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The Intractable Problem of The Interpretation of Legal Texts*

JOHAN STEYN†

John Lehane had a brilliant academic career at the University of Sydney. In the 1980s he became Australia’s pre-eminent banking lawyer. He produced many scholarly publications. The book on equity, which he wrote with RP Meagher (now a justice of the New South Wales Court of Appeal) and WMC Gummow (now a justice of the High Court of Australia), is a text known and used throughout the English speaking world. His appointment as a judge of the Federal Court of Australia was an inspired choice. The hallmarks of his work were courtesy, calmness, a deep sense of justice, preciseness of thought, profound scholarship and an elegant prose style. It is fitting that Allens Arthur Robinson, the result of a merger which had John Lehane’s blessing, and the University of Sydney, should dedicate this occasion to the memory of a great Australian. I am particularly pleased that his widow, Ros, and his children, Lucy, William, Richard and Felicity are here tonight. It is a great privilege for me to give the first John Lehane Memorial Lecture.

Some might say that to speak of the intractable problem of interpretation of legal texts is an exaggeration. After all, unlike other professionals, a judge usually starts with the comfort that he has a 50 per cent chance of getting the answer to the question right. Moreover, he has the reassurance of Lord Reid’s advice to judges that if your average drops significantly below 50 per cent you have a moral duty to spin a coin.

The centrality of the interpretation of legal texts is not always fully appreciated. Day by day, in Britain, up and down the country, tribunals, lower courts, the High Court, the Court of Appeal, and the House of Lords, are concerned with the interpretation of a variety of legal texts ranging from wills, contracts, statutes, regulations, bye-laws, various types of ‘soft laws’ and so forth. It amounts to the preponderant part of the legal work of English judges, perhaps as high as 90 per cent. I would be surprised to hear that the position is significantly different in Australia. But the academic profession and universities have not entirely caught up with the reality that statute law is the dominant source of law of our time. The interpretation of legal texts is of supreme importance for a modern lawyer.

There are, of course, rules applicable to interpretation, some which are known by Latin expressions, such as *equisdem generis, expressio unius est exclusio*.

† The Rt Hon Lord Steyn is a Lord of Appeal in Ordinary.
alterius, and noscitur a sociis. These underlying rules of interpretation have a role to play. But, subject to what I will say about constitutional adjudication, ultimately interpretation does not generally depend on the application of rules. It is an art. And I would therefore like to start by taking a look at the subject in a more general way. But I am not putting forward a theory of interpretation. The subject is too elusive to be encapsulated in a theory. But as a result of the work of legal philosophers, academic and practicing lawyers, and judges it is possible to take stock of some modest insights.

I propose to discuss the interpretation of contracts, statutes and constitutional measures. But before I turn to these particular legal texts, I would put forward four general propositions which (if correct) go to the heart of interpretation.

First, it is a universal truth that words can only be understood in relation to the circumstances in which they are used. Adapting one of Wittgenstein’s memorable examples, one can imagine parents telling a baby-sitter, who agreed to look after their five year old twins for some hours, that if the children become troublesome ‘teach them a game’\(^1\). The parents return to find the baby-sitter playing poker with the children. Poker is a game. Did the context give a more restrictive colour to the word ‘game’? Wittgenstein thought the answer was Yes. Judging by my own grandchildren I am not so sure.

The purpose of interpretation is sometimes mistakenly thought to be a search for the meaning of words. This in turn leads to the assumption that one must identify an ambiguity as a pre-condition to taking into account evidence of the setting of a legal text. Enormous energy and ingenuity is expended in finding ambiguities. This is the wrong starting point. Language can never be understood divorced from its context. In the words of Oliver Wendell Holmes, a word is not a transparent crystal. The true purpose is to find the contextual meaning of the language of the text, ie, what the words would convey to the reasonable person circumsented as the parties were. In *Codelfa* Brennan J succinctly stated that ‘the symbols of language convey meaning according to the circumstances in which they were used’\(^2\). Earlier this year in the *Royal Botanic Garden* case your High Court reaffirmed this observation\(^3\). In his classic judgment in *Reardon Smith* Lord Wilberforce illuminated this point.\(^4\) Speaking of contracts, Lord Wilberforce said that there is invariably a setting in which the language has to be placed. He made clear that the court is always entitled to be informed of the contextual scene of a contract. The same must apply to the interpretation of all legal texts. The failure to understand this fundamental principle of linguistic jurisprudence and legal logic has caused great injustices. An example in the field of wills is instructive. Consider the decision in *re Fish; Ingham v Rayner*.\(^5\) The testator gave his estate to ‘his niece

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2 *Codelfa* Construction Pty Ltd v State Rail Authority (NSW) (1982) 149 CLR 337 at 401.
3 *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 186 ALR 289 at 293.
5 *In re Fish; Ingham v Rayner* [1894] 2 Ch 83.
Eliza Waterhouse’ during her life. The testator had no niece named Eliza Waterhouse. But his wife had a legitimate grand niece named Eliza Waterhouse and also an illegitimate grand niece of the same name. The illegitimate grand niece was living with the testator and he was in the habit of calling her his niece. This was powerful objective evidence that the words in the will referred to her. With wringing protestations about the painful nature of their task, the Court of Appeal refused to admit the evidence. They held that there was no ambiguity. The illegitimate grand niece lost what had been left to her. What a grotesque result. The will could not be understood without knowing the context.

In the interpretation of legal texts the most frequent source of judicial error is the failure to understand the contextual scene of a legal text. Often judges are not provided with all the contextually relevant raw materials. The essential setting of a text may include in a contract case how a market works, in a breach of statutory duty case competing policy arguments, the structure of a complex statute, the historical development of legislation, and so forth. There is scope for the development of something like a Brandeis brief but carefully and concisely targeted to the relevant context.

The second proposition is that the aim of interpretation of a legal text, whether it be a private instrument or a public statute, must be to derive a meaning from its nature and contents. The mandated point of departure must be the text itself. The primacy of the text is the first rule of interpretation for the judge considering a point of interpretation. Extrinsic materials are therefore subordinate to the text itself. Often lawyers argue cases on the reverse hypothesis. Justice Frankfurter recalled the lawyer who said to the United States Supreme Court ‘the legislative history is doubtful so I invite you to go to the statute’. Contextual materials must of course not be downgraded. On the contrary, the judge must consider all relevant contextual material in order to decide (a) what different meanings the text is capable of letting in and (b) what is the best interpretation among competing solutions. But the judge’s task is interpretation not interpolation. What falls beyond that range of possible contextual meanings of the text will not be a result attainable by interpretation. There is a Rubicon which judges may not cross: principles of institutional integrity forbid it.

The third proposition relates to the generalisation that there has been a shift from literal interpretation to purposive interpretation. What is literalism? This is straightforward. The tyrant Temures promised the garrison of Sebastia that no blood would be shed if they surrendered to him. They surrendered to him. He shed no blood. He buried them all alive. That is literalism. It has generally no place in modern law. On the other hand, it would be an over-simplification to say that there has been a homogenous shift towards a purposive interpretation of all legal texts. Much depends upon the particular text. A comparatively strict interpretation of a documentary credit issued in an international sale may be necessary because a third party (the bank) must be able to rely on a meaning gathered largely within the

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6 This example is given in William Paley, The Works of William Paley (1838) Vol 111 at 60.
four corners of the text. In a network of contracts governing a construction project, parties ought generally to be able to rely on the obvious meaning of the interlocking texts. Similarly, fiscal legislation may sometimes require a stricter approach than social welfare legislation. By contrast, in a consumer transaction the purchaser of a fridge in a consumer sale may be entitled to a more generous interpretation of a right to reject a fridge which cannot make ice.

The fourth proposition I have already foreshadowed. Interpretation is not a science. It is an art. It is an exercise involving the making of choices between feasible interpretations. Structural arguments must be considered. Competing consequentialist arguments must be taken into account. Broader policy considerations may be relevant. Educated intuition may play a larger role than an examination of niceties of textual analysis. The judge’s general philosophy may play a role. Ultimately, however, a judge must be guided by external standards in making his choice of the best contextual interpretation. He must put aside his subjective views and consider the matter from the point of view of the reasonable person.

1. Commercial Contracts

Clarity is the aim in drafting commercial contracts but absolute clarity is unattainable. It is impossible for contracting parties to foresee all the vicissitudes of commercial fortune to which their contract will be exposed. Moreover, and quite understandably, business bargains have to be struck under great pressure of time and events. Often the phenomenon of studied ambiguity obtrudes: the parties cannot resolve a particular difference but leave it to the court to settle the issue. It is therefore tiresome for judges to expatiate on the quality of draftsmanship of commercial contracts. Judges must simply do the best they can with the raw materials produced in the real world.

The common law does not in principle differentiate between the interpretation of a rudimentary cobbled together contract and a sophisticated standard form contract; between the interpretation of a consumer contract and a commercial contract; or between the interpretation of a domestic and transnational contract. That is not, however, to say that in working out what is the best interpretation of a contract a court may not have to take into account, for example, a consumer as opposed to a commercial context, or the need for uniformity in international transactions.

In sharp contrast with civil law legal systems the common law adopts a largely objective theory to the interpretation of contracts. The purpose of the interpretation of a contract is not to discover how the parties understood the language of the text, which they adopted. The aim is to determine the meaning of the contract against its objective contextual scene. By and large the objective approach to the question of construction serves the needs of commerce. It is, however, less well suited to delivering practical justice in consumer transactions. There is much to be said for approaching commercial transactions and consumer agreements somewhat differently. This is already happening. One of the biggest modern developments in contract law has been the development of greater rights for consumers, notably in
controls on exemption clauses and requirements of ‘fairness’ in consumer contracts. In England the principal impetus has been European directives for the protection of consumers. This has given rise to arguments that there should be two contract laws; one for consumer transactions, the other for commercial dealings.\(^7\)

Two recent decisions in the House of Lords explored the extent to which the context may impress a meaning other than the obvious meaning on contractual language. In *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd*\(^8\) the issue was whether a contractual notice by a tenant to determine a lease was valid. The notice wrongly named the day upon which the tenant would do so as 12 January rather than 13 January. The majority held that the notice was valid. Essentially, they regarded it as wholly implausible that the tenant only wanted to terminate if he could do so on 12 rather than 13 January. Given this position the majority concluded that a reasonable recipient would have understood that the option was being exercised. In the context 12 meant 13. The minority held that the notice failed to conform to the requirements of the option reserved in the lease. As a member of the majority in *Mannai* I acknowledge that when judgments were delivered in the House of Lords Chancery, practitioners hoisted a black flag over Lincoln’s Inn.

The case of *Investors Compensation Scheme Ltd v West Bromwich Building Society*\(^9\) is important. The particular dispute can be put to one side. It is sufficient to say that by a majority of four to one the House of Lords upheld the conclusion of the judge that something had probably gone wrong in the drafting and reversed a ruling of the Court of Appeal. Lord Hoffmann, speaking for the majority, rejected the contention that judges cannot, short of rectification, decide on an issue of interpretation that parties had made mistakes of meaning or syntax. Lord Hoffmann observed that ‘if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.’ This was the ratio of the decision. However, in the course of his speech Lord Hoffmann also observed that the admissible background ‘includes absolutely anything which would have affected the way in which the language would have been understood by a reasonable man’. This proposition upset the horses in the commercial paddock. Commercial judges vented their angst. Subsequently, in *BCCI v Ali*\(^10\) Lord Hoffmann explained that his observation only referred to anything which the reasonable man would regard as relevant. Relevance of the extrinsic evidence to the objective setting of the contract is the expressed criterion. It is, however, rare for a judge to decide that a text means something that it could not mean in ordinary or technical language. On the rare occasions when a judge does this, he does it because he thinks there is an obvious mistake which has been made by the author of the text and that he has a duty to correct it.


\(^8\) *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 (hereinafter *Mannai*).

\(^9\) *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (hereinafter *Investors Compensation Scheme*).

\(^10\) *Bank of Credit and Commerce International SA v Ali* [2001] 2 WLR 735 at 749 (Lord Hoffman).
The decision in the Investors Compensation Scheme case raised questions about two sacred cows of English law, namely that the court is not permitted to use evidence of (1) pre-contractual negotiations of the parties or (2) of their subsequent conduct in aid of the construction of written contracts even if the material throws light on the subjective intentions of the parties. One view is that these rules follow from the principle that the task of the court is simply to ascertain the objectively ascertained contextual meaning of the language of the contract. The other view is that the restrictive rules are imposed as a matter of legal policy to achieve certainty. It is, however, important to note that the Vienna Convention on the Sale of Goods (1986), the Unidroit Principles of International Commercial Contracts [1994], and the Principles of European Contract Law (1999) in principle permit such evidence to be taken into account. No doubt this liberality is due to the subjective approach of the civil law system. Possibly we are swimming against the tide. In England the rule about prior negotiations may for the moment be relatively safe. I am less confident about the life expectancy of the rule excluding subsequent conduct. Business people and, for that matter, ordinary people, simply do not understand a rule which excludes from consideration how the parties have in the course of performance interpreted their contract. The law must not be allowed to drift too far from the intuitive reactions of justice of men and women of good sense: the rule about subsequent conduct may have to be re-examined.

In any event, the strict application of these rules had to be qualified in practice. Pragmatically, it has been decided that if pre-contractual exchanges show that the parties attached an agreed meaning to ambiguous expressions, that may be admitted in aid of interpretation. That is a substantial inroad on the restrictive rules. The courts have resorted to estoppel to temper the rigidity of the orthodox rule regarding the inadmissibility of subsequent conduct. Thus in Vistafjord the Court of Appeal held that a party may be precluded by an estoppel by convention from raising a contention contrary to a common assumption of fact or law (including the interpretation of a contract) on which the parties have acted. In this way the reasonable expectations of parties are given some protection. A more radical approach to the two restrictive rules may become necessary. It may be that the differences between commercial and consumer transactions should be more clearly recognised: a hard-nosed attitude to admitting such evidence in commercial transactions may be right but in consumer transactions a more relaxed approach may be necessary.

13 Article 4(3).
14 Article 5:102.
16 Norwegian American Cruises v Paul Mundy Ltd (the Vistafjord) [1988] 2 Lloyd’s Rep 343.
That brings me to the implication of terms.\textsuperscript{17} It is part of the interpretative process. In systems of law where there is a general duty of good faith in the performance of contracts the need to supplement the written contract by implied terms is less than in the common law system. The implication of terms fulfils an important function in promoting the reasonable expectations of parties. Two types of implication are relevant. First, there are terms implied in fact, ie, from the contextual scene of the particular contract. Such implied terms fulfil the role of ad hoc gap fillers. Often the expectations of the parties would be defeated if a term were not implied eg, sometimes a contract simply will not work unless a particular duty to co-operate is implied.

The law has evolved practical tests for such an implication, such as the test whether the term is necessary to give business efficacy to the contract or whether the conventional bystander, when faced with the problem, would immediately say ‘yes, it is obvious that there must be such a term’. The legal test for the implication of a term is the standard of strict necessity. And it is right that it should be so since courts ought not to supplement a contract by an implication unless it is perfectly obvious that it is necessary to give effect to the reasonable expectations of parties. It is, however, a myth to regard such an implied term as based on an inference of the actual intention of the parties. The reasonable expectations of the parties in an objective sense are controlling: they sometimes demand that such terms be imputed to the parties.

The second category are terms implied by law. This occurs when incidents are impliedly annexed to particular forms of contracts, for example, contracts for building work, contracts of sale, hire etc. Such implied terms operate as default rules. By and large such implied terms have crystallised in statute or case law. But there is scope for further development in a rapidly changing world. This function of the court is essential in providing a reasonable and fair framework for contracting. After all, there are many incidents of contracts which the parties cannot always be expected to reproduce in writing.

Ending my discussion of contracts, the black letter approach to interpretation of contracts has given way to a more commercial approach. It eschews niceties of language and concentrates on a contextual approach and the structure and purpose of the transaction. It is to be welcomed. On the other hand, the problem of the consumer perspective has not been completely solved.

2. Statute Law

In 1882 Pollock described the approach of English judges to statutes as follows: ‘Parliament generally changes law for the worse, and . . . the business of the judges is to keep the mischief of its interference within the narrowest bounds.’\textsuperscript{18} This was an accurate description of the judicial mindset in Victorian times. This approach led to restrictive interpretation by literalist methods which sometimes blocked

\textsuperscript{17} Andrew Phang, ‘Implied Terms, Business Efficacy and the Officious Bystander’ (1988) \textit{JBL} at 1.
\textsuperscript{18} Sir Frederick Pollock, \textit{Essays on Jurisprudence and Ethics} (1882) 85.
social progress. It remained the approach of English judges until some time after
the Second World War. But the legal world has changed. Like Australian judges,
English judges now apply purposive methods of construction of statutes.

Except in the rare case where a statute reveals a contrary intention, it is now
settled that every statute must be interpreted as an ‘always speaking statute’. There
are at least two strands to this principle. The first is that courts must interpret and
apply a statute of any vintage to the world as it exists today. That is the basis of the
decision of the House of Lords in \textit{R v Ireland} case where ‘bodily harm’ in a
Victorian statute governing assaults was held to cover psychiatric injury.\footnote{19}
Equally important is the second strand, namely that a statute must be interpreted in the light
of the legal system as it exists today.\footnote{20} Thus the importance the law nowadays
attaches to free speech is a relevant background to the interpretation of earlier
statutes. The rationale of this principle is that a statute is usually intended to endure
for a long time in a changing world. This principle does not apply to contracts.
Arguably, however, there could be a similar development in respect of
international standard form contracts with an intended long life.

It will be rare for a statute to have one obvious meaning which can be
determined without taking into account the context of the legislation. One might
say that a statutory provision that a notice must be lodged within 30 days requires
no resort to contextual material. Even this proposition is not necessarily correct.
The context may throw light on the relative plausibility of interpretations holding
that days include every day of the week or only week days. While the text of the
statute is of pre-eminent importance, it cannot be understood in a vacuum. This
was lucidly explained by Lord Blackburn in \textit{River Wear Commissioners v Adamson} as follows:

\begin{quote}
. . . I shall . . . state, as precisely as I can, what I understand from the decided cases
to be the principles on which the Courts of Law act in construing instruments in
writing; and a statute is an instrument in writing. In all cases the object is to see
what is the intention expressed by the words used. But, from the imperfection of
language, it is impossible to know what that intention is without inquiring farther,
and seeing what the circumstances were with reference to which the words were
used, and what was the object, appearing from those circumstances, which the
person using them had in view; for the meaning of words varies according to the
circumstances with respect to which they were used.\footnote{21}
\end{quote}

Legislative language can only be understood against the backcloth of the world
to which it relates. Moreover, sometimes judgments do not fully take into account
the different levels of reasoning at which the context is relevant. As in the case of
commercial contracts, and other legal texts, the context is relevant to what possible
different meanings the language of the text may let in. But the context is again
relevant when the judge comes to select among the possible interpretations the best

\footnotesize
19 \textit{R v Ireland; R v Burstow} [1998] AC 147 at 158D-G.
20 Sir Rupert Cross, \textit{Statutory Interpretation} (3rd ed, 1995) 51-52; \textit{McCartan Turkington Breen (a
firm) v Times Newspapers Ltd} [2001] 2 AC 277 at 296A-F.
21 \textit{River Wear Commissioners v Adamson} (1877) 2 AC 743 at 763.
one. In any event, it is a fundamental misconception to say that the background to the statute may only be admitted in the event of an ambiguity. The interpretative process requires judges to make informed choices.

