Hvala, the influential paper 'Rethinking Richardson: Sexual Harassment Damages in the #MeToo Era.

Robyn Bradey is an internationally recognised mental health consultant with over 40 years' experience. Since 2008, Ms Bradey has specialised in training, consulting and supporting the legal profession in Australia, New Zealand and the United Kingdom. Ms Bradey is currently working as a consultant and trainer for the Federal Court of Australia, the UK Bar and Inns of Court, the New Zealand Law Society, the Bar Association of NSW, and many other agencies and organisations. She has written five books and numerous professional papers.

Dr Holly Doel-Mackaway is a Senior Lecturer with the Macquarie Law School. Dr Doel-Mackaway previously worked for the United Nations and various international non-government organisations as a lawyer, providing specialised advice on international human

rights law pertaining to children and young people. Dr Doel-Mackaway's PhD from the Macquarie Law School received the Executive Dean's Award for Excellence in Higher Degree Research for its exploration of Aboriginal children and young people's participation in law and policy development.

Professor Kieran Tranter is the Chair of Law, Technology and Future in the Queensland University of Technology's School of Law. He is the founding General Editor of Law, Technology and Humans. Professor Tranter has won multiple awards for his pedagogy, particularly in the fields of higher-degree research and law reform. Professor Tranter's research focuses on how humans legislate, live with, and are changed by technology.

Professor Jeremy Gans is a Professor in Melbourne Law School. In 2007, Professor Gans was appointed as the Human Rights Adviser to the Victorian Parliament's Scrutiny of Acts and Regulations Committee. He is particularly expert in the role of evidence in the criminal justice system, and the limits of the jury system. In addition to his pedagogy and research, Professor Gans is a public commentator and has facilitated debate on matters of criminal justice in multiple forums.

AN INTERVIEW WITH EMERITUS PROFESSOR ARIE FRIEBERG

To turn to the first question, I would like to broadly ask you about how law and psychology interact. In your paper* Psychiatry, Psychology and Non-Adversarial Justice: From Integration to Transformation [1] *you discussed the idea of an "interdisciplinary approach" to how lawyers, psychologists and psychiatrists work together in the justice system. To start off, what can lawyers learn from psychologists and what can psychologists learn from lawyers?

It was very interesting to reread something I wrote over a decade ago. To review my thoughts and academic aspirations was like visiting an old friend. In that article I had a moderate swipe at the concept of "law and". I was trying to think beyond the idea of two separate, distinct disciplines.

As lawyers, we have a lot to learn from psychology. Psychologists are utilised in many areas of legal practice. For example, psychologists prepare pre-sentence reports or give evidence about a person's mental state and the various conditions a person might have which may reduce their criminal culpability. We also have psychologists who give evidence about eye-witness identification. I did some research about four decades ago into eye-witness identification. It was a real "eye-opener" for me, because I realised that the law had a limited understanding of the nature and fallibilities of human memory.[2] So, as lawyers, we have enormous amounts to learn from psychologists about the vagaries of the human mind, about perception, memory and cognition.

What can psychologists learn about law? Psychologists can learn about the rigour that is required when giving evidence in court. Psychologists who are involved in the justice system also need an understanding that courts require evidence, not vacuous, equivocal statements,

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[1] Arie Freiberg, 'Psychiatry, Psychology and Non-Adversarial Justice: From Integration to Transformation' (2010) 18(2) *Psychiatry, Psychology and Law* 297.

[2] See eg, Ian Coyle, David Field and Glen Miller 'The Blindness of the Eye-witness' (2018) Australian Law Journal 82(7) *Australian Law Journal* 471; Steven Clark, Aaron Benjamin, John Wixted, Laura Mickes and Scott Gronlund 'Eyewitness Identification and the Accuracy of the Criminal Justice System' (2015) 2(1) *Policy Insights from the Behavioral and Brain Sciences* 175.

such as "on one hand X, and on the other hand Y". The law often requires more rigour and certainty because courts are not dealing with abstract ideas, but often the life of a particular human being. There is certainly a humility and modesty that goes with that.

Professor Freiberg, you mentioned 'pre-sentence reports'; can you please tell us a bit more about them and how they are used by a sentencing judge?

Prior to sentencing, the Court will receive a range of reports. Most of these reports are prepared by correctional officers as to an offender's suitability for a community correction order or a probation order, or something like that. If other, more particular, forms of treatment are required (for example, if there are indications of substance abuse, gambling addictions, family violence, or psychological trauma), psychologists or psychiatrists may write reports about an offender's culpability or mental capacity. Psychologists are drawn on extensively in these circumstances, particularly where a defendant can afford to get private, independent advice.

A sentencing judge might rely on these reports quite extensively. Perhaps, sometimes, a certain cynicism creeps in, where decision makers are aware that certain health professionals have a reputation for providing certain kinds of advice. As such, psychiatrists and psychologists need to be careful to maintain their integrity, and not merely be a "gun for hire". Certainly, there are real dangers in providing formulaic reports which are based on short and scant interviews with offenders. Judges see these reports day in and day out and they get to know what value those reports can give and they are wary of those whose opinions are predictable. Ultimately the decision is that of the judge. However, it is appropriate for them to take into account a wide range of evidence, including that frome psychiatrists, psychologists, and corrections officers.

Professor Freiberg, you have over 45 years of experience in researching sentencing. You have been an advocate for maintaining judicial discretion in sentencing regimes. However, this needs to be balanced with an understanding that judges are human and fallible to psychological biases. How can we balance preserving judicial discretion with the need to ensure integrity in sentences, such that there are not unjustifiable disparities in sentences?

That is a difficult question. I have a very firm commitment to the idea of judicial discretion. I think the concept of mandatory, or even presumptive, sentencing needs to be treated with extreme caution because these methods do not allow for the nuances of a particular case to be taken into consideration. I do not believe that *a priori* decisions, as required by mandatory sentencing, can provide fair and just outcomes. Rather, mandatory and presumptive sentences are aimed at appeasing the public who think judges are too lenient or too idiosyncratic. On one hand there are great dangers if there is no discretion, or very limited discretion. On the other hand, I am not sympathetic to unfettered, or unbridled discretion, where judicial biases, conscious or not, can result in unjustifiable disparity in sentences. Such unfettered discretion can result in circumstances where a judge may take into account factors which are inappropriate, unnecessary and unfair – such as biases in relation to gender, race, or even the way an offender looks. Indeed, there are some famous studies which have revealed that judges sometimes sentence a certain way depending on what time of the day it is. That is, there is a so called "lunchtime bias".[3]

I am of the view that there is a middle way: sentencing regimes which provide for guided discretion. I believe that it is not inappropriate for the need for consistency to be an important factor that courts need to take into account.[4] This is contrary to what the High

[3] See eg, Shai Danzier, Jonathan Levav and Liora Avnaim-Pesso 'Extraneous Factors in Judicial Decisions' (2011) 108(17) *Proceedings of the National Academy of Sciences of the United States of America* 6889.

[4] See further, Sarah Krasnostein and Arie Freiberg, 'Pursuing consistency in an individualistic sentencing framework: if you know where you're going, how do you know when you've got there?' (2013) 76(1) *Law and Contemporary Problems* 265

Court has said in recent cases, where the court has put a premium on individualised justice.[5] In between strict controls on discretion and unfettered discretion there are ways in which judges can pay due regard to the need for consistency in "like" cases, where there are like facts, and like offenders. But there is never going to be a perfect fit. That is why I am not opposed to such mechanisms as guideline judgments. I am not even opposed to statutory statements of what judges should take into account, provided such statements do not unduly fetter judges.

You touched on guideline judgments and sentencing guidelines, could you elaborate on what those are?

Guideline judgments[6] are statements by a court, usually a Court of Appeals sitting as five judges, which provide a set of guiding principles in particular cases. These statements often give information to sentencing judges and magistrates about what the relevant factors to be considered are, and what weight is to be given to them. There will be a particular procedure where various parties are able to make submissions. A recent example in Victoria is the Victorian Court of Appeal decision in *Boulton*.[7]

Sentencing guidelines are different. We are currently considering implementing them in Victoria, modelling them as they exist in the UK. Sentencing guidelines provide a framework of factors that a court should take into account. These guidelines are created by a non-judicial body, such as the Sentencing Guidelines Council. The members of the council can be made up of active or retired judges, members of the community, victims, law enforcement officers, prosecutors and the like. As such, sentencing guidelines provide guidance by requiring judicial officers to step through a certain process of reasoning. They provide some indication of what an outcome might be, without requiring that outcome.

I think that there is some utility in statements, guidelines, or a set of principles which require a judge to think their way through a matter in a particular way, how to approach a case.

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[5] Elias v The Queen; Issa v The Queen [2013] HCA 31 at [27].

[6] See also, *Sentencing Act 1991* (Vic) s 6AB.

[7] *Boulton v The Queen* [2014] VSCA 342.

While recognising, in the end, it is ultimately the role of the judge to make the decision. I am worried about idiosyncratic judges, or inexperienced judges, who take irrelevant factors into account. If we could avoid those extremes, we would have a better system.

As I have said, the High Court is of the view that individualised justice is the most important factor. However, I think this can lead to unjustifiable disparities between cases. It can be said that there is too much restriction on judicial discretion in the United States' Federal jurisdiction, where there are very strict sentencing guidelines set by the United States Sentencing Commission. On the other hand, the High Court in Australia has emphasised the importance of being "consistently right" rather than "rightly consistent", and this is an interesting tension.

You touched on mandatory sentencing, which you consider to be too restrictive. Can you explain a bit about mandatory sentencing and presumptive sentences?

Mandatory sentences require judicial officers to impose a particular sentence, regardless of the circumstances. Presumptive sentences require judicial officers to order a particular sentence unless there are "exceptional circumstances". For mandatory sentencing the criticisms are legion. It does not allow for a judge to take into account the individual circumstances of the case. Secondly, mandatory sentences are often set at levels which are completely out of sync with what current sentencing practices have been. What often happens is an uplift of the sentencing range which is unnecessary for the purposes of deterrence or incapacitation. Mandatory sentences can be unnecessarily expensive. Given the background of many of the people who come before the criminal justice system, mandatory sentences make courts unable to take individual factors into account. This is undesirable given many people who come before the courts have a mental disorder, an intellectual disability, an acquired brain injury, or a history of substance abuse or trauma.

Mandatory sentencing yields results which pander to a politician's belief that the public believes sentences are too lenient. However, this is based on a false assumption, as shown

by studies in Tasmania and Victoria led by Kate Warner.[8] Rather, these studies indicate that people who are informed about sentencing are not in favour of mandatory sentencing, and those members of the public are quite happy to leave the discretion to the judge. Indeed, these jury studies have shown that the public appreciates that sentencing is hard work and emotionally difficult, so we want to leave this to the judge.[9]

Could you tell us a bit about your work examining how law and psychology can be better systematically integrated in the justice system and the concept of non-adversarial justice?

Colleagues and I have worked on developing the concept of non-adversarial justice. That is, the idea of how the criminal justice system could operate in a different way. The school of thought involves the marrying the disciplines of law, psychology and therapeutic jurisprudence, which is a social science approach to understanding how the criminal justice system operates. We perhaps need to go beyond the idea of a psychiatrist and a psychologist giving advice to the court, as the traditional approach. The idea was that you could change the way the system itself operates. Underlying this theory of non-adversarial justice is the transformation of the operation of the system. It is not just an 'add on' where experts provide reports to the court. It is the idea that the way we operate, the way we take evidence, the way we sentence, who is involved could be better structured to promote real justice. For example, if you think of the drug court, there is the drug court team working with the judicial officer, which team provides support and information to both the court and to the offender. This changes the way that we manage that person. In the drug court, using therapeutic jurisprudence ideas, the judge remains involved in the offender's progress, and will

[8] Kate Warner, Julia Davis, Maggie Walter and Rebecca Bradfield 'Public Judgement on Sentencing: Final Results from the Tasmanian Jury Sentencing Study' (2011) *Trends and Issues in Crime and Criminal Justice* 407; Kate Warber, Julia Davis, Maggie Walter, Rebecca Bradfield and Rachel Vermey, *Jury Sentencing Survey*. Report to the Criminology Research Council. Canberra: Criminology Research Council; Kate Warner, Julia Davis, Caroline Spiranovic, Helen Cockburn and Arie Freiberg "Measuring Jurors' Views on Sentencing: Results from the Second Australian Jury Sentencing Study' (2017) 19(2) *Punishment and Society* 180.

[9] Arie Freiberg, Kate Warner, Caroline Spiranovic and Julia Davis 'You be the Judge: No Thanks!' (2018) 43(3) *Alternative Law Journal* 154.

supervise, assist and work with a team of counsellors, social workers and correctional officers, prosecutors and defence counsel to achieve some sort of resolution. Indeed, the idea of therapeutic jurisprudence is focussed on structural change, and we see it in the mental health court, or the Assessment Referral Court, Koori Courts and the like. Therefore, inherent in the concept of therapeutic jurisprudence is the idea that the evidence of psychologists and social workers should form *part of the system*, not just be an add on.

During my time as Dean of the Faculty of Law at Monash University I tried to change the curriculum so that law students could understand that practising law is not all about heroic moot courts, where one presents television-inspired cut-throat arguments in court. Rather, understanding law is really about negotiation and examining the way you resolve disputes in a way that is productive for all sides. This idea of moving away from an adversarial paradigm has to start in law schools, and has to be the way practitioners operate. As you know, most disputes are settled out of court. We do have a non-adversarial justice system, we just need to give it the theory that underpins it.

In a way is there a psychology in the way lawyers see the law and the role as legal practitioners? Is there a need to shift from adversarial aspects, towards a community centred approach to dealing with conflicts?

Yes. This also applies to the relationship the law has with victims as well. I just finished a book[10] on victims in plea negotiations, and the importance of understanding their role, their needs, the need for procedural justice for victims. The book examines the role of restorative justice, the need for voice, validation and respect for victims. It also considers the concept that an adversarial system can be broader, and that the interests of victims, offenders and the State do not necessarily have to be in conflict. That is, one can meet the needs of all parties without undermining the basic principles of fairness to defendants. This is all about understanding the non-adversarial discourse.

[10] Arie Freiberg and Asher Flynn, *Victims and Plea Negotiations: Overlooked and Unimpressed* (Palgrace Macmillan, 2020).

The book is co-authored by Asha Flynn, from Monash. Previously, we had written a book on the views of prosecutors, defence, judges on plea negotiations.[11] There is a bad perception in the public that plea negotiations were "dirty deals". On the other hand, those involved in the criminal justice system understand that they are the oil that keeps the wheels of justice moving, whereby 70-80% of cases are resolved by guilty plea and a large proportion of them are resolved by plea negotiation. However, in writing that book Flynn and I did not speak to victims. It was not within the scope, and beyond our resources. However, we decided that it was a lopsided view to not present the views of the people who were the actual victims of the crime. So, we ran a number of focus groups of the victims of crime, and gave them a number of scenarios of what could happen in a plea negotiation and asked them to comment on those. The research was focussed on getting a different perspective of what victims saw of that process, and their own experience of that process.

The views of victims were often fairly negative. What they were seeking was voice, validation and respect, and acknowledgement. We found, particularly, that they wanted support and advice to navigate through the system. Simply being informed and being consulted was not enough for them, a lot of them had been traumatised and couldn't take information in. They often did not want legal advice *per se*, they wanted someone to work with them and understand their position, and to explain things. In that way, the process is not therapeutically oriented to the victim.

Professor Freiberg, you have discussed in your research the role the media has in educating the public about the legal system. How important is public opinion in the development of policy, and what role does the media play in informing that opinion?

Huge topic. There is a difference between an informed public opinion and a public opinion generally. There is a complex relationship between the media and the public, politicians and the judicial system. I do not even know where to start. The issue is that many people gain

[11] Arie Freiberg and Asher Flynn, *Plea Negotiations: Pragmatic Justice in an Imperfect World* (Palgrave Macmillan, 2018).

their understanding of how a particular system operates (whether the court, sentencing or parole) from the media.

However, the relationship is very complex. People are not just black boxes and do not just "soak up" what they see in the media. Rather, people will be drawn to the media which reinforce their own views. Indeed, we all live in a cognitive bubble, and are subject to confirmation bias. People consume media with their own pre-existing schema. On the other hand, people can develop more nuanced views, beyond their own pre-existing ideas, if you provide them with complex information. There is not such a large gap between what judges do and what the public will accept and agree to.

Studies we have done on parole (for example with Robin Fitzgerald from UQ)[12] and studies we have done on juries[13] will show that if you provide people with background information, their views are more nuanced. That is, when provided with detailed information, people can appreciate why a person can be paroled or not sent to jail in a particular case. Ironically, we have also found that, even when people are given detailed information and have gone through the process of developing a nuanced view on a particular case, there is a big disconnect between their immediate "top-of-the-head" opinions and the case which they were just presented with. When you ask "the Goldilocks Question" (i.e. is sentencing too hard, too soft or just right), 60 or 70% of people will say that it is too soft. Nonetheless, when you ask them about the specific case, in which they had been privy to all the facts, they will treat that case as an exception.

This is what makes a dialogue with the general public difficult. We believe that providing information can contribute to a more informed debate about the criminal justice system. This is why I stay as chair of the Victorian Sentencing and Advisory Council. We try to provide information and facts. We have to be realistic about the effect it has, especially when you have extreme cases with horrendous facts. In those extreme cases, people will

[12] Robin Ftizgerald, Arie Freiberg and Lorana Bartels 'Redemption or Forfeiture? Understanding Diversity in Australians' Attitudes to Parole' (2018) 20(2) *Criminology & Criminal Justice* 169.

[13] See above, n 8.

revert to wanting mandatory sentencing or no parole (being 'tough' on crime). But we have to resist those sorts of emotional responses to outrageous events.

Indeed, I have written a bit on the role of emotion in criminal justice. It must be understood that all decision making, whether by judges, the public, jurors, or politicians, is influenced by emotions. In this sense, psychologists and psychiatrists can help us by making us aware that our rational and emotional brains are intimately connected – one influences the other. This is hugely important in understanding the way public policy is formed and the way judges make decisions.

There is a huge literature on the interaction of law and emotion. It examines how we are complex beings and the way that we take in and process information is influenced by emotions. Emotions such as anger, fear, anxiety and also positive emotions, such as love. A lot of mandatory sentencing provisions and restrictions on judicial discretion are driven by fear and anxiety, a fear that we have lost control of society and that awful criminals and predators are out there. Crime stokes fear and anxiety, and people seek reassurance for that. And then, parliamentarians and politicians stoke that fear, and seek to assuage it by inappropriate measures which will appease the public.

In a couple of the articles I have written, I have argued that we cannot ignore emotion in developing public policy. We need to be aware of the way emotions drive us, and being conscious of that fact, we need to also focus on evidence-based policy. However, it is important to recognise the role of emotion because, as much as one would like to rely on scientists in the criminal justice system, it is only one part of the equation. We have to understand emotion as well as rational cognition. This is where psychologists, psychiatrists and anthropologists can assist us in making decisions.

IS # METOO OVER? HARASSMENT, CULTURE CHANGE AND THE LEGAL PROFESSION

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I ABSTRACT

The #MeToo movement laid bare the pervasiveness of sexual harassment in workplaces across the globe. Three years on, has the response to #MeToo contributed to positive, substantive change? Drawing on data and insight from the International Bar Association's *Us Too?* campaign to address harassment within the legal profession, this article critically engages with the movement and the backlash to it. It considers challenges and opportunities in driving cultural change, within the law and more generally. Harassment has no place in our workplaces, but effectively addressing this phenomenon and its underlying drivers has proven to be a complex, multi-faceted task. This article seeks to provide a nuanced, informed discussion of one of the most urgent challenges of our time: ensuring safe and supportive workplaces for everyone.

II INTRODUCTION

> A high court judge fondled my backside and then followed it up with a phone call and a letter. – *Australia, Female, Barristers' Chambers*[2]

In June 2020, allegations emerged that Dyson Heydon – a former justice of the High Court of Australia – had sexually harassed six former associates.[3] In the days that followed, more

[1] The views expressed here are the authors' own and do not represent the views of their institutions.

[2] Anonymous Response, *Global Survey on Bullying and Sexual Harassment in the Legal Profession* (International Bar Association and Acritas, Survey, 2018). This story and the ones that follow are drawn from the International Bar Association's 2018 global survey on bullying and sexual harassment in the legal profession. Almost 7,000 lawyers from 135 countries responded to the survey. We include responses throughout this article to underscore the pervasive and insidious nature of misconduct in law.