That brings me to the use of Hansard in aid of interpretation of statutes. As in Australia, English courts regularly use reports which led to or preceded legislation, in aid of interpretation. It is part of the setting of a statute. Australian and English lawyers would agree that there is no reason why Hansard materials should not be used to identify the mischief against which the statute is aimed. It helps to explain the background of the statute. Far more troublesome is the use in aid of interpretation of statements of a government minister in the promotion of a bill as reflecting the desired intent of the government. Section 15A-B of the Acts Interpretation Act 1901, as inserted in 1984, permits the use of such material where the legislation is ambiguous or obscure or where its literal meaning leads to an absurdity. In England Pepper v Hart 22 heralded a parallel development. Doubts about the reach of that decision have arisen in England. It may be of interest if I explained the reservations which are now emerging in England.

*Pepper v Hart* broke new ground by holding that in cases of ambiguity it is permissible to refer in aid of construction of statutes to statements of a promoter of the bill. The rationale of this principle was memorably stated by Lord Denning, ‘Why should judges grope about in the dark searching for the meaning of an Act, when they can so easily switch on the light?’ I have, however, come to the conclusion that while the actual decision in *Pepper v Hart* was correct, the broadly based observations in that case are contrary to constitutional principle.23

In the Westminster Parliament, exchanges sometimes take place late at night in nearly empty chambers whilst places of liquid refreshment are open. Sometimes there is a party political debate with whips on. The questions are often difficult but political warfare sometimes leaves little time for reflection. These are not ideal conditions for the making of authoritative statements about the meaning of a clause in a bill. Let me give you the flavour from an explanation by Lord Hayhoe, reported in Hansard of 27 March 1996. He said:

I remember only too well my first intervention as a new Minister at the Treasury on the Finance Bill in the very early hours of the morning on a subject about which I knew absolutely nothing but on which I had a marvellously thick book of briefing from the Inland Revenue. I appropriately read out the response to some detailed points that had been made by one of the Opposition spokesmen who stood up afterwards to say how well I had dealt with the point he had raised and welcomed my first intervention in Finance Bill Committees. However, I discovered from my private office afterwards that I had read out the wrong reply to the amendment. Clearly, it made not the slightest bit of difference.

It is sometimes meaningful and appropriate for a judge to refer to the intention of parliament in recognition of its supreme law-making power. It is also perfectly sensible to say that legislation as duly promulgated reflects the will of parliament.

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22 *Pepper v Hart* [1993] AC 593.
But it is quite a different matter to ascribe to a composite and artificial body such
as a legislature a state of mind deduced from exchanges in debates. The law can
ascribe to legal persons, such as companies and state agencies, an intention to
commit particular acts. Rules of attribution have been developed to suit the
demands of particular contexts. But the argument that a legislature, operating
through two chambers, may have an intention revealed by statements in debates is
altogether more ambitious. Until Pepper v Hart, under the common law, there was
in England no rule of attribution, or rule of recognition, which treated statements
of ministers as acts of parliament.

The intention under consideration is one targeted on the meaning of language
contained in a clause in a bill and employed in a ministerial statement. A bill is a
unique document. It speaks in compressed language. Parliament legislates by the
use of general words. It is difficult to ascribe to members of parliament an intention
in respect of the meaning of a clause in a complex bill and how it interacts with a
ministerial explanation. The ministerial explanation in Pepper v Hart was made in
the House of Commons only. What is said in one House in debates is not formally
or in reality known to the members of the other House. How can it then be said that
the minister’s statement represents the intention of parliament, ie, both Houses?
The Appellate Committee took the view that opposing views expressed by a
person other than the promoter can safely be disregarded whenever a statement by
a promoter is admitted. This is also an assumption which seems inherently
implausible in respect of the ebb and flow of parliamentary debates. In truth, a
minister speaks for the government and not for parliament. The statements of a
minister are no more than indications of what the government would like the law
to be. In any event, it is not discoverable from the printed record whether
individual members of the legislature, let alone a plurality in each chamber,
understood and accepted a ministerial explanation of the suggested meaning of the
words. For many the spectre of the ever-watchful whips will be enough. They may
agree on only one thing, namely to vote yes. And they have no means of voting yes
and registering at the same time disagreement with the explanation of the minister.
Their silence is therefore equivocal. When one considers such realities of
parliamentary life the idea of determining from Hansard the true intention of
parliament on the meaning of a clause in a bill, and an associated ministerial
statement, looks more and more farfetched. In Black-Clawson, speaking with enormous parliamentary experience, said: ‘We often say that we are
looking for the intention of parliament but that is not quite accurate. We are
seeking the meaning of the words which parliament uses.’ It would have been a
fiction for the House to say in Pepper v Hart that as a matter of historical fact the
explanation of the Financial Secretary reflected the intention of parliament.
Arguably the House may have had in mind in Pepper v Hart that an intention
derivable from the Financial Secretary’s statement ought to be imputed to
parliament. If that were the case, the reasoning would rest on a complete fiction.
The only relevant intention of parliament can be the intention of the composite and
artificial body to enact the statute as printed.

There is a strong case for allowing a statute to be interpreted in favour of the citizen in accordance with a considered explanation given by a minister promoting the bill. It is the argument that the executive ought not to get away with saying in a parliamentary debate that the proposed legislation means one thing in order to ensure the passing of the legislation and then to argue in court that the legislation bears the opposite meaning. That is what happened in Pepper v Hart. Lord Bridge of Harwich said that the Financial Secretary ‘assured’ the House that it was not intended to impose the relevant tax. He must have taken the view, as did other members of the majority, that the Revenue in imposing the tax was going back on an assurance to the House of Commons. That would have been an unfair and unacceptable result. If such a consequence prevailed it would tend to undermine confidence in the legal system.

Whether one calls it an estoppel, a legitimate expectation, a principle of fairness, or whatever else, Pepper v Hart as decided on its facts can simply be viewed as a tempering of the traditional exclusionary rule in the interests of justice. On this basis the impact of the decision can be confined to the admission against the executive of categorical assurances given by ministers to parliament. This may be a principled justification of Pepper v Hart. And it does not involve a search for the phantom of a parliamentary intention.

Unfortunately, that is not how the reasoning of the House in Pepper v Hart was expressed. The House had before it a ministerial statement which it regarded as favouring the taxpayer. This framework dictated the shape of the arguments and the judgments. The converse case was not considered. What would the position have been if the statutory position had been truly ambiguous and the ministerial statement favoured the Revenue? Ex hypothesi the statement would have come from a minister promoting the bill and would have been clear on the very question in issue. It would therefore have been a trump card. A judge who declined to give effect to it would, on the reasoning in Pepper v Hart, be thwarting the intention of parliament. What then happens to the principle that if a taxation provision is reasonably capable of two alternative meanings, the courts will prefer the meaning more favourable to the subject? Pepper v Hart does not address this question.

The basis on which the exclusionary rule was relaxed ignores constitutional arguments of substance. Lord Bridge described the rule as ‘a technical rule of construction’. And implicitly that is how the majority approached the matter. Surely, it was much more. It was a rule of constitutional importance which guaranteed that only parliament, and not the executive, ultimately legislates; and that the courts are obliged to interpret and apply what parliament has enacted, and nothing more or less. To give the executive, which promotes a bill, the right to put its own gloss on the bill is a substantial inroad on a constitutional principle, shifting legislative power from parliament to the executive. Given that the ministerial explanation is ex hypothesi clear on the very point of construction, Pepper v Hart treats qualifying ministerial policy statements as canonical. It treats them as a source of law. It is in constitutional terms a retrograde step: it enables the executive to make law. It is of fundamental importance to understand that the objection is not to the idea of a judge looking at Hansard. It is entirely acceptable for a judge to identify the mischief of a statute from Hansard. What is constitutionally wrong in
the English system is to treat the intentions of the government as revealed in debates as reflecting the will of parliament.

A matter not considered in *Pepper v Hart* is the likely impact of the relaxation of the exclusionary rule on executive practice. It was always predictable that the behaviour of ministers would alter in response to the change announced in *Pepper v Hart*. After all, why should ministers not take advantage of *Pepper v Hart* to explain the effect of the legislation in the way in which the government would like it to be understood? If this happens it must mark a constitutional shift of power from parliament to ministers. The parliamentary debates leading to the enactment of the *Human Rights Act* 1998 are revealing. When questioned about the effect of the omission to incorporate Article 13 of the European Convention on Human Rights the Lord Chancellor said: ‘One always has in mind *Pepper v Hart* when one is asked questions of that kind. I shall reply as candidly as I may’.\(^{25}\) This makes my point: executive practice is bound to be influenced by *Pepper v Hart*. There is a real incentive for government to use this strategy to get *Pepper v Hart* statements on the record when it is reluctant to spell out its precise intentions on the face of the bill.

In *Pepper v Hart* the House of Lords failed to consider important constitutional questions. There are, however, those who believe that the relaxation of the exclusionary rule was the ultimate vindication of purposive construction. And purposive construction is like mother’s milk and apple pie: who can argue against it? The reasoning in *Pepper v Hart* sought to build on the fact that official reports and white papers are admissible for the purpose of identifying the mischief to be corrected. Such reports are always admissible for what logical value they have. But the constitutional objections do not apply to such reports. They are part of the contextual scene against which parliament legislates. In any event, to present the *Pepper v Hart* issue as depending on whether one adopts a literal or purposive approach to construction is wide off the mark. By the time *Pepper v Hart* was decided, nobody supported literal methods of construction. The suggested antithesis misses the point of the fundamental and constitutional nature of the objections. The objections are not simply that a minister’s view of a clause is irrelevant but that it is in principle wrong to treat it as a trump card or even relevant in the interpretative process.

What are the chances of *Pepper v Hart* being reversed? Being a decision that marks a shift of power from parliament to the executive, the prospect of any government initiating legislation to reverse it must be slight. It is, however, possible that *Pepper v Hart* may be confined by judicial decision to the use of Hansard against the executive when it goes back on an assurance given to parliament. This would not require the overruling of *Pepper v Hart*. It would simply confine its legal force to the material circumstances of that case. In England this question will not go away. In two recent decisions in the House of Lords there have been dicta raising these questions.\(^{26}\) The debate continues.

\(^{25}\) United Kingdom, House of Lords, Parliamentary Debates (Hansard), 18 November 1997 at Col 475.

\(^{26}\) *Regina v Secretary of State for the Environment, Transport and Regions, Ex p Spath Holme* [2001] 2 WLR 15 at 48 (Lord Hope of Craighead); *Robinson v Secretary of State for Northern Ireland and Others* [2002] UKHL 32 (Lord Hoffmann and Lord Millett).
3. **Constitutional Measures: Fundamental Rights**

Constitutional adjudication affecting fundamental rights contained in a bill of rights requires a broader approach than is applicable to commercial contracts and statutes. It requires what Lord Wilberforce in *Foster* described as a generous interpretation avoiding what has been called ‘… the austerity of tabulated legalism, suitable to give to individuals the full measure of fundamental rights and freedoms’.27

Bills of rights have proved themselves in the common law world, influencing the common law and being influenced by it. The interpretative techniques adopted in common law countries vary. The Canadian Charter of Rights and Freedoms requires judges to interpret an impugned law in a way that conforms to the Charter. If it cannot be reconciled the court declares the inconsistency and the law is pro tanto void. The New Zealand Bill of Rights 1990 is a weaker model. While the court must strive to reach an interpretation compatible with the Bill of Rights, there is no express power for the court to go further. On the other hand, the New Zealand Court of Appeal has strengthened the regime by holding that there is an implied power to make a declaration of inconsistency.28 With the advantage of these earlier models the South African Constitution, and its Bills of Rights, was carefully crafted to entrench human rights strongly. Unlike Canada and New Zealand there is a Constitutional Court to adjudicate on constitutional issues. It has the power to declare legislation unconstitutional. The United Kingdom Bill of Rights is a relative newcomer in the field. The *Human Rights Act* 1998, which incorporates the European Convention on Human Rights into our law, came into force in October 2000. There is a strong interpretative obligation on the court to interpret legislation so as to be compatible with the Convention. If it is impossible to do so, the court must make a declaration of incompatibility. Parliamentary supremacy is respected. The expectation is, however, that parliament will consider the law on an early occasion and amend it.

It is undoubtedly the case that human rights are protected at many levels in the Australian system.29 But unlike Western European countries and major Commonwealth countries, Australia has no express bill of rights. For Australian courts, fulfilling their constitutional duties of standing between the people and the executive, and protecting fundamental rights, this is a disadvantage.

In advance of the *Human Rights Act* 1998 coming into operation there was much hysteria. Newspapers described the Act as a recipe for chaos. They feared that traffic would be brought to a halt; that serious crime would go unpunished; and that the prison gates would be left permanently open. The forecast was that it would rain sulphur and brimstone. The premise of this hysteria was that the courts would accede to every impractical and implausible claim, ignoring the balance inherent in the Convention between individual rights and conditions of stability and order required in a liberal democracy. This ignored the fact that the direct

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application of the Convention has caused no such chaos in other European democracies. Nevertheless, Lord McCluskey, a Scottish judge, joined in by saying that the Human Rights Act ‘would provide a field-day for crackpots, a pain in the neck for judges and legislators, and a goldmine for lawyers’. Unsurprisingly, the judge was held to be disqualified from sitting in a human rights case.30 The predicted legal revolution has not taken place. Instead there has been a subtle process of weaving human rights law into United Kingdom law. The Act has bedded down in a sensible and satisfactory way. Only a small percentage of challenges have succeeded. But it has afforded an opportunity for the courts to examine critically but constructively a few murkier areas of English law. It has strengthened our democracy.

Much can, however, be done through the common law. In England, the courts have recognised certain fundamental rights as constitutional. The courts protect as constitutional the right of participation in the democratic process, equality of treatment, freedom of expression, religious freedom and the right of unimpeded access to the courts. Even before the incorporation of the European Convention on Human Rights into English law the courts held that everybody has an absolute constitutional right to a fair trial which if breached must lead to the setting aside of the conviction.31 What is the significance of classifying a right as constitutional? It is meaningful. It is a powerful indication that added value is attached to the protection of the right. It strengthens the normative force of such rights.32 It virtually rules out arguments that such rights can be impliedly repealed by subsequent legislation.33 Generally, only an express repeal will suffice. The constitutionality of a right is also important in regard to remedies. The duty of the court is to vindicate the breach of a constitutional right, depending on its nature, by an appropriate remedy.

There is another important common law development. Parliament does not legislate on a blank sheet. In the case of Britain it legislates for a European liberal democracy. This gives rise to what Sir Rupert Cross described as a presumption of general application which operates as a constitutional principle.34 General words in a statute should not be allowed to abrogate fundamental rights. This principle has a considerable common law pedigree but in practice judges often failed to observe it. In 1998 in Pierson35 in separate judgments Lord Browne-Wilkinson and I tried to bring together the rich strands of authority in support of this principle. At that time our views did not attract the support of a majority. Two years later in Simms36 the House of Lords unambiguously reaffirmed the principle. Lord Hoffmann explained the rationale of the principle:

30 Hoekstra and Others v HM Advocate [2001] 1 AC 216.
31 R v Brown (Winston) [1994] 1 WLR 1599; R v Bentley (2001) 1 Cr App Rep 307. Now the absolute guarantee of a fair trial is governed by article 6.1 of the European Convention: the relevant case law is reviewed in Mills v Lord Advocate (Scotland Act), July 2002, PC.
32 Mohammed v The State [1999] 2 AC 111.
33 Thoburn and Others v Sunderford City Council and Others (18 February 2002, DC).
34 Statutory Interpretation (3rd ed) at 166.
35 R v Secretary of State for the Home Department, Ex parte Pierson [1998] AC 539 at 575D.
Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

This principle is now firmly entrenched in English law. If it is applied by your courts, it will strongly reinforce the protection of fundamental rights in Australia.

4. Conclusion

I end by saying that in the interpretative process the judiciary owes allegiance to nothing except the constitutional duty of reaching through reasoned debate the best attainable judgments in accordance with justice and law. This is their role in the democratic governance of our countries.

38 I am indebted to Lydia Clapinska, a Judicial Assistant in the House of Lords, now based in Sydney, and to Karen Steyn, for suggestions about my lecture.
Address

Why Law Reviews?*

MICHAEL TILBURY†

A majority of us here have in common the fact that we have contributed in some way or another to recent issues of the *Sydney Law Review*. That contribution has taken many forms, from membership of the Editorial Board or the Editorial Committee, to authorship, to refereeing, and so on. No matter what the exact nature of the contribution has been, I thought that there is at least one question on which all of us could profitably reflect: why do we participate in the production of law reviews? Before the invitation to speak here tonight, I cannot say that I had ever consciously thought about this question, notwithstanding my involvement, in a variety of capacities, in the work of several law reviews over a number of years. All I could recall reading on the subject was a memorably amusing article by an American law professor that I had come across at some indeterminate time and that had, in the now dated terminology of the critical legal scholars, ‘trashed’ law reviews, the professor (whose name I could not remember) announcing that he would no longer publish in any of them – a promise which, as he himself later acknowledged, was not honoured in full!1

The justification for participating in the law review process can, of course, only sensibly be found by asking another question: why do we have law reviews? Or, elaborating on this central question: what is the purpose of law reviews and how successful are they in achieving that purpose? The rediscovery of the article by the American law professor whose name I had forgotten led to the realisation that this further question is itself a minor query in the broader search for the *raison d'être* of legal scholarship generally. From its citation in later literature, I realised that the rediscovered article had become something of a foundational, even cult, piece in a small but important corner of a vast literature dealing with ‘scholarship about scholarship’. A significant recent contribution to that literature is the March 2002 issue of the *Harvard Law Review*, which contains a whole Symposium on the subject entitled ‘Law, Knowledge and the Academy’, with powerful papers by such famous names as Richard Epstein, Gerald Torres, Richard Posner, Todd Rakoff, Deborah Rhode and James Boyd White. Looking at the literature, I could not help thinking, from the frequency of its citation, that the rediscovered article has probably disproved its overall thesis that writing law journal articles is a waste of productive time. Although this admittedly involves an assumption about ‘productive time’, more than sixty years on the paper is still provoking a response.