[3] Kate McClymont and Jacqueline Maley, 'High Court Inquiry Finds Former Justice Dyson Heydon Sexually Harassed Associates' *The Sydney Morning Herald* (online, 22 June 2020)

and more women came forward alleging incidents of predatory behaviour by the ex-judge. An independent investigation commissioned by the High Court revealed that Heydon had engaged 'in a pattern of sexual harassment' while he was on the bench. Subsequent reporting alleged that Justice Michael McHugh and Chief Justice Murray Gleeson were told about Heydon's sexual harassment.[4] Undoubtedly, a significant number of other people were aware and did not act. As Josh Bornstein, a lawyer representing a number of Heydon's former associates, commented: Heydon's inappropriate behaviour was the legal profession's 'dirtiest and darkest secret'.[5]

The Heydon allegations have sparked an outpouring from the profession, with women coming forward to speak about their own experiences of sexual harassment.[6] Perhaps, in Australia at least, the pervasive and endemic nature of sexual harassment – law's darkest secret – is finally seeing the light. Now that decades of silence have been broken, difficult questions are being asked. Who knew? Who knew and said or did nothing? How could inappropriate behaviour of this scale have been allowed to continue, unimpeded, for so long?

These questions are eerily familiar. In 2017, reporting by the *New York Times* and the *New Yorker* exposed nearly thirty years of sexual harassment and assault by film producer Harvey Weinstein.[7] While many were shocked by the allegations, others were not surprised; just as

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<https://www.theage.com.au/national/high-court-inquiry-finds-former-justice-dyson-heydon-sexually-harassed-associates-20200622-p5550w.html>.

[4] Kate McClymont and Jacqueline Maley, 'Two High Court Judges Knew Of Complaints Against Dyson Heydon' *The Sydney Morning Herald* (online, 25 June 2020) <https://www.smh.com.au/national/two-high-court-judges-knew-of-complaints-against-dyson-heydon-20200624-p555pd.html>.

[5] McClymont and Maley, 'High Court Inquiry Finds Former Justice Dyson Heydon Sexually Harassed Associates' (n 3).

[6] Liz Maine, Hannah Wooton and Ronald Mizen, 'Law's 'Culture of Silence' on Sexual Harassment Exposed' *The Australian Financial Review* (online, 24 June 2020) <https://www.afr.com/work-and-careers/workplace/law-s-culture-of-silence-on-sexual-harassment-exposed-20200623-p5559x>.

[7] Jodi Kantor and Megan Twohey, 'Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades' *The New York Times* (online, 5 October 2017) <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html>; Ronan Farrow, 'From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell

with Heydon, Weinstein's predatory behaviour was an open secret in Hollywood. The allegations against Weinstein opened the floodgates. Actress Alyssa Milano tweeted '[i]f all women who have been sexually harassed or assaulted wrote 'Me too' as a status, we might give people a sense of the magnitude of the problem.'[8] Although the #MeToo movement had been started by Tarana Burke a decade earlier to assist survivors of sexual violence,[9] it was Milano's tweet that sent the movement viral. Social media was flooded with people, mostly women, telling their stories of sexual harassment; by 2018, #MeToo had been tweeted over 19 million times.[10] Every day, survivors broke their silence and told their stories of sexual harassment and abuse. By January 2019, over 250 influential individuals had become the subject of sexual harassment allegations.[11]

Is the reporting about Heydon Australia's Weinstein moment? He is certainly not the first powerful man in this country to have allegations made against him. A few days following Milano's tweet, Australian journalist Tracey Spicer tweeted 'I am investigating two long-term offenders in our media industry. Please, contact me privately to tell your stories.'[12] The result was Australia's first big #MeToo moment, an exposé on Australian television personality Don Burke. Spicer, alongside Kate McClymont, Lorna Knowles and Alison

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Their Stories' *The New Yorker* (online, 10 October 2017) <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories>.

[8] @Alyssa_Milano (Alyssa Milano) (Twitter, 16 October 2017, 7:21am AEST) <https://twitter.com/Alyssa_Milano/status/919659438700670976>.

[9] Tarana Burke, 'History and Inception' *MeToo* (Webpage) <https://metoomvmt.org/get-to-know-us/history-inception/>.

[10] Monica Anderson and Skye Toor, 'How Social Media Users Have Discussed Sexual Harassment Since #MeToo Went Viral' *Pew Research Centre* (Web Page, 11 October 2018) <https://www.pewresearch.org/fact-tank/2018/10/11/how-social-media-users-have-discussed-sexual-harassment-since-metoo-went-viral/>.

[11] '262 Celebrities, Politicians, CEOs, and Others Who Have Been Accused of Sexual Misconduct Since April 2017' *Vox* (Web Page) <https://www.vox.com/a/sexual-harassment-assault-allegations-list>.

[12] @TracySpicer (Tracey Spicer) (Twitter, 18 October 2017, 8:34 AEST) < https://twitter.com/TraceySpicer/status/920402701124431872>.

Branley, were awarded a Walkley Award for this reporting.[13] Allegations against actors Craig McLachlan and Geoffrey Rush followed; both subsequently commenced defamation proceedings (Rush succeeded). While the Heydon allegations are the latest in a string of #MeToo moments in Australia, they have certainly reinvigorated the conversation.

Sexual harassment is not confined to the realm of 'celebrity'. It is endemic in Australian workplaces. In March 2020 the Australian Human Rights Commission ('AHRC') published its *National Inquiry into Sexual Harassment in Australian Workplaces*, declaring that sexual harassment is 'prevalent and pervasive' in Australia, occurring 'in every industry, in every location and at every level'.[14] Data collected by the AHRC in 2018 found that 72% of all Australians had experienced sexual harassment at some point in their lifetime, while one in three had experienced workplace sexual harassment in the previous 5 years.[15]

Our understanding of the pervasiveness of sexual harassment is not new. In 2004, 20 years after the introduction of the *Sex Discrimination Act 1984* (Cth), the AHRC found that 41% of Australian women had experienced sexual harassment.[16] Similarly, gender-based discrimination and sexual harassment have a long history in the legal profession. In 1993, national outrage was generated over comments by South Australia's Justice Derek Bollen, who said that a man could use 'a measure of rougher than usual handling' to get his wife to 'consent' to sex.[17] In response, then-Prime Minister Paul Keating announced 'it's back to school for judges and magistrates' and established an inquiry into 'Equality Before the Law',

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[13] 'Kate McLymont, Lorna Knowles, Tracey Spicer and Alison Branley : Don Burke Investigation' *The Walkey Foundation* (Web Page) <https://www.walkleys.com/award-winners/kate-mcclymont-lorna-knowles-tracey-spicer-and-alison-branley/>.

[14] Australian Human Rights Commission, *Repsect@Work: National Inquiry Into Sexual Harassment in Australian Workplaces* (Report, January 2020) 13 ('National Inquiry').

[15] Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (Report, August 2018) 17; 26 ('Everyone's Business').

[16] Australian Human Rights Commission, '20 Years On: The Challenges Continue' (Executive Summary, 24 March 2004) <https://humanrights.gov.au/our-work/20-years-challenges-continue-executive-summary>.

[17] Regina Graycar and Jenny Morgan, 'Legal Categories, Women's Lives and Law Curriculum or: Making Gender Examinable' (1996) 18 *Sydney Law Review* 431, 431.

along with allocating funding to judicial education programs on gender discrimination.[18] Almost ten years later, the situation had barely improved; in 2002, the Law Society of New South Wales reported that 37% of female lawyers had experienced gender-based discrimination or harassment.[19] Most recently, the International Bar Association (IBA) found that, globally, one in three women in the legal profession had been sexually harassed. In Australia, these figures were higher: 47% of female Australian respondents reported being sexually harassed.

While many have been shocked by the Heydon allegations, for others in the profession, who have lived and worked through decades of sexual harassment and discrimination, the allegations came as no surprise. Former NSW Bar Association President Jane Needham SC said, 'I think almost every woman I know at the bar has a story'.[20]

Sexual harassment and sex discrimination go hand in hand. While all people can experience sexual harassment, it is undeniably a gendered issue. Women experience sexual harassment at far higher rates than men.[21] Sexual harassment is also overwhelmingly perpetrated by men: 79% of workplace sexual harassment occurring in the past five years was perpetrated by a man.[22] The *National Inquiry* found that gender inequality is a key driver of sexual harassment.[23] Recognising gender equality as a 'root cause' of violence against women and sexual harassment, the AHRC held that sexual harassment 'cannot be addressed until the norms, practices and attitudes that underlie it (and other forms of violence against women) are acknowledged and transformed.'[24] Gender inequality is compounded by other inequalities that exacerbate the prevalence and impact of sexual harassment. LGBTIQ+-

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[18] Ibid.

[19] Law Society of NSW, *After Ada: A New Precedent for Women in Law* (Report, 29 October 2002) 14.

[20] Michael Pelly, 'Women At the Bar Are Just Exhausted In Dealing With This' *Australian Financial Review* (online, 24 June 2020) <https://www.afr.com/politics/women-set-to-change-culture-of-sexual-harassment-in-legal-20200622-p5554p>.

[21] AHRC, Everyone's Business (n 15) 18.

[22] Ibid 8.

[23] AHRC, *National Inquiry* (n 14) 142.

[24] Ibid 160.

identifying individuals, Aboriginal and Torres Strait Islanders and people with disabilities are more likely to experience sexual harassment.[25] Acknowledging the gendered and intersectional nature of sexual harassment is a necessary step in addressing the structural framework that reinforces inequality and creates a workplace culture that perpetuates and tolerates sexual harassment.

In March 2020, Weinstein was sentenced to 23 years in prison for sexual assault and rape.[26] Manhattan district attorney Cyrus R Vance Jr acknowledged the women who had spoken up against Weinstein: 'their words took down a predator and put him behind bars, and gave hope to survivors of sexual violence all across the world.'[27] While Weinstein is now behind bars, the extent to which the movement he sparked has resulted in widespread change for survivors of sexual harassment deserves interrogation. #MeToo has undeniably resulted in global outrage and publicity surrounding sexual harassment, yet the extent to which the movement has had an impact on the lives of ordinary working women is unclear. Has #MeToo resulted in substantive societal change? Can truth-telling alone overthrow entrenched inequalities within workplaces? Is #MeToo able to encapsulate the complex boundaries between inappropriate behaviour and the legal definitions of harassment, assault and rape?

These issues will be considered with reference to the authors' work for the IBA, the global peak body for legal practitioners, which in recent years has sought to address harassment within the profession. In May 2019, the IBA published *Us Too? Bullying and Sexual Harassment in the Legal Profession*, based on a global survey of almost 7,000 members of the legal profession.[28] Subsequently, one of the authors led a global campaign – in 30 cities across six continents – to promote awareness about the report's findings, advocate for positive change and listen and learn from those working to address these issues. Across hundreds

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[25] AHRC, *Everyone's Business* (n 15) 27-28.

[26] Jan Ransom, 'Harvey Weinstein's Stunning Downfall: 23 Years in Prison' *The New York Times* (online, 1 March 2020) <https://www.nytimes.com/2020/03/11/nyregion/harvey-weinstein-sentencing.html>.

[27] Ibid.

[28] Kieran Pender, *Us Too? Bullying and Sexual Harassment in the Legal Profession* (International Bar Association, May 2019).

of events and thousands of meetings, the authors have derived insight – which we hope can be constructively shared here.

That campaign and the Heydon allegations have only underscored the need to critically interrogate the prevalence of misconduct in legal workplaces. The male-dominated, hierarchical nature of the profession provides structural explanations for a high prevalence of harassment within legal workplaces. The legal profession is not unique – insight derived in this context has wider applicability. But while sexual harassment is unacceptable in any profession, in the legal profession it is particularly insidious. Legal professionals are expected to uphold the highest standards of ethical conduct – an expectation often enshrined in professional conduct regulations. They are also responsible for advising on, adjudicating and upholding the law, including the law relating to discrimination and harassment. How can society place their trust in the legal system when lawyers and judges themselves are engaged in inappropriate behaviour (often contrary to the laws they are supposed to uphold)? In response to the Heydon investigation, Chief Justice Susan Kiefel said, 'we're ashamed that this could have happened at the High Court of Australia.'[29] Now that the silence has been broken, and our collective shame and responsibility acknowledged, the question must be: where to next?

This article commences with a contextual analysis of the #MeToo movement and sexual harassment. It then goes on to consider the challenges faced by the movement and the barriers to addressing sexual harassment. This will include an analysis of the backlash to the movement, the need to address the 'everyday' nature of sexual harassment and the legal and structural barriers to reform. Finally, the article will consider future directions for sexual harassment reform and action.

[29] Michaela Whitbourn, 'We're Ashamed': the Chief Justice and the High Court's #MeToo Moment' *The Sydney Morning Herald* (online, 26 June 2020) < https://www.smh.com.au/national/we-re-ashamed-the-chief-justice-and-the-high-court-s-metoo-moment-20200623-p555hd.html>.

III POSITIVE CONSEQUENCES OF #METOO

> *I was just starting out and doing some research work for barristers. A particular high-profile QC asked me to assist him with administrative work in his chambers. Once I was there, he closed the door and found ways to press himself against me or touch me. For example, he would ask me to get a book down from the shelf for him and then stand behind me pressing against me while I did that. At first, I doubted myself. But once it happened a few times over a few weeks, I simply stopped working for him. I did not report it to anyone. – Female, Australia, Law Firm*[30]

In her foreword to the *National Inquiry*, Sex Discrimination Commissioner Kate Jenkins said #MeToo had 'ignited a global discussion about sexual harassment and gender inequality', as 'victims who have for too long been silenced have found their individual and collective voice.' [31] #MeToo has had positive consequences, particularly for targets of sexual harassment, who have been encouraged to talk openly about their experiences. Leanne Atwater and her co-authors found that 74% of women surveyed said they would be more willing to speak out about sexual harassment because of #MeToo, while 77% of male respondents said they would be more careful and thoughtful about potentially inappropriate behaviour in the workplace.[32] Similarly, in a study by Ksenia Keplinger and others, female respondents reported that they felt less shame and more empowered to talk about their experiences of sexual harassment in the post-#MeToo era.[33]

While sexual harassment has been identified as a 'pervasive' workplace phenomenon since the 1970s,[34] insufficient action has been taken at both institutional and societal levels to

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[30] Anonymous Response, *Global Survey on Bullying and Sexual Harassment in the Legal Profession* (International Bar Association and Acritas, Survey, 2018).

[31] AHRC, *National Inquiry* (n 14) 11.

[32] Leanne Atwater, Allison Tringale, Rachel Sturn, Scott Taylor and Phillip Braddy, 'Looking Ahead: How What We Know About Sexual Harassment Now Informs Us of the Future' (2019) 48(4) *Organisational Dynamics* 1, 5.

[33] Ksenia Keplinger, Stefanie Johnson, Jessica Kirk and Liza Barnes, 'Women at Work: Changes in Sexual Harassment Between September 2016 and September 2018' (2018) *PLoS ONE* 14(7) 1, 11.

[34] See e.g. Catharine A MacKinnon, *Sexual Harassment of Working Women* (Yale University Press, 1979); Lin Farley, *Sexual Shakedown: The Sexual Harassment of Working Women on the Job* (McGraw-Hill, 1978); Mary Rowe, 'The Progress of Women in Education institutions: The Saturn Rings Phenomenon'

address inappropriate behaviour. Despite decades of women making complaints and taking legal recourse against their harassers, prior to 2014 women's experiences of sexual harassment remained largely silenced. The #MeToo movement generated a global truth-telling, a moment of reclamation of narratives and spaces that had previously been muted.[35] Where legal and institutional remedies had previously failed survivors, collective truth-telling enabled stories of sexual harassment and abuse to transcend the systemic silencing.[36] Additionally, as a movement that initially began on social media, #MeToo was able to overcome structural, geographic, legal and institutional barriers and to bring previously 'private' acts into the public realm.[37] The explicitly 'public' nature of the movement shifted the responsibility for addressing sexual harassment from individual survivors and perpetrators to understanding sexual harassment as a 'social and institutional problem'.[38] As Catharine MacKinnon said, 'th[e] logjam, which has long paralysed effective legal recourse for sexual harassment, is finally being broken. Structural misogyny, along with sexualised racism and class inequalities, is being publicly and pervasively challenged by women's voices. The difference is, power is paying attention.'[39]

#MeToo also created a greater momentum for workplaces, across different sectors, to address sexual harassment. For example, in response to sexual harassment allegations that

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(1974) *Graduate and Professional Education of Women, American Association of University Women* 1; Enid Nemy, 'Women Begin to Speak Out Against Sexual Harassment at Work' *The New York Times* (online, 19 August 1975) <https://www.nytimes.com/1975/08/19/archives/women-begin-to-speak-out-against-sexual-harassment-at-work.html?>; Ann Crittenden, 'Women Tell of Sexual Harassment at Work' *The New York Times* (online, 25 October 1977) <https://www.nytimes.com/1977/10/25/archives/women-tell-of-sexual-harassment-at-work.html>.

[35] Sara Clarke-Vivier and Clio Stearns, 'MeToo and the Problematic Valor of Truth: Sexual Violence, Consent, and Ambivalence in Public Pedagogy' (2019) 34(3) *Journal of Curriculum Theorising* 55, 58.

[36] Ibid.

[37] Ibid 58-59.

[38] Ibid 59.

[39] Catherine McKinnon, '#MeToo Has Done What the Law Could Not' *The New York Times* (online, 4 February 2018) <https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html>.

rocked the New Zealand legal profession,[40] one law firm decided to scrap their sexual harassment policy entirely and to begin again. Consulting with all of their employees, the firm rebuilt their policy from the ground up. Engaging the entire firm in the development process meant that employees had a greater sense of ownership and knowledge of the policies and procedures in place. It was no longer just a directive from management – it was something the whole firm had bought into. That said, the impact of #MeToo on employer responses has been qualified. While the profile of sexual harassment has undeniably been raised, employers remain focused on addressing individual incidents, predominantly motivated by a desire to avoid reputational damage, rather than an ambition to address the structures that continue to perpetuate sexual harassment.[41]

#MeToo has not been the only impetus for change. In 2014, the Full Federal Court in *Richardson v Oracle* rejected the 'range' of general damages in sexual harassment matters, finding it was no longer in line with prevailing community standards.[42] In the leading judgment, Kenny J found the original award of $18,000 to be 'manifestly inadequate' as it failed to adequately compensate Richardson for the sexual harassment she had experienced.[43] Richardson was instead awarded $100,000 in general damages.[44] In increasing the award, Kenny J recognised that the community now has a 'deeper appreciation of the experience of hurt and humiliation that victims of sexual harassment experience and the value of loss of enjoyment of life occasioned by mental illness or distress caused by such conduct.'[45] This decision has been cited over 40 times and has resulted in an increase in the amount of general damages awarded in sexual harassment matters.[46] Where

[40] Sasha Borissenko and Melanie Reid, 'The Summer Interns and the Law Firm' *Newsroom* (online, 4 February 2018) <https://www.newsroom.co.nz/2018/02/14/88663/the-summer-interns-and-the-law-firm>.

[41] Madeleine Castles, Tom Hvala and Kieran Pender, 'Rethinking *Richardson*: Sexual Harassment Damages in the #MeToo Era' (Forthcoming)

[42] *Richardson v Oracle Corporation Australia Pty Ltd* (2014) 223 FCR 334 [117].

[43] Ibid [109].

[44] Ibid [118].

[45] Ibid [117].

[46] Castles, Hvala and Pender (n 41).

previously, judgments typically sat between a 'range' of $12,000–$20,000,[47] of the seven sexual harassment matters that have resulted in awards of general damages since *Richardson*, the average was $74,286, and included two awards over $100,000.[48] Justice Kenny's recognition of the raised attention and value to be placed on the loss of enjoyment of life occasioned by sexual harassment laid the groundwork, in the Australian context, for the ongoing evolution in community perceptions and attitudes continued by #MeToo.

IV #METOO BACKLASH

> *This was at a social gathering of current and former colleagues – my farewell from the law firm (I had resigned to go to another firm). The perpetrator was my former boss - who was a senior partner in a law firm. He made very suggestive comments throughout the evening, including saying he wanted to kiss me, and continued to pester me to kiss him, commented on my appearance (e.g. I look 'hot' tonight), asked me to go home with him. He eventually did try to corner and kiss me - but I managed to avoid it. He touched my bottom, my breast and stroked my thigh and would continue to follow me and sit/stand near me whenever I moved away. Eventually, I asked another colleague to always try to sit in between us. – Female, Australia, In-House*[49]

Unfortunately, if perhaps unsurprisingly, the response to #MeToo has not been entirely positive. In some cases, the movement has been accompanied by a damaging backlash. American Vice President Mike Pence was famously quoted as saying that 'he never eats alone with a woman other than his wife and that he won't attend events featuring alcohol without her by his side.'[50] What has become known as the 'Pence Effect' encapsulates the backlash being faced by the #MeToo movement. Men, particularly senior managers, have

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[47] *Shiels v James & Lipman Pty Ltd* [2000] FMCA 2, [79].

[48] Castles, Hvala and Pender (n 41).

[49] Anonymous Response, *Global Survey on Bullying and Sexual Harassment in the Legal Profession* (International Bar Association and Acritas, Survey, 2018).