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I also could not help thinking that the article has had at least a beneficial and long-term effect on legal style. The modern American literature on ‘scholarship about scholarship’ is clearly written and completely comprehensible, notwithstanding the occasional reference to ‘hermeneutics’.2

Professor Fred Rodell of Yale Law School wrote the paper to which I refer. It was published in the Virginia Law Review in 19363 and republished, with an addendum, in the same review in 19624. The essence of its provocative title, ‘Goodbye to Law Reviews’ is summed up in this passage:

There are two things wrong with almost all legal writing. One is its style. The other is its content. That, I think, about covers the ground.5

Located within the broader literature of ‘scholarship about scholarship’, this view is some evidence of a ‘crisis’ of confidence in scholarly writing in law.6 And scholarly writing in law is, of course, what law reviews are all about. Indeed, they represent, or at least ought to, the quintessence of legal writing.

I suggest that talk of a ‘crisis’ in scholarly legal writing is fundamentally misconceived. At the same time, I suggest that the learning from the United States on ‘scholarship about scholarship’ is important for Australia since it contains some clear messages and warnings for legal writers, law review editors and law review boards.

I begin by pointing out that the debate in the current United States literature is focused on the generalist University (or University-associated) law review with a scholarly orientation, such as the Sydney Law Review. It does not specifically address trade journals designed for practitioners or specialist journals containing both scholarly and trade material. It seems to be accepted that such journals have their purposes. At least they have their markets.

What is the perceived ‘crisis’ in legal writing in generalist scholarly law reviews? Rodell purported to denounce both the ‘content’ and ‘form’ of law reviews (although his 1962 addendum seems to crystallise around ‘form’). But he did not clearly distinguish between the two. And his criticism of content is, frankly, rather opaque, since it tends to be lost in amusing jibes against an easy target. It is, however, important to appreciate exactly what his basic objection to legal writing is for, ultimately, it exposes the weakness of his argument.

The following articles would, Rodell indicated, be the sort of articles to which he objected: ‘The Rule Against Perpetuities in Saskatchewan’; ‘Some New Uses of the Trust Device to Avoid Taxation’; and ‘An Answer to a Reply to a Comment

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4 Rodell, above n1.
5 Rodell, above n3 at 38.
on a Criticism of the Restatement of the Law of Conflicts of Laws’. Let us take ‘The Rule Against Perpetuities in Saskatchewan’. An article such as this, so Rodell’s argument goes, fails to appreciate that law, as an institution, has a real job to do in the world. Why? It would surely be banal to suggest that it is the article’s subject matter that is the problem. Rodell’s real concern seems to be that, typically, such an article would deal with technical issues relating to perpetuities (such as the definition of a ‘life in being’) rather than concentrate on, for example, whether the law of perpetuities promotes efficient land usage or not. The latter type of article would serve society; the former only the interests of a particular client (who would no doubt be rich and corporate). As Rodell puts it:

With law as the only alternative to force as a means of solving the myriad problems of the world, it seems to me that the articulate among the clan of lawyers might, in their writings, be pointedly aware of those problems, might recognize that the use of law to help toward their solution is the only excuse for the law’s existence, instead of blithely continuing to make mountain after mountain out of tiresome technical molehills.  

You will appreciate that this passage, central to Rodell’s thesis, is question begging. Why do the ‘myriad problems’ that law must solve not include both the technicalities of the rule against perpetuities and the social implications of the operation of the rule – in Saskatchewan or anywhere else? The truth is that this passage reveals no more than Rodell’s concept of law and his view of the function of law in society. His concept is the Realist one that law is nothing other than what persons in power do. On this view ‘useful’ writing on perpetuities would have as its focus the ways in which those able to do so use or manipulate the law of perpetuities. But this is only one view of the whole. I will return to this point.

Meanwhile, it is important to note that, whatever may have been the force of Rodell’s thesis about the sorts of articles published in law journals in the United States in 1936, it is clear that it no longer holds water, either in the United States or in Australia. Indeed, as we shall see in a moment, debates in the United States now tend to centre on the concern that, however relevant its articles are to law as an institution in society, the average law review fails to publish material of use to courts in the settlement of disputes – including (presumably) disputes about the rule against perpetuities. The wheel appears to have come full circle.

Rodell thought that the reason for the concentration by Law Reviews on what he considered trivia lay in the very nature of the academic enterprise. Law reviews, in his view, published material that needed to be written, not material that needed to be read. It needed to be written to promote the academic careers of its authors. Such authors write on ‘safe subjects’ for other experts in their chosen fields who, in turn, testify to the authors’ standing in the field when required. Student editors and writers are co-conspirators in this process in the hope that the prestige flowing from their membership of the journal board will secure them better jobs on

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7 Rodell, above n3 at 43.
graduation. Practising lawyers are also blameworthy participants: while they generally do not bother to read law reviews, they shelve them in the hope that, at some time in the future, they will shortcut the process of finding references or arguments to support a particular case.

Leaving aside the role of students and practising lawyers in the production and use of law reviews, I think that, if we are being honest, we have to acknowledge that there is more than a grain of truth in what Rodell says here. But neither the problem nor its solution has anything to do with law reviews as such. It has everything to do with university policies and procedures. In particular, it exposes the need to remove disincentives in the university system to the achievement of excellence in the academic enterprise by recognising that achievement within the University system need not always lie in publication in refereed journals. This is urgent and important for at least two reasons.

On the one hand, the academic enterprise is now more diverse than it has ever been, requiring a multitude of skills overall – skills in research, in teaching and in administration or management. We need to recognise that success in research is not the only measure of achievement in the university in the modern world – in short, we need to recognise, as such, the great Law Teacher or the great Law Dean. In their promotion practices, some universities in Australia have moved down the path of giving greater weight to achievements in teaching and administration. But my experience in university management suggests that there is here a vast gulf between aspiration and reality. A major reason is the conspicuous failure of universities to identify credible criteria by which excellence in teaching and administration can be judged. In their absence, it is simply much easier for academics to be promoted if a promotion committee can sight publications rather than rely on testimonials of teaching and administrative achievement.

On the other hand, we also need to recognise that the great Law Scholar is not necessarily the one who produces 2.5 articles every year in a refereed law review. The great researcher may, instead, be working on a long-term project involving complex theoretical analyses or the assessment of empirical material that will revolutionise our understanding of particular areas of law or of law more generally. This researcher may also be disadvantaged under current university promotion or funding practices. Here again articles in refereed journals are generally simply easier to evaluate – or, as the cynics would have it, to count – than the promise of something really outstanding, no matter how many testimonials are produced about work in progress.

What I have just said, of course, does not answer the question whether the scholarly law review as such is worth preserving. It is if we accept (as I do) that the object of such reviews is to publish writing on and about law that augments the general body of human knowledge, thereby adding to our understanding of law’s operation in the world – an understanding that may assist in the solution of real, even everyday, legal problems. Although broad, I believe that this understanding of the underlying purpose of scholarly law reviews would command, and has always commanded, overwhelming support among legal scholars – or, at any rate, sufficient support to put the burden on those who assert otherwise to make a case
beyond mere assertion. Implicit in this understanding of the purpose of law reviews are two particular reasons why Rodell’s argument about the content of such reviews is so wrong.

First, even if we were to concede that much of what is published in law reviews is unimportant (however we define that term), this is not to the point. What is to the point is the institution, maintenance and promotion of a culture that values scholarly writing in law. I like Posner’s way of putting this. ‘Scholarship’, he says, ‘like salmon breeding in the wild, is a high-risk, low-return activity.’ On average, 6000 fertilised salmon eggs produce only two fish that live to maturity. Does this mean that 5,998 eggs are ‘wasted’? Posner’s unsurprising answer is: ‘only if there is a more efficient method of perpetuating the species’.9 Like Posner, I do not think that, for legal scholarship, there is. But I do think that there is a message here for writers and editors: if you want your article (or your review) to rank in the realms of creative scholarship refrain from writing or publishing the trivial, repetitive or unoriginal. The need for restraint is now more important than ever. The frightening prospect of a combination of electronic technology and sophisticated citation analysis10 increases the risk of exposure of mediocrity. This may turn out to be as effective a deterrent as fear of detection in the case of most criminal behaviour!

Secondly, and fundamentally, Rodell’s concept of law is, at the very least, too narrow. I am not taking issue with Realism. I simply want to point out that Rodell’s view of law gives it only one function or orientation. The adoption of an essentialist view of law is a common, but regrettable, trait in legal scholars, especially legal theorists. It is perhaps understandable as the reaction of a Realist to the declaratory and positivist theories of law that generally held such sway in the common law world in the nineteenth century and that lingered on into the twentieth. As is well known, these theories, at base, viewed law as a closed system of objective rules divorced from their economic, social and political contexts. The Realists put paid to these fictional premises in the first half of the twentieth century. Their work was developed, in the second half of the century, principally by (in chronological order) the law and economics scholars, the critical legal scholars and the feminist legal scholars. Not all of this scholarship has been influential in Australia. But, at least within the academy, it has demonstrated that the common law is not a closed discipline immune from other influences of the societies in which it operates. Values can be identified which underpin the common law itself and the appropriateness of those values (and hence the content of the rules of law) can be analysed, evaluated and reformed according to a variety of criteria, both from within the legal system and outside it.

That analysis and evaluation not only justifies, but requires, a diversity of approaches to legal writing. For no known theory of law is inclusive of all its...

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9 Posner, above n6 at 1928.
various functions and manifestations in society. *A fortiori*, the same is true of any perspective on law. In 1974 Grant Gilmore perceptively reminded us, in his Storrs lectures, that ‘the lesson of the past two hundred years is that we will do well to be on our guard against all-purpose theoretical solutions to our problems’. Yet this is precisely the warning that scholars do not heed when they grumble about the content of law reviews because they publish material that does not correspond with their view of what legal scholarship ought to be. As Deborah Rhode has pointed out, doctrinal scholars complain of being dismissed as ‘mundane’, ‘arid’ or ‘passé’; empiricists and legal historians complain that their work is marginalised as ‘merely descriptive’; even theorists, including Ronald Dworkin, perceive a ‘revolt from theory’. In all these cases, the complaint is of a departure from an implicit (but usually unarticulated) understanding of the essential nature of law.

Indeed, I suspect that scholars devoted to the brand of technical doctrinal scholarship that Rodell meant to criticise most, are now the real whingers. For them, the greater prominence given in law reviews to ‘theoretical’ material, however defined, heralds the decay of the law review. Their view is buttressed by statistical or anecdotal evidence of a decline in the citation rates of academic writings in the courts, allegedly attributable to their publication of ‘unimportant’ material – ‘unimportant’ here meaning that the material is not of any use in the resolution of individual disputes. Yet, it follows from a broadly inclusive theory of law that we should not, in principle, be unduly concerned by this so-called ‘cite-deficiency’. Citation rates will always vary, depending on the nature of problems arising in practice and the current state of legal knowledge. The two are not necessarily related. Bearing in mind that it is only in the last 10 years or so that Australian courts have begun to cite academic writings on a regular basis, we are as yet unable to contribute any hard evidence to the ‘cite-deficiency’ argument. Those of us trained in a different era are still excited by the occasional – very occasional – citation!

Further, as far as Australia is concerned, I do not believe that the content of law reviews is, or has ever been, unduly narrow or technical. I illustrate this by comparing four articles, two on constitutional law and two on foreign law, one on each topic coming from the first issue of the *Sydney Law Review* in April 1953, the other from the *Review’s* most recent issue in June 2002. The authors of the constitutional articles are, in 1953, Sir John Latham (who reviews the ways in which the Constitution could, and perhaps should, be amended after being in force for 50 years) and, in 2002, Dan Meagher (who analyses non-originalism as a method of interpretation in hard constitutional cases with reference to s80 of the

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Constitution). The authors of the articles on foreign law are, in 1953, William Woelper (who describes the nature and success of New Jersey’s legislative restructure, in 1948, of its court system and procedures) and, in 2002, Bron McKillop (who gives an account of 10 criminal cases in the tribunal de police, the lowest tier of the criminal courts in France).

Perhaps the most striking difference in the approach of these articles is that those published in 2002 make greater use of material outside the authoritative sources of statute and case law. Thus, Meagher begins with an assessment of the legal and philosophical arguments against non-originalism as a method of constitutional interpretation, while McKillop’s approach is overtly empirical, involving personal observation, study of court materials and interviews. By contrast, Latham’s point of first reference is the difficult issues of interpretation to which the Constitution has given rise over time, while Woelper examines the New Jersey legislation primarily by reference to the cases interpreting it and by identifying the deficiencies of the previous statutory regime. Woelper’s approach is the most traditional. For example, he makes no attempt when explaining the merger of courts of law and equity by the New Jersey legislation to analyse the policy arguments for and against the adoption of a judicature system, even though he recognises the then current interest in the topic in Australia (or, more accurately, New South Wales). However, he does cite statistics in support of his argument that the New Jersey reforms have been successful. Sir John Latham is much less hesitant in mentioning the context of the issues that he discusses. For example, he suggests that any attempt to repeal s92 of the Constitution by referendum – a development to which he seems to have been particularly sympathetic! – would be unsuccessful because of the emotional appeal to voters of the word ‘freedom’ in the section; and that the endless difficulties in the interpretation of the industrial power in s 51 (xxxv) of the Constitution could only be overcome by repealing the section, giving the Commonwealth Parliament greater power in employment matters and minimising the role of the judiciary, overtly recognising that issues between employers and employees call more for legislative than judicial intervention.

The other side of the coin is that the articles published in 2002 do not ignore the authoritative sources of law. Meagher’s theoretical discussion of non-originalism serves as an introduction to an analysis of the actual or potential application of that method of interpretation in recent High Court cases dealing with s 80. And McKillop’s empirical study provides a backdrop for an assessment of the contrast between the law garnered from its traditional sources (which stress the orality of summary proceedings and prosecutorial direction) and the law in action (which indicates a documentary system and a lack of supervision of the police).

The study of such disjunctures is surely to prove as important in comparative law as in legal history.\(^\ast\)

Of course, there is room for debate as to what constitutes ‘theory’, ‘doctrine’ and ‘practice’ in all of these articles. But my simple point is that, so far as there is a change in the articles in 1953 and 2002, it is a change of emphasis, not a wholesale change of approach. Arguments focusing squarely on statute and case law dominate the 1953 articles: those in 2002 cast a wider net. Generally, I think it is true to say that current legal scholarship contains, often subtly, a more reflective, even ‘theoretical’ (if we don’t have to define the term!) emphasis than a more ‘technical’ approach that may have held sway 20 or 30 years ago.\(^\ast\)

I turn now to the criticisms of the style of legal writing found in Law Reviews. The United States literature identifies three principal problem areas: footnotes, impersonal style and lack of plain language.

First, footnotes. The tradition in Australia (following England) differs from that in the United States. We are not generally accustomed to long footnotes that permit only a few lines of text on the page. A 1979 study in the American Law Library Journal revealed that the average number of footnotes per page in the California Law Review was 4.5, while the Columbia Law Review boasted 5.6. The Cambridge Law Review carried only 1.7 footnotes per page.\(^\ast\) These numbers now need inflation, at least in Australia where there is a perceptible shift to greater footnoting. That shift is being driven from the top by the High Court. It is a trend that could significantly devalue legal writing in this country if writers and editors use, without restraint, three types of inter-related and hopelessly obese\(^\ast\) footnotes. The first is the unnecessary footnote; the second is the ‘for-further-information’ footnote; and the third is the ‘I’ve-read-everything-there-is-to-read-on-the-topic’ footnote.

An unrestrained use of the first two is illustrated by imagining a sentence of text beginning with the word ‘Australia’ followed by footnote 1. Footnote 1 is unnecessary (because the point can be taken for granted), to the extent to which it explains, without necessary reference to anything in the text, that Australia comprises States and Territories united pursuant to an Act of the British Parliament of 1900, and then compares the definition of ‘Australia’ in s17 of the Acts Interpretation Act 1901 (Cth). Footnote 1 becomes an unacceptable ‘for greater detail’ footnote if it then goes on to provide references to the history of federation, each of the States, etc.

An offending example of the third type of footnote is one that cites as authority a recent decision of the High Court authoritatively settling a narrow technical

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19 I do not regard this as necessarily the same as a difference in style between ‘embedded’ and ‘nonembedded’ scholarship: see Todd Rakoff, ‘Introduction’ (2002) 115 Harv L Rev 1278.
point, and then adds references (with appropriate signals) to the previous 10 cases that the High Court has overruled, reconciled or otherwise explained. Another common offending example of the third type is the footnote that cites every legal article on the topic that the now author can find without attempting to sort the worthwhile from the dross. Here writers and editors should bear in mind Lord Goff of Chieveley’s admonition of Lord Cooke of Thorndon, whom Lord Goff obviously perceived to have an addiction to this type of citation. Lord Goff pointed out that he personally cited only academic authority that was of assistance. His Lordship’s touchstone of assistance, at least for the instant case, is garnered from his comment that: ‘A crumb of analysis is worth more than a loaf of opinion’.

Secondly, impersonal style, namely, the ‘it is submitted’ or ‘it would seem’ phrases with which we are all familiar. There has not, perhaps, been the same reluctance in Australia as there once was in the United States for academic authors to identify their own views of the law and openly, but respectfully, to disagree with judges. The reason may be that, unlike in England and the United States, the academic study of law has generally been a part of the university fabric in Australia almost from the start, and academic lawyers (who have contributed widely to the life of their universities) have not, perhaps, seen themselves as distinct from the general body of university scholars as they once may have done in the United States. Whatever the reason, I believe a concern with style ought to lead law writers and editors to beware of translating into law reviews the impersonal language used in courts. While appropriate in that context, it is the sort of language that simply looks silly in broader academic discourse.

Thirdly, plain language. We have a tradition – even a movement – in Australia that favours plain language. And quite rightly. Plain language enunciates the clear thought that abstruse language hides. For this reason we ought to support the plain language movement at least so far as it aims to do away with what Fred Rodell referred to as ‘the nonsensical, noxious notion that a piece of work is more scholarly if polysyllabically enunciated than if put in short words. I mean the utilization of “utilization” – ugh – instead of the plain and simple use of “use”’.

But there must, of course, be moderation in all things. And law review writers and editors must not interpret the cry for plain English as an excuse for the dull or boring English that may be appropriate in an insurance policy. Nor should plain English require the excision of all technical terms in law. We should not hesitate to write the six words ‘clog on the equity of redemption’ in preference to the six (or perhaps sixty) pages otherwise required to explain what we mean. Just as an Act dealing with the abdication of a monarch need not be drafted in 200 sections rather than in the two sections made possible by reference to a ‘demise of the Crown’.