[50] Ashley Parker, 'Karen Pence is the Vice President's 'Prayer Warrior', Gut Check and Shield *The Washington Post* (online, 28 March 2017) < https://www.washingtonpost.com/politics/karen-pence-is-the-vice-presidents-prayer-warrior-gut-check-and-shield/2017/03/28/3d7a26ce-0a01-11e7-8884-96e6a6713f4b_story.html>.

begun refusing to mentor women, hold one-on-one, 'closed door' meetings with women, or travel or engage in work social events with women, out of fear of attracting sexual harassment allegations. During the IBA's *Us Too?* campaign, the authors were frequently told this first-hand by law firm partners. 'I no longer travel with my female associates,' said one, unashamedly.

Empirical research supports these anecdotal findings. In 2019, *LeanIn* found that 60% of male managers were uncomfortable participating in mentoring, working alone or socialising with a woman.[51] 36% of men surveyed said they have avoided mentoring or socialising with a woman because they were nervous about how it would look.[52] Similarly, according to 2018 research by the Pew Research Centre, 51% of respondents believe #MeToo has made it more difficult for men to know how to interact with women in the workplace.[53] This fear is not new. 2017 research by the *New York Times,* conducted prior to the publication of the Weinstein allegations, found that two-thirds of respondents thought people should 'take extra caution' when engaging with members of the opposite sex in the workplace.[54] However, it is clear that #MeToo and the global response to its truth-telling have galvanised those who share this fear.

In the years since #MeToo, there has been an increase in concerns about false reporting. In response to sexual harassment allegations against US Supreme Court Justice Brett Kavanagh (then a nominee), US President Donald Trump said, 'it's a scary time for young men in America' because 'you can be guilty of something that you may not be guilty of'.[55] This

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[51] LeanIn.Org and Survey Monkey, 'Working Relationships in the #MeToo Era: Key Findings' *LeanIn* (Web Page) <https://leanin.org/sexual-harassment-backlash-survey-results#endnote1>.

[52] Ibid.

[53] Nikki Graf, 'Sexual Harassment at Work in the Era of #MeToo' *Pew Research Centre* (Report, 4 April 2018) <https://www.pewsocialtrends.org/2018/04/04/sexual-harassment-at-work-in-the-era-of-metoo/>.

[54] Claire Cain Miller, 'It's Not Just Mike Pence. Americans Are Wary of Being Alone With the Opposite Sex' *The New York Times* (online, 1 July 2017) <https://www.nytimes.com/2017/07/01/upshot/members-of-the-opposite-sex-at-work-gender-study.html>.

[55] 'Donald Trump: 'It's A Very Scary Time For Young Men in America – Video' *The Guardian* (online, 3 October 2018) < https://www.theguardian.com/us-news/video/2018/oct/02/donald-trump-its-a-very-scary-time-for-young-men-in-america-video>.

sentiment has been echoed in the wider population. In 2018, a US survey found that 57% of adults were equally as worried about men facing false allegations as they were of women experiencing sexual harassment and assault.[56] Similarly, *The Economist* reported that in 2018 31% of adults believe women making harassment allegations 'cause more problems than they solve', while 18% think that false allegations are a bigger problem than low levels of reporting of harassment and assault, up from 13% in 2017.[57] More recently, a 2019 study found that one in 20 women and one in 12 men believed that most or all #MeToo allegations were false and that accusers were 'purposefully lying for attention or money.'[58]

It is easy to dismiss the backlash. 'Just don't sexually harass them,' is a common retort. There is empirical evidence that false reporting is extremely rare,[59] such that these concerns – in the absence of actual misconduct – are irrational and unfounded. But justified or not, this fear has enormous potential to push women even further behind in workplaces. In particular, in the majority of sectors (including law), management and senior executive positions remain male-dominated. Many women rely on mentoring and promotion opportunities from men higher up in organisations. If women are unable to access such opportunities, the movement that was designed to empower women may have the consequence of pushing feminism further backwards, leaving many women behind. We must engage with that backlash. Dismissing it will not help anyone.

Some may find that attitude confronting. It is, of course, not the movement's fault that these men hold this irrational fear. Some might insist that engagement with people who

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[56] Joanna Piacenza, 'A Year Into #MeToo, Public Worried About False Allegations' *Morning Consult* (online, 1 October 2018) < https://morningconsult.com/2018/10/11/a-year-into-metoo-public-worried-about-false-allegations/>.

[57] 'Measuring the #MeToo Backlash' *The Economist* (online, 20 October 2018) <https://www.economist.com/united-states/2018/10/20/measuring-the-metoo-backlash>.

[58] UCSD Centre on Gender Equity and Health, 'Measuring #MeToo: A National Study on Sexual Harassment and Assault' (Final Report, April 2019) 36.

[59] David Lisak, Lori Gardinier, Sarah Nicksa and Ashley Cote, 'False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases' (2010) 16(12) *Violence Against Women* 1318; Anita Raj, 'Worried About Sexual Harassment – or False Allegations? Our Team Asked Americans About Their Experiences and Beliefs' *The Conversation* (online, 13 May 2019) < https://theconversation.com/worried-about-sexual-harassment-or-false-allegations-our-team-asked-americans-about-their-experiences-and-beliefs-116715>.

hold such views is not productive, and we should forge ahead in disregard of their concerns. Yet meeting with thousands of stakeholders as part of the IBA *Us Too?* campaign, it became clear to the authors that constructive engagement is essential. The fear may be unfounded, irrational and contrary to the empirical evidence on false reporting and due process, but it is genuine – and, in most (although not all) cases, not malicious. One meeting, with a senior partner who was on his firm's diversity committee, stuck with the authors. He told us that he was afraid of being alone in a taxi with junior female colleagues. This was not the stereotype of a #MeToo 'truther', rather he was someone committed to progressing diversity and inclusion – who still felt fearful about false allegations of harassment. Ignoring those concerns – even if they are unfounded – will not progress the movement. It may feel more principled or righteous to disregard those who hold such views. But if we want to achieve positive change, and ensure that the #MeToo movement does not have negative consequences for the next generation of women professionals in the law, and elsewhere, the pragmatic thing to do is engage, to convince, to persuade. In other words, we can disagree with the backlash, we can think it is irrational, but that is no excuse not to engage with it. Change requires dialogue.

V INCLUSIVE APPROACH TO INCLUSION

> *A male staff member and I shared the same office. He would repeatedly walk past me and stroke my hair. He would also sit in my chair at my desk. He repeatedly called me names such as 'pretty face' and I would often catch him staring at me…I confided in one male colleague and was told that he was 'sure that this guy was just joking about and trying to have a laugh and that I should loosen up.' I was an intern at the time and still at law school. I was terrified that if I said anything I would lose any prospect of being employed at the firm as a graduate. – Female, Australia, Law Firm*[60]

What does engagement look like? Firstly, we need to normalise conversations about harassment. We need to talk about acceptable and unacceptable conduct, about the

[60] Anonymous Response, *Global Survey on Bullying and Sexual Harassment in the Legal Profession* (International Bar Association and Acritas, Survey, 2018).

importance of bystander intervention, about the impact of harassment. If structural change is what is required, an approach to addressing sexual harassment and inequality in the workplace cannot only involve approximately 50% of the workforce – it must involve all genders. During the IBA *Us Too?* engagement campaign, we held hundreds of public and private events across the globe – with this goal in mind, open conversations about issues that are too often taboo. Yet we confronted a challenge: often our audiences were predominantly female. Women, of course, have a vital role in these conversations. But we also need old men in the conversation.

Some organisations, such as Male Champions of Change, and GOOD Guys (Guys Overcoming Obstacles to Diversity) have been set up to bring men into the conversation.[61] Created by the National Conference of Women's Bar Associations in the United States, the rationale behind GOOD Guys is that 'research has repeatedly shown that the key to achieving diversity is to engage men, not blame them.'[62] Similarly, one international law firm has deployed reverse mentoring – pairing older partners with junior lawyers to talk informally about diversity, inclusion and other barriers to equality in the law.

Yet bringing men into the conversation is not always easy, nor without controversy. For example, in 2020 law firm Shoosmiths held an 'alternative' event for International Women's Day, to discuss 'gender equality, diversity and inclusion from the perspectives of predominantly male 'champions of women'.[63] The panel received considerable backlash on social media, with the firm accused of 'mansplaining' sexual harassment.[64] There is a risk that in bringing men into the movement, women remain conceptualised as problematic and

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[61] 'Male Champions of Change' (Web Site) < https://malechampionsofchange.com/>; 'GOOD Guys' *National Conference of Women's Bar Associations* (Web Page) <https://ncwba.org/programs/good-guys-toolkit/>.

[62] 'Introduction' *GOOD Guys* (Web Page) <https://ncwba.org/wp-content/uploads/2017/07/01-GOOD-Guys-Introduction.pdf>.

[63] @Shoosmiths (Twitter, 26 February 2020, 2:57am AEST) <https://twitter.com/Shoosmiths/status/1232333855224410112>.

[64] Thomas Connelly 'Shoosmiths Faces Social Media Backlash Over International Women's Day 'Male Champions' Panel' *Legal Cheek* (online, 4 March 2020) <https://www.legalcheek.com/2020/03/shoosmiths-faces-social-media-backlash-over-international-womens-day-male-champions-panel/>.

inherently victimised, waiting for 'male champions' to come in and save them. The backlash to the Shoosmiths event highlights a key contradiction within the #MeToo movement: if #MeToo was an opportunity for women to break decades of silence and finally speak their truth and be heard. How do we balance this with the need to engage men in the conversation in order to bring about desperately needed structural change? How do we engage with the backlash to #MeToo without endorsing it, or absolving these men of their responsibility to shift their behaviour and attitudes?

VI PROTECTING PERPETRATORS

> *I stayed back after Friday drinks and a new more senior colleague cornered me and kissed me. I warned some of the juniors who were talking about him that he was a predator and the office manager overheard and reported it to the partners. They fired me. There were no ramifications for him. – Female, Australia, Government*[65]

Endorsing the backlash, and the 'irrational' fear, serves to shift the narrative away from the targets of sexual harassment to the perpetrators of such behaviour. The focus changes from empowering and vindicating targets of sexual harassment, to protecting alleged perpetrators. The fear that 'innocent' men will be brought down by an allegation perpetuates the idea that women are overly sensitive, exaggerate or falsify 'harmless' workplace interactions. In fact, Atwater and colleagues found that in fact both men and women generally agreed on the nature of sexual harassment: 'the notion that men don't know their behaviour is troublesome or women are overly sensitive and see many things as harassment that men are unaware of both seems to be untrue. For the most part, men and women are on the same page about what is harassment.'[66] However, one third of those surveyed said that sexual harassment accusations are giving innocent men a bad reputation. Emphasising the damage to men's reputations fails to acknowledge the years of pain and suffering that has been, and continues to be, experienced by women who are targets of inappropriate behaviour. As

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[65] Anonymous Response, *Global Survey on Bullying and Sexual Harassment in the Legal Profession* (International Bar Association and Acritas, Survey, 2018).

[66] Atwater et al (n 32) 3.

Mackinnon pointed out, even where targets of sexual harassment have been believed, '[h]is value outweighed her sexuali[s]ed worthlessness. His career, reputation, mental and emotional serenity and assets counted. Hers didn't. In some ways, it was even worse to be believed and not have what he did matter. It meant she didn't matter.'

By deflecting the attention away from targets of sexual harassment to 'innocent' victims brought down by a false allegation, we simultaneously individualise perpetrators of inappropriate behaviour, reducing them to a few 'bad apples'. It is easy then to say 'I am not Weinstein' or 'I am not Heydon', or 'I am not a part of the problem.' But data does not lie. Sexual harassment is not confined to a few wrongdoers; it is endemic. While millions of women took to social media to tell their stories, the ones that received publicity, and on occasion resulted in a perpetrator facing consequences, were the stories which involved high profile, powerful individuals. As Sara Clarke-Vivier and Clio Stearns point out, the women 'who came forward to accuse Weinstein of rape, harassment and assault, while certainly victims, had louder, stronger and more publicly honoured voices than many, precisely because of their celebrity status.'[67] Closer to home, while the Heydon allegations are certainly despicable, they have dominated the front pages precisely because of the former judge's power and status. Yet nearly 50% of all women in Australia's legal profession have reported experiencing sexual harassment. There are thousands of perpetrators like Heydon, whose public outing (if it ever occurs) will never reverberate beyond the immediate circle. For many who broke their silence, saying #MeToo was a moment of empowerment and taking back ownership. Yet it has done little to dismantle the structural inequalities that perpetuate 'ordinary' sexual harassment, that is occurring not only on the casting couch and high judicial office but on the shop floor, in the office, in the factory.

[67] Sara Clarke-Vivier and Clio Stearns, 'MeToo and the Problematic Valor of Truth: Sexual Violence, Consent and Ambivalence in Public Pedagoy' (2019) 34(3) *Journal of Curriculum Theorising* 55, 58.

VII THE GREY

> *There are often sexist or inappropriate comments made by (mostly) older male barristers towards younger female barristers. No one blinks an eye - this conduct is just dismissed as 'so and so is just like that' or you are taken to be particularly sensitive if you take offence to it* – Female, Australia, Barristers' Chambers[68]

In early 2018, an allegation of sexual assault emerged against actor and comedian Aziz Ansari.[69] The incident, recounted by a woman known only as 'Grace' involved the pair going on a date, returning to Ansari's apartment and engaging in sexual relations which Grace found forceful, distressing and uncomfortable. Eventually she left. The Ansari allegations sparked widespread media debate. Unlike the clear-cut, black-and-white stories that had come before, the Ansari story was a shade of grey. Commentator Caitlin Flanagan decried Grace's story as '3,000 words of revenge porn.'[70] Scores of people, mostly women, took to social media with stories of their own, similarly messy, sexual encounters.[71] It seemed in the days that followed that nearly every woman had a story like Grace's. Was this another #MeToo moment? Was Ansari's behaviour sexual assault, or was it just bad sex?

The Ansari story highlights the current barriers in the way we talk about sexual harassment. There is no doubt that we should welcome criminal and civil sanctions against perpetrators of serious sexual offences. But the reality is that the majority of behaviour that makes women (and, sometimes, men) uncomfortable is all too ordinary, all too widespread, and

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[68] Anonymous Response, *Global Survey on Bullying and Sexual Harassment in the Legal Profession* (International Bar Association and Acritas, Survey, 2018).

[69] Katie Way, 'I Went on a Date With Aziz Ansari. It Turned Into The Worst Night of My Life' *Babe.Net* (online, 13 January 2018) <https://babe.net/2018/01/13/aziz-ansari-28355>.

[70] Caitlin Flanagan, 'The Humiliation of Aziz Ansari' *The Atlantic* (online, 4 January 2018) <https://www.theatlantic.com/entertainment/archive/2018/01/the-humiliation-of-aziz-ansari/550541/>.

[71] Emma Gray, 'On Aziz Ansari and Sex That Feels Violating Even When It's Not Criminal' *Huffington Post* (online, 17 January 2018) <https://www.huffingtonpost.com.au/entry/aziz-ansari-sex-violating-but-not-criminal_n_5a5e445de4b0106b7f65b346?ri18n=true>.

more often than not within the bounds of the law. Inappropriate behaviour need not be criminal if the result is nevertheless violating, hurtful and upsetting for the person involved.

VIII THE ORDINARINESS OF SEXUAL HARASSMENT

> *My supervising partner, while drafting a document with me, on one occasion told me - 'God you have nice legs'. A second time, when I informed him I would need to be on leave during the Christmas party day, which was to be held at the beach, he said – 'but we were all looking forward to seeing you in a bikini'* – Female, Australia, Law Firm[72]

The discourse prompted by the Ansari story is indicative of a broader challenge. By focusing on the high-profile, more 'serious' cases, we risk obscuring the pervasive, every day and undeniably 'ordinary' nature of sexual harassment. The AHRC found that the most common incidences of workplace sexual harassment were offensive, sexually suggestive comments or jokes, intrusive questions about a person's private life or physical appearance and inappropriate staring or leering.[73] In contrast, the more 'serious' incidents of sexual harassment were far less common: inappropriate physical conduct was experienced by 9% of people while attempted or actual rape or sexual assault was experienced by 1%.[74] In the legal profession, the IBA's *Us Too?* report made similar findings. Perhaps paradoxically, the most common forms of sexual harassment are the least likely to be reported.[75] Sexual harassment already has an incredibly low incidence of reporting – just 17% of targets formally report.[76] The focus on the most egregious forms of conduct, the Heydons and Weinsteins of the world, obscures the 'everyday' inappropriate behaviour experienced by the vast majority of targets. Such conduct might be commonplace, but that does not mean its impact is any less severe for the individuals who experience it. A workplace that tolerates

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[72] Anonymous Response, *Global Survey on Bullying and Sexual Harassment in the Legal Profession* (International Bar Association and Acritas, Survey, 2018).

[73] AHRC, Everyone's Business (n 15) 40.

[74] Ibid 40.

[75] Ibid 68.

[76] Ibid 67.

the less severe forms of conduct creates a culture that enables and perpetuates the most egregious conduct. An American regulator, the Equal Employment Opportunity Commission, described the lower-level incivility as 'a gateway drug'. Is it any surprise that a Justice of the High Court was frequently perpetrating sexual harassment, in a profession where sexual harassment is insidious, ordinary and everywhere?

IX INDIVIDUALISING SEXUAL HARASSMENT

> *There is a senior partner at my firm who famously harasses young women, particularly when he has been drinking at social events. I was groped on two separate occasions. After nothing was done about it the first time I reported it, I did not report it the second time. The same partner has groped three other women at this firm.* – Female, Australia, Law Firm

While sexual harassment is undeniably a broad, social issue, the current system places the emphasis to address inappropriate behaviour on individuals. The burden is on individual targets of sexual harassment to truth-tell, to report and to take legal action. This is often a major deterrent against taking action, and leads to underreporting of sexual harassment. The *Us Too?* report found that 75% of sexual harassment cases and 57% of bullying cases are never reported. The main reasons for not reporting were a fear of repercussions and the status of the perpetrator. It is no wonder that so many associates, over a number of years, did not report Heydon's sexual harassment. As a High Court Justice, he had the power to influence their future success or failure in the legal profession.

A fear of reporting is not the only reason targets do not report. As we have already established, everyday, 'ordinary' sexual harassment is common and pervasive. Reporting mechanisms are often long, arduous, extremely stressful and, if one proceeds to take legal action, can be incredibly expensive. Many women simply accept this 'less egregious' behaviour as the cost of being a woman in a male-dominated profession. As one Australian respondent remarked 'when I was a young female solicitor, sexual harassment was perceived as acceptable by male colleagues and workplaces, and women were expected to be tough

enough to deal with it.'[77] The focus on individualising sexual harassment therefore obscures the structural forces that create and perpetuate inappropriate behaviour. Sexual harassment does not occur in a vacuum. Rather, it is one manifestation of entrenched gender inequality that still pervades in modern Australian workplaces. We should understand sexual harassment, not as an individual, private experience but rather as 'a social wrong and a social injury that occurs on a personal level.'[78]

However, as Thornton points out, the current system, which has only been amplified by #MeToo, is focused on the aberrant behaviour of individual, impliedly 'serious', perpetrators.[79] Where sexual predators are exposed, the system attempts to deal with this specific behaviour, albeit slowly. The current legal framework is not, though, designed to address the less than severe conduct. While we should certainly do more to create flexible and accessible reporting mechanisms, and encourage more targets to speak up, the reality is that one is unlikely to want to go through a long and taxing reporting process for an inappropriate comment in the elevator, or an uncomfortable joke. Most targets of this conduct will simply choose to move on. How do we move the focus beyond the next Heydon, or the next Weinstein? When nearly every adult woman has a harassment story, we have to ask ourselves, where do we go from here?

X FIXING THE WOMEN

> *I was told because I was sexually harassed before, on multiple occasions, by multiple men, I was the problem.* - Female, Australia[80]

In the legal profession, which remains deeply hierarchical, the above sentiment is particularly evident. There are currently more women than men practising as solicitors in

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[77] Pender, *Us Too?* (n 28).

[78] Catharine A MacKinnon, *Sexual Harassment of Working Women* (Yale University Press, 1979) 173.

[79] Margaret Thornton, 'Sexual Harassment Losing Sight of Sex Discrimination' (2002) 26 *Melbourne University Law Review* 422, 424.

[80] Anonymous Response, *Global Survey on Bullying and Sexual Harassment in the Legal Profession* (International Bar Association and Acritas, Survey, 2018).

Australia; in 2013 61% of admitted solicitors were women.[81] Despite this, women continue to make up the minority of senior positions,[82] leave firms at a higher rate than men, [83] and despite working on average more hours than men, they get paid significantly less than their male counterparts.[84] The Law Council of Australia's National Attrition and Re-engagement Study also identified that the most important and most frequent reason for women leaving a workplace was being unhappy with its culture.[85]

Legal workplaces have a long history of initiatives designed to address diversity, inequality and harassment. A survey of the 200 largest law firms in the US found that all firms had some form of women's initiative, with the average program running for over a decade.[86] However, diversity and harassment policies have made an insufficient impact. In 2019, the IBA found that there was no statistically significant difference in levels of bullying and sexual harassment between workplaces that had policies and training and those that did not. [87] It is clear that despite increased awareness of the importance of addressing inappropriate behaviour in the workplace, current approaches are not working. In particular, rather than addressing a workplace's underlying operational and structural culture, diversity

[81] Law Council of Australia, National Attrition and Re-Engagement Study (NARS) Report (Final Report, 2013) 9.