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23 See R Davis, 100 Years: A Centenary History of the Faculty of Law, University of Tasmania, 1893–1993 (Hobart, University of Tasmania, 1993) at 3–4.
25 Rodell, above n1 at 287.
26 See His Majesty’s Declaration of Abdication Act 1936 (UK) s 1(1).
It follows from all I have said that I consider that, overall, Australian law reviews do a wonderful job. There is every reason why academics, judges and practitioners should continue to support their work in a variety of ways. In a note tucked away at the end of the very first issue of the *Sydney Law Review* in April 1953, the General Editor, Professor Julius Stone, expressed trepidation, but also hope, that the *Review* would survive in the ‘crowded world of legal literature’. Almost fifty years on, we can confidently say that the *Review* has more than fulfilled that aspiration and that the state of legal writing in Australia promises it an even greater future.
Equitable Compensation: Towards a Blueprint?*
CHARLES E F RICKETT†

1. Equitable Compensation and the Nature of Modern Equity

In the last 15 years or so of the previous century, equitable compensation was recognised by the courts of all the major Commonwealth jurisdictions as an important component of the judiciary’s remedial armoury. But this recognition has not been without difficulty. In particular, there now exists some considerable ambiguity about the nature of and limitations upon the remedy. Two companies of players each appear to be performing a play (whether tragedy or comedy is unclear!) with the same name, ‘Equitable Compensation’, but with a rather different plot, and sometimes in the same theatre!

One company might be happy to be described as the purists, and the other as the modernists. The purists tend to regard equity as a jurisprudence to be maintained in a state as far as possible unsullied by association with the common law. Its particularities and peculiarities should be protected, especially the notion that equity does not award damages and is more concerned with specific and gain-stripping remedies than with compensation. The role for equitable compensation should therefore be a very contained one, because the established blueprint of that jurisprudence, as historically determined, must be respected.

The modernists, on the other hand, tend to focus on coherence within a single united legal system, perhaps being less interested in historical fit than in doctrinal and conceptual fit. In many respects, the appearance of the modernists is the consequence of two developments. First, it spins off the rapid expansion in the last third of the previous century of civil liability for wrongdoing. The energetic increase in the realm of common law torts has been matched by an energetic development of the reach of equitable duties to define expected behaviour, and of their breach in creating a large class of equitable wrongs. Secondly, at the same time, there has been infatuation with articulating the law of restitution, which, no

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1 See, for example, Preface to Peter Birks & Arianna Pretto (eds), Breach of Trust (2002).
matter what particular form it might take, requires as fundamental to its very articulation a theory of the whole of the private law. And in that taxonomic enterprise, the equity/common law divide is regarded, indeed, as divisive and to be avoided in the search for unity and coherence.²

This bipolarity of schools of thought within modern equity is a major challenge. It can only be overcome by an appreciation that features of both schools are part and parcel of an understanding of modern equity. For, in the end, the debate about equitable compensation, as many involved in it already realise, is actually a debate about the make-up of modern equity, and the latter’s place in the civil law of obligations and property in the new century. The blueprint for equitable compensation is a particular application of the greater blueprint for modern equity.

Equitable compensation has become established in large measure because modern equity has recognised an increased range of equitable duties.³ Furthermore, because of this broadened range of equitable duties, equitable compensation cannot in fact be neatly packaged as if it were a single item encompassing only one exclusive set of stipulated rules. An award of equitable compensation is the outcome of the court’s process of compensating a plaintiff in respect of a breach of an equitable duty. That process is a complicated one, requiring a sophisticated appreciation not only of what is being sought to be achieved (ie, what is the objective of a monetary award?), but how best to achieve it (ie, what are the controlling features in the determination of the quantum of a monetary award?). Indeed, a mere glance at a list of the more important equitable duties that courts have recognised immediately behoves caution in our approach to understanding equitable compensation as a modern equitable remedy. The more obvious duties include:

- fiduciary duties of custodial fiduciaries (especially, but not limited to, express trustees) in respect of the property in their custody;⁴
- fiduciary duties of loyalty and fidelity (usually owed by custodial fiduciaries in addition to duties of the first type; but also owed by some who are not custodial fiduciaries because they respond to trust and confidence owed to rather than control of property on behalf of others);⁵

² Ibid.
³ See, for example, Joshua Getzler, ‘Equitable Compensation and the Regulation of Fiduciary Relationships’ in Peter Birks & Francis Rose (eds), Restitution and Equity Volume 1: Resulting Trusts and Equitable Compensation (2000) at 246–248.
⁴ ‘Custodial fiduciary’ is a term used in Steven Elliott, Compensation Claims Against Trustees (DPhil thesis, University of Oxford, 2002) Ch II, ‘Fiduciaries and Claims’ at 1. The Custodial Fiduciary Relation. Dr Elliott states: ‘A custodial fiduciary may be tentatively defined as any person who receives property in circumstances binding him in equity to apply it for the benefit of another.’
⁵ See further id at 2. The Duty of Loyalty. Dr Elliott states: ‘The relation of trust and confidence is nowadays usually thought to consist in a cluster of duties emanating from the core requirement of loyalty.’ The relation of trust and confidence gives rise to two prescriptive principles: the no-profits rule and the no-conflict rule. Proscriptive duties are essentially disabilities, rather than requirements to act. For their modern transmutation into prescriptive-focused duties, see further at Part 4 below.
• equitable duties not to breach confidences (sometimes referred to as ‘fiduciary’ duties, but actually quite distinguishable);
• equitable duties of skill and care (again, sometimes called ‘fiduciary’ duties, but quite distinct);¹⁶
• equitable duties not to conduct oneself unconscionably;
• equitable duties recognised to have been assumed by representations or conduct; and
• equitable duties not to involve oneself knowingly in a breach by a third party of an equitable obligation owed by that third party to the same person now alleging the equitable duty owed to him or her.

It is important to appreciate at this point that some of the difficulties experienced in analysing equitable compensation result also from problems of taxonomy. First, not all equitable duties require breach before they become legally ‘remediable’. Thus, if a duty is in truth a primary obligation to perform, then it may be that an order for performance is a remedy available in equity. It would be surprising, indeed, if performance were not available in respect of some obligations recognised exclusively in equity, which jurisdiction after all grants performance remedies for many non-equitable obligations. The issue of what performance entails is a separate matter.

Secondly, if a primary duty in equity is not performed, that breach will give rise to a secondary right in the person to whom the primary obligation is owed to obtain a remedy. Thus, if there occurs non-performance of a positive equitable duty, or failure to maintain a negative equitable duty, and a ‘wrong’ thereby occurs, is that wrong remediable by compensating for loss suffered by the plaintiff (which is the presumptive remedy for common law wrongs), or only by stripping of gains made by the defendant? Most breaches of equitable duties have historically been met with gain-based responses, notably through the process of accounting for profits or by a proprietary remedy. Those responses are ‘disgorgement’ (or ‘restitutio in integrum’ in a ‘giving up’ sense) remedies, responding to wrongdoing. But if wrongdoing is the true cause of action, how can the mere fact that the wrongdoing is defined as an ‘equitable’ wrongdoing rather than a ‘common law’ wrongdoing mean that compensation might not be a legitimate response? If the plaintiff in equitable wrongdoing has suffered a loss, why should that not be compensable by a money award?

Thirdly, although the factual matrix of the case may appear at first glance as a matter of law to signal a breach of an equitable duty, and thus a wrongdoing, sometimes the claim might in truth be founded on an obligation to make restitution in order to reverse an unjust enrichment by the defendant. If the cause of action is not wrongdoing, but unjust enrichment, then no matter that a monetary remedy is provided (because, for example, restitutio in integrum is not possible, or is inappropriate), that remedy is restitution (in a ‘giving back’ sense), not compensation.

Thus, not only is equitable compensation itself the result of a complicated process in each individual case to which it is applied, but care must be taken to ensure that what is at issue really is ‘compensation’ and not something else.

¹⁶ These will be prescriptive duties requiring certain levels of conduct.
2. A Thesis for Understanding the Role of Equitable Compensation

In an earlier published paper, I offered a tentative thesis about understanding the dynamic role of equitable compensation, in these terms:

Equity will grant compensation where a breach of equitable duty by the owner of the duty has resulted in loss to the person owed the duty. But a full appreciation of how equity compensates requires a quite sophisticated analysis. The type and content of the duty allegedly breached must be very carefully articulated (such analysis to include considerations of policy and legal doctrine) so that:

- compensation is only considered for loss suffered that is relevantly connected to the duty breached (causation);
- compensation does not extend to loss suffered beyond that which is mandated by the scope and purpose of the duty (consequential loss);
- compensation is not awarded for types of loss which contradict the proper boundaries of the duty (heads of damages); and
- compensation is denied or reduced only in those circumstances where such denial or reduction is consistent with the reach of and expectations engendered by the duty (apportionment and mitigation).\(^7\)

I still believe this thesis to be essentially sound,\(^8\) but it now requires some slight elaboration in the light of a very important analysis in a recent DPhil thesis at Oxford University, submitted by Dr Steven Elliott.\(^9\) In particular, the notion of compensation requires extension. In my earlier paper, and as indicated in the propositions cited above, I took the term ‘compensation’ to refer to a monetary remedy available only for loss caused by a wrongdoing, or breach of duty. This is

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\(^7\) See Charles Rickett, ‘Compensating for Loss in Equity – Choosing the Right Horse for Each Course’ in Peter Birks & Francis Rose (eds), Restitution and Equity Volume 1: Resulting Trusts and Equitable Compensation (2000) at 175–176.

\(^8\) In Beach Petroleum NL v Kennedy (1999) 48 NSWLR 1 at 90 (hereinafter Beach Petroleum), the Court of Appeal of New South Wales (Spigelman CJ, Sheller & Stein JJA) stated: ‘The rules for the recovery of equitable compensation are less developed than the rules for proprietary remedies in equity. The rigour of the remedy is of comparatively recent vintage. At this stage of the development of the remedy, each case requires a precise focus on both the nature of the obligations and the nature of the breach.’ I doubt that the observation in the last sentence will change with time. Indeed, I doubt it should. And, in any event, it is not clear that the law of proprietary remedies in equity, although having a much more reduced field of operation than equitable compensation, is any more ‘developed’ than the rules for equitable compensation: See, for examples, the debate around the rationale for the decision in Foskett v McKeown [2000] 1 AC 102 (Compare Ross Grantham and Charles Rickett, ‘Tracing and Property Rights: The Categorical Truth’ (2000) 65 Mod LR 905; Andrew Burrows, ‘Proprietary Restitution: Unmasking Unjust Enrichment’ (2001) 117 LQR 412 and Peter Birks, ‘Property, Unjust Enrichment, and Tracing’ [2001] CLP 231); the continuing problems in respect of granting proprietary remedies in circumstances of insolvency (See Charles Rickett, ‘Of Constructive Trusts and Insolvency’ in Francis Rose (ed), Restitution and Insolvency (2000) Ch 10); and the fundamental dispute about the jurisprudential basis upon which proprietary remedies are to be awarded (See general discussion in Craig Rotherham, Proprietary Remedies in Context – A Study in the Judicial Redistribution of Property Rights (2002)).
of course the normal meaning given to the term. The objective of compensation is to repair a loss suffered by the plaintiff. Reparation is the normal connotation of ‘compensation’. However, it transpires that the compensatory jurisdiction of equity is more sophisticated than this. There is a further form of compensation by payment of money, as revealed in the manner in which equity deals with enforcing the primary obligations of custodial fiduciaries, which class of fiduciaries was of course for a very long time almost the sole focus of equity’s attention. In this circumstance, as Dr Elliott writes, ‘compensation consists in a money equivalent to property of which a person has been deprived or denied’.10 Dr Elliott calls this ‘substitutive compensation because it is calculated to provide a substitute for the property’.11 But, as Dr Elliott goes on to show, from a very early time equity was also concerned with monetary compensatory awards founded on the objective of reparation. Thus, at the very centre of equity’s realm, compensation was an established remedy, but with two faces. The importance of this insight is that it aids in removing a misconception about the proper controlling limits of equity in providing compensation. This needs further examination in the following section.

3. Custodial Fiduciaries and Their Duties in Respect of the Trust Fund

A. Accountability

(i) Performance of Primary Obligations and the Notion of Substitutive Compensation

All custodial fiduciaries, of which the express trustee is the paradigm example, are bound to apply the property they receive in that capacity for the benefit of another, and are thus under a fiduciary duty to account for the trust fund, which duty arises immediately upon receipt of the relevant property. This is a primary obligation.12 It is enforceable in itself as a primary obligation by those who are interested in the trust fund whether or not there has been any breach of that obligation by the fiduciary. Its enforcement does not depend upon any breach, because a secondary obligation is not necessary. The duty to render an accounting does not depend on the fiduciary having mishandled the property or having otherwise breached his or her trust. The enforcement is directed at the administration of the trust. Hence, the


11 Ibid.

12 See also Robert Chambers, ‘Liability’ in Peter Birks & Arianna Pretto (eds), Breach of Trust (2002) at 3–6 (discussion of the primary obligations of custodial fiduciaries).
mechanism by which it is enforced is the common account, or ‘the order for administration in common form’.  

As Austin J succinctly commented in a recent New South Wales Supreme Court decision:

An order for an account of administration is made for the taking of accounts of money received and disbursed by the person who is responsible for the administration of a business enterprise or fund or other property [what I term here a custodial fiduciary], and for payment of any amount found to be due by that person upon the taking of the accounts ….. In such a case the making of the order need not imply any wrongdoing by the defendant…. The usual form of order … requires the defendant to account only for what he or she has actually received, and his or her disbursement and distribution of it. The defendant prepares accounts and it is open to the other parties to surcharge or falsify items in those accounts. A surcharge is the showing of an omission for which credit ought to have been given, while a falsification is the showing of a charge which has been wrongly inserted, the falsifying party alleging that money shown in the account as paid was either not paid or improperly paid ….14

An account will balance when the sum of the receipts equals the sum of the discharges and property still on hand. If the account does not balance, the difference represents the sum that the custodial fiduciary is liable to make good out of his or her own pocket. It bears repetition that the court orders that follow from the common account are not granted in order to enforce secondary obligations to make good any loss caused by breach of trust. In some cases the orders enforce primary duties of the fiduciary by directing ‘restitution’ or ‘restoration’ of the trust property (in specie or by payment of a pecuniary substitute) to the beneficiaries, where there is a duty to distribute the fund to beneficiaries who have an immediate right to be paid, or to the current trustee, where there is a duty to transfer the trust fund to a replacement custodial fiduciary. In so far as the orders here are to pay money, they are not concerned with reparation, but with substituted performance. Compensation is payable, but it is ‘substitutive compensation’, not ‘reparative compensation’. In other circumstances, court orders after common account

13 This particular procedure can be part of what is more generally and historically called ‘judicial execution proceedings’. However, the latter are now rare, and the common account procedure is better understood as a form of direct enforcement of a custodial fiduciary’s primary obligation of accountability. Other forms of direct enforcement of primary obligations are by direction of the court, by injunction and by declaration: See above n12 at 10–11.

14 Glazier Holdings v Australian Men’s Health (NSW Supreme Court, Austin J, 22 January 2001) at paras 37–38 (hereinafter Glazier). Although Austin J’s decision in Glazier was overturned on appeal, nothing that was said by Giles JA in giving the judgment of the New South Wales Court of Appeal contradicted Austin J’s structural analysis of accounting in equity: see Meehan v Glazier Holdings Pty Ltd (2002) 54 NSWLR 146 at 149–150 (hereinafter Meehan).

15 This is restitution in the sense of ‘a person to a condition’, not of ‘a thing to a person’: See above n1 at xi; and above n12 at 14. In Roxborough v Rothmans of Pall Mall Australia Ltd (2002) 185 ALR 335 at 353, Gummow J adverted to the availability of an express trust beneficiary to an action for money had and received against his or her trustee ‘when there remains nothing to the trustee to execute except payment over of money to the beneficiary, or the trustee admits the debt ….’ See also the comment of Mason J quoted at n111 below.
enforce primary duties of the fiduciary in a non-restitutionary or non-restorationary manner by requiring the segregation and protection of the fund where the custodial relationship is a continuing one.

Common account is a claim to performance. It is a vindication of an existing in personam right. It is the way in which a custodial fiduciary is required to execute his or her personal obligation of accountability in respect of the trust property. If the fiduciary no longer has the original property, and cannot therefore specifically perform his or her obligation, the claim will be that he or she must perform by payment of a monetary equivalent. This vindication claim is not a claim for damages caused by equitable wrongdoing. ‘The claim does not rest upon the allegation of loss in the sense of detriment or injury, and for this reason considerations of causation, remoteness, mitigation and contributory fault are inapposite. The award may be described as compensation but it is compensation of the substitutive variety.’ The monetary equivalent or compensation is measured by the objective value of the property lost as determined after the account is taken. The subjective position of the individual claimant is not relevant in assessing the loss, nor is ‘consequential loss’ to be considered. Nor does the claim require any unjust enrichment by the custodial fiduciary. The claimant gets simply the fulfilment of the primary right, even if that requires monetary substitution.

This analysis helps us to understand the correct reach of a passage that has become widely regarded as the locus classicus on the law of equitable compensation, found in Street J’s judgment in Re Dawson:

The obligation of a defaulting trustee is essentially one of effecting a restitution to the estate. The obligation is of a personal character and its extent is not to be limited by common law principles governing remoteness of damage ....

The cases to which I have referred demonstrate that the obligation to make restitution, which courts of equity have from very early times imposed on defaulting trustees and other fiduciaries is of a more absolute nature than the common law obligation to pay damages for tort or breach of contract .... Moreover, the distinction between common law damages and relief against a defaulting trustee is strikingly demonstrated by reference to the actual form of relief granted in equity in respect of breaches of trust. The form of relief is couched in terms appropriate to requiring the defaulting trustee to restore to the estate the assets of which he deprived it. Increases in market values between the date of breach and the date of recoupment are for the trustee’s account: the effect of such increases would, at common law, be excluded from the computation of damages; but in equity a defaulting trustee must make good the loss by restoring

to the estate the assets of which he [sic] deprived it notwithstanding that market values may have increased in the meantime. The obligation to restore to the estate the assets of which he deprived it necessarily connotes that, where a monetary compensation is to be paid in lieu of restoring assets, that compensation is to be assessed by reference to the value of the assets at the date of restoration and not at the date of deprivation. In this sense the obligation is a continuing one and ordinarily, if the assets are for some reason not restored in specie, it will fall for quantification at the date when recoupment is to be effected, and not before.17

The defendant was a defaulting custodial fiduciary who had control over assets that formed a trust estate, ie, the equitable obligations of the trustee to the plaintiff beneficiaries related to an estate. Thus, the relief sought was substitutive compensation. The primary liability of the defaulting fiduciary was to restore the property in specie. If that were not possible, then the monetary compensation payable in lieu (which might be termed equitable compensation) must reflect the economic position had restoration in specie been possible. This was not a case where reparative compensation was being sought, no matter the loose references to ‘breach’ or ‘loss’. Accordingly, Street J’s account was not intended to state the parameters of equitable compensation on the basis of reparation for loss. The obviously plaintiff-friendly nature of the controlling limits on the compensation remedy should be appreciated as determined by the nature of the claim under discussion, being for performance of primary obligations rather than based on the wrongdoing of the trustee (even though, on the facts, such wrongdoing had indeed occurred).

(ii) Breach of Trust and the Notion of Reparative Compensation

Of course, common account is not the only form of ‘account of administration’ available against a custodial fiduciary. There is also available the ‘account on the basis of wilful default’.