[82] Jane Ellis and Ashleigh Buckett, *Women in Commercial Legal Practice* (International Bar Association, 2017) found that only 14% of respondents were equity partners; Thomson Reuters and Acritas, *Transforming Women's Leadership in the Law: Current Approaches to Improving Gender Diversity at Senior Levels in Law Firms and Correlated Success* (Research Study 2019) 4 found that only one third of all new partners were women, with senior male associates 250% more likely to become partners than their female counterparts; Stanford Law School, *White Paper: Retaining and Advancing Women in National Law Firms* (2016) found that of the largest 250 firms in the US, only 5 report women accounting for over 25% of their equity partners.

[83] David Wilkins, Bryon Frog and Ronit Dinovitzer, *The Women and Men of Harvard Law School: Preliminary Results from the HLS Career Study* (Harvard Law School Centre on the Legal Profession, 2015) 55.

[84] Ibid 6-7; National Association of Women Lawyers, 2019 Annual Survey report on the Promotion and Retention of Women in Law Firms (2019).

[85] Law Council of Australia, *NARS Report* (n 81) 43-44.

[86] National Association of Women Lawyers (n 84) 14.

[87] Pender, *Us Too?* (n 28) 76.

policies are instead often 'designed to address the problem of women, not the workplace.'[88] The follow-on effect of this is that the blame for sexual harassment is shifted to the target.[89] One woman told the *National Inquiry* that when she reported sexual harassment she was told she was being 'too friendly' and that she should 'wear a garbage bag over [her] head' because she was 'too pretty'.[90]

As a result, some workplace responses are teaching women how to avoid or handle sexual harassment, rather than teaching men how not to harass. Initiatives such as women's only networks, women's mentoring groups and targeted female-only training seek to isolate women as the problem. There is, of course, an appropriate and proper place for such support networks and solidarity groups. But these responses not only fail to deal with the root cause of the problem – cultural and systemic drivers of inequality – they often do little to address the problem, and some cases even exacerbate it. For example, a 2019 study by Thomson Reuters found that women's only networks were more likely to have a *negative* impact on diversity levels.[91] In trying to 'fix' women to conform to a workplace culture still inherently shaped by patriarchy, the result is that the ideal lawyer, or the ideal employee, is always already gendered.[92] As a Harvard Law School study asked, are the high numbers of women who ultimately leave the profession voluntarily choosing to do so, or is it in reality 'a choice made in the shadow of what women reasonably believe is possible given the expectations of employers and society.'[93]

[88] Ellis and Buckett, (n 82) 5.

[89] AHRC, *National Inquiry* (n 14) 152.

[90] Ibid.

[91] Thomson Reuters and Acritas, (n 82) 3.

[92] Stanford Law School (n 80).

[93] Wilkins, Frog and Dinovitzer (n 83) 56.

XI SEEKING ABSOLUTION

> *An older male barrister told me I was a 'naughty girl' for making an application to the presiding magistrate. He said he should put me over his lap and spank me for it. It was a routine application which is made daily in courts.* – Female, Australia, Barristers' Chambers[94]

The backlash to #MeToo has ignored the core issue; while certainly not all men are Harvey Weinstein or Dyson Heydon, we are all responsible for creating, and perpetuating, a culture that allows sexual harassment to occur. Laughing at an inappropriate joke, failing to intervene when you witness someone being harassed or commenting on a female co-worker's appearance contribute to a climate that allows the more serious abuse to occur unimpeded. We might not all be Weinstein, but we are all part of the problem. Michelle Golberg argued, 'I feel sorry for a lot of these men, but I don't think they feel sorry for women, or think about women's experience much at all. And maybe that's why the discussion about #MeToo and forgiveness never seems to go anywhere, because men aren't proposing paths for restitution. They're asking why women won't give them absolution.'[95] Suggesting that men can, in response to #MeToo, simply say 'sorry' and move on fundamentally misses the point. Until society as a whole takes responsibility for creating the climate that allowed abusers like Weinstein and Heydon to perpetrate serious inappropriate behaviour for decades, we will not be able to embrace the social and systemic change that is needed.

XII CONCLUSION

How then do we engage with the backlash and bring men into the conversation, without absolving them of the responsibility for creating the environment that perpetuates harassment? While we can and should make efforts to create better policies and training

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[94] Anonymous Response, *Global Survey on Bullying and Sexual Harassment in the Legal Profession* (International Bar Association and Acritas, Survey, 2018).

[95] Michelle Goldberg, 'The Shame of MeToo Men' *The New York Times* (online, 14 September 2018) <https://www.nytimes.com/2018/09/14/opinion/columnists/metoo-movement-franken-hockenberry-macdonald.html>.

around sexual harassment, sexual harassment is not just a policy problem, it is an intrinsically social and cultural problem. To return to the legal profession, yes there are aspects that make it ripe for harassment. Yes, there are things that policies and training can do. Yes, top down leadership can make a huge difference. The profession can and must do better. However, it is not as though all lawyers are perfect humans until they enter law school and then come out the other side as chronic harassers. Sexual harassment is 'learned' at a far younger age, going all the way back to bullying on the playground. In 2017, the AHRC released the findings of its national inquiry into sexual assault and sexual harassment at Australian universities.[96] 21% of all university students had experienced sexual harassment in a university setting.[97] 94% of those who were sexually harassed never reported it.[98] We should not be surprised that the law is full of harassers, when the whole country is full of them. They are in our schools, our universities, our offices, they are on our televisions and our movie screens, and yes they are in our law firms and courtrooms. Change starts by admitting there is a problem. Australia has had a sexual harassment problem for decades. It is long overdue that we took collective responsibility for it.

Given #MeToo, and the years that followed, have shown us the importance of truth-telling, it seems appropriate to end this article with a final response to the IBA survey, received (anonymously) two years before the Heydon story broke.

> *I worked for this judge as an associate. He was a judge on Australia's highest court…The incident occurred at a dinner he asked to have with me to farewell me before I headed overseas to take up post-graduate study. The behaviour was physical and highly intrusive and probably a criminal offence. The worst part was that I knew it would happen. While I was his associate, I learned through the grapevine about various incidents that had occurred in the past with this particular judge. I wasn't sure whether to believe what I heard. … When I arrived to start post-graduate study, I*

[96] AHRC, Change the Course: National Report on Sexual Assault and Sexual Harassment at Australian Universities (Final Report, 2017).

[97] Ibid 3.

[98] Ibid 9.

became friendly with some other people who had previously served as associates to judges on that court. I discovered that similar (and in one case, a much worse) incidents had arisen for them with the same judge I worked for. I know of at least 5 women associates who have been the subject of a similar incident. There must be more. None of us have ever reported it. - Female, Australia, Barristers' Chambers[99]

[99] Anonymous Response, *Global Survey on Bullying and Sexual Harassment in the Legal Profession* (International Bar Association and Acritas, Survey, 2018).

IMPROVING PSYCHOLOGICAL WELLBEING IN THE LAW, CAN IT BE DONE?

Robyn Bradey

I INTRODUCTION

In this paper I wish to explore what we know about the psychological wellbeing of the legal profession, offer some possible explanations for why this is the case and proffer some possible remedies. I have been consulting with multiple law societies, bar associations and many legal employers in three countries since 2008. I am neither lawyer nor psychologist, so I come at this as an outsider, with no axe to grind. I do have over 40 years' experience as a clinician and deep respect and gratitude for lawyers and the job we ask you to do. If my opinions and observations are provocative to some, I will have done my job and honoured the ethos of this journal. I hope some will find some of my suggestions helpful. Thank you for the opportunity.

II WHAT THE RESEARCH TELLS ABOUT THE MENTAL HEALTH OF THE PROFESSION

We do know that the mental health of lawyers is not good when compared to other professions. Studies from around the world, and here in Australia, consistently show lawyers as being more than 3 times more likely to suffer from major depression and anxiety disorders than non-lawyers. US studies have it at 3.6 times greater with a quarter of Californian lawyers experiencing extreme anxiety.[125]

Research commissioned by the UK Bar Council[126] and led by my colleague Bencher Rachel Spearing,[127] conducted across 2,500 barristers in 2014 found the following. One in 3 barristers reported finding it difficult to control or stop worrying. Two in 3 thought showing signs of stress equaled weakness thereby making it highly unlikely they would mention their

[125] Patrick J Schiltz, 'On being Happy, Healthy and Ethical Member of an Unhappy, and Unethical Profession' (1999) 52 *Vanderbilt Law Review* 871.

[126] Research funded by the 4 Inns of Court, the Bar Council and Charlie Waller Memorial Trust

[127] Co-founder of the Wellbeing at the Bar UK ('WATB').

distress to anyone. One in 6 said they were in low spirits most of the time. 59% demonstrated unhealthy levels of perfectionism. Further, for all of the above reasons psychological wellbeing was not being discussed in the profession.[128] The same body of research uncovered a report that encouraged legal leaders to initiate measures to better understand and promote wellbeing in the profession.[129]

Here in Australia research involving 7551 participants found that lawyers experienced the highest incidents of depressive symptoms compared to 9 other professions, with 52% reporting they were considering leaving the profession.[130] I have heard anecdotally that 70% of new lawyers in this country leave after 5 years. I will first speculate on what I think some of the causes of these alarming statistics might be and I will seek to offer some possible remedies along the way.[131]

III POSSIBLE CAUSES AND REMEDIES

A PERFECTIONISM & ISOLATION

There are some hints of the issue of perfectionism and isolation in the above research, I think. The notion that lawyers believe showing signs of stress equals weakness is telling. From the moment young lawyers take up their place in most law schools, they are told they are the cream of the crop, but only half of them will complete their degree. Further, they are told many of them will not find a job when they graduate. So, from the outset they get the message the Law is only for the brightest and the toughest, the weak will fail. Also, we know from fabulous research by Carol Dweck[132] that high achievers, the so called "Gifted and Talented" become so afraid of failure they only focus on what they are good at and won't risk failing by trying something new. They value being smart, and first in the class and

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[128] Bar Council, *Wellbeing at the Bar Report* (April 2015) <http://www.barcouncil.org.uk/media/348371/wellbeing_at_the_bar_report_april_2015_final.pdf>.

[129] Daniel Bowling, 'Lawyers and their Elusive Pursuit of happiness: Does it Matter?' (2015) 7 (37) *Forum for Law and Social Change*.

[130] Adele J Bergin and Nerina L Jimmieson, 'Australia Lawyer Well-being: Workplace Demands, Resources and the Impact of Time-billing Targets' (2014) 21 (3) *Psychiatry & Psychology and Law* 427.

[131] I am indebted to Rachel Spearing Co-Founder of WATB for these references that she sourced, and we used in a co-presentation to Inner Temple Pupils, London 2017.

[132] Carol S Dweck, *Mindset. The New Psychology of Success* (Ballantine Books, 2006).

assume they will succeed without much effort which is usually true at least until the end of their schooling. They develop what Dweck refers to as a "fixed mindset" that closes them off to experimental learning and learning through failure and collaboration with others. All of which diminishes their capacity for resilience and support. They believe perfectionism is both desirable and achievable. So long as they keep achieving easily, they are fine.

Once they enter the world of more rigorous study, with high work volumes and self-directed learning that Law School requires; whilst finding themselves for the first time a small fish in a big pond of high achievers, many of whom are smarter than them, some begin to flounder. Some cheat, plagiarise and bluff their way through. Others develop into workaholics in order to cope. Many quit. The seeds of anxiety and depression are planted here and will come with them into their professional lives.

Those that do get a job find themselves the most junior person in a firm, large government department or legal centre often reporting to lawyers who came through the "if it's too hot in the kitchen get out" school of thought. They are put to long hours, boring and repetitive tasks with files returned to them laden in red ink more often than not correcting style rather than substance. Or they are thrown in at the deep end listening to very distressed clients in family law, criminal law, immigration, personal injury and other volatile areas with huge caseloads and few resources. They lack the life experience to deal with this and with no culture of supporting staff or being able to ask for help, they repress and bluff.

Others do get lucky and have, at worst a benign and at best a kind, well intentioned senior who is working so hard and such long hours themselves the new lawyers don't feel they can ask for support for fear of overloading the boss. Also, they think if the boss is working that hard, they should too. I have heard eminent, excellent senior legal practitioners boast about being workaholics and perfectionists. Where does that leave the exhausted youngster who wants to have a life and a successful career? He or she becomes just like the boss (rather reminiscent of the message of the 70's song Cat's in the Cradle)[133] and the culture is reinforced for the next intake. They struggle on, growing those seeds of depression and anxiety and possibly Vicarious Trauma. But because there is no-one to talk to the

[133] Harry Chapin, 1974.

psychological distress continues until a mistake, a or a complaint, or worse, suicide brings the issue to light.

The suicide rates in the law are very high and, as research by Schiltz[134] suggests, the suicide rate for white male lawyers may be over twice that for other white males. Until fairly recently the law, in first world countries at least, has been dominated by white males. My observation is, alarmingly, that many successful white female lawyers have emulated the culture and attitudes of their male colleagues. (They felt they had to in order to survive). It is my prediction that, unless attitudes change, that the gender gap on suicidality will narrow.

It is not a lot better for the large majority of lawyers who go into solo or small private practices, where they quickly have to become practice managers, accountants, accidental counsellors as well as doing the work of lawyers. Often working long hours and being abused by their clients when they send the bill. These lawyers always express to me the burden of being over regulated and under appreciated by the government, their own societies and the public. Those working in the regions find all of these problems exacerbated by isolation.

As can been seen by the UK Bar study,[135] the majority of those called to the Bar go to the private Bar, where even though they are often in large Chambers, they are effectively in competition with each other for briefs and operate as sole practitioners. Isolation was once again cited as a huge issue for the cohort in the Bar Study. An eminent senior counsel in Australia took the trouble to walk me through the rabbit burrow of his chambers in Sydney to show me his colleagues all locked behind their doors with only the clerks coming and going as they bought briefs. He was trying to disabuse me of my naïve Social Work thinking that they would be willing or able to support each other in their workplace. Notably he had only recently recovered from a serious bout of depression himself, that was picked up by his wife, not his colleagues.

Finally, judges, magistrates, barristers and solicitors in every jurisdiction report feeling extremely stressed in the Courts. The pressure on the Courts imposed by the sheer numbers waiting to appear before them coupled with misinformed public opinion and media beat

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[134] Schiltz (above n 1).

[135] Bar Council (above n 4).

ups is enormous. Judges, magistrates, registrars and senior counsel have all come through legal training and the workplaces that bring the attitudes and practices described above and are not immune to developing the resultant mental illnesses. The consequences for judges admitting to being unwell or, more simply, stressed, whilst still sitting, are enormous. So most don't acknowledge a mental illness until they are about to retire. One exception in recent times is Magistrate David Heilpern in NSW, whose brilliant, brave article and interview for the then named Tristan Jepson Memorial Foundation (now the Minds Count Foundation) did exactly what its title said and "Lifted the Judicial the Veil on Stress."[136] His article describes how he suffered from PTSD for months on the bench reacting particularly to a multiple victim child abuse matter. He did not realise what he had and, as in the case of the barrister above, it was his wife who insisted something was wrong. His colleagues either had not noticed, or felt they could not say anything. He links the period of his illness with being very agitated and cranky when in court and realised, only after he recovered, what a difficult time he had given everyone else in court. He had become as a result of his illness an "unintentional bully" which make up 96% of bullies in Australian workplaces.[137]

Possible Remedies

Perfectionism must go. Legal academics and leaders need to recognise the quest for perfection as the fool's quest that it is. They need to cure it themselves. There is an excellent program set out by Tal Ben Shahar, Harvard Professor, which addresses perfectionism.[138] They must learn to and recognise it in their students and colleagues and encourage the profession to strive for Optimalism, which is 80% all of the time without burnout. Optimalists are more efficient, more productive, happier and therefore much more likely to make good decisions and be more resilient. Further, because they allow themselves to make mistakes and fail sometimes, they are better placed to assist others who will confess their mistakes more readily and not try to cover them up or blame others. One of my teams of Immigration lawyers has adopted the mantra: "turn your losses into data." Instead of energy

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[136] David Heilpern, *Lifting the Judicial Veil Vicarious Trauma, PTSD and the Judiciary: A Personal Story* <https://www.judicialcollege.vic.edu.au>.

[137] Evelyn M Field, *Bully Blocking at Work* (Australian Academic Press, 2011).

[138] Tal Ben Shahar, *The Pursuit of Perfect* (McGraw-Hills Education, 2009).

sapping self-blame for losing a case, find out how you lost and do it differently next time. In recognising his own perfectionism Tal Ben Shahar identified that it had helped turn him into the world's best procrastinator. He had to re-read every submission, could not settle on strategies, or could not finish work because it might not be good enough. His in-tray never went down, and he was exhausted. He could not believe the energy he found when he ditched perfectionism. Many of the lawyers I have recommended his program to report the same to me.

I was heartened to hear Sir Andrew McFarlane, President of the Family Division and Head of Family Justice UK, speaking at the Wellbeing for Law Conference in 2019, urging us to learn to work differently in order to stay well. For example, he instructed his judges that "short orders would do, just write the judgment and get it out there." On the matter of overwork, he said "if it's the list or the judge that has to go, it's the list every time." He also instructed his judges not to check or respond to emails and texts out of hours. He also was encouraging his judges to "work differently." He conceded he could do little to stem workflow, so they all had to learn to use the technology and try different systems to do the job without getting sick. This is leadership and this is going in the right direction.

Whilst on the point of too much work and too little time to do it in, billable hours must go. Unrealistic time frames attached to tasks, micromanaging and not valuing the unbillable components of the work, like research, consulting, self-care and training mean these components do not happen. Lawyers report their stress levels go up when they must spend time logging their billable hours, time which by its nature is also not billable![139]

Flexibility is a core component of wellness. Daniel Siegel a psychiatrist in the US has even proposed a model in which he reconfigures all of the mental illnesses as being the product of either rigidity or chaos,[140] which he conceptualises as the banks of river and wellness is going with the flow in the river. The law has been, perhaps, the most rigid and inflexible of professions. This has not only contributed to the poor mental health of its practitioners, but has also contributed to making it impervious to sensible change and unnecessarily vulnerable to disruption caused by technological change. Richard Susskind has been

[139] Bergin and Jimmieson (above n 6).

[140] Daniel J Siegel, *The Mindful Brain* (WW Norton & Company, 2007)

warning the legal (and other) professions about this for years,[141] encouraging them to embrace the change and make the disruption work for them. Those who have heeded his message will emerge from the COVID-19 period not only with businesses intact but flourishing. Their anxiety at the time of writing which has most legal workplaces, including the courts working virtually, will be much lower than colleagues who have not already been adapting.

The ability to embrace new learning, a core component of flexibility, has also been shown to enhance mental and physical wellbeing because it strengthens the synaptic connections in the brain, which improves the brain's plasticity.[142] So from Law School and into required continued professional development (CPD), new skills in diverse subjects need to be introduced and constantly updated. Professional training and development should include subjects like recognising mental illness, mindfulness, developing empathy, computer courses, lateral thinking and business skills, and the ability to work collaboratively. The list is literally endless and should include something the practitioner has not tried before. New learning goes to competence and, as I have said, increases brain power, which leads to confidence and promotes enhanced wellness.

One specific skill that can and should be taught as it is in Social Work and Psychology courses, and is required to be demonstrated in CPD is self-awareness. The capacity to know yourself, question your own practices, decisions and emotional states is considered a necessary skill in the other professions that work with distressed clients and distressing material. Why hasn't it been required of lawyers? Self-awareness combined with mindfulness practices mean the practitioner will no longer be the last person to know they are unwell.

Mindfulness practice would only enhance this. I have been teaching lawyers how to do a daily mindfulness practice that helps them to calm their own mind, focus their attention and

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[141] Richard Susskind, *Transforming the Law* (Oxford University Press,2000); Richard Susskind, *Tomorrow's Lawyers* (Oxford University Press, 2013); Richard Susskind, *The End of Lawyers?* (Oxford University Press, 2010); Richard Susskind, *The Future of the Professions: How technology will transform the work of human experts* (Oxford University Press, 2017).