As Austin J has stated:

The order is ‘entirely grounded on misconduct’, the defendant being required to account not only for what he or she has not received, but also for what he or she might have received had it not been for the default: … the concept of ‘wilful default’ is confined to cases where there has been ‘a loss of assets received, or assets which might have been received’: … the concept is evidently not confined to cases of conscious wrongdoing: … the court may make an order that general accounts be taken on the footing of wilful default if at least one instance of wilful default has been proved … An order for accounts based on wilful default has the effect of casting a much more substantial burden of proof on the accounting party than applies in the case of common accounts. On a falsification, the onus is on the accounting party to justify the account … An accounting on the footing of wilful default leads to an order requiring the defendant to replenish funds wrongfully depleted by him or her and in that sense to make restitution for the benefit of the plaintiff.18

18 Glazier, above n14 at paras 39–42.
Austin J also pointed out an important aspect of the account on the basis of wilful default, by distinguishing it with an order for an account of profits. The objective of the latter is to identify those gains made by the fiduciary through a finding of specific wrongdoing, such as breach of trust or fiduciary duty. That gain is then to be disgorged (‘given up’), as a remedy for the wrongdoing. The former type of account relates to administration of the trust, where ‘emphasis is placed on whether the defendant has failed to discharge his or her duty, rather than whether the plaintiff has established active conduct in breach of duty’. One commentator has suggested that: ‘The technical meaning of “wilful default” is a failure to receive assets that would have been received if the trust had been performed properly.’

This leads to an important observation, made by Austin J in the extract reproduced above. Charging a defendant trustee in their account meant that he or she was chargeable with property actually received, and was liable to be surcharged with property he or she might have received. The basis upon which the defendant would be surcharged with foregone receipts (ie, beyond actual receipts) was wilful default. But it is strongly arguable that ‘wilful default’ and ‘breach of trust’ are coextensive concepts, and that the focus of the account for wilful default extends beyond merely the failure to receive assets. If breach of trust really amounts to nothing more than an infringement by the trustee of any duty owed as trustee to the beneficiary, then the basis upon which the trustee can be surcharged for foregone receipts, termed wilful default, is actually no greater than that the defendant trustee has breached a duty he or she owes by virtue of the office of trustee. Thus, an ‘account on the basis of wilful default’ covers the same ground as an ‘account in common form’ (ie, what property the trustee received and what has become of it), but goes further (ie, the trustee may be surcharged with property he or she would have received but for his or her wilful default/breach of trust). But more still needs to be said.

There is therefore a problem in linking too closely the two forms of accounts of administration. The danger is that an important taxonomic point is missed. As seen above, the common form of account is not founded upon misconduct by a custodial fiduciary. The duty it enforces is a primary duty. And its objective is merely to ascertain the property that the fiduciary is understood to hold in that capacity with a view to the carrying out of the trust by the fiduciary. Any order of payment of money by the fiduciary personally is at most substitutive compensation. The wilful default form of account is, however, conceptually quite

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19 Id at paras 43–45.
20 Id at para 46.
21 Chambers, above n12 at 19.
22 Two definitions of what is encompassed by referring to a ‘breach of trust’ are found in Peter Birks & Arianna Pretto (eds), Breach of Trust (2002). In the Preface, Professor Peter Birks and Dr Arianna Pretto comment that there are ‘breaches which consist in ultra vires acts and … breaches which consist in doing badly acts which, done properly, would be intra vires’: at ix. Professor David Hayton states: ‘A breach of trust is any act or neglect on the part of a trustee which is not authorised or excused by the terms of the trust instrument or by law, or which fails to satisfy the duties imposed on a trustee conducting authorised activities’: See ‘Overview’ at 384.
distinct. It is founded upon a breach of duty by the custodial fiduciary that has resulted in loss. The duty it enforces is a secondary duty. And its objective is to remedy the breach by making good the loss through surcharging the fiduciary’s account. The focus is reparative compensation, because the surcharge, although often misleadingly described as a charge on the basis of what the fiduciary ought to have but did not receive, is really a charge on the amount of the loss sustained, determined as if the fiduciary had received more than he actually did.

B. Equitable Compensation for Breach of Custodial Fiduciary Duties and the Problem of Target Holdings

It can be seen from the previous discussion that equity has long recognised monetary awards in connection with trusts and other forms of custodial fiduciary relationships. These awards are compensatory, even though they are hidden behind the language of accounts. Compensation is ‘achieved … by making [custodial fiduciaries] accountable for assets which they [have] lost or [have] failed to receive’. The monetary compensation can be measured differently, either as substitution for performance, or as reparation for loss. Once compensation for reparation of loss is recognised as a legitimate objective in the case of wrongdoing by custodial fiduciaries, it does not require much of a leap to see it as a legitimate objective in the case of other types of equitable wrongdoing. But there is a further lesson to be learned from the case of the custodial fiduciary, and that is that the controlling limits on substitutive compensation awards, as exemplified in Street J’s judgment in Re Dawson, should not alone, without more, be taken to be the correct controlling limits on reparative compensation.

Indeed, although the decision presents a further problem, that was the very point in issue in the decision of the House of Lords in the custodial fiduciary case of Target Holdings Ltd v Redferns. This decision, as would be expected, has been enormously influential in the development of the jurisprudence on equitable

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23 This point was clearly made by Giles JA in Meehan, above n14 at 149-150, where his Honour stated: ‘Under such an order the accounting party must account not only for what has actually been received, but also for what should have been received: that is, for what would have been received if the relevant duties of the accounting party had been properly discharged.’ See also Armitage v Nourse [1998] Ch 241 at 252 (Millett LJ): ‘A trustee is said to be accountable on the footing of wilful default when he is accountable not only for money which he has in fact received but also for money which he could with reasonable diligence have received. It is sufficient that the trustee has been guilt of a want of ordinary prudence: …’

24 Professor Robert Chambers has recently presented a slightly different analysis. He states (above n12 at 7): ‘A common account is used to compel trustees to perform their primary duties, an account on the basis of wilful default is used to obtain compensation for loss, and an account of profits is used to obtain restitution of gain. However, a common account is also used to obtain compensation and the other two forms of account also provide direct enforcement of primary duties.’ In discussing compensation for loss, Chambers discusses account (both common account and account for wilful default) and equitable compensation as separate methods of compensation. See his full discussion at 2–34.

25 Birks & Pretto, above n1 at xi.

26 [1966] 2 NSWLR 211.

compensation. The plaintiff was a finance company which instructed the defendant firm of solicitors to act for it in the provision of a loan as mortgagee on a commercial property to a proposed mortgagor. The same solicitors were instructed by the proposed mortgagor. The latter had told the plaintiff that the property had been valued at £2 million. In fact, unknown to the plaintiff, the proposed mortgagor was paying only £775,000 for the property. The plaintiff gave the solicitors over £1.5 million to be held on a bare trust, and then to be transferred to the mortgagor once the property had been purchased and charges over the property in favour of the plaintiff had been executed by the mortgagor. The solicitors actually paid out most of the £1.5 million before the mortgagor had purchased the property and thus before any charges had been executed, informing the plaintiff that all was in order. All this was admitted to be in breach of trust. A short time later, the property was in fact charged to the plaintiff. The mortgagor later became insolvent, and the charged property was sold by the plaintiff as mortgagee, but fetched only £500,000. The plaintiff claimed ‘restitution’ of the entire sum it had transferred to the solicitors on the basis of the latter’s breach of trust.

In the Court of Appeal, a majority found in favour of the plaintiff. Peter Gibson LJ stated that ‘a trustee or other fiduciary [who] in breach of trust disposes of trust property to a stranger comes under an immediate duty to make restitution....’ No inquiry as to causation was necessary. The ‘loss’ was immediate, and the (factual) causal connection was obvious. The loss here was £1.5 million, which the plaintiff could recover from the solicitors, subject only to giving credit for the £500,000 recovered on the sale of the charged property.

The House of Lords, however, allowed an appeal by the solicitors. Lord Browne-Wilkinson, the only equity lawyer on the panel, gave a speech in which the remainder of the panel concurred. He saw the issue as being whether a defaulting trustee could be held liable to make good a loss suffered by the beneficiary where there was no causal link between the breach of trust and the loss. And his conclusion was that the defaulting trustee could not be held liable.

His Lordship began with a general statement:

At common law there are two principles fundamental to the award of damages. First, that the defendant’s wrongful act must cause the damage complained of. Second, that the plaintiff is to be put “in the same position as he (sic) would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation”: Livingstone v Ravyards Coal Co (1880) 5 App. Cas. 25, 39, per Lord Blackburn. Although, as will appear, in many ways equity approaches liability for making good a breach of trust from a different starting point, in my judgment those two principles are applicable as much in equity as at common law. Under both systems liability is fault-based: the defendant is only liable for the consequences of the legal wrong he has done to the plaintiff and to
make good the damage caused by such wrong. He is not responsible for damage not caused by his wrong or to pay by way of compensation more than the loss suffered from such wrong. The detailed rules of equity as to causation and the quantification of loss differ, at least ostensibly, from those applicable at common law. But the principles underlying both systems are the same.31

The focus of Lord Browne-Wilkinson’s statement of principle was thus reparative compensation for loss in equity, following a breach of duty by the custodial trustee. But his Lordship was clearly troubled by the plaintiff’s argument that the solicitors’ duty, as custodial trustee, was to reconstitute the trust fund rather than pay compensation for loss. His Lordship dealt with this point by introducing a troubling distinction between types of trusts, being ‘traditional trusts’ (ie, subsisting trusts with indeterminate or contingent beneficial interests) on the one hand, and bare trusts (ie, trusts under which the beneficiaries are absolutely entitled) on the other. The latter grouping of bare trusts was further subdivided into exhausted traditional trusts and bare commercial trusts (of which Target Holdings was said to be an example). His Lordship stated that the rules of equitable compensation for breach of trust were largely developed in relation to ‘traditional trusts’, where the basic rule is that a trustee in breach must restore, or pay into, the trust estate either the assets which have been lost to the estate by reason of the breach, or compensation for such loss. Courts of equity did not award damages but, acting in personam, ordered (or charged) the defaulting trustee to restore the trust estate. If specific restitution of the trust property is not possible, then the liability of the trustee is to pay sufficient compensation to the trust estate to put it back to what it would have been had the breach not been committed. Even if the immediate cause of the loss is the dishonesty or failure of a third party, the trustee is liable to make good the loss to the trust estate if, but for the breach, such loss would not have occurred.32

It should be apparent that, although his Lordship appeared to be concerned throughout with reparative compensation for loss caused by a breach of trust, in effect his discussion of the limits of equitable compensation in cases of traditional trusts confused the rules established for providing substitutive compensation in equity with the rules for the pursuit of reparative compensation. Indeed, having lifted out wholesale the rules relating to substitutive compensation in respect of performance of traditional trusts, his Lordship applied these as if they were the standard rules on reparative compensation for breach of trust, with a bit of tweaking on the matter of causation. There was some awareness of having crossed a conceptual divide, because his Lordship then had to say that these rules would not apply to every breach by a trustee of a traditional trust.33 For example, if a

31 Target Holdings, above n27 at 432.
32 Thus, although the common law rules of remoteness of damage and causation do not apply, there does have to be some causal connection between the breach of trust and the loss to the trust estate for which compensation is recoverable, namely, the fact that the loss would not have occurred ‘but for’ the breach. See further Getzler, above n3 at 237–246.
trustee commits a breach of trust with the acquiescence of one beneficiary, that beneficiary has no right to complain and an action for breach of trust brought by him or her would fail. Further, if a trustee makes an unauthorised but profitable investment, the investment might be sold at the insistence of the beneficiary and the funds applied towards authorised investments, but the trustee would be under no liability to pay compensation either to the trust fund or to the beneficiary because the breach had caused no loss to the trust fund. His Lordship emphasised that ‘in each case the first question is to ask what are the rights of the beneficiary: only if some relevant right has been infringed so as to give rise to a loss is it necessary to consider the extent of the trustee’s liability to compensate for such loss’.34

Lord Browne-Wilkinson then stated that it was wrong to lift out wholesale the detailed rules developed in the context of ‘traditional trusts’ and seek to apply them to bare trusts, as he defined them.35 The trust in Target Holdings was a bare (commercial) trust. As such, it was simply an aspect of a wider commercial transaction involving agency. The commercial objective of the plaintiff was to lend money on security. One step in that process involved the plaintiff depositing money in the solicitors’ trust account. Until the money was loaned in accordance with the plaintiff’s instructions, it was undoubtedly trust money. Thus, if it had been paid away other than in accordance with the plaintiff’s instructions, and the commercial transaction anticipated had not been finalised, general equitable principles applicable to trusts would demand that the fund be restored to the plaintiff’s account. However, once the commercial transaction had been completed Lord Browne-Wilkinson considered it ‘entirely artificial’ to import into such a trust an obligation to restore the trust fund.36

His Lordship continued:

The obligation to reconstitute the trust fund applicable in the case of traditional trusts reflects the fact that no one beneficiary is entitled to the trust property and the need to compensate all the beneficiaries for the breach. The rationale has no application in a case such as the present. To impose such an obligation in order to enable the beneficiary solely entitled (ie, the client) to recover from the solicitor more than the client has lost flies in the face of common sense and is in direct conflict with the basic principles of equitable compensation. In my judgment, once a conveyancing transaction has been completed the client has no right to have the solicitor’s client account reconstituted as a “trust fund.”37

Lord Browne-Wilkinson also discussed the matter of quantification of any compensation payable. His Lordship agreed with the majority of the Court of

33 Target Holdings, above n27 at 433.
34 Id at 433–434.
35 Id at 421, 435.
36 Id at 436.
37 Ibid.
Appeal that the trustee’s duty to remedy the breach — even in the case of a bare trust — arose immediately, and thus, had proceedings been brought before the conveyancing transaction had been completed, an order requiring restoration would have issued.38 However, in the events which occurred, and in view of the real interest of the plaintiff, he could not agree with the view taken by Peter Gibson LJ that ‘events which occur between the date of breach and the date of trial are irrelevant in assessing the loss suffered by reason of the breach’.39 This rejection of Peter Gibson LJ’s position is, of course, to bring equitable reparative compensation into line with the approach generally taken at common law to assessing the quantum of reparative compensatory damages in tort. Since the quantum of compensation was to be assessed at the time of judgment, not at an earlier date,40 that quantum ‘would be the figure then necessary to put the trust estate or the beneficiary back into the position it would have been in had there been no breach’.41 Compensation would ‘make good a loss suffered by the beneficiaries and which, using hindsight and common sense, can be seen to have been caused by the breach’.42 The plaintiff, it was assumed for the purpose of argument (since the substantive matter still had to be tried), obtained exactly what it would have obtained had no breach occurred, and accordingly the loss suffered was not compensable because it was not caused by the breach.43 Had there been no breach, the plaintiff would have experienced the very same loss. This examination of causation in Target Holdings was the consequence of adopting a reparative compensatory approach in equity and then applying it to a case dealing with loss arising from the breach of a (bare) trust.

Dr Elliott comments:

Lord Browne-Wilkinson set out in Target Holdings to restate the law relating to compensation claims against trustees from first principles. The “basic equitable principle applicable to breach of trust” on which he founded his conclusions was that the beneficiary, or the fund where reconstitution is appropriate, “is entitled to be compensated for any loss he would not have suffered but for the breach.” The corollary is that the beneficiary should not recover as compensation more than his causally-related loss. It is implicit in this that a beneficiary’s only compensation claim against a trustee who has misapplied trust property is reparative in nature. Lord Browne-Wilkinson seems to have considered this idea to be self-evident and he did not offer any authority for his broad statement of principle which depends upon it.44

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38 Id at 437.
39 Ibid.
40 Ibid.
41 Ibid.
42 Id at 439.
43 Id at 440.
44 Elliott, above n4, Ch VI, Target Holdings Ltd v Redfern at 3. Discussion (footnotes omitted).
It is clear that Target Holdings’ claim against the solicitors as custodial trustees was for substitutive compensation. Lord Browne-Wilkinson recast it as a reparative compensation claim, on the basis that that was what compensation in equity was concerned with. If substitutive compensation in equity is to disappear, this would mark a radical restructuring of the nature of the in personam liabilities of custodial fiduciaries.

C. The Impact of Target Holdings

Two points must be made. The first is a point related to the comment in the previous paragraph. Has substitutive compensation disappeared? The second point is more general, about the ‘atmosphere’ that Target Holdings has introduced.

(i) The Future for Custodial Fiduciaries?

It is notable, and perhaps not at all surprising, that in decisions after Target Holdings, where there have been breaches of custodial duties by custodial trustees, the courts have largely reverted to a Re Dawson-like position on the limits of equitable compensation to be awarded. This reversion has, however, been promulgated as part of a generally reparative compensatory framework modelled on Target Holdings, and the only potential relaxation on Dawson principles has been understood to be in the context of causation, although even here there has been little movement away from a plaintiff-friendly causation test.

Thus, for example, the New South Wales Court of Appeal, in O’Halloran v RT Thomas & Family Pty Ltd, was quick to equate the position of a director who improperly dealt with assets of the company to that of a traditional trustee for the purposes of applying a strict causation test. Spigelman CJ entered into an analysis of the policy reasons requiring the strict test, focusing on the vulnerability of the company in placing its property in the hands of a custodial trustee as being similar

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45 Dr Elliott refers to Mr Tony Oakley’s view (Parker & Mellows, The Modern Law of Trusts (1998) at 680–683) that the claim by Target Holdings was a claim for equitable (reparative) compensation without account. It is probably correct to say that this is how the case has come to be understood in hindsight, but it is a view not easily sustained on a close examination of the actual claim made. In Youyang v Minter Ellison (NSW Supreme Court, Handley JA, Hodgson JA and Young CJ in Eq, 8 October 2001 (hereinafter, Youyang)), Young CJ in Eq (as discussed below at text to n99) also took the view that Target Holdings was better understood as a claim for equitable (reparative) compensation without account. An appeal in Youyang was heard by the High Court of Australia on 13 November 2002. No decision has been given at the time of writing, but the transcript of the hearing indicates that the Court may well re-examine Target Holdings.

46 Reference has been made at n9 above to articles by Lord Millett and Professor Birks: See generally Millett, above n9 at 225–227; and Birks, above n9 at 45–48. Their argument essentially is that Redfemns was indeed held accountable, and that the right result was reached because Redfemns had accounted for the funds paid away by obtaining the mortgage which Target Holdings had sought to have in the first place. This interpretation of course avoids the problem altogether.

But there is clearly considerable unease about *Target Holdings*’ reparative framework. *Bairstow v Queens Moat Houses plc* was a recent custodial fiduciary case where the difficulties introduced by *Target Holdings* were at least given a brief airing by Robert Walker LJ (as he then was). Directors were held to be accountable to the company for dividends unlawfully paid out in contravention of statutory requirements. The directors were said to have trustee-like responsibilities in respect of company property. An attempt to apply *Target Holdings* to suggest that the breach of custodial duties had caused no compensable loss was rejected. Robert Walker LJ questioned, without deciding, whether *Target Holdings* was intended to cover a case of the sort before him. His Lordship seemed, to my way of thinking, to wish to recapture the simple (and rather obvious) circumstance where reimbursement was required without the trammels of reparative compensatory considerations.

First, his Lordship said that the qualities of the fiduciary obligations undertaken by the directors in *Bairstow* ‘involved heavy and continuing responsibilities for the stewardship of the company’s assets’, whereas ‘the trust in *Target Holdings* … was simply an aspect of a wider commercial transaction involving agency’. This raised an issue whether ‘a more satisfactory dividing line is not that between the traditional trust and the commercial trust, but between a breach of fiduciary duty in the wrongful disbursement of funds of which the fiduciary has this sort of trustee-like stewardship and a breach of fiduciary duty of a different character (for instance a solicitor’s failure to disclose a conflict of interest …)’. It is not clear, however, that Robert Walker LJ’s suggested dividing line can be applied, as he implies, to sustain the holding in *Target Holdings* itself. Surely Redfers had a ‘trustee-like stewardship’? If Redfers’ trusteeship was to be seen as not of this sort, then how exactly was it to fall on the other side of the dividing line? What is the ‘different’ character of the fiduciary duty owed by Redfers? The more satisfactory dividing line is surely that between custodial fiduciary duties and fiduciary duties of loyalty and fidelity, and that is the very dividing line that *Target Holdings* threatens. It will not be an easy threat for a Court of Appeal judge to avoid, as I suspect Robert Walker LJ realised.

A second suggestion from Robert Walker LJ was to focus instead on the fault of the custodial fiduciary. In *Target Holdings*, ‘the solicitors were shown to have...
done no more than to have acted imprudently in disbursing their client’s funds before they obtained their client’s security’, whereas in *Bairstow* the directors had deliberately and dishonestly paid away the company’s funds. Again, with respect, this will not work. While Lord Browne-Wilkinson referred to liability for breach of trust as fault-based, he was referring only to the issue of causal connection between breach and loss. This was made clear by a differently constituted Court of Appeal in *Collins v Brebner*. That latter decision also showed why an argument that Lord Browne-Wilkinson did not intend to exclude fraudulent breach of trust from the ambit of his judgment could not be sustained. In any event, his Lordship was not intending to dispatch the rule that in making an unauthorised disposition of trust property a trustee will be strictly liable.

One problem that will have to be faced if *Target Holdings* is to be revisited, and substitutive compensation is to be re-established in the context of liability of custodial fiduciaries, is the charge of harshness as to results in custodial fiduciary cases like *Target Holdings* itself. There are doctrinal reasons, however, why the charge of harshness is misdirected. Most custodial fiduciaries are trustees or executors. It can be suggested that the strict approach to a trustee’s obligation in respect of the trust property is best understood as founded upon the trustee’s general duty of strict compliance with the trust deed (or testamentary document).

By agreeing to assume the obligations of trustee or executor, including that of complying with the deed, there is nothing unfair about the rigorous nature of the substitutive (and reparative) compensatory response. The notion of the duty of strict compliance also justifies a company director’s liability as if he or she were a trustee, where he or she fails to account properly for the company’s property. The director has assumed a duty to comply (strictly) with the company’s constitutional documents, especially in respect of the company’s assets. This explains why, for example, when it comes to a compensatory claim against the director for loss of the company’s assets, ‘[t]here is a sufficient connection, irrespective of the identification of a separate and concurrent cause, when the loss would not have occurred if there had been no breach of duty’. Further, since the trustee/executor/company director *assumes* his or her duties, their position is accordingly analogous to that of a party who assumes obligations in a contractual setting. Liability for breach of the latter tends to be strict, and why should that not be so also in a custodial fiduciary context? A further doctrinal reason for the harshness encountered in the determination of a substitutive compensation response is found in the nature of the claim. Although the obligation sought to be enforced is an *in personam* obligation to perform, that obligation is ultimately referable to the

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54 *Collins v Brebner* (English Court of Appeal, Aldous, Tuckey LJJ & Hale J, 26 January 2000).
55 See the extract at n31 above; and see Speight v Gaunt (1883) 9 AC 1 at 19.
57 See *O’Halloran*, above n47 at 277 (Spigelman CJ). In New Zealand, the duty of strict compliance has statutory force: See *Companies Act* 1993 (NZ), s134.
existence of property rights (rights in rem). The essential distinguishing feature of a custodial fiduciary is the existence of property belonging in equity to others.60 In other areas of equity and common law, property rights, even if their protection is mediated indirectly,61 are generally protected without too much concern for the resulting harshness to the defendant. Further, in unjust enrichment law, where the focus is the protection of the plaintiff’s value in circumstances where property transfers, although legally effective to transfer property rights, are essentially defective,62 the claim itself is based on strict liability, with no concern for harshness to the defendant. Harshness of result is only considered, if at all, in the context of well-defined defences.63

There are other more technical reasons why concern about harshness of results might be overstated.64 First, custodial fiduciaries can usually seek directions as to the lawfulness of their proposed activities prior to undertaking them.65 Secondly, the scope for improper disposition of property has been much reduced by the introduction of enlarged general powers of investment of trustee funds.66 Thirdly, many custodial fiduciaries can rely upon express exculpatory clauses.67 Fourthly, there are statutory relief provisions available for ‘worthy’ trustees whose breach of duty is largely technical.68 And, fifthly, Dr Elliott has suggested that a discretionary hardship defence might be recognised in equity. Indeed, he suggests that Target Holdings itself might be the harbinger of such a defence:

Where a beneficiary effectively seeks to shift losses owing to his [sic] own misjudgment onto his fiduciary and the fiduciary has not profited in the transaction, as happened in the Target Holdings case, there is a prima facie case of hardship, though proof that the fiduciary has acted dishonestly would generally deprive him of this defence.69

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60 See D Hayton, above n22 at 379–383.
63 Id at Chs 14–16.
64 Elliott, above n4, Ch VI, Target Holdings Ltd v Redfern at 3. Discussion. Evaluation of the Way Forward.
65 See, for examples, Trustee Act 1925 (NSW), s63; Trustee Act 1956 (NZ), s66. In any event, trustee investments are now largely regulated by a duty of care standard: see discussion in Joshua Getzler, ‘Duty of Care’ in Peter Birks & Arianna Pretto (eds), Breach of Trust (2002) at Ch 2.
66 See, for examples, Trustee Act 1925 (NSW), s14; Trustee Act 1956 (NZ), s13A.
68 See, for examples, Trustee Act 1925 (NSW), s85; Trustee Act 1956 (NZ), s73. This statutory jurisdiction may not extend to non-trustee fiduciaries: see Jalmoon Pty Ltd (in liquidation) v Bow [1997] 2 Qd R 62 at 72–73. The English Law Commission has recommended the extension of the relief jurisdiction to all fiduciaries: see Fiduciary Duties and Regulatory Rules (Law Com No 236, 1995) at 90–96. In the context of companies, see Corporations Act 2001 (Cth), s1318; Compare Companies Act 1993 (NZ), s376. See full discussion in J Lowry and R Edmunds, ‘Excuses’ in Peter Birks & Arianna Pretto (eds), Breach of Trust (2002) at Ch 9.
(ii) The ‘Atmosphere’ After Target Holdings

More generally, whatever the deficiencies of the actual reasoning in Target Holdings, the decision heralded a much greater prominence for the remedy of reparative compensation in equity. In particular, the manner in which Lord Browne-Wilkinson drew a distinction between different types of trusts, and hence different types of obligations which might be breached causing some loss, has enabled a rapid development of the remedy. As indicated in Part I of this paper, there are other equitable obligations, beyond custodial fiduciary obligations, such as fiduciary obligations founded on trust and confidence, or equitable obligations founded perhaps on an unconscionability principle. Identification of the differences between various types of equitable obligations, as undertaken (even if somewhat questionably achieved) in a very limited context at one end of the spectrum in Target Holdings, is essential from a remedial perspective. Once the nature of any particular equitable obligation that has been breached is identified, it becomes much easier to develop equitable compensation in a manner which properly reflects that loss suffered by the plaintiff which, consistent with the nature of the obligation, ought to be compensated.

If the breach of a custodial duty causes loss to the trust estate, and it is sought to remedy the loss by an avowedly reparative compensatory claim, thus deliberately eschewing account, equity is likely to adopt a plaintiff-friendly approach to defining the controlling limits of recovery. This is indicated by the post-Target Holdings custodial fiduciary cases, even though some of these cases have actually tended to hover unhappily between substitutive and reparative compensation. The custodial obligation breached here has very particular characteristics – of both policy and legal doctrine – that require the reparative compensatory response to be rather strict and inflexible as far as the fiduciary is concerned, mirroring to a considerable degree the contents of the substitutive compensatory response.

It must be stressed, however, that the obligation in question here is the custodial fiduciary’s obligation only in respect of the estate. Compensation does not, on the basis of breach of this duty, extend to consequential losses unrelated to the ‘restoration’ of the trust estate, or to the compensation of a particular beneficiary’s personal loss beyond the loss of the trust fund. A custodial fiduciary will likely have other obligations, including fiduciary obligations of trust and confidence, and duties of care. If those obligations are breached, they must be separately analysed,
and the reparative compensatory response of equity to those breaches may well be rather different, in that it may be rather less plaintiff-friendly in respect of its controlling limits.

It must be quite clear that the manner in which equity compensates for loss in a case of a breach of duty by a custodial fiduciary in respect of the property under that fiduciary’s control cannot provide an exclusive blueprint for equity’s compensating in other contexts. To some degree, this is because compensation in this part of equity’s domain has a very particular history. And, further, both the issues whether compensation is appropriate, and the extent of such compensation, must be determined by the nature and scope of the obligation said to have been breached. Equitable obligations exist to further particular policies, and have differing conceptual foundations. Their breach may be met by compensation, but what that means will be particular to the obligation at issue.

4. **Breach of Non-custodial Fiduciary Duties: Loyalty and Fidelity in Cases of Trust and Confidence**

The established fiduciary duties of loyalty and fidelity, emanating from a relationship of trust and confidence, manifest themselves in rules prohibiting profit-making at the expense of the beneficiary, and prohibiting activity which causes a conflict with the requirement to be loyal and faithful. The consequences of breaches of the no-profit and no-conflict duties are therefore remedied by traditional equitable responses designed to strip gains and to avoid transactions. These responses are consistent with the prohibitive objectives of the rules, and in that respect continue to be the presumptive responses for their breach. It is in that sense that they can be said to be ‘traditional’.

It is reasonably easy to appreciate why breaches of custodial fiduciary duties, whereby loss is caused to the trust estate, should be met where necessary by reparative compensation. The entire thrust of the custodial fiduciary’s role is the management of property within certain limits and for the benefit of the beneficiaries. Loss by breach of duty cannot be permitted and must be remedied. However, in respect of non-custodial fiduciary duties, where the focus of the duties appears to be proscriptive, it is less obvious that reparative compensation should follow automatically from their breach. To reach that conclusion needs a re-visioning of the duty of loyalty and fidelity as constitutive of positive requirements, which, if not met and resulting in loss, behove such a reparative

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72 These duties arise ‘whenever one party undertakes to act in the interests of another, or where he places himself in a position where he is obliged in the interests of another’: See Millett, above n9 at 219.

compensatory response. In England, New Zealand and Canada such re-visioning has in effect occurred.\textsuperscript{74} In Australian cases, there has been much less readiness to adopt such a re-visioning, and fiduciary duties retain their strongly proscriptive character.\textsuperscript{75} However, having at the same time ‘adopted’ \textit{Target Holdings}, and thereby accepted the proposition that reparative compensation is available in equity as a remedy for loss, Australian courts are struggling with the conceptual fit of such a remedy within their understanding that non-custodial fiduciary duties of loyalty are fundamentally (and exclusively) proscriptive.

I have examined elsewhere a number of the more recent decisions from the leading Commonwealth jurisdictions, and it is not necessary to repeat all that detailed analysis here.\textsuperscript{76} As it turns out, the Australian cases unsurprisingly mirror a regime of equitable compensation for non-custodial cases whose content is very close to that of reparative compensation for breach of custodial fiduciary obligations (which itself is largely modeled on the substitutive compensation regime).\textsuperscript{77} The content of \textit{Re Dawson}\textsuperscript{78} is alive and well, and operating happily in the land of equitable compensation for breach of non-custodial fiduciary obligations. However, on the whole, the other Commonwealth jurisdictions, although more ‘advanced’ in re-visioning non-custodial fiduciary duties, have not found themselves minded to depart overly much from a \textit{Re Dawson}-like position in laying down the features of equitable compensation. There is a growing awareness in all jurisdictions that the key to understanding the approach of equity to compensating reparatively for loss caused by breach of a fiduciary duty of loyalty is a close analysis of the scope of the duty in question and the nature of a breach of that duty.\textsuperscript{79}


\textsuperscript{75} \textit{Pilmer}, above n73 at 1084–1085 (McHugh, Gummow, Hayne & Callinan JJ) at 1093–1096 and 1098–1100 (Kirby J); \textit{Maguire v Makaronis}, above n71 at 471–474 (Brennan CJ, Gaudron, McHugh & Gummow JJ).

\textsuperscript{76} Charles Rickett, ‘Where are We Going with Equitable Compensation?’ in \textit{AJ Oakley} (ed), \textit{Trends in Contemporary Trust Law} (1996); Rickett, above n7.

\textsuperscript{77} See, for a clear example, \textit{Aequitas}, above n71 at paras 442–443 and 448 (Austin J). His Honour distinguished the approach taken in breach of fiduciary duty cases from the rather stricter approach taken in cases of breaches of duty by trustees and company directors: see paras 444–445. See also \textit{Youyang}, above n45 at para 16 (Handley JA), for a list of ‘\{t\}he principles which govern the assessment of compensation for breaches of trust and other equitable duty …’. His Honour stated that the principles were those established in \textit{Target Holdings}, which decision had been approved in several Australian decisions. However, with respect, his Honour’s failure to distinguish between different types of equitable duty means that the list of principles is a little general, and in places repetitive. It appears limited also to custodial and non-custodial fiduciary duties. Compare the analysis presented in \textit{Youyang} by Young CJ in Eq, referred to in the text to n99 below. As stated above n45, \textit{Youyang} is currently under appeal to the High Court.

\textsuperscript{78} Above n17.

\textsuperscript{79} See \textit{Beach Petroleum}, above n8 at 90 para 431 (Spigelman CJ, Sheller & Stein JJA); and Elliott, above n9.
Thus, to take one example, although New Zealand has gained for itself something of a reputation for looseness of doctrine and hyperactivity in its approach to compensating in equity, recently the New Zealand Court of Appeal in *Bank of New Zealand v New Zealand Guardian Trust Co Ltd*\(^80\) adopted a strict approach to compensation for breach of the fiduciary duty of loyalty. Tipping J stated:\(^81\)

> In the second kind of case, the trustee or other fiduciary has committed a breach of duty which involves an element of infidelity or disloyalty engaging the fiduciary’s conscience – what might be called a true breach of fiduciary duty…. In short, in such a case once the plaintiff has shown a loss arising out of a transaction to which the breach was material, the plaintiff is entitled to recover unless the defendant fiduciary, upon whom is the onus, shows that the loss or damage would have occurred in any event, i.e. without any breach on the fiduciary’s part. Questions of foreseeability and remoteness do not arise in this kind of case …. Policy dictates that fiduciaries be allowed only a narrow escape route from liability based on proof that the loss or damage would have occurred even if there had been no breach.

In his judgment (for himself, Richardson P, Henry and Blanchard JJ), Gault J suggested that there was a link between breaches of trust in dissipating the trust estate, and abuse of fiduciary duties of loyalty and fidelity, in that both would attract liability on a ‘restitutionary’ basis.\(^82\) These cases were then linked with ‘dishonesty in the commission of certain intentional torts such as fraudulent misrepresentation’\(^83\) (later enlarged to fraud and impropriety)\(^84\) as circumstances where there was justification to approach issues of causation and remoteness in determining compensation differently from contract and non-intentional tort cases. Tipping J also adverted to this. If the wrong committed was one ‘engaging the conscience of the wrongdoer, what has sometimes been called fraud in equity, a stricter approach is justified. That corresponds with the position when there is fraud in the common law sense, … In such cases the greater moral turpitude of the wrongdoer supports a restitutionary ‘but for’ approach, at least on a prima facie basis.’\(^85\) The true fiduciary duty, being one of loyalty and fidelity, can only be breached by disloyalty and infidelity, which per se is equitable fraud.\(^86\)

What is important is that the controlling limits on the reparative compensatory response for loss suffered by breach be seen to be coherent with the nature of the obligation owed.\(^87\) Thus, the ‘absolute’ nature of the duty, which carries with it the notion that any breach is ‘equitable fraud’, sustains a ‘but for’ test of causation. If

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\(^{80}\) *Bank of New Zealand*, above n71.

\(^{81}\) Id at 687.

\(^{82}\) Id at 681. The reference to ‘restitutionary’ means ‘restorationary’, or the strict approach.

\(^{83}\) Ibid.

\(^{84}\) Id at 682.

\(^{85}\) Id at 688.

\(^{86}\) Ibid.

\(^{87}\) See further Getzler, above n3.
this is so, it follows that there should be little, if any, scope for considerations which would enable the defendant to escape liability. This would support the presumption in the rule in *Brickenden v London Loan & Savings Co* \(^88\) (that, in effect, once the court has determined the materiality of a breach of fiduciary duty arising from non-disclosure of a conflict of interest or a significant likelihood of such a conflict, speculation as to what course the aggrieved party would, on disclosure, have taken is not relevant). \(^89\) It might also mean that there ought to be no judicial jurisdiction to apportion responsibility for loss, \(^90\) although there might be discretion to attach certain conditions on the award of equitable compensation. \(^91\)

5. **Equitable Duties of Skill and Care: Compensation for Breach?**

Equitable compensation has found itself thrust into the limelight in part because of the recent articulation of duties of care in equity. \(^92\) In *Bristol and West Building Society v Mothew*, Millett LJ (as he then was) stated:

> It is … inappropriate to apply the expression ‘[fiduciary duty]’ to the obligation of a trustee or other fiduciary to use proper skill and care in the discharge of his duties. If it is confined to cases where the fiduciary nature of the duty has special legal consequences, then the fact that the source of the duty is to be found in equity rather than the common law does not make it a fiduciary duty. The common law and equity each developed the duty of care, but they did so independently of each other and the standard of care required is not always the same. But they influenced each other, and today the substance of the resulting obligations is more significant than their particular historic origin. … Although the remedy which equity makes available for breach of that equitable duty of skill and care is equitable compensation rather than damages, this is merely the product of history and in this context is in my opinion a distinction without a difference. Equitable compensation for breach of the duty of skill and care resembles common law damages in that it is awarded by way of compensation to the plaintiff

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\(^88\) [1934] DLR 465 at 469.