[142] See e.g., Michael Merzenich, *Soft-Wired How the New Science of Neuroplasticity Can Change Your Life* <www.soft-wired.com>.

assess how they are travelling each day. It can then be adapted to help with Vicarious Trauma intrusions as well.[143]

The other practice missing from the law is professional supervision as practised by Social Workers and Psychologists. This is not line supervision, it is the practice of meeting with a senior colleague on a regular basis (usually monthly) to be checked for wellbeing and Vicarious Trauma, asked about good and bad interventions and what you have learned from them. It can also be conducted in groups. The process involves self-reflection with another who can help and direct you to new learning when needed, pick up early signs of distress and support wellbeing practices. I am not allowed to practice as a Social Worker even after over 40 years without proving I submit myself to this process for a required number of hours in a working year. I am not allowed by my professional body to be isolated because it's not safe. I currently run this style of supervision with a number of legal centres and have done it with individual practitioners, both junior and senior. They love it, in one group I led recently one of the senior practitioners said, "Isn't it great we get to do this - to reflect on what's happening and help each other plan strategy."

Regular supervision is a great way to make sure practitioners don't get isolated, as is mentoring. The Law has had a great tradition of informal mentoring which billable hours has eroded. Many legal organisations including the UK Bar are beefing up their mentoring now. This is also now starting to happen in Law Schools too, which is a great thing.

B FEAR OF BEING SEEN AS WEAK OR UNABLE TO FUNCTION

It is evident from the research that once thrust into this aggressive, competitive environment the last thing a new lawyer is going to do is tell anyone they are not coping. As we have already seen they believe they will be seen as weak. All lawyers worry that getting a diagnosis may call into question their ability to do complex work, threatening promotion, and indeed their practising certificates. So, they suffer quietly or turn to comfort strategies like alcohol, drug taking, eating, gambling, spending and unsafe sexual practices or relationships. All of these are well known to exacerbate poor mental health and lead to malpractice and client complaints. I deal with Legal regulators in Australia and New

[143] Ruby Wax's books and resources are a great place to start a mindfulness practice. See e.g., Ruby Wax, *A Sane New World: Taming the mind* (Hodder & Stoughton, 2013).

Zealand, all of whom have observed the correlation of the practitioner being unwell and the likelihood of complaints. In a profession that values the acuity of the practitioner's mind admitting to mental illness is an anathema. And of course, the legal regulation processes only enhance the risks of anxiety and depression, worsening the practitioner's mental health. Many regulators are quite rightly deeply concerned about the effect their processes have on the mental health of both the practitioner and those investigating.

Possible Remedies

Training in Law School, Colleges of Law and workplaces in understanding, recognising and responding to mental illness in yourself and others should be mandatory. Clear statements from societies, regulators and employers that you will not be punished, or your career adversely affected for declaring yourself to have a mental illness. As thankfully has been the case for Magistrate Heilpern. And if the illness turns out to be a factor in malpractice or poor behaviour, it will be taken into account. Also members of staff in chambers, law societies, Bar associations, firms and larger organisations should be trained in Mental Health First Aid, so that they can quickly recognise and respond to colleagues in distress.

The UK Bar wellbeing portal[144] contains a resource of mine which provides to help a colleague who has been off getting treatment for a mental illness have a supported return to work, like you would have if they were returning from physical illness. There is also a template for gaining prior consent from someone with a known illness, say for example Bi-polar disorder to enact a care plan when early signs of the illness arise. A practitioner with a mental illness, who acknowledges having it, advises his employer or colleagues, keeps himself well and co-operates with sensible care plans in the workplace is a valuable practitioner. We should no longer tolerate having a different approach for physical illness to mental illness in the modern workplace. Helping practitioners feel safe to disclose an illness and supporting their recovery will end the fear of being seen as weak.

[144] See: www.wellbeingatthebar.org.uk.

C *VICARIOUS TRAUMA*

I have made several mentions of Vicarious Trauma (VT). I want to turn to it specifically. VT is the trauma we get from another person's trauma. Because "the thought is the same as the activity to the brain",[145] when we read, listen to and deal with material that describes something traumatic happening to another person, our brain reacts as if it's happening to us and activates the fear centre of our brain, getting us ready to respond. This is not a psychological response, initially, but a physiological response whereby the brain pumps out cortisol, adrenalin and hypertensive chemicals into our system to help us meet the threat and keep us hyper alert. This physiological response is what got us away from predators in the past and is hardwired into our DNA. Originally, as it still is in the animal kingdom, the response was a short-term response, minutes not hours, days, weeks or months and it turned off when the danger passed. However, over time the human brain has developed in a way that our animal cousins' brains have not. We have grown more connections in the prefrontal neo-cortex which has enabled our brains to anticipate bad things happening. We also do what other animals don't do and that's ruminate (which is why they don't get ulcers) so we keep the bad event in our head going over and over it and in so doing we keep our fear centre activated, pumping chemicals we don't need and can't easily disperse into our systems.[146] And lawyers are the best ruminators I know with good memories so a lot of nasty stuff stays in their brain, bringing the symptoms of trauma and depression, anxiety and intrusive thoughts with it. And of course, many lawyers have a high caseload of distressing cases.

The symptoms are hyperarousal, literally the fight, flight fright, evidenced by anger, overreacting to little things, startle response, hypervigilance, over working and a rescue mentality. Next is its cousin, hypo-arousal typified by tiredness, lack of motivation, and low mood. Finally, withdrawal and avoidance of distressing material or clients. Coupled with this the practitioner's world view changes. Some adopt a very dark world view in which they see perpetrators and dangers everywhere and become over-protective of themselves and others. Others become cynical and hardened which they think will work to protect them, but it only cements their isolation. I have actually heard senior lawyers tell junior lawyers to

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[145] Baroness Susan Greenfield 'The Mind and Its Potential' (Conference, Sydney, 2015).

[146] Robert Sapolsky Why Zebras Don't Get Ulcers 3rd Edition OUP

ditch their empathy. Without empathy the practitioner has no ability to read others properly, and they will become prone to responding inappropriately, drawing more aggression and are likely to become isolated. This only magnifies their risk of becoming very unwell. Psychopaths don't have empathy - that's what makes them good bomb disposal experts! As evident from Magistrate Heilpern's account above, the sufferer is the last person to know they have VT and they typically soldier on until a seemingly minor incident becomes the "straw that breaks the camel's back" or an error or complaint brings it to light.

Possible Remedies

Many legal organisations have begun to understand and recognise VT and have begun educating lawyers and those who work with them to know the signs and adopt practices to minimise its harm. This is a good thing. It should be in all Law School syllabuses, covered by Colleges of Law and Law Societies, Bar Councils and Judicial educators. I have done this training with the Family Law Bar in the UK.[147] the Redress Scheme in Australia, community legal centres, CDPP, ODPP, Legal Aid and many others. When lawyers receive this training, it makes sense to them and they can immediately adopt practices and strategies to stay well. [148]This is another issue demonstrating the need for supportive supervision and mentoring as outlined above. Every supervision session the practitioner should be checked for VT, asked if they have had any particularly distressing matters recently and be helped to implement their self care strategies or if necessary, referred to a clinician.

Mindfulness comes back into the discussion here. If a practitioner establishes a regular mindfulness practice, then it can easily be adapted to help deal with intrusive thoughts and distress. They will first notice the distress more quickly, because they are better at tuning in to themselves. They are able to recognise they have been triggered and can quickly calm and stabilise themselves using their practice, accept and normalise their response and manually attune their minds to something safe.

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[147] Indeed they have a video of it on their website and there is a VT manual on the UK Bar wellbeing portal, see e.g. www.wellbeingatthebar.org.uk.

[148] Further strategies can be found in my book: *The Resilient Lawyer*.

Some of the workplaces mentioned above have implemented Wellbeing checks for lawyers working in known risk areas like, child abuse, immigration, criminal law, personal injuries and so on. In some cases, the checks are mandatory. Others have made them opt-out, so at least we know who is not going and other measures can be put in place for those lawyers. The Ontario (Canada) Prosecutor's Office has embedded counselling staff within the organisation to be available onsite on a daily basis for the prosecutors.

In addition, many of these workplaces and others have made gym membership, yoga, and Pilates available to staff either onsite or nearby to encourage the exercise component that is also crucial in managing VT. There is also plenty of research from psychology that suggests kind and happy workplaces make for safe and productive work practices and promote higher staff yield retention and profit.[149] Injury from VT goes down in such workplaces and recovery is faster.

D ETHICS & VALUES

I have heard many lawyers worry about the ethics of the firm or agency they work for or used to work for, and this is an oft cited reason for leaving a legal job or the law altogether. Is the mental health of lawyers also being compromised by how some lawyers are being asked to work? As it happens there is some Australian research which found exactly that. [150] Law students and new lawyers show heightened stress levels and low job satisfaction if they are required by the seniors to work contrary to their values. Ethical legal practices have higher morale and better retention.

Martin Seligman, the father of Positive Psychology also makes the connection between living and working consistently with one's values and psychological wellbeing. He says it is the difference between living a good life or a meaningful life, the latter being the one in which we are not only well, but we flourish.[151]

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[149] See e.g., Ed Diener and Robert Biswas-Diener, *Happiness: Unlocking the mysteries of psychological wealth* (Blackwell Publishing, 2008); Martyn Newman, *Emotional Capitalists: the new leaders* (John Wiley & Sons, 2008)

[150] Tony Foley, Vivien Holmes, Stephen Tang and Margie Row, 'Helping Junior Lawyers Thrive' (2015) *September, Law Institute Journal* 44.

[151] Martin Seligman, *Flourish* (Random House, 2011).

Possible Remedies

The education of ethics and values currently being offered needs to be extended to invite participants to explore themselves to find out what matters to them (*their* values, in other words) and use this to help them decide what kind of legal practice they can participate in that would be consistent with what they care about. Clearly this discussion should begin in law school (well, primary school in my opinion) and develop over a career with supervisors and mentors who would then be able to keep the practitioner focussing on their values and thinking about how to daily incorporate them into every aspect of their work.

IV CONCLUSION

I have highlighted here only some of the problems and some of the solutions to improving the mental health of this important profession. I have also utterly failed to list the many strengths of the profession that it can be drawn on to assist those who are struggling. So, let me mention a few as I conclude, the Law is intelligent, tenacious, works from right values (for the most part), loves being collaborative and collegiate when it can and has a great sense of humour. It is resourceful, and if it could turn its fabulous advocacy skills towards its own practitioners, which is beginning to happen, then it cannot only recover but thrive. I also want to state clearly my own deep gratitude to the law and for what you all do for me and our community, in these troubled times where would we be without you? It has been a wonderful privilege and honour for me to work alongside so many of you. (Which reminds me gratitude is in and of itself a great wellbeing strategy).[152] I urge educators, leadership and practitioners to take up these suggestions, use the wealth of psychological knowledge that is out there along with the technology and resources provided to grow a robust, healthy, resilient profession that will thrive and flourish in the future. It can and must be done.

[152] Martin Seligman, *Flourish* (Random House, 2011).

AN INTERVIEW WITH DR HOLLY DOEL-MACKAWAY

Dr Doel-Mackaway, thank you for agreeing to be interviewed by *Pandora's Box* for our 2020 edition: Law and the Mind. This year we have seen the #BlackLivesMatter movement expose the systemic, long-term and endemic state-based abuse of, and discrimination against, people of colour in many countries, including Australia. This has included increased media coverage of heinous acts of violence by the State against people of colour and raised community awareness of the prevalence of racism in Australian society.

Dr Doel-Mackaway, your area of research concerns children's rights under international law, focusing on the rights of Aboriginal children. What evidence points to inequalities faced by young Aboriginal people in Australia today?

There are many legal and structural inequities that underpin discrimination against Aboriginal young people in Australia. Indigenous children and young people are much more likely to encounter police because of racist over-policing and enter the juvenile 'justice' system. Young Aboriginal people are also far more likely to be taken from their families and placed in out-of-home-care through the child 'protection' system. Note the names of these systems, the *justice* and *protection* systems, and the abundance of research that demonstrates these systems do the antithesis of dispensing justice and providing protection to Aboriginal children and young people. This claim is supported by Indigenous youth incarceration rates that are 25 times higher than that of non-Indigenous youth,[1] and the fact that Indigenous children are being removed from their families at 10 times the rate of non-Indigenous children[2]. This level of child removal in Aboriginal communities is unprecedented and far exceeds the rate of removal during the period known as the Stolen Generations, that occurred between 1910 and 1970, where state laws and policies supported widespread

[1] Cunneen, Chris, 'Juvenile Justice' in Larissa B Behrendt et al, *Aboriginal and Torres Strait Islander Legal Relations* (Oxford University Press, Second Ed, 2019) Chapter 5, 72.

[2] Melissa O'Donnell et al, 'Infant Removals: The Need to Address the Over-Representation of Aboriginal Infants and Community Concerns of Another "Stolen Generation"' (2019) 90 *Child Abuse & Neglect* 88.

forcible removal of Aboriginal children from their families – acts that the 1997 *Bringing Them Home Report* concluded constituted genocide[3].

What are the mechanisms that have allowed these inequities to flourish?

The seeds of inequality are apparent in many Australian laws, including within the Australian Constitution that sets out the rules by which Australia is governed. Two key sections of the Australian Constitution anticipate and permit racism: section 25 permits the disqualification of 'persons of any race' from voting and section 51(xxvi) empowers the Federal Parliament to make 'special laws' with respect to 'people of any race' – this section is known as the race power. These provisions play a significant role in perpetuating racism throughout Australian legal systems despite the 1967 referendum that many people think quashed the racist elements contained in the Constitution.

In 1967 Australians voted overwhelmingly to amend s51(xxvi) of the Constitution to allow the Federal Parliament to make laws with respect to Aboriginal people; previously only the States could make such laws. The consequence of the referendum was that the text in section 51(xxvi) that referred to Aboriginal peoples was struck out. This has the effect of transferring law-making power from the States to the Federal Parliament, but the provision retained the power to make 'special laws' for the 'people of any race.' Of great significance though is the fact that this text does not state that such laws must be for the *benefit* of Aboriginal peoples, and I will come to why this is so significant in a minute. Additionally, the referendum repealed section 127 of the Constitution that excluded Aboriginal peoples from being counted in the census, which was of course vital; but the referendum did not alter section 25, so it still permits the exclusion of people from any race from voting.

There is no acknowledgement or recognition of Aboriginal peoples in the Australian Constitution, no mention of anything relating to Aboriginal people's rights, nothing.

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[3] Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Australian Government Publishing Services Canberra, 1997).

The consequence of there being no requirement for Federal Parliament to make laws that will *benefit* the people of any race under the race power in s51(xxvi) is something that became clear in the Kartinyeri case[4] concerning the building of the Hindmarsh Island bridge on Kumarangk, secret women's business land in South Australia. This case was the first time the 'race power' was challenged on whether it could be used purely for the benefit of Aboriginal and Torres Strait Islander peoples. The majority of the High Court of Australia found the race power could also be used for actions that were *not* beneficial to Aboriginal and Torres Strait Islander peoples (such as in this case the building of a bridge on Kumarangk, a sacred site). This determination was a major setback in the long fight for Indigenous rights and was contrary to the aims of the 1967 activists who had campaigned in good faith that the race power would be used for the benefit of Aboriginal peoples.

The Kartinyeri case demonstrates the way colonialist law so often interacts with, and detrimentally impacts, Aboriginal and Torres Strait Islander people's lives. The Constitution is extraordinarily difficult to alter and cannot be altered other than via a double majority referendum[5]. This was achieved with an overwhelming positive 'yes' vote in 1967, owing to the efforts of campaigners such as Faith Bandler in NSW leading up to the referendum. But despite overwhelming public support in 1967 to remove discriminatory constitutional provisions Doreen Kartinyeri still lost her battle in the High Court some 30 years after the referendum.

I raise this case as a key example of how Australian laws, and indeed Australia's supreme law, can be interpreted in ways that permit and support the denigration of First Nation's people's human rights, cultural expression and connection to land, which is a key form of legal racism that is still prevalent in the law today.

[4] *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

[5] *Commonwealth of Australia Constitution Act* (1900) (Imp) s 128.

One of the most recent examples of Australia's targeted legislation, and a focus of your research, was the* Northern Territory Emergency Response and Stronger Futures *legislation (known as the* Invention*). Could you explain what the Intervention entailed and what your research uncovered?

In June 2007, after the release of the Little Children are Sacred Report arising from the Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse[6] the Federal Government commenced the *Northern Territory Emergency Response* (later rebranded the Stronger Futures legislation). The purported aims of the *Intervention* were to address child abuse and included a range of racially targeted measures affecting Aboriginal peoples living in 73 'prescribed communities' in the Northern Territory (NT). The Territories power in s122 of the Constitution was the head of power Federal Parliament relied upon to carry out the Intervention and it was carried out without warning and without consultation with Indigenous communities. My research examined young Aboriginal people's views about two *Intervention* measures: income management through the BasicsCard, and alcohol regulation through the 'blue and white warning signs' that were placed at the entrance of communities.

The BasicsCard is a cashless welfare mechanism and looks like a key card; it serves as a means to quarantine 50% of a person's welfare payments. Unlike a key card though, people who are in receipt of welfare and have a BasicsCard cannot go to an ATM and withdraw cash from that card. Welfare money is quarantined onto the card and can only be used for purchase of basics such as clothing, bills and for basic necessities- that is why it has been called the BasicsCard. People cannot use the card to purchase pornography, alcohol, cigarettes or use the card for gambling. In its early stages it was only accepted in certain stores so people who lived in very remote areas of the NT couldn't use it, for example, at the local store because the system wasn't set up for people to use it like an ordinary ATM card. It meant that people had to come into town centres, often great distances from their

[6] Rex Wild QC and Patricia Anderson, *Ampe Akelyernemane Meke Mekarle: "Little Children Are Sacred": Report of the Northern Territory Board of Inquiry Into the Protection of Aboriginal Children from Sexual Abuse* (Report, 30 April 2007).

homes and at great expense via private transport. The BasicsCard is now accepted at far more places. In my research most young people said the BasicsCard positively impacted some aspects of their lives such as helping with family budgeting for food, yet nearly all participants were unaware that the BasicsCard targeted Aboriginal peoples and upon learning this children and young people assessed the measure as 'bad racism'.[7]

The other aspect of the Intervention I asked young people's views about was the 'blue and white signs' that are a part of the alcohol regulation measures imposed under the *Intervention*. These are very large metal, highly visible signs erected at the entrance to each prescribed community. The signs have the words 'no alcohol' and 'no pornography' written on them in very large print. In my research I did not have ethics approval, nor did I seek it, to talk with young people about pornography restrictions, and that did not come up in my research, but I did seek and was granted ethics approval to talk with children about the alcohol regulation measures. Of the blue and white signs, all the children had seen these at the entrance of either their or another's community. Participants unanimously agreed that the blue and white warning signs are an ineffective regulatory measure that negatively impacted their lives by 'shaming' communities and making their communities, particularly the men in their communities, 'look bad'[8]. All young people said the signs branded their communities as alcoholic communities. Notably, many young people said that their communities had been dry for many years, they had high levels of self-determination and had declared their community to be alcohol free, and yet children reported these massive banners were in situ at the entrance to their communities.

Aboriginal children and young people have very little opportunity to contribute to public decision making in Australia and are rarely asked to provide their views about matters affecting them, like the design and implementation of laws, such as the *Intervention*. My research demonstrates ways to engage young Aboriginal people in culturally appropriate, cross-cultural research in child friendly and respectful ways. It also shows that if Aboriginal children are asked, and asked in appropriate ways, they can play a vital role in contributing

[7] Holly Doel-Mackaway, "'I Think It's Okay ... But It's Racist, It's Bad Racism": Aboriginal Children and Young People's Views about the Intervention' (2017) 76(1) *Monash Univeristy Law Review* 76, 79.

[8] Ibid, 108.

to public decision-making, even about matters as complex as law-making—a realm dominated by powerful, adult, mostly white decision-makers.

You mention above that your research indicated that young Aboriginal people said there were some positive benefits from the BasicsCard. Does this suggest that some of the Intervention measures were successful?

This was a complex finding to report because yes, the children and young people in this research did identify some positive elements of the BasicsCard, such as assisting with household budgeting. However, they also identified that anyone who needs help with budgeting and who is in receipt of welfare payments should be able to use a BasicsCard. Significantly, a large-scale intervention involving the military and the suspension of the *Racial Discrimination Act* was in no way needed to implement a measure such as this. The BasicsCard measure could far more easily and efficiently have been made available in an opt-in manner through ordinary Centrelink channels—channels that already exist and are already set up. Children said income quarantining should be voluntary, that people should not be forced to go on a BasicsCard, that it should be something offered by way of support not by way of control.

This goes to the heart of what is wrong with the *Intervention* and what is wrong with interventionist, racially targeted laws designed in haste and without consultation with the people who will be impacted by such laws. These outcomes could have been achieved through a far less invasive, far less intrusive interventionist style takeover.

As you have mentioned, prior to the* Intervention *legislation coming into force the* Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse *(known as* The Little Children are Sacred Report*) recommended that the Government commit to genuine consultation with Aboriginal communities. Why is it that these kinds of recommendations are largely ignored by the legislature?

That's a very good question. The Federal Government deployed the army when they initially implemented the *Intervention*—this was an extraordinarily heavy-handed approach. Major

concerns arose about the impact this had on children seeing the armed forces come into their communities complete with fatigues, army trucks and weapons. Aboriginal children must have been thinking 'what is going on?!', they must have been thinking 'this must be an emergency!' Marion Scrymgour described it as 'shocking — and unexpected,' noting that the last time the army were deployed in the NT was in 1975 to help with the recovery from cyclone Tracy[9]. The way the Government chose to roll out the *Intervention* was in complete contrast to the 'The Little Children are Sacred Report' recommendations that first and foremost stressed the importance of committing to genuine consultation with Aboriginal communities.

The *Intervention's* architect, Mal Brough, the Minister of Indigenous Affairs at the time, described the NT as 'nothing less than a war zone'[10] and used this kind of imperative to deploy the military to give effect to the legislation and intervene so that children could be kept safe[11]. Brough's framing of the context for children in the NT created a sense of emergency and he falsely and publicly claimed that paedophile rings were operating in the NT. This framing garnered public support and enabled the legislation to be swept into law. Notably, though, Brough asserted the *Intervention* was all about protecting children, yet the legislation hardly mentions children and the aim to protect children is not apparent in the language of the legislation at all. This must make you think that *Intervention* was not about protecting children, that perhaps it was about something else—perhaps it was about acquisition of land, about controlling Aboriginal peoples, about extinguishing Indigenous self-determination (which contradicts international law mandates). This approach was the exact opposite of what the *Little Children are Sacred Report* called for. Indigenous self-determination and genuine governmental consultation did not occur prior to the *Intervention*.

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[9] Marion Scrymgour, 'Whose National Emergency? Caboolture and Kirribili? Or Milikapiti and Mutitjulu?' (Paper presented at the Charles Perkins Oration, University of Sydney, 23 October 2007) 8.

[10] Mal Brough, 'The Federal Government's *Intervention* into Northern Territory Indigenous Communities' (Alfred Deakin Lecture, University of Melbourne, 2 October 2007).

[11] Alison Vivian and Ben Schokman, 'The Northern Territory *Intervention* and the Fabrication of "Special Measures"' (2009) 13(1) *Australian Indigenous Law Review* 78.

It is important to emphasise that the *Little Children are Sacred Report* was the purported catalyst for the *Intervention* and used as the justification of the harsh measures that were implemented. The inquiry delivered 97 recommendations to address the alleged abuse of Aboriginal children in the NT the first of which stated: 'It is critical that both governments commit to genuine consultation with Aboriginal people in designing initiatives for Aboriginal communities'[12]. The *Intervention* was in complete contrast to this first recommendation.

How does our legal system allow such prejudicial legislation to exist?

Our legal system is set up such that laws emerge from a supreme guiding document: The Australian Constitution. As I outlined earlier, if Australia's guiding document is fundamentally racist, that sets up a system whereby structural inequality is legitimised. It follows that statutes written thereafter will also have racist underpinnings and this is apparent in the *Intervention* legislation. The fact that the *Racial Discrimination Act (Cth)* 1975 (RDA) had to be set aside for the *Intervention* legislation to come into force originally is a stark demonstration of the racist nature of the *Intervention* legislation. A group of people affected by the Intervention petitioned the United Nations and successfully argued for the reinstatement of the RDA as its suspension was contrary to Australia's ratification duties under the *Convention on the Elimination of Racial Discrimination.*

Another way our legal system allows prejudicial legislation to exist is through the refusal to undertake law reform. Currently children as young as 10 years old can be found guilty of a crime and imprisoned. The United Nations Committee on the Rights of the Child recommends the minimum age of criminal responsibility should be no lower than 14, ideally 16[13]. In 2020 there was a huge national campaign to raise the age of criminal responsibility across all Australian States and Territories. The former national children's commissioner, Megan Mitchell, along with many non-government organisations and others, called upon the Australian government across all states and territories to reform their criminal laws to

[12] Wild QC and Anderson (n 6), 82.

[13] UN Committee on the Rights of the Child, 'Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia,' CRC/C/AUS/CO/5-6, (1 November 2019) [47-48].

be more consistent with public sentiment and academic knowledge about children's development and about the legal implication of such a very low age of criminal responsibility. Many submissions were received calling for raising the age yet in July 2020 the Council of Attorneys-General (CAG) decided not to decide on raising the age of criminal responsibility and said they will reconsider it in 2021 as there was a 'need for further work to occur regarding the need for adequate processes and services for children who exhibit offending behaviour.' This was an incredible blow for the progress of Aboriginal children's rights in Australia demonstrating CAG's willingness to allow prejudicial legislation to continue to exist despite the devastating impact this legislation has on children, especially Aboriginal children.

Setting the age of criminal responsibility so low permits and enables the incarceration of very young children, and Aboriginal children are disproportionately affected by these laws. If the age of criminal responsibility were 14, or even better 16, this would end the incarceration of very young children and force governments to find alternatives to imprisoning children. No other western nation has such a low age of criminal responsibility.

It suggested that public pressure to maintain a low age of criminal responsibility is 'not based on a rational understanding of children's development[14]'. What are the legal implications of the low age of criminal responsibility?

The legal implication is that a 10-year-old can be imprisoned by being placed in juvenile detention. This is a huge legal implication. Incarcerating very young children is inconsistent with the standards Australia is required to meet under the *Convention on the Rights of the Child*. Imprisoning children does not make any legal, social or economic sense. Imprisoning someone who has not had the opportunity to finish school, who has not had the opportunity to fully develop and thrive, who has not had the opportunity to gain all the goodness that a family environment can offer her/him, who is still developing cognitively, emotionally and spiritually is contrary to all that children should be able to expect from a society and from a legal system. Further, it is widely understood and accepted that a child

[14] United Nations Committee on the Rights of the Child, General comment No 24 (2019) on children's rights in the child justice system, UN Doc CRC/C/GC/24 (18 September 2019) [25].

as young as 10 cannot have the required intent to commit a crime given their young age and level of development.

The implications of such a low age of responsibility are vast and can fundamentally and detrimentally change a child's life prospects. Incarceration has been shown to have no positive implications for young people's welfare and development.

The law age of criminal responsibility suggests that the law and society see children as being cognitively similar to adults in the context of criminal responsibility, yet governments rarely seek children's opinions about law and policy reform. Why is this?

The observation embedded in your question is so important. Why are children as young as 10 being incarcerated but are never asked their opinions and views on laws that might impact them? I think it is because of a lack of political will to listen and take notice of children combined with long held perceptions of children as being incapable of contributing to decision-making in this way. Governments in Australia are very bad at listening to children, even worse at taking notice of what they say and embedding it into law and policy. I'm not suggesting that Aboriginal children and people need to be consulted on everything that has to deal with law and policy; what I am saying is that Aboriginal children and people must be consulted about matters that will impact them, or are impacting them, such as the *Intervention*, the age of criminal age of responsibility, and the very high rates of Aboriginal child removal via the child protection and juvenile justice systems.

I do not think society sees children as cognitively similar to adults in the context of criminal responsibility. The 2020 'Raise the Age' campaign demonstrated broad societal support for raising the age of criminal responsibility. Thousands of people across Australia agreed that young children should not be found guilty of a criminal offence in the same way as an adult can be because children do not have the same level of understanding about crime as adult do. However, decision-makers within the legal system such as CAG have resisted community calls to raise the age of criminal responsibility.

Demand for real legal change is increasing. In the wake of soaring rates of Aboriginal child removal and incarceration, combined with huge social, economic and educational inequality young Aboriginal people are speaking out against discrimination and inequity and demanding a place at decision-making tables. This was very much reflected last year when a group of Aboriginal people at the Garma Festival Youth Forum wrote and delivered the *Imagination Declaration* that says, 'we are not the problem, we are not a problem to be solved, we have the answers, ask us'[15].

How would you characterise the treatment of Aboriginal and Torres Strait Islander children in Australian juvenile justice systems?

I have heard many Aboriginal people characterise Australian juvenile justice systems as juvenile 'injustice systems'. I agree with this assessment because there is no compelling evidence that demonstrates these systems benefit or lead to long term improved life outcomes for Aboriginal children and young people. These systems have completely failed young Aboriginal people.

In my forthcoming book called 'Indigenous Children's Participation in Law and Policy Development' I agree with the statement by children's rights scholar, Professor Laura Lundy, that it is a 'cold climate for children's rights' globally. I argue that it is 'bitterly cold in relation to the rights of Aboriginal and Torres Strait Islander children and young people,' so much so that there is an absence of young Indigenous people's human rights in Australia.[16] There is an abundance of data demonstrating gross violations of Aboriginal children and young people's rights in both the child protection and juvenile justice systems. The absence of Indigenous children's rights in Australia became more well-known in 2016 after the ABC Four Corners program 'Australia's Shame',[17] that televised graphic footage of the torture of Aboriginal children and young people by officers at the NT Government's

[15] Youth Forum at the 21st annual Garma gathering, 'The Imagination Declaration', 5 August 2019.

[16] Holly Doel-Mackaway, *Indigenous Children's Participation in Law and Policy Development* (In press, Routledge) Chapter 1.

[17] 'Australia's Shame', *Four* Corners (Australian Broadcasting Commission, 25 July 2016) <http://www.abc.net.au/4corners/australias-shame-promo/7649462>.

maximum security Don Dale Youth Detention Centre. The revelation of this abuse led to the NT Royal Commission into Juvenile Justice and Child Protection,[18] the outcome of which revealed these crimes against children were widespread, endemic and occurring across Australian juvenile 'justice' systems.

There is an abundance of evidence demonstrating that the imprisonment of children is contrary to their rights and interest and leads to poor outcomes for their future. Incarceration negatively impacts children's education and future vocational outcomes. I am of the firm view that detention for children is not appropriate and needs to be stopped. There are many alternatives and those should be implemented in accordance with international human rights standards.

The High Court recently found that the use of tear gas against youth detainees in the Don Dale Correction centre was unlawful[19] and the* Royal Commission into the Protection and Detention of Children in the Northern Territory *also found that that youth justice officers in the Northern Territory resorted to physical force "far too often" when trying to control youth detainees.[20] Do you believe there was cognitive dissonance that allowed workers to treat these young people so harshly?

It is more than cognitive dissonance that enables these kinds of crimes to be perpetrated against Aboriginal children unchallenged and without conviction. The underlying cause of this behaviour is State supported systemic discrimination over generations and the commission of crimes against children by the State with impunity over generations. Professor Thalia Anthony notes that this climate 'enabled torture in youth detention' through State legitimisation of the 'mistreatment of children as reasonable, necessary and even ethical.'[21] I'm not a psychologist so I can't talk to the clinical meaning of cognitive

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[18] *Royal Commission into the Detention and Protection of Children in the Northern Territory* (Final Report, 2017),

[19] *Binsaris v Northern Territory of Australia*; *Webster v Northern Territory of Australia*; *O'Shea v Northern Territory of Australia*; *Austral v Northern Territory of Australia* [2020] HCA 22.

[20] *Royal Commission* (n 18) Volume 2A, 261

[21] Thalia Anthony, 'Growing Up Surplus to Humanity: Aboriginal Children in the Northern Territory' [2018] (51/52) *Arena Journal* 40, 44, 47.

dissonance other than to observe that this appears to be large-scale state-based cognitive dissonance. I know from my previous experience as a social worker working with victims of trauma that perpetrators of child abuse often justify their behaviour in all sorts of ways, which is a form of cognitive dissonance, and we see this playing out at the state level in relation to the torture of Aboriginal children in detention. Notably, there have been no convictions against officers of the State for abuses of children in Don Dale despite agreement that these abuses amounted to torture[22].

If these abuses were committed against a white child in a school, for instance, charges would absolutely have been laid. Young Aboriginal people are far more likely to come before a court, far more likely to be convicted, far more likely to receive a custodial sentence and be sent to juvenile detention (which is another form of child removal) and far more likely to be removed from family and placed into out-of-home-care. It is important to understand the root causes of this abuse of children, and this is due to endemic, systemic and structural discrimination that supports and leads to State-based abuses, rather than because of the individual choices and actions of officers of the state. These are not isolated abuses against Aboriginal children, these are abuses that are occurring unchecked time and time again over decades, over generations.

When we were preparing for this interview you mentioned that children should not be labelled as 'abused' but rather 'children who have experienced abuse'. Could you speak about why this distinction is relevant when speaking with and listening to children.

Yes, this is something I hear a lot in the media and in general conversation. People often label children by their experiences, 'a sexually abused child' or 'an abused child', rather than first referring to their status as a child. Labelling and defining children according to experiences of abuse is unhelpful and inconsistent with a rights-based approach to matters involving children. Children and young people are far more than their experiences. Children

[22] Kate Fitz-Gibbon, 'The Treatment of Australian Children in Detention: A Human Rights Law Analysis of Media Coverage in the Wake of Abuses at the Don Dale Detention Centre' (2018) 41(1) *UNSW Law Journal* 100; Anthony (n 21).

and young people are humans just like everyone and have the right to be spoken with and about in ways that respect these rights.

Australia's policymaking has largely occurred in the context of the Westminster system and follows Eurocentric practices and traditions. In your research how did Aboriginal communities operate this system whilst maintaining their own unique laws and culture?

My research did not explicitly ask Aboriginal children to comment on young people's experience of living under two legal systems, but interestingly, it came up nevertheless. That is because Aboriginal children are living in a context where they are subject to two systems of law— Aboriginal law on one hand and imposed Westminster law on the other. Two young people expressed their view about the interplay between these two systems:

> *Holly: How does Aboriginal law and non-Aboriginal law fit together?*
>
> *Nathaniel (14 year old male): Ah, a little bit not nicely.*
>
> *Holly: What is Aboriginal law about?*
>
> *James (17 year old male): It's about culture, keep the culture strong.*[23]

Several children and young people spoke broadly about the relationship between Aboriginal law and non-Aboriginal law and the impact on Aboriginal people, and themselves, about living under these two systems. In the context of a group discussion about whether the government should ask children and young people about laws and policies likely to affect them before they make these laws and policies two young people said:

> *Samantha (16 year old female): Yes, cause this is not their country, cause this is Aboriginal Country.*
>
> *Holly: And are there Aboriginal people who make laws?*

[23] Holly Doel-Mackaway, "'Ask Us... This Is Our Country": Designing Laws and Policies with Aboriginal Children and Young People' (2019) 27(1) *International Journal of Children's Rights* 31, 42.

> *James (17 year old male): Yes all over the place. North, South, East and West. All over the country.*[24]

This data indicates that Aboriginal children and young people experience and understand the operation of two systems of law operating in their lives and the interplay between Aboriginal and non-Aboriginal law. Some of the data indicates children and young people perceive a tension between the two systems of law and perceive the respective legal systems as operating separately from one another. This was raised by Aboriginal people during the research process as significant to them and they emphasised that they should be involved in the development of Aboriginal law because it is their land and they should be involved in decisions concerning their land.

Thank you so much for your time Dr Doel-Mackaway. I have no doubt that your insight into the role that Australian legal instruments and institutions play in the treatment of Aboriginal children and young people will prove valuable for our readers.

[24] Ibid

LEGALITIES OF THE PRESENT, OF THE BAN AND OF HOPE IN STAR TREK: PICARD

Professor Kieran Tranter [1]

I ABSTRACT

This paper identifies that the return of Star Trek's Jean-Luc Picard (Patrick Stewart) in *Star Trek Picard* (2020) (PIC) brings into focus particular legalities of the present. The first season is an exposé of the ban, revealing how this founding law emerges from the trauma of transgression to establish a futureless loop where a fearful and enclosed present, preoccupied by its past, falls into repetition. It also tries to present an alternative legality of agreed inclusion; of cosmopolitan communities of meaningful subjects, rather than managed populations. In this it is not without its cracks. This inclusive future is also secured through the intersection of the great white saviour backed by techno-military superiority. PIC keeps dreaming the 'imperfect dream 'of the West. It does not necessarily offer a New Hope, but it does remind that the West can do better.

II PICARD AND THE PRESENT

Star Trek: The Next Generation (TNG) (1987-1994) is often considered the high mark within the Star Trek franchise. Less variable in terms of tone and quality than the original *Star Trek* (TOS) (1966-1969), the series established the key actors, particularly English actor Patrick Stewart, as Captain Jean-Luc Picard, as household names, and gave the franchise momentum to go on with three further series (*Star Trek: Deep Space Nine* (DS9) (1993-1999), *Star Trek: Voyager* (VOY) (1995-2001), *Enterprise* (ENT) (2001-2005) and several films featuring the TNG crew culminating in the disappointing *Star Trek: Nemesis* (2002).[2] TNG was particularly celebrated by the academy, where the series' reoccurring themes of ethical

[1] Chair of Law, Technology and Future, School of Law, Queensland University of Technology. I would like to thanks Dr Edwin Bikundo for his comments on a draft of this paper.

[2] Stuart Baird, 'Star Trek Nemesis' (13 December 2002, Paramount Pictures); Kieran Tranter and Bronwyn Statham, 'Echo and Mirror: Clone Hysteria, Genetic Determinism and *Star Trek Nemesis*' (2007) 3(3) *Law, Culture and the Humanities* 361.

conduct, responsibility, self-development and leadership were seen as reflecting, and possibly presenting, an aspired future for the 1990s.[3]

The Star Trek franchise's fortunes have been mixed in the twentieth-first century. ENT was cancelled in 2005 after 4 seasons,[4] and a series of reboot blockbuster reimagined TOS films seemingly has run their course after three instalments.[5] In more recent years, with the current golden-age of streamed television, the franchise has possibly begun a renaissance. The darker *Star Trek: Discovery* (DIS) (2017-) takes the Star Trek franchise on a mushroom fuelled ride to alternative realities and far futures and an animated, comedy series *Star Trek: Lower Decks* (2020-) shifts the emphasis away from the elite officers on the starship's bridge to the more mundane lives of junior crew members. However, within this recent profusion of Trek shows the one that attracted the most fan and critic attention has been the return to TNG Trek timeline and the life and times of Jean-Luc Picard in *Star Trek: Picard* (PIC).

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[3] There is an incredibly diverse library of material on TNG. Karen Anijar, *Teaching Towards the 24th Century: Star Trek as Social Curriculum* (Falmer Press, 2000); Judith Barad and Ed Robertson, *The Ethics of Star Trek* (Harper Collins, 2000); Katrina G Boyd, 'Cyborgs in Utopia; The Problem of Racial Difference in *Star Trek: The Next Generation*' in Taylor Harrison et al (eds), *Enterprise Zones: Critical Positions on Star Trek* (Westview Press, 1996) 95; Paul A Cantor, 'Shakespeare in the Original Klingon: Star Trek and the End of History' (2000) 29(3) *Perspectives on Political Science* 158; Anne Cranny-Francis, 'Sexuality and Sex-Role Stereotyping in *Star Trek*' (1985) 12 *Science-Fiction Studies* 274; Lee E Heller, 'The Persistence of Difference: Postfeminism, Popular Discourse and Heterosexuality in *Star Trek: The Next Generation*' (1997) 24 *Science-Fiction Studies* 226; Brian L Ott and Eric Aoki, 'Popular Imagination and Identity Politics: Reading the Future in Star Trek' (2001) 65(4) *Western Journal of Communication* 382; Donald E. Palumbo, 'The Monomyth in *Star Trek* Films' in Lincoln Geraghty (ed), *The Influence of Star Trek on Television, Film and Culture* (McFarland, 2008) 115; Sarah Projansky, 'Deanna Troi's Tenuous Authority and the Rationalization of Federation Superiority in *Star Trek: The Next Generation* Rape Narratives' in Taylor Harrison et al (eds), *Enterprise Zones: Critical Positions on Star Trek* (Westview Press, 1996) 33; Sue Short, 'The Measure of a Man" Asimov's Bicentennial Man, Star Trek's Data and Being Human' (2003) 44(2) *Extrapolation* 209; Susan A Lentz, 'Where No Woman has Gone Before: Feminist Perspectives on Star Trek' in Robert H Chaires and Bradley Chilton (eds), *Star Trek Visions of Law and Justice* (Adios Press, 2003) 136; Mark P Lagon, '"We Owe it to Them to Interfere": Star Trek and US Statecraft in the 1960s and the 1990s' (1993) 34(3) *Extrapolation* 251; M Keith Booker, 'The Politics of Star Trek' in J P Telotte (ed), *The Essential Science Fiction Television Reader* (University Press of Kentucky, 2008) 195; Jutta Weldes, 'Going Cultural: Star Trek, State Action, and Popular Culture' (1999) 28(1) *Millennium* 117.

[4] Sharon Sharp, 'Nostalgia for The Future: Retrofuturism In Enterprise' (2011) 4(1) *Science Fiction Film Television* 25.