\(^89\) See *Everist v McEvedy* [1996] 3 NZLR 348; *Gilbert v Shanahan* [1998] 3 NZLR 528; *Maguire, above n71*; *O’Halloran, above n47 at 280–281* (Priestley JA); *Beach Petroleum, above n8 at 91–94* (Spigelman CJ, Sheller & Stein JJA); *Aequitas, above n71 at paras 445–447* (Austin J).


\(^91\) See *Demetrios v Gikas Dry Cleaning Industries Pty Ltd* (1991) 22 NSWLR 561. I am grateful to Mr Justice Ken Handley for this reference.

\(^92\) These duties have an impressive pedigree. See discussion in *Rickett, above n76*. See also *Julie K Maxton, ‘Equity and the Law of Civil Wrongs’ in Paul Rishworth (ed), The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon* (1997) at 91; and *Getzler, above n3 at 252–257*. 
for his loss. There is no reason in principle why the common law rules of causation, remoteness of damage and measure of damage should not be applied by analogy in such a case.  

His Lordship made it quite clear that equitable compensation in this context is to be distinguished from the earlier forms of equitable compensation discussed in this paper.

As Tipping J stated in Bank of New Zealand v New Zealand Guardian Trust Co Ltd, breaches of duty of care and skill ‘involve neither loss to the trust property, nor infidelity or disloyalty’. Where a failure to take care is the material dimension in an alleged breach of duty, trust and fiduciary duties are ‘not relevantly engaged’. Gault J said that the ‘but for’ test of causation and remoteness was not appropriate where there was a breach of a duty in equity of equivalent scope to duties owed in contract or tort, unless the breach was dishonest or fraudulent. He stated:

That the liability arises in equity is no sufficient reason. Surely the stage has been reached in the development of the law where something more substantial than historical origin is needed to justify disparate treatment in the law of those in breach of the obligation to exercise reasonable care.

It followed, therefore, that an equivalent approach to causation and remoteness as applied in contract and tort ought to apply to the equitable duty.

The rules for equitable compensation for loss in breach of duty of care cases will mirror to a considerable extent the rules developed for damages awards at common law. Particular care may need to be exercised in determining whether the equitable duty of care has been assumed in the circumstances or must be imposed. This distinction may itself determine whether a contract or tort model of damages is followed. This subtlety was adverted to in Bank of New Zealand, but the Court of Appeal regarded it as unnecessary on the facts to draw a clear distinction. Most of the central features of compensation awards at common law (eg, contributory negligence, duty to mitigate, exemplary damages, aggravated damages) will be fundamental factors in compensation awards in equity. In the

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94 These duties may well be owed, as Millett LJ’s comments in Bristol and West Building Society signal, to beneficiaries within a trust or fiduciary matrix, but they do not thereby metamorphose into trust or fiduciary duties. See also Henderson, above n93 at 204–206 (Lord Browne-Wilkinson); White, above n93 at 271–272 (Lord Browne-Wilkinson).

95 Bank of New Zealand, above n71 at 687.

96 Id at 688.

97 Id at 681.

98 See further Getzler, above n3; Getzler, above n65; and Elliott, above n9.
background, however, there will also be the overriding discretion of the equitable jurisdiction, but this will very likely surface only in the rarest of cases. Indeed, the discretion ought perhaps to wither away through disuse and a growing recognition that its retention simply perpetuates the historical jurisdictional divide in a context where there are no legitimate policy or doctrinal grounds to do so. Any work that needs to be done to balance the position of the plaintiff and the defendant, in pursuit of a just solution, can and ought to be done by the established principles, without appeal to overriding discretion.

One final comment is called for. An interesting notion has been introduced by Young CJ in Eq in his judgment in Youyang v Minter Ellison.99 A firm of solicitors paid away the plaintiff’s money without receiving in return for it a deposit certificate in the correct form. The plaintiff’s investment was ultimately lost, and he sought to have the fund replenished. The firm disputed, however, that the loss was caused by the breach of the firm’s custodial duty, relying upon Target Holdings. By a majority the New South Wales Court of Appeal held in the firm’s favour. Treating the duty breached as ‘fiduciary’, the majority100 concluded that the loss had not been caused by the breach. Young CJ in Eq, however, expressed a reservation as to the fiduciary nature of the duty at issue, although he would have decided the case in the same way. His Honour outlined the distinction between fiduciary duties and equitable duties of care,101 and seemed to suggest that Target Holdings might best be understood as a case where the more flexible rules relating to compensation for breach of a duty of care were to be applied.102 He concluded:

\[\text{The authorities say that in this area of the law, courts must act with commonsense. Further, the trend of authority, culminating in } \text{Target Holdings Ltd v Redforns }[1996] \text{ 1 AC 421, is that, in applying equitable principles to commercial relationships, courts must not be too technical and must take care to apply the basic equitable concepts rather than blindly follow the result of private equity cases of yesteryear. Thirdly, courts must be careful not to effectively widen liability in negligence by saying that a person who is in fact a trustee or fiduciary and who breaches his or her duty of care to the beneficiaries is charged with all losses that would not have occurred but for such carelessness without regard to principles of foreseeability or contributory negligence: Bristol and West Building Society v Mathew }[1998] \text{ Ch 1, 17.}^{103}\]

This view envisages the re-visioning of some duties that appear to be fiduciary (either custodial or non-custodial) as, in reality, duties of care. Such re-visioning would apparently be required where applying rules of trusts and fiduciary law would be to laud technicalities rather than appreciating the wider factual context.

99 Youyang, above n45.
100 Handley JA & Young CJ in Eq.
101 Youyang, above n45 at paras 54–59.
102 Id at paras 60–62.
103 Id at para 97.
of commercial (and largely contractual) relationships. Whether the duty of care needs especially to be equitable in these circumstances is, of course, questionable. In any event, this innovative position is possibly at the edge of what the modernist school of equity might be happy to live with.

6. Conclusion: A Future for Equitable Compensation

Professor Michael Tilbury has written that ‘[e]quitable compensation seems to have a secure function in modern law due to the absence of an alternative for the compensation of breaches of equitable rights’. 104 He further suggested that:

[T]here will be a tendency, wherever possible, to equate the principles applicable to equitable compensation … with the rules relating to damages which have been well developed at law. This is a natural development in a post-judicature world. Its danger is that it may lead to a failure to appreciate the operation, in appropriate contexts, of traditional equitable principles which, in the circumstances of the particular case, more appropriately mirror the equitable right breached. 105

In the first flush of innocence and excitement, there was something of a rush in Canada and New Zealand towards wholesale integration of equitable compensation with the common law of damages by simple adoption of common law principles and rules. 106 England and Australia were much more measured, as befits the much keener awareness in those jurisdictions of the doctrinal and historical dimensions of the core of equity jurisprudence. ‘Compensation’ was understood to be limited and plaintiff-friendly because it was essentially ‘restitutionary’.

Gradually, however, it has come to be appreciated that, although in general terms the peculiarity of equity must not be overlooked, the fundamental point is to examine carefully the type and content of any equitable duty allegedly breached, and the nature of that breach. From that examination should flow the answer to how equity will compensate in any case. And so, custodial fiduciary duties can be enforced by performance orders, including in some cases orders for money payments, and their breach can be remedied by a range of orders, including in some cases orders for reparative compensation for loss caused to the estate. The process of compensating is girded by strict rules that cohere with the nature of the duties. Loss caused by breaches of non-custodial fiduciary duties is also compensable, but only by reparation. Strict compensation rules also apply here,

105 Ibid.
not because equitable compensation is automatically strict, but because coherence of response with the nature of the duties breached requires those strict rules. That equitable compensation is not per se automatically strict is most clearly seen in the case of compensation for breaches of duties of care and skill, where there simply would be no coherence between duty and response if a strict regime were adopted. Compensating in equity for loss caused by breach of obligations originating in equity is a process, as is compensating at common law for loss caused by breach of obligations originating in the common law. How can it possibly be otherwise? The consequence is that the rules that equity develops for dealing with compensating for loss caused by breaches of the other equitable duties identified in Part 1 of this paper will be sensitive to the need for coherence between the duty and the reparative compensatory response.

7. And Finally, Some Lessons from Exemplary Damages

A rigorous taxonomy reveals that custodial fiduciary duties can be enforced by performance orders, requiring substitutive compensation where appropriate. Breaches of equitable duties, both fiduciary and of care, are met by orders for compensation. Such breaches are also met by orders for disgorgement (or restitution). What of punishment in that part of the civil law structured by equity? Will the increasing readiness to award compensation in cases of breach of equitable duty, especially given the potential in some areas for appeal to a tort analogy, lead inexorably to the embrace of exemplary damages? Of course, there is no sound conceptual link between compensation and punishment, but a 'practical' link does often offer itself.

A recent decision in New South Wales has confronted this issue head on. In Digital Pulse Pty Ltd v Harris, Digital provided multi-media services to clients. The defendants were its employees. They became dissatisfied with Digital and decided to leave and set up their own competing business. While continuing in the employ of Digital they diverted business opportunities to themselves and their new company. Digital sued the defendants for, inter alia, breach of fiduciary duty. Palmer J awarded equitable compensation and, in the alternative, an account of profits. After a lengthy discussion concluding that exemplary damages can be

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107 In an earlier paper on the limits of equitable compensation, I wrote (see Rickett, above n7 at 183 (footnote omitted)): ‘In principle, exemplary damages and aggravated damages may also be properly awarded in some cases. Such damages awards may be sustainable by an appeal to the discretionary jurisdiction. If equity has a discretion to limit, why is it not also have a discretion to enlarge? But caution is the order of the day again. Breaches of duty amounting to disloyalty and infidelity are already met by a plaintiff-friendly approach centered on the “but for” analysis. The disloyalty and infidelity must not be counted twice.’ I have developed serious reservations since writing this, whether exemplary damages are defensible within the framework of the civil law.

awarded in equity, and having earlier listed the various factors that made punishment appropriate in the case before him,\(^{109}\) his Honour awarded exemplary damages against the defendants.

Were exemplary damages available? Palmer J commented particularly on Somers J’s remark in his dissenting judgment in *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* to the effect that exemplary damages were not available in equity because ‘equity and penalties are strangers’,\(^{110}\) a comment whose sentiment has received considerable approval in Australia.\(^{111}\) Palmer J did not agree with it. His reasons need attention, and it transpires that they are not strong.

First, Palmer J stated that ‘the concept of punishment was by no means always foreign to the Chancery courts’.\(^{112}\) This historical argument was supported by appeal to cases from the 16th and 17th Centuries. It is, with respect, not clear that the division between criminal and civil jurisdictions was as well developed then as it is now. Furthermore, it is quite clear that the conceptualisation of the civil law was not as well developed then as it is now. On this basis, which, as I shall argue below, requires a careful appreciation of the structure of civil law claims, it becomes problematic to appeal to historical sources in a rather uncritical manner. To be fair to Palmer J, however, his approach was undergirded by an appeal to the notion that there should not be a ‘sharp cleavage’ between criminal and civil law, and he made observations on the position in Australia.\(^{113}\) I am not familiar enough

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\(^{109}\) Having held that the defendant employees owed Digital both statutory and general law duties of loyalty, the extent of which was the same, Palmer J examined in some detail the circumstances of the defendants’ breaches of those duties. He concluded that these demonstrated ‘deliberate wrongdoing for profit, in contumelious disregard of Digital’s rights, deserving of special condemnation and punishment’ (at 505 para 128). The defendants defrauded Digital of its valuable business opportunities and its confidential information, and their activities bore the stigma of fraud. Although the damage inflicted on Digital was relatively modest, ‘the character of the defendants’ dishonest conduct strikes at the heart of commercial integrity, upon which the business community, and ultimately the community as a whole, depends’ (at 507 para 134). ‘Employees should know that their deliberate and dishonest breach of their fiduciary duties of loyalty, calculated to produce profit for themselves, will not go unpunished and that, at the end of the day, breach of those duties does not pay.’ (at 507 para 134).

\(^{110}\) [1990] 3 NZLR 299 at 302.

\(^{111}\) See, for example, Mason J in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 109 (a dictum not cited by Palmer J): ‘…, there is authority for the proposition that equity does not assume jurisdiction to punish a fiduciary for misconduct by making him account for more than he actually received as a result of his breach of fiduciary duty. In *Vyse v Foster* [(1872) LR 8 Ch App 309 at 333] James LJ said: “This Court is not a Court of penal jurisdiction. It compels restitution of property unconscientiously withheld; it gives full compensation for any loss or damage through failure of some equitable duty; but it has no power of punishing any one. In fact, it is not by way of punishment that the Court ever charges a trustee with more than he actually received, or ought to have received, and the appropriate interest thereon. It is simply on the ground that the Court finds that he actually made more, constituting moneys in his hands “had and received to the use” of the cestui que trust.” The decision of the Court of Appeal was affirmed by the House of Lords [(1874) L.R. 7 H.L. 318] without their Lordships reflecting on the passage which I have quoted.’ For recent discussion of the English position, see Chambers, above n12 at 34–37.
with this Australian development to be able to do more than make the following three points. First, the examples used by Palmer J to illustrate his point are statutory (certain provisions of the Corporations Act and the jurisdiction given to criminal courts to order compensation for victims of crime). Secondly, compensating victims of crime in the context of the state’s punishing criminals is very different – because it is a matter of vindicating society’s interest or right, which can as a matter of policy be extended to compensation — from the state’s punishing duty-breachers in the context of private law claims for compensation or disgorgement — where society has no legitimate interest or right which courts can appeal to. Thirdly, if the divide between criminal and civil law is to wither away, then in my view we will be conceptually much the poorer. I shall return to this below.

Secondly, Palmer J argued that ‘even in modern times it cannot be right to say that equity never gives a plaintiff more than his or her strict entitlement and never exacts a punishment from a defendant’. This argument was supported by appeal to the existence of awards of accounts of profits against fiduciaries and reduction or disallowance of allowances for the work and skill of the fiduciary. But, with respect, accounts of profits are a strict entitlement of the plaintiff. The award of disgorgement against a defendant is founded upon a plaintiff’s claim right as against that defendant. In respect of allowances, the grant or non-grant of those allowances, and their quantum in any case, is also determined by a careful examination of the rights of the parties as between each other. Considerations of unjust enrichment enter into the matter if an allowance is not made. Reduction or disallowance is, as Palmer J stated, premised on the level of dishonesty of the defendant. Again, this matter is germane to the nature and extent of the breach of duty by the defendant and how it impacts upon the rights of the plaintiff. It is not a matter of punishment at all.

Thirdly, Palmer J went on to suggest that equity gave recognition to an element of deterrence in its resolution not to allow fiduciaries to make profits. But the no-profit rule is part and parcel of the duty of loyalty undertaken by the fiduciary. Equity is neither deterring nor punishing the fiduciary. Rather, equity is defining what it is to be under a fiduciary obligation, and if a profit is made and then stripped away, then that is because the plaintiff has that right as against the fiduciary!

Fourthly, Palmer J sought support from comments made by the English Law Commission in its Report No 247 on Aggravated, Exemplary and Restitutionary Damages. The paragraph cited by Palmer J simply focused in essence on the

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112 Digital Pulse, above n108 at 512-513 para 164.
113 Id at 515 para 172.
114 Id at 513 para 165.
115 Id at 513 paras 165–166.
116 As Professor Chambers writes: ‘Of course, responses to breach of duty are not punishments just because they relate to the consequences of the breach or the moral culpability of the wrong done.’ See Chambers, above n12 at 35.
118 Id at 514 para 168.
need to synthesize equity and the common law.\textsuperscript{119} If exemplary damages are available at common law, they should also be available in equity. This, of course, simply imports into the law of equitable wrongs the deeply problematic issue of the basis upon which exemplary damages are awarded. Just because others do it does not of itself mean that equity should also do it,\textsuperscript{120} especially if what others do is conceptually indefensible. I shall return to this below.

Palmer J stated:

Consistency in the law requires that the availability of exemplary damages should be coextensive with its rationale. Where wrongful and reprehensible conduct calls for the manifest disapprobation of the community, where a punishment is called for to deter the wrongdoer and others of like mind from similar conduct and where something more than compensation is felt necessary to ameliorate the plaintiff’s sense of outrage, then it should make no difference in the availability of exemplary damages that the court to which the plaintiff comes is a court of equity rather than a court of common law.\textsuperscript{121}

His Honour concluded that equity had an inherent jurisdiction to punish, which although muted was not dead.\textsuperscript{122}

The issue whether exemplary damages are, or should be, available in equity boils down, in my view, to a re-visitation of the general debate about their availability within the civil law generally. Indeed, Palmer J’s judgment made much of the need for coherence between the common law and equity. However, the more fundamental issue is to address their coherence within the very structure of civil law claims, whether sourced at common law or in equity. In an important forthcoming article, Dr Allan Beever has argued convincingly that:

It is not possible to bring private law and exemplary damages together into a single legal structure and pretend that that structure makes sense. Exemplary damages in private law are on ‘foreign soil’.\textsuperscript{123}

This is because compensation and/or disgorgement/restitution is a response to a breach of a duty that is owed to the specific plaintiff. The key point is that the breach of the initial duty-right relationship creates the claim of the plaintiff,\textsuperscript{124} which is correctly a claim \textit{in personam} arising from a secondary right owed to that

\begin{itemize}
\item \textsuperscript{119} Paragraph 5.55 of the Report.
\item \textsuperscript{120} Palmer J stated that it would be anomalous if exemplary damages were to be available in tort claims but not where the cause of action was equitable: see \textit{Digital Pulse}, above n108 at 514 para 169.
\item \textsuperscript{121} Id at 514 para 170.
\item \textsuperscript{122} Id at 514–515 para 171.
\item \textsuperscript{124} In performance claims, the focus on the primary duty in the duty-right relationship obviously fits the model also. Enforcement of property rights are a little more complex, but since most property rights are enforced indirectly through breaches of \textit{in personam} duties even here the model is vindicated.
\end{itemize}
plaintiff by that defendant. This analysis is the correct structural analysis of private law claims. Dr Beever argues, with considerable force, that:

[W]hile, as a matter of practice, exemplary damages are awarded when the defendant has breached a duty to the [plaintiff], it is not correct to regard the duty to pay exemplary damages as a duty owed to that [plaintiff]. Instead, the duty is owed to society at large. Perhaps it is owed when defendants seriously breach duties owed to [plaintiffs], but it is not owed for those duties. Liability for exemplary damages, then, is not a ‘term of relation’ between the parties; it results from ‘a wrong to the public at large’. Exemplary damages do not operate in personam.125

Accordingly, Dr Beever continues, exemplary damages are inconsistent with the structure of liability in civil law and must be rejected as part of the private law.