[5] Sandwell. Ian, *Star Trek 4: Cast, Release Date and Everything You Need to Know: has it Been Cancelled?!* (9 September 2020) <https://www.digitalspy.com/movies/a864366/star-trek-4-cast-release-date-trailer-plot-spoilers-chris-pine-chris-hemsworth/>

Overall both fans and critics were mostly pleased.[6] The 10 episodes of the first season shows the future of the TNG universe, twenty years after the events in *Nemesis* and the death of android officer Lieutenant Commander Data (Brent Spiner). A future where a retired Admiral Picard is wasting away on his ancestral French vineyard, and the Federation and Starfleet has turned inwards. Following the developing template for streaming television, the first series is a single storyline enacted over 10 episodes, sort of a prolonged mini-series, rather than the episodic adventures of earlier Trek. It tells the story of a dying Picard finding one last mission to save Data's 'daughter' from what emerges to be a deep pogrom against 'synthetic life' perpetrated by one of the enduring Star Trek bad guy races, the Romulans. Picard assembles a crew and a ship and hinting at Joss Weldon's space western *FireFly* (2002, 2005), has a series of misadventures through new and iconic Trek environments; the later including a disabled Borg cube. He reconnects with characters from the TNG such as William Riker (Jonathan Frakes) and Deanna Troi (Marina Sirtis) and VOY ex-Borg character Seven of Nine (Jeri Ryan) before finding and saving a hidden colony of Data derived androids.

This slower, character driven study about an old white man (79 year old Stewart as 94 old Picard) plays in an entirely different registry than TNG. There is more blood, vomit, and violent death then used to be permissible on shiny starship decks and syndicated television back in the 1980s and 1990s. Each of the found crew members comes with wounds and hurts. His former aid Rafaella 'Raffi' Musiker (Michelle Hurd) is dealing with substance abuse: captain of the downmarket freighter, compared to Picard's usual screened rides, the *La Sirena*, Cristobal 'Chris' Rios (Santiago Cabrera) is a former Starfleet officer suffering PTSD from witnessing the suicide of his former captain: the expert on synthetic life Dr Agnes Jurati (Alison Pill) has to deal with having killed her former lover while under a compulsion: and swordsman Elnor (Evan Evagora), a Romulan refugee who feels abandoned by Picard as a child. Finally, there is the young woman Soji Asha (Isa Briones) who discovers that her perceived life was artifice, that she is an android derived from Data

[6] 'Star Trek Picard: Season 1', *Rotten Tomatoes* (Web Page) <https://www.rottentomatoes.com/tv/star_trek_picard/s01>

and is emotionally abused and manipulated by a Romulan agent, before he attempts to kill her. These more broken, hurt and scared outsiders seem very different to the pneumatic people of Picard's TNG crew, who overcame days of dangers, heartache and monumental decision, to awake and cheerfully do the same again. The difference in characters highlights that PIC is different in message and tone to TNG. It is in this difference that it is particularly reflective and revealing of the present.

2020 has not been a good year. In began in smoke, ash and a sense of climate catastrophe with the Australian and Amazonian fires. COVID-19 emerged and killed people, economies and dreams. Geopolitical tensions between the great powers further intensified and black lives were shown to still not matter to a jacked in and jacked up police service. The West was repeatedly shown to have maelstrom of leadership at its centre; as privileged white men spouted rubbish and caring less, while people died, cities emptied and the 'new normal' kept changing.

2020 has witnessed an intensification in the apparatus of governing – laws, regulation, digital tools – to manage populations. This is nothing surprising. Modern governance, and its strategies and technologies of population management, have its origins in responses to the plague.[7] Posited law, administration and the conceiving of human communities as 'populations' are deeply and explicitly entwined with conceptions and desires around hygiene and public health.[8] Sovereignty was founded and rooted in bio-power.[9] The COVID-19 responses of lockdown, distancing and tracking, bolstered by digital surveillance and processing, can be seen as the next iteration of a governing paradigm comprised of

[7] Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan trans, Vintage Books, 1977). Significantly, as Agamben has emphasised, the famous frontpiece in Hobbes' *Leviathan* had plague doctors as the only persons visible in the represented city. Giorgio Agamben, *Stasis: Civil War as a Political Paradigm* (Nicholas Heron trans. Edinburgh University Press, 2015), 6-7.

[8] Graham Hammill, 'Miracles and Plagues: Plague Discourse as Political Thought' (2010) 10(2) *Journal for Early Modern Cultural Studies* 85.

[9] Nicholaa De Genova, 'Life Versus Capital: COVID-19 and the Politics of Life' (2020) 28(2) *Social Anthropology* 253-254.

apparatuses that can simultaneously imagine and control populations and individuals as data flows.[10]

Parallel to this, there has also been witnessing of reactions to apparatuses that can simultaneously imagine and control populations and individuals as data flows. The death of George Floyd on 25 May, which triggered an intensification of the Black Lives Matter protests with occupations of police precincts and city centres across US states, and also renewed protests focused on First Nation justice in Australia, has specifically been a reaction to generations of law and order campaigns and technical augmentation of policing that has efficiently and effectively targeted individuals from specific racial groups. George Floyd died not as a human but as a threat to an imagined body politic that did not include him or his kin; as an *other* whose transgressive existence required force to control and expel. What is also significant about his death and the protests that followed was that the very digital technologies that assisted in targeting him also recorded and distributed the images of his death. Further, the digital provided, not only the spark for the global condemnation and abhorrence but also the pragmatic infrastructure for organising and coordinating protests and opposition.[11] A much more trivial iteration of this response to targeting and bio-control has also been seen in the conduct of some members of that imagined, privileged body politic who emerged from their media bubble of conspiracies to post opposition to pandemic responses through symbolic acts of rights affirmation and anti-vaccine behaviour.[12] Seemingly ambivalent digital technologies simultaneously augment and challenge bio-power and its legalities.

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[10] Noël Um, 'Biopower, Mediascapes, and the Politics of Fear In the Age of COVID-19' (2020) 32(2) *City and Society*.

[11] Nubras Samayeen, Adrian Wong and Cameron McCarthy, 'Space to Breathe: George Floyd, BLM Plaza and the Monumentalization Of Divided American Urban landscapes' (2020) *Educational Philosophy and Theory* https://doi.org/10.1080/00131857.2020.1795980

[12] Daniel Jolley and Jenny L Paterson, 'Pylons Ablaze: Examining the Role of 5G Covid-19 Conspiracy Beliefs and Support for Violence' (2020) 59(3) *British Journal Of Social Psychology* 628; Anatoliy Gruzd and Philip Mai, 'Going Viral: How a Single Tweet Spawned A Covid-19 Conspiracy Theory on Twitter' (2020) 7(2) *Big Data and Society*.

Which connects directly to PIC. Science fiction is the storehouse for technological futures. It is the location where dreams and anxieties about the future of a technologically infused humanity is told, screened and role-played. It is a popular and shared fantasy that provides imagery, tropes, memes and language about technology, humanity and change. In this science fiction connects to law. This can be superficial. Justices of the High Court of Australia have quoted Jean-Luc Picard in judgments.[13] It can be highly motivational. When law and technology scholars see technological disruption needing law, their visions are infused by science fiction. Discourses around cloning connect with *Brave New World*;[14] autonomous weapon systems with *Terminator*;[15] and space travel with space opera.[16] It also can be theoretical. William P MacNeil has shown that popular culture 'texts', particularly novels, films and television, not only project socio-legal commentary about laws, legal issues, actors and institutions, but can reveal a 'popular jurisprudence.'[17] Essential concepts and principles that give form and meaning to 'the law' circulate and are critiqued within popular culture.[18] This is a 'democratic' exercise. Cultural texts present and contest fundamental legal concepts and principles; and this is not the exclusive preserve of legal elites and their tomes on jurisprudence, but located, alive and everyday within the cultural artefacts of the very communities that law claims it rules.

PIC resonates as popular jurisprudence of the present. It animates a founding legal concept: The ban. The ban in PIC is denoted. The show is driven by a founding prohibition by the

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[13] *Phonographic Performance Company of Australia v Federation of Australian Commercial Television Stations* (1998) 195 CLR 158 at 181 (McHugh and Kirby JJ).

[14] Kieran Tranter, *Living in Technical Legality: Science Fiction and Law as Technology* (University of Edinburgh Press, 2018), 22.

[15] See for example Gregory P Noone and Diana C Noone, 'The Debate Over Autonomous Weapons Systems' (2015) 47(1) *Case Western Reserve Journal of International Law* 25; Michael W Meier, 'Lethal Autonomous Weapons Systems (LAWS): Conducting a Comprehensive Weapons Review' (2016) 30 *Temple International and Comparative Law Journal* 119.

[16] Kieran Tranter, 'The Speculative Jurisdiction: The Science Fictionality of Law and Technology' (2011) 20(4) *Griffith Law Review* 817.

[17] William P. MacNeil, *Lex Populi: The Jurisprudence of Popular Culture* (Stanford University Press, 2007).

[18] Karen Crawley and Timothy D Peters, 'Introduction: 'Representational Legality'' in Timothy D Peters and Karen Crawley (eds), *Envisioning Legality: Law, Culture and Representation* (Routledge, 2018) 1.

Federation to outlaw synthetic life. A ban imposed after synthetic workers went rogue and destroyed Mars.

III THE BAN AND THE PAST

The ban is a reoccurring feature of Western legality. But its law-giving comes mostly from its transgression. God's ban in the Garden of Eden only mattered in the consequences of Eve's and Adam's consumption of fructose. Freud's band of brothers found homosocial society through breaking taboos of the father to establish the Law of the Father.[19] As Giorgio Agamben has mapped the ban is always in two parts.[20] The first is the prohibition. The claim that something, some act – especially someone – is not to be. The taking of a human life, the consumption of meat on Fridays or the not wearing of masks in public space. However, the prohibition, the ban properly called, is fragile. In its enunciation it is hollow, mere words spoken or etched. For the ban to become, there must be a second element: it must rule.

To rule means the ban must manifest. This manifestation is weakly seen in coherence. That what is proscribed by the ban is not present in the everyday and on the social surface. Jurisprudence calls this the external view.[21] The ban exists because the alien anthropologist can observe humans in community acting in accordance with its tenements. However, this does not distinguish the ban from lessor forms of shared conduct. The alien observer looking at the West might record collective conduct involving binge watching of streamed content through screen devices, but that does not reveal the sort of foundational legality of the ban. This confuses observations of mass conduct with legality. The ban becomes so through transgression. The act of transgression need not be real, it can be remembered or imagined. But the ban rules through the trauma of transgression.

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[19] Sigmund. Freud, Totem and Taboo: Some Points of Agreement between the Mental Lives of Savages and Neurotics, tr James Strachey (Routledge Classics, 2nd ed, 2001), 164-167.

[20] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life,* Crossing Aesthetics (Daniel Heller-Roazen trans, Stanford University Press, 1998); Katia Genel, 'The Question of Biopower: Foucault and Agamben' (2006) 18(1) *Rethinking Marxism* 43.

[21] H L A Hart, *The Concept of Law* (Clarendon Press, 1961).

It is animating the trauma of transgression that is the essential legality represented in PIC. Star Trek has always been the most obviously legal of science fictions. It is celebrated in Starfleet and the Federation, a rule-based order doing good among the stars.[22] While critics have identified that the specific articulations of Star Trek's norms and rules changed and were inconsistent across the seasons and generations, a focus on consistency does not distract from the strong projection within the franchise of the primacy of rules. These rules were usually intra-textual references to Starfleet ordinances, particularly the Prime Directive not to interfere in pre-interstellar societies, various internal rules of the Federation and engagement with the laws and rules of other cultures.[23] In PIC these are deemphasised. There is little screen time on these intra-textual referents to rules. Picard even makes the quip before setting out on his clandestine adventure that he is 'not in the habit of consulting lawyers before I do what needs to be done.'[24] Indeed, the most 'legal' site in PIC is the Romulan occupied Borg cube; which seems to be governed by a 'Treaty' that gives Federation researchers access and prevents a Romulan from killing a character because he was a Federation citizen.[25]

In PIC, the destruction of Mars fifteen years earlier to the screened present is shown as the Federation's 9/11 moment. In a flashback scene in the opening of Episode 2, a very Data-like android with yellow eyes and skin, spasms then embarks on a homicidal frenzy.[26] In other episodes, there are recurrent images of slow moving ships destroying infrastructure on a red planet. The attack was so complete, that characters make reference that Mars is still

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[22] Michael P Scharf and Lawrence D Roberts, 'The Interstellar Relations of the Federation: International Law and Star Trek - The Next Generation' (1994) 25(3) *University of Toledo Law Review* 577; Thomas C Wingfield, 'Lillich on Intersteller Law: U.S. Naval Regulations, *Star Trek*, and the Use of Force in Space' (2001) 46(1) *South Dakota Law Review* 72; Robert H Chaires and Bradley Chilton, 'Law, Justice and Star Trek' in Robert H Chaires and Bradley Chilton (eds), *Star Trek Visions of Law and Justice* (Adios Press, 2003) 11.

[23] Paul R Joseph and Sharon Carton, 'The Law of the Federation: Images of Law, Lawyers and the Legal System in "Star Trek: The Next Generation"' (1992) 24(1) *University of Toledo Law Review* 43; Richard J Peltz, 'On a Wagon Train to Afghanistan: Limitations on Star Trek's Prime Directive' (2003) 25(3) *University of Arkansas at Little Rock Law Review* 635.

[24] 'The End is the Beginning', *Star Trek: Picard* (CBS All Access, 2020).

[25] 'Nepenthe', *Star Trek: Picard* (CBS All Access, 2020).

[26] 'Maps and Legends', *Star Trek: Picard* (CBS All Access, 2020).

burning.[27] The significance of this act of terror is both personal and galactic. It was the Federation's and Starfleet's reaction to the Mars attack that sent Picard into angry retirement. The attack destroyed a fleet of rescue ships that were under hasty construction to help evacuate the Romulan homeworlds. The Picard-led plan was to save the core Romulan populations from a massive supernova. In the aftermath of the destruction, the Federation reneged on its promises of assistance, leaving the Romulans to their fate.[28]

The consequence of the Mars attack and the Federation's reversal of commitments to assist reframed the galaxy. Foremost, the Federation declared an edict banning both synthetic life and its research. Second, the Federation turned inward. Characters talk, and the episodes shows how the Federation has withdrawn from the wider universe, leaving a power vacuum for warlords and dens of villainy that might not be out of place in *Star Wars*.[29] The Romulan Star Empire has diminished, resulting in a dysphoria of poor settlements on refugee planets.[30] Borg technology is harvested by gangsters from ex-Borgs who had previously been deprogrammed by Starfleet.[31] Even on Earth, the capital of the Federation, a young woman is attacked by Romulan commandos, and the civil law enforcement and Starfleet fail to notice.[32]

The sense is a civilisation in comfortable decline. When Picard visits the Daystrom Institute in Okinawa, he is shown through a mostly empty facility. Research projects are archived in large halls that were obviously designed to accommodate many more staff.[33] This is not the confident 'exploring the stars and welcoming the universe' Federation that launched the *Enterprise-D* under Captain Jean-Luc Picard some thirty years earlier. It has turned aside and

[27] 'Remembrance', *Star Trek: Picard* (CBS All Access, 2020).

[28] 'The End is the Beginning' (n 198).

[29] 'Star Dust City Rag', *Star Trek: Picard* (CBS All Access, 2020).

[30] 'Absolute Candor', *Star Trek: Picard* (CBS All Access, 2020).

[31] "Star Dust City Rag' (n 203).

[32] 'Remembrance' (n .201).

[33] Ibid

become nervous and in a fabulous rebuke by Starfleet command is particularly not impressed by media appearances by Admiral (retir'd) Picard reminding what it has lost.[34]

What is shown are the consequences of a culture founded on the ban. The trauma of the founding moment of transgression, is forever replayed. It is remembered or becomes sublimated as fearfulness. The past is the present's future. In PIC, Starfleet headquarters in San Francisco has holograms of past Enterprises.[35] The most substantial building on the campus is the archive.[36] Even the Starfleet uniforms reference the colourful 'body socks' of TNG early seasons rather than the darker monochrome of the chronologically later TNG films. There is more than a slight irony at play by the producers. The show exists and trades on the nostalgia of Trek-past, but in doing so it emphases the enclosing of the ban.

The parallels to the era of Trump cannot be more obvious. To make America great again, to pine for an England unencumbered by Europe, to reclaim territories lost 'before China stood up' is nostalgia as a politicised myth.[37] The attraction of nostalgia is that it is selective memory bathed in a golden light. The past filtered and relived in the present is a safe place.[38] This projection of the past is always selfish and self-absorbed. It is about escaping responsibility for the present, and with it, the making of the future. This is not to say that nostalgia is important for a sense of self. To remember one's past and to find meaning in a narrative can be healthy. In therapy, the talking cure involves the telling, dwelling and narrating of the subject's past. This is ripe for exploitation. Consumer capitalism repackages and resells things from the past; new cars that carry the name and likeness of iconic earlier models,[39] retro-gaming transporting players back to simpler graphics and interfaces from

[34] 'Maps and Legends' (n 200).

[35] Ibid.

[36] Ibid.

[37] Edoardo Campanella and Marta Dassù, *Anglo Nostalgia: The Politics of Emotion in a Fractured West* (Oxford University Press, 2019)

[38] Svetlana Boym, *The Future of Nostalgia* (Basic Books, 2001).

[39] Elizabeth Guffey, 'Nostalgia' in Anne Massey (ed), *A Companion to Contemporary Design since* (Wiley Blackwell, 2019) 32.

the 1980s,[40] or mega-media rebooting franchises beloved from turn of the millennium childhoods. At the level of the self this can be a pleasurable indulgence and a temporary, if not sometimes expensive, escape from the actualities of middle-life. However, it becomes something else when it seeps into the public zeitgeist.

PIC shows what happens when nostalgia become public. The ban is nostalgia as politics. It is a founding rule that emanates from a remembered trauma. The trauma/ban dyad reduces the present. There is a better past, cut off by the ban, leaving an inadequate present. What vanishes is any sense of future. The present tries to mediate the change marked by the ban. Prohibitions on synthetic life requires constant policing. Halting the sense of the economic and geopolitical decline of the United States requires exceptional measures and inflammatory tweets, resisting a life of sin to regain eternal life involves sacrifice and testing. The past becomes something ripened into a myth exploitable by demagogues and populists to imagine an ideal community that was traumatised, imposed the ban and gave rise to a diminished world of struggle. The trauma and ban stretches from the past to consistently threaten the perceived heirs of that ideal community. This can be white privilege resenting and resisting the trauma of formal and substantive equality and the bans on expressions of racism and discrimination. Or cis-normal patriarchy aggressively holding on to a past of male dominated and enforced binary genders against the 'trauma' of challenges to sexual, social and economic hierarchies. Or rights fetishized individuals reacting against the trauma and bans of public health measures, with acts of unmasked disobedience and vaccination resistance in the assertion of enduring natural freedoms. The trauma/ban dyad diminishes the present.

This is writ on a galactic stage with the Romulans in PIC. Throughout the franchise's history, the Romulans were the keepers of the past secrets that have festered into bans. The trauma of the split from the Vulcans in the franchise's prehistory has meant that the Romulans were always the negative of the Vulcans. Aggressive and emotional in opposition to the Vulcans' repression and reason (and passive aggression). The trauma of that split

[40] David S Heineman, 'Public Memory and Gamer Identity: Retrogaming as Nostalgia' (2014) 1(1) *Journal of Games Criticism* 1.

becoming manifest in xenophobia and conquest.[41] The Romulans are a civilisation with an opaque state comprising shadows and inner sects. In PIC three are shown. There is an order of warrior women, the Qowat Milat on the refugee planet of Vashti.[42] There is the ongoing, familiar to fans of the franchise, plotting and meddling by the Tal Shiar, loosely described as the Romulan secret police, and then there is the shadow within that shadow, the deep cabal within the Tal Shiar of robot haters, the Zhat Vash. It is through this group and its borderline campy agents Narrisa (Peyton List), Narek (Harry Treadaway) and Commodore/General Oh (Tamlyn Tomita), that the turning back that comes from a founding ban is at its zenith. Zhat Vash – defined as meaning the 'only reliable keepers of secrets' in Romulan[43] – is grounded on an absolute hatred of synthetic life. Its founding secret is an encounter with the Admonition, an ancient alien monument that downloaded what seemed to be a terrible warning on the consequences for biologicals in the creation of synthetic life.[44] What the founders of the Zhat Vash understood from the message was synthetic life will develop to annihilate its biological creators. The familiar sci-fi robot uprising that has its origins in *R.U.R.*[45], and its more recent televisual retellings in the Terminator franchise, the reimagined *Battlestar Galactica* (2004-2010)[46] and also in the recent, flattery-by-imitation, TNG comedy remake *The Orville* (2017-). Since Zeus displaced Kronos, the old story of the sons disposing the father, seemingly not only runs deep, but also regularly reruns in the cultural imaginary of the West.

The Romulans in PIC are a society forever tied to the trauma/ban dyad. This is a society, or at least its deep state, that would rather sacrifice planets of its people than have the Federation use rescue ships tainted by the labour of synthetic life. It cannot move on from a moment of imagined trauma. The irony is that the Zhat Vash founders and its present

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[41] George A Gonzalez, The Politics of Star Trek: Justice, War, and the Future (Palgrave Macmillan, 2015).

[42] 'Absolute Candor' (n 204).

[43] 'Maps and Legends' above (n 200).

[44] 'Broken Pieces', *Star Trek: Picard* (CBS All Access, 2020).

[45] Josef Čapek and Karel Čapek, *R.U.R. and the Insect Play*, tr P Selver (Oxford University Press, 1961).

[46] Kieran Tranter, '"Frakking Toasters" and Jurisprudences of Technology: The Exception, the Subject and Techné in Battlestar Galactica' (2007) 19(1) *Law and Literature* 45.

inner sanctum have misunderstood the message. Rather than a warning from biological life against the rise of the machines, it is actually a message to future synthetic life to beware the infanticide tendencies of its creators. Further, it provides the instructions for persecuted synthetic life to 'phone home' and dial for help from the ascended synthetic creators of the Admonition when the exterminations begin.[47] The founding ban of the Zhat Vash, which in turn justifies the violence and terror regularly screened in the show and generated the Federation's ban on synthetics, is shown to be a misunderstanding. The roles were reversed and become reversed in the climatic final episodes that sees what remains of the Romulan war fleet commanded by Commodore Oh, now revealed as Tal Shiar General Oh, barring down to destroy the androids' sanctuary world.[48]

Often this return of the same is the consequence of the ban. It generates a cycle; a conserving story where crisis restarts the system; where trauma leads to prohibition that leads to trauma that leads to prohibition. The cycle is future-less. There is repetition, a sense of inescapable trans-historical forces always leading back, to borrow a concept from Robert Cover, to the 'jurigenesis'[49] of founding violence and formalising ban. The past trauma repeats in the present because the present could never escape the gravity of its ban.

However, this is not the outcome of PIC. At the moment of ragnarok with the Romulan fleet poised to bombard the planet and the androids activating the beacon to summon the builders of the Admonition, one man and his ragtag crew intercede. The hint as to who that might be is in the title of the show. To a score that cleverly integrates signature bars from TNG title track, Picard leads and breaks the trauma/ban dyad. He also dies.

IV HOPE AND THE FUTURE

In the West there is a story about how the trauma/ban dyad can be undone and for the future to be freed from the past. A loving God gifted to fallen humanity his son to die for all their sins. In death the original ban from the Garden was undone. The supreme sacrifice

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[47] 'Et in Arcadia Ego Part 1', *Star Trek: Picard* (CBS All Access, 2020).

[48] Ibid; 'Et in Arcadia Ego Part 2', *Star Trek: Picard* (CBS All Access, 2020).

[49] Robert M Cover, 'Nomos and Narrative' (1983) 97 *Harvard Law Review* 4, 16.

of one saved the many. There is more than a passing hint to the Christological escape clause in the climax-resolution of the first season of PIC.

Picard readies to sacrifice himself, badly flying the *La Sirena* between the amassed Romulan Warbirds and Coppelius, the androids' planet. The beacon assembled by the androids has a vague cruciform outline and the Romulans themselves, in name, their imperial tendencies, secret societies, Senate and homeworlds of Romulus and Remus provide not even a loosely veiled allusion to the Romans.[50] There is a sense of forsakenness; Picard repeatedly tries to contact Starfleet for intersection. His prayers go, seemingly, unanswered. With these there are enough elements to suggest the Crucifixion even before Picard's death and resurrection.

In speculative fiction, the death of a major character is often just a moment of drama within their continual involvement in the story. In fantasy, magic, gods or incursions to the underworld, allows deceased characters to return to keep adventuring in the mortal realm. In science fiction, fantastic technologies do the same. Picard dies at the very moment the crisis is averted. The stress of saving aggravated a terminal brain condition that had been affecting him since he left Earth. Conveniently, the androids had developed the technology to neuro-upload a biological brain to a synthetic body and just happened to have an empty synthetic body lying around. After spending a scene conversing with Data in a 'massively complex quantum simulation',[51] Picard walks towards the light, to awake inside his new body. That the climatic final two episodes contain the confluence of death and paradise is hinted at with title '*Et in Arcadia Ego*'[52] The writers avoid PIC becoming *Blake's 7* (1978-1981),[53] and Patrick Stewart and the titular character will continue to 'engage', 'make it so' and soliloquise into the Star Trek future.

So Picard dies and rises, to save the future from the enclosing of the ban. But what is this future? The founding legality of the ban produces enclosed, hostile communities. Defensive,

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[50] William Blake Tyrrell, 'Star Trek as Myth and Television as Mythmaker' (1977) 10(4) *Journal of Popular Culture* 712.

[51] 'Et in Arcadia Ego Part 2' (n 222).

[52] Ibid; Goldsman, 'Et in Arcadia Ego Part 1' (n 221)

[53] Mark Bould, 'Science Fiction in the United Kingdom' in J P Telotte (ed), *The Essential Science Fiction Reader* (University Press of Kentucky, 2008) 209.

backwards-looking communities; the Romulans, the post-Mars attack Federation and Trump's West. Picard's plea on the subspace transmitters to Starfleet is that the android colony is a first contact situation that Starfleet has an obligation to protect; Data's kin are life in its complex diversity that should be valued, defended and brought into the galactic community. This affirmation of cosmopolitanism – of unity in diversity based on mutual respect – is classic TNG and vintage Picard.[54] The static he receives in response seemingly only reinforces how much his universe has changed. Soji, by the final episode, having had her 'true' android nature unlocked tells Picard why her community needs to build the beacon:

SOJI: 'Picard, try to see this from our point of view. You choose if we live, you choose if we die. You choose! We have no choice! You organics have never given us one.'

PICARD: 'To say you have no choice is a failure of imagination.[55]

Soji's claim is the claim of a population made by the ban. Excluded, managed, and denied equal subjectivity. The past defines a present of conflict and struggle. Picard's reply is in a completely different registry. It could be seen as insubstantial. How can imagination be meaningful against historical abuse and impending annihilation by 208 Romulan Warbirds? The founding legality of the ban seems real and hard. A world of pain and death. Picard's call for imagination seems ethereal and childish.

However, to recognise that another can imagine does two fundamentally radical and disruptive things to the enclosed logic of the trauma/ban dyad. First, the addressee is recognised as a being, as an entity comprised of awareness and intelligence, a thinking, feeling self-aware agent located, responding and *dreaming* within the world. Second, to imagine opens to the future. To imagine is not to remember and mourn trauma; but to plan and project from the present to somewhere else. Imagination is the wellspring of hope.

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[54] Michèle Barrett and Duncan Barrett, *Star Trek: The Human Frontier* (Routledge, 2017); Barry Buzan, 'America in Space: The International Relations of Star Trek and Battlestar Galactica' (2010) 39(1) *Millennium* 175.

[55] 'Et in Arcadia Ego Part 2' (n 222).

The West tells another story of hope; beyond the metaphysics of the savior sacrifice. The myth of the social contract has also been re-runned and syndicated in the West. Like the ban it is a story of legality. Hobbes' animalist, yet prudent, humans agree to mutual preservation by agreeing to nominate one to rule them all.[56] In Locke the realisation of the need for security of property generates a more limited compact.[57] These resemble, to a degree, the trauma/ban dyad. The contract, in the past, provides for the possibility of a more civilised present. In Rousseau the negotiation between meaningful subject and the general will becomes ever-present, not in the past, but always underway. In broad structure, this is reiterated by Mills and also Rawls where the agreement to participate in society is the ongoing responsibility of the individual and the collective.[58] The past recedes to inform the 'veil of ignorance' in the present so it can dream and agree on a just future. Two things to note. First, the legality of the social contract is unquestionable. It takes the preferred legal form of mercantile capitalism and turns it into a founding ethos. Second, it becomes timeless.

There are two great narratives of time in the West.[59] The first is the empirical, technical time of history and diaries. Of past, present and future in their known place. [60] The second is time as the lived moment of an insubstantial present where the past is lost and the future is forever revealing.[61] The ban, and early iterations of the social contract make meaning within empirical, technical time. This happened, then that, which led to now. In later iterations the living compact is continuously being remade in a future focused present. Decisions of individuals founded on mutual respect can build better futures. There is hope. Individuals

[56] Thomas Hobbes, *Leviathan* (Pearson Longman, 2008).

[57] John Locke, *Second Treatise of Govermnet: An Essay Concerning the True Original, Extent and End of Civil Government* (Harlan Davidson, 1982).

[58] John Stuart Mills, *On Liberty* (Penguin Books, 1974); John Rawls, *A Theory of Justice* (Oxford University Press, 1971).

[59] John Ellis McTaggart, *The Nature of Existence* (Cambridge University Press, 1927).

[60] Bernard Stiegler, *Technics and Time, 1: The Fault of Epimetheus* tr Richard Beardsworth (Stanford University Press, 1998), 213.

[61] Craig Bourne, *A Future for Presentism* (Clarendon Press, 2006), 10.

can imagine, and through imagination form a cosmopolitan community of diverse and meaningful subjects.

And that is what happens in PIC. The Romulans back down. The androids deactivate the beacon closing of the portal through which mechanical Lovecraftian tentacled horrors were emanating. The Federation announces that the ban on synthetic life is lifted. Through Picard's gestures of sacrifice:

> *PICARD: 'I have something I want to give you and your people. And I hope it will change your mind.'*
>
> *SOJI: 'And what's that?'*
>
> *PICARD: 'My life. Picard out.'*[62]

And with that, the androids are welcomed into a restored, inclusive galactic society.

Actually, not quite. At the very moment of hopelessness, as the damaged *La Sirena* crashes towards Coppelius, as Oh's countdown to planetary bombardment reaches zero and as the portal opens, the sheriff rides into town. Blinking out of warp a massive armada of Federation starships arrive with Acting-Captain William Riker in the command chair of the flagship *USS Zheng He*. With a few boasts about the techno-military superiority of the assets he has brought to the arena, some choice words to the Romulans and a little bit of brinkmanship, the Romulans retreat. Old white dude saves another old white dude. One of the genre progenitors of space opera were the naval romances of the 19th century.[63] As such gunboat diplomacy is never far from a space opera's surface. It even comes dressed up in PIC with legality. Riker justifies Starfleet's sudden, and overwhelming appearance as authorised by the 'Treaty of Algeron.'[64] Starfleet's saving intervention is, at least from their perspective, lawful.

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[62] 'Et in Arcadia Ego Part 2' (n 222).

[63] Gary Westfahl, 'Space Opera' in Edward James and Farah Mendlesohn (eds), *The Cambridge Companion to Science Fiction* (Cambridge University Press, 2003) 197.

[64] This treaty is also surface texture in the Will Riker focused TNG episode LeVar Burton, 'The Pegasus' *Star Trek: The Next Generation* (10 January 1994, Paramount) and strangely the finale episode

PIC ends in hope. But it is not a New Hope, to suggest another space opera franchise. In Picard's actions the Federation finds its future; releasing the trauma of Mars and removing the prohibition on synthetic life. The androids are transformed from life under erasure to meaningful subjects. Picard has been returned to the universe of the real in a synthetic body that conveniently is the same in look, capacity and (to his disappointment) lifespan, as his previous. As befitting Stewart as a Shakespearian actor, and also the regular Shakespearian interludes between Picard and Data in TNG, the Bard is quoted: 'We are such stuff as dreams are made on, and our little life is rounded with a sleep.'[65] This is also the legacy of the West; that the present is responsible and capable of making a better future; that humans are not just preprogramed by the trauma/ban dyad to repeat exclusion and violence.

Sort of. This dream of the West in PIC comes with conditions. It is the possibility of a future catalysed by leadership. This is the ultimate nostalgia-trip conducted by the producers of the show. Streamed into a fearful, quarantined West of 2020, where leadership seemingly has been replaced by cynical messaging by picayune, angry men, PIC idolises leadership as a vocation of care and service. Picard for his many faults – bombastic stubbornness, love of his own voice, clumsy displays of personal emotion – is shown to lead.[66] Picard leads not solely because his white, cis-male and wealthy (if his ancestral estate is any measure) location of privilege has allowed him to occupy the leadership role of admiral. But he is shown to lead through putting himself in harm's way and through his actions trying to enact what he speaks. Picard is presented as the anti-Trump from the mirror universe. In merging bureaucratic and charismatic authority, PIC dreams of an alternative old white man that saves androids, the Federation and the galaxy itself.

This old white man saving is not perfect. Picard needs his Number One to back-up the speeches and gestures with the 'toughest, fastest, most powerful ship that Starfleet has put

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of ENT Allan Kroeker, 'These are the Voyages...', *Star Trek: Enterprise* (Paramount, 2005). On what the Treaty might mean as law, see Scharf and Roberts (n 196).

[65] 'Et in Arcadia Ego Part 1' (n 221).

[66] Picard as leader has been also grounded a management discourse: Wess Roberts and Bill Ross, *Make It So: Leadership Lessons from Star Trek: The Next Generation* (Simon and Schuster, 1996).

into service.'[67] There is also paternalism. Picard falls very comfortably into seeing the android community as 'children' needing to be taught that 'to be alive is a responsibility, as well as a right.'[68] The spontaneity of the formation and enlarging of the cosmopolitan community is not a given, but can be imagined and brought into being through leadership, luck and 'lawful' shows of power.

This is the not-so new hope in PIC. It is an injunction that the West can dream of a better future and make it so. That the legalities of the ban that lead to a focus on the past and the repetition of trauma can be undone. The nomos of the West has another story of founding legalities that can lead to inclusive cosmopolitan communities of meaningful subjects that look to the future. But it is a story that requires belief in the possibility of humans to come together – even against the evidence of 'violence and corruption and wilful ignorance' – and the role and importance of genuine leadership to believe and manifest 'kindness, immense curiosity, and greatness of spirit.'[69]

PIC says that notwithstanding the many anxieties of the present – of pandemics, of geopolitical tensions, of racial conflict – it does not mean that humans and the planet are doomed to the violent repetition and reiteration of the trauma/ban dyad. The West can do better. PIC might be an imperfect dream; but in 2020 beaming hope for better futures is needed.

[67] 'Et in Arcadia Ego Part 2' (n 222).

[68] Ibid.

[69] Ibid.

AN INTERVIEW WITH PROFESSOR JEREMY GANS

Before we get started on the inner workings of juries could you explain why we have a jury system in Australia?

The short answer: because England had them and we got English common law transported to us along with the convicts. The longer answer: because of Australians' (or Australian politicians') historical discomfort – which persists in modern times – with people who deny their guilt being subject to significant punishment without substantial input from non-officials.

How are juries selected and what assumptions/ strategies do barristers rely upon when selecting a jury for their case?

Juries are selected from pools drawn at random from the electoral roll. After disqualified jurors are weeded out, lawyers for each side can veto a small number of jurors. I can't speak to what strategies lawyers use to challenge. They only receive very narrow information about each juror and can also judge their appearance. Clearly, it's mostly just guesswork.

In the court's opinion what is the ideal jury?

The court's ideal jury is a strange combo – jurors are meant to know lots about how the world works, but almost nothing about either the law or the alleged crime and those involved.

Juries are made up of ordinary members of the public - susceptible to biases and emotional decision making. What are some concerns regarding the impartiality and fairness in jury trials?

Jurors' biases and emotions are a feature, not a bug. We expect jurors to inject an unofficial, (human) element into the process, although the courts also expect that the human element should also include a sense of fair play and seriousness that counteracts the biases and emotions to an extent. I think the fact that twelve jurors have to decide together is what adds the fair play and seriousness.

Concerns over unscientific and unjust jury deliberation was probably most apparent in the case of the Oujia board jurors. Could you briefly explain what happened in this case and the public backlash?

In 1994, four out of the twelve jurors deliberating overnight in a murder trial drunkenly set up a makeshift Ouija board with pen, paper and an overturned glass in a hotel room. After some attempted seances with relatives, they purported to 'speak' to one of the two murder victims, asking him questions about the crime, including who the culprit was. They were supposedly told the defendant was guilty. The jury convicted the defendant the next morning. When word got out – via another juror who learnt what happened over breakfast – the defendant sought and got a new trial, where he was again convicted.

From the beginning and ever since, the jurors were condemned as foolish and irresponsible, in part because of a common but wrong belief that the incident was much more serious than it actually was: in particular, that all of the jurors participated, that a real Ouija board was used and that the board was used in the jury room. The case became emblematic of how rules about jury secrecy can conceal the risks of bad jury-decision-making, even though the secrecy rules did not apply to what happened in the hotel room. The actual evidence the jurors heard was little discussed, and I argue that the highly upsetting nature of that evidence likely played a significant role in what happened in the hotel room.

Judge McClellan at the NSW Supreme court had ruled that juries should be presented with fractions rather than percentages because formulation in a percentage, though mathematical identical, were perceived to be more significant/ serious. This seems to support Dennis J Devine's jury studies that there is a 'model of choice' concerning jury thinking. Could you explain the role of story creation in jury decision-making?

No-one really knows how jurors decide things, but most suspect that jurors try to understand what stories about what happened are plausible or possible. Prosecutors need to come up with a plausible story of criminality, while defendants try to suggest a plausible story of innocence (such as the chance, e.g. 1 in 100, 1 in 1000, 1 in a million, of seemingly damning DNA evidence just being an unfortunate coincidence.)

Juries in the past have been chastised for researching legal terms. How pressing is the issue of legal illiteracy in our courts, particularly with regard to the concept of 'beyond a reasonable doubt'.

Courts expect jurors to be ignorant of the law, as that ensures that the court can be the sole source of their legal knowledge. Unfortunately, judges aren't always good at explaining the law, and sometimes the law is very difficult to explain – for example, the High Court insists that the term 'beyond reasonable doubt' can't be explained. Unsurprisingly, jurors will often look elsewhere if they don't understand a key concept.

Probably the most high-profile case involving a jury's verdict being overturned was the George Pell case. Could you explain what happened in this case?

In the Pell case, his (second) jury and the High Court differed on whether the case put by Pell's prosecutors proved Pell's guilt beyond reasonable doubt. That doesn't mean that the jury was 'inadequate' - it just means that the High Court disagreed with the jury on whether Pell's innocence was a reasonable possibility. There are lots of possible reasons for that: the jury or the High Court may have made a mistake, or the explanation may lie in the contrasting ways they heard the evidence in the case – the jurors saw everything, including video of the complainant, in a few weeks, while the High Court had months to study the details of (just) the written transcript.

What is the effect of heavy news coverage on a jury's ability to be impartial and are the gag-orders courts have necessary and used sufficiently?

Some people worry that biased news coverage can bias a jury, though what research there is says that jurors are usually very critical of how their cases are covered by journalists. The main worry about news coverage is that jurors will get information about their case from the news rather than the court. Gag orders are one option to avoid that, but they really only work in low-profile cases. For example, no gag order could plausibly have stopped Pell's jurors from hearing of the other proceedings against him, which means – I think – that the order had limited effect, and that limited effect was likely outweighed by the significant cost of stopping public discussion of Pell's trial and verdict as it happened.

How prone to biases are judges as opposed to juries?

There is no reason to believe that judges are somehow less prone to bias than jurors – judges and jurors are both human and legal training and experience doesn't remove bias. They do differ in how potential bias might be detected or reduced. Judges give reasons, which means that others can sometimes check for bias. Jurors don't give reasons, but they decide in large groups, which may also protect against individuals' biases.

Jury duty is not an easy job. Often jurors are left in tears and develop bonds with each other to alleviate the burden. What is the emotional burden on a juror and how prevalent is juror stress?

There are at least three burdens: being involved in an unfamiliar and stressful official process, being required to make an unusual and difficult decision about someone's life and (sometimes) being exposed to horrible evidence. We don't really know how prevalent these burdens are, in part because jurors are generally not allowed to fully discuss their experiences in public.

Trial judges receive no training for their informal role of court psychologists and often their only recourse is withholding evidence which is too emotionally charged as to cause an irrational verdict? Should there be a psychologist present in jury trials?

I don't think that's a practical solution – everyone would argue about whether the psychologist was right. The only practical option is to let a judge decide, but I think judges should acknowledge that they are often relying on pop psychology and tradition to make their judgments on these issues.

In your opinion is the jury system a good one?

Yes, so long as it's subject to an effective review for wrongful convictions. It is a good thing to have people who haven't been institutionalised or hardened to act as one of the decision-makers in serious prosecutions, alongside officials such as prosecutors and appeal judges.

What alternatives can courts implement in place of juries? Are these options viable?

The only real alternative is to have trial by judges alone, but I don't think that's ideal, because that puts too many eggs in one judicial basket, for serious cases. Other systems used overseas – e.g. panels of judges and jurors sitting together – aren't viable because they depend on institutional and cultural arrangements that have no footing in Australia.

What changes would you implement to improve the current system?

I think rules that stop public discussion of jury trials should be avoided or minimised wherever possible. Generally, the media should be able to report contemporaneously on criminal prosecutions, including pending and current trials, (with the judge and lawyers addressing any issues that arise directly with jurors during current trials) and jurors should be allowed to talk about their experiences as they choose after their trial (as in NSW, where the media cannot approach jurors, but jurors can approach the media.)