Embracing compensation and rejecting punishment may therefore be required of equity if it is to cement its position as a coherent part of the entirety of a coherent private law. Indeed, if equity, by rejecting exemplary damages, avoids succumbing to the enticing call for complete integration with the common law, the resulting dissonance with the common law on this matter might provide a reason for future integration the other way, but this would appear to have to await common law’s coming back to its senses.126

125 Beever, above n123 (forthcoming) (emphasis in original; footnotes excluded).
126 The decision of the New South Wales Court of Appeal (see above n108) was delivered on 7 February 2003: Harris v Digital Pulse Pty Ltd. The judgments are too long, learned and important to enable full analysis at the proof stage of this paper. By a majority, the Court allowed the appeal against the grant of exemplary damages by Palmer J. Spigelman CJ applied a contract analogy. Since exemplary damages were not available in cases of breach of contract, they were not available in a case such as the present, where there was ‘a relationship created by contract between the parties, in which one party has a fiduciary obligation to act in the interests of the other in relevant respects’ (para 5). His Honour left open the possibility that a tort analogy might be more appropriate in other cases in equity, where, it would seem, the power to award exemplary damages might well be exercised (para 44). Heydon JA, in a firm, scholarly and lengthy judgment, denied any existing jurisdiction in (Australian) equity to award damages whose objective was to punish, and stated that an intermediate appellate court could not change the law to introduce such jurisdiction (para 470). Mason P, in the minority, upheld much of the reasoning of Palmer J, and proceeded on the basis that a recognition of power to award exemplary damages for equitable causes of action aided consistency and coherence in the private law (para 153). The judgments, although directed primarily to the issue of exemplary damages, all contain fascinating insights into the matters highlighted in Part 1 of this paper, and will repay very careful analysis.
Paying For the Comfort of Dogma

JAMES ALLAN*

There are those who would pay for the comfort of dogma, with the coin of intellectual subjection. (Voltaire)

In a very recent paper of mine I argued strongly against the desirability of any sort of bill of rights for Australia. I argued there that the nature of rights themselves, the provenance that can plausibly be claimed for them, may itself lead us to doubt the wisdom of placing a set of these rights at (or near) the apex of the legal and constitutional system, where of necessity unelected judges would have to give them specific content. I argued too that in the context of the present Australian system the protection of the sort of important human interests that fall under the aegis of rights or of human rights requires no bill of rights. Australia, I urged, is better off without such an instrument, be it constitutionalised or statutory.

Everything that follows in this paper can be understood as arguing for the same conclusion, though on different grounds and from different starting points. In other words, the two papers should be seen as complementary, both serving to reinforce the view that ‘we don’t need any sort of bill of rights here in Australia’.

Let us start this paper by imagining that Australia has just managed (somehow) to adopt a bill of rights. Two immediate, and I will contend related, questions spring to mind. Firstly, what would have been the motivation for adopting it? Secondly, how is it likely to be interpreted? As we shall see, the answers to these questions seem likely to influence one’s assessment of the merits of our imagined recent decision to adopt a bill of rights.

Take the first question first. Justice Antonin Scalia of the United States Supreme Court draws a distinction between amendatory and confirmatory bills of rights. An amendatory bill of rights is ‘not meant to confirm and preserve the past, but to repudiate it’. Scalia gives the example of a guarantee of religious freedom in the bill of rights of the newly formed Federal Republic of Germany or Republic.

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1 See my chapter, James Allan, ‘A Defence of the Status Quo’ in Tom Campbell, Jeffrey Goldsworthy & Adrienne Stone (eds), Protecting Human Rights: Instruments and Institutions (forthcoming, 2003). In that chapter I reviewed briefly the notable features of the present Australian constitutional structure (from voting systems to bicameralism to constitutional amendment procedures), considered the singularity of lacking any sort of bill of rights, examined the nature of rights themselves and finished by weighing the cases for and against any sort of bill of rights. I concluded the latter is more compelling.

2 See Antonin Scalia, ‘The Bill of Rights: Confirmation of Extant Freedoms or Invitation to Judicial Creation?’ in Grant Huscroft & Paul Rishworth (eds), Litigating Rights: Perspectives from Domestic and International Law (2002).

3 Id at 20.
of Italy. Such a guarantee in such a bill of rights is ‘[s]urely… not meant to refer to the pre-existing freedom of religion in Nazi Germany, or Mussolini’s Italy’.\textsuperscript{4} We could add to this the further example of the recent South African Constitution, a clearly amendatory document aimed at rolling back the legacies of apartheid.

By contrast, a confirmatory bill of rights is meant to preserve the freedom, liberties and rights believed already to exist. Justice Scalia argues, persuasively in my view, that the American Bill of Rights is an example of a confirmatory bill of rights:

\begin{quote}
[it] was meant to preserve a state of liberty that was believed already to exist…. That the individual guarantees of the American Constitution have traditionally been regarded as confirmatory rather than amendatory is strikingly demonstrated by the fact that we adopted a constitutional amendment, in 1920, to compel all States to give women the vote — even though the Constitution already contained… a requirement that the States accord all persons equal protection of the laws.\textsuperscript{5}
\end{quote}

The New Zealand Bill of Rights Act 1990 is another example of a bill of rights — this one statutory — that was meant to be confirmatory. Indeed, this Act proved remarkably difficult to get through the New Zealand Parliament and was only enacted after being significantly watered down and after the then Prime Minister’s assurances that it would be ‘a Parliamentary Bill of Rights’\textsuperscript{6} and that:

\begin{quote}
the Bill creates no new legal remedies for courts to grant. The judges will continue to have the same legal remedies as they have now, irrespective of whether the Bill of Rights is an issue.\textsuperscript{7}
\end{quote}

On which side of the divide would our imagined Australian bill of rights fall? That is the gist of the first question posed above. Would it have been adopted as an amendatory or confirmatory bill of rights?

It seems to me that in the foreseeable future our imagined scenario of an Australian bill of rights will only ever come to pass if it is sold to the public as a confirmatory instrument. Australia is not one of the ex-communist eastern European countries hoping to shuffle off the coils of a widely despised political

\begin{footnotes}
\item[Ibid.]
\item[Id at 20, 21.]
\item[(1989) 502 New Zealand Parliamentary Debates 13038 (Rt Hon Geoffrey Palmer PM moving introduction of the Bill).]
\end{footnotes}
system; Australia is not South Africa with a legacy of apartheid. Instead, Australia is (and has been for over a century) one of the most democratic countries on the planet. Its voting systems are good; its compulsory voting regime enhances equality of input;\(^\text{8}\) constitutional amendments cannot bypass the electors, as they can (and do) in Canada and the US, but are subject to the direct say of the people voting in a referendum;\(^\text{9}\) the legal protection of rights, though not constitutionalised, is widespread, observed not least in numerous anti-discrimination statutes; even on more subjective grounds such as best places in the world to live, Australia scores extremely highly — as is evidenced by the 2001 UN Human Development Report which ranked Australia the second best place in the world to live behind only Norway.\(^\text{10}\)

The point is that the preponderance of Australians is well off and knows it. A bill of rights sold as an amendatory instrument, as a basis for repudiating the past, would (in my view) have next to no chance of being adopted or enacted in Australia.\(^\text{11}\) So whatever the basis for most other countries these days opting to have one, were Australia to join the recent worldwide trend and opt for some sort of bill of rights it would certainly be intended to be on a confirmatory basis, to confirm and preserve the freedoms and rights believed already to exist.

How then, returning to the second question I posed above, would our imagined Australian bill of rights be likely to be interpreted? For all those people who are undecided about the desirability of a bill of rights, the answer to this question may well be decisive. Accordingly, allow me here to digress for a moment to remind the reader about the purpose of constitutionalising rules and rights.\(^\text{12}\) Jeremy Waldron is blunt. ‘[T]he aim of constitutionalising an issue is to remove it from the

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\(^{8}\) Compulsory voting was first applied to an Australian Commonwealth election in 1925 after being enacted the previous year through a private member’s bill. Queensland introduced it in time for its 1915 general election. For detail on Australian compulsory voting see Colin Hughes, ‘Compulsory Voting’ (1966) 1 Politics 81 and Neil Gow, ‘The Introduction of Compulsory Voting in the Australian Commonwealth’ (1971) 6 Politics 201.

\(^{9}\) To win a referendum the amendment needs (i) a majority of electors in a majority of States and (ii) a majority of all electors. (See section 128 of the Commonwealth of Australia Constitution Act 1900 (UK).) In other words, a broad consensus of the political elite is not enough. Relatedly, the fact that only 8 of 44 Constitution altering questions have succeeded in Australia does not prove the s128 referendum is procedurally onerous; rather, it proves the majority is usually not in favour. This is made clear by the fact that in only 4 of the 36 failed referenda has (ii) been satisfied but not (i). Almost all s128 referenda fail because they cannot gain the support of a majority of Australians (witness, the question on republicanism). Onerous procedural hurdles should be made of sterner stuff.

\(^{10}\) This report built an index based on life expectancy, literacy, educational attainment and GDP per capita. Of course I do not mean to suggest that such a subjective, rather arbitrary measuring index spews out objectively right ranked answers of best places to live. I would, however, concede that for most of us there is some correlation between a weighted average of those four things and the desirability of living in that country. And lest the reader think I am blithely overlooking the historical treatment of Aborigines, in my complementary paper, Allan, ‘A Defence of the Status Quo’, above n1, I argue that as bad as the treatment has been, a bill of rights (one set in the relevant historical context of 30 or 50 or 100 years ago) would not have improved things.
ordinary discourse of politics.\textsuperscript{13} Hence a constitutionalised bill of rights is supposed to lock in, and remove from the realm of political debate, negotiation and compromise, certain articulated rights (or their analytical equivalents rules). Once locked in, if we want to change or alter these rights and rules, we will have to win approval in the much more difficult process of a constitutional amendment. That, at any rate, is the theory.

In practice, however, how is Australia’s mooted bill of rights likely to be interpreted? There is clearly the possibility that with our mooted bill of rights in place the Australian judiciary will play a significantly greater role in social policy-making than at present. Even a former Chief Justice of Australia, writing extra-judicially, concedes this point:

If the exercise of political power is to be subjected to a Bill of Rights, there is no institution to which the administration of those provisions can be entrusted save the Courts. The Courts … would be constrained to base their decisions on political considerations. This is foreign to our present conception of judicial function …. If the Courts are to decide on their political and social merits, the Courts will have to be given … ‘a deliberate push away from the cautious and highly deferential posture they exhibited’ in cases governed by Statute law …. A Bill of Rights, drawn in open-textured terms, necessarily requires individual human rights to be defined with a content specific to the case in hand …. This is the stuff of politics, but a Bill of Rights purports to convert political into legal debate, and to judicialize questions of politics and morality.\textsuperscript{14}

How, though, can we predict how far the judges are likely to go in giving our new bill of rights ‘content specific to the case in hand’? One way to predict how this conjectured bill of rights is likely to be interpreted (and so, concomitantly, to see the constraints this instrument will — or will not — place on the judges) is to look around the world at countries with similar legal systems, traditions and constitutional structures — say New Zealand, Canada and the UK — to see what the judges have done there. Another, more homegrown, way is to consider how judges here in Australia have already dealt with constitutional rights.

\textsuperscript{11} Recall, as a further indication that this is so, that the two 1988 referenda proposals seeking to insert such relatively weak rights guarantees as religious freedom and the right to vote failed not only to win a simple majority in the Commonwealth as a whole, they each failed to carry in any State.
\textsuperscript{12} It is worth remembering too that analytically speaking the existence of a right is equivalent to the existence of a rule. To say one has a right is to say that ‘others must’ do or refrain from doing something — in other words that there is a rule laying down this right (together with its correlating duty on some other or group of others). The claimed rule may, of course, be legal or non-legal. I elaborate on rights in James Allan, \textit{A Sceptical Theory of Morality and Law} (1998) and in ‘Rights, Paternalism, Constitutions and Judges’, \textit{Litigating Rights} above n2.
This latter indicia I refer to is, of course, the so-called ‘implied rights’ cases that began a decade ago. Recall that in *Australian Capital Television v Commonwealth* the judges were acting in response to 1991 Commonwealth legislation limiting access to television and radio for all political advertising, including third party political advertising — or more accurately put, banning all broadcasting of advertisements containing political matter during an election campaign in favour of requiring broadcasters to provide free broadcast time to qualifying candidates and parties. The Australian High Court stepped in to strike down the relevant legislation on the basis of its being an abridgement of a freedom of communication which the judges held, for the first time ever, to be inherent and so entrenched in the Australian constitution.

As an aside, it is important to notice that what the judges did here was not uncontentiously desirable or obviously a good thing. In particular, if one falls into either:

(a) the camp that believes that rationing access to television campaigning on a basis other than wealth tends to further egalitarian concerns and so the substantive right to participate in decision-making; or

(b) the camp that thinks that when there are potentially conflicting values at stake, say the need for free and open dialogue in a representative democracy as against the need to keep a modicum of equality of input in the democratic process, it is the people through their elected representatives who have the right to decide between them;

then the intrusion of the judiciary into this area of campaign finance regulation will be seen very much as a negative, not positive, initiative. In other words, far from adding value, the judges will be seen to have made things worse — worse in terms of rights.

Returning, however, to the ‘implied rights’ cases more generally, a very brief précis of what the courts have done may throw some light on how our conjectured bill of rights is likely to be interpreted. In essence, I take the High Court to have created (or if one takes a different view than I of what was done, then it has

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16 Here, let me just qualify the main text by noting that a more circumscribed characterisation might be more apt, say the ‘limited freedom of communication between the people concerning political matters in order to enable them to exercise a free and informed electoral choice’. See too *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 120 where Mason CJ, Toohey and Gaudron JJ, the activist judges be it noted, say ‘In those [earlier] cases, a majority of the court distilled from the provisions and structure of the Constitution, particularly from the concept of representative government which is enshrined in the Constitution, an implication of freedom of communication. That implication does not extend to freedom of expression generally.’ (emphasis mine) See too *Lange v ABC* (1997) 145 ALR 96 at 107 (‘Those sections [and the implications drawn] do not confer personal rights on individuals.’) and at 108 (‘The freedom of communication...operates as a restriction on legislative power.’). Note, too, that having ‘discovered’ this right, there was no necessity that the judges would strike down the law. Compare the Canadian response in the area of defamation law in *Hill v Church of Scientology of Toronto* (1995) 126 DLR (4th) 129.
discovered) what amounts to a limited right to freedom of political communication. The scope of the right or freedom first waxed, then waned to the point of seeming vulnerability, then was confined within boundaries that confirm its existence but make clear it does not confer personal rights on individuals and can lose out to a law that is reasonably appropriate and adapted to serve a legitimate end.

In my opinion, these cases show that judges, when inclined, can travel a long way towards achieving the rights-based outcomes they like with little or no textual support for that outcome. More to the point of this paper, though, is that whatever the Australian judiciary might do using the vehicle of implied rights, they could do much, much more with a set of explicit rights laid down in some sort of bill of rights. They could, I repeat, use a text which lays down explicitly proclaimed individual rights (usually in vague, amorphous but emotively attractive terms) to get their own way against the elected branches of government much more easily than they could ever use the ‘implied rights’ vehicle. They could, but would they?

My opinion is unequivocal. The likelihood is overwhelming that our imagined bill of rights would be interpreted by the Australian judges so as to give those same judges a significant increase in power vis-à-vis the elected branches of government. In other words, they could and they would. Of course, what was being done would not be articulated in terms of power. The language of rights would be used virtually exclusively. It might well begin with our being reminded of Lord Wilberforce’s oft-cited dictum that bills of rights:

call for a generous interpretation avoiding what has been called ‘the austerity of tabulated legalism’, suitable to give the individuals the full measure of the fundamental rights and freedoms referred to.

Or to stop speculating for a moment, and to focus on a real life example, take New Zealand. Recall from above that New Zealand’s bill of rights was statutory. In fact, the bill of rights ultimately enacted in New Zealand was arguably on its face — and in terms of its legislative history — the most enervated conceivable. And yet in the very first Bill of Rights Act case to reach the Court of Appeal Cooke P (speaking for the Court) suggested that, due to the bill of rights, there was ‘force in the argument that, to give full effect to the rights…, [a particular statutory

17 These are the early cases of Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106 and Nationwide New Pty Ltd v Wills (1992) 177 CLR 1 moving on through to Theophanous v Herald & Weekly Times Ltd (1994) 182 CLR 104.

18 In McGinty v Western Australia (1996) 134 ALR 289 and Langer v Commonwealth (1996) 134 ALR 400 the majority of a by now somewhat differently constituted High Court declined to extend the implied right to cover equality of voting power. Indeed McHugh and Gummow JJ, rejected the reasoning of the earlier cases that had created the implied right (see pages 348 and 391) and Dawson J came close to doing the same (see pages 304–305).

19 See Lange v ABC (1997) 145 ALR 96. Notice that although the implied right was bracketed, it was not renounced. Justices Dawson, McHugh and Gummow, the sceptics, all joined in the judgment of the Court here in Lange accepting the existence of the implied freedom.

20 For my arguments supporting this claim see Allan, ‘A Defence of the Status Quo’ above n1.

provision with a long-standing interpretation[...] should now receive a wider interpretation than has prevailed hitherto.24

The same judge, shortly thereafter, said of this enervated, statutory bill of rights:

[it] is not to be construed narrowly or technically.25

The correct judicial response can only be normally to give it primacy, subject to the clear provisions of other legislation.26

The [Bill of Rights] Act requires development of the law where necessary. Such a measure is not to be approached as if it did no more than preserve the status quo... it is asking no more than that we in New Zealand try to live up to international standards or targets and to keep pace with civilisation.27

And while not all the top New Zealand judges were as manifestly keen as Cooke P to use the new bill of rights to bring about changes they thought desirable, it is nonetheless true that in fewer than 10 years the judiciary there had transformed what looked like — and had been intended to be — an enervated, statutory instrument into one that allowed them to make declarations of inconsistency (on no statutory basis whatsoever), to read down competing statutes, to undertake potentially sweeping abridging enquiries, and to create an ad hoc Bill of Rights Act cause of action subjecting the Crown to potentially unlimited liability for its breach (in the face of a specific earlier amendment and assurances in the House to prevent this).28

The evidence from Canada of how judges will treat a bill of rights in an activist manner is, if anything, even plainer.29 Grant Huscroft, focusing on Canada and New Zealand, asserts that '[t]he willingness of the courts to adopt “generous interpretations” often negates the intention to limit the scope of rights at the drafting stage.... Nothing prevents natural justice or any other term with a well-understood meaning from being interpreted more expansively if the courts are

disposed to doing so.\textsuperscript{30} This assertion seems to be holding true even of the jurisprudence now emerging from the UK’s recently come into force \textit{Human Rights Act}.\textsuperscript{31}

Accordingly, it would appear safe to predict that our imagined bill of rights would — sooner or later, but probably sooner — be interpreted by the Australian judges in an expansive, broad, generous, non-austere way, in order (we might be told) ‘to keep pace with civilisation’.\textsuperscript{32} The willingness of Australian judges in the past to ‘find’ (or to ‘tease out’) rights as an implication of a text that nowhere specifically sets out, refers to or in any way mentions them is one ground for thinking this. The evidence from comparable countries such as Canada, the UK and New Zealand is another. And we can all see that this sort of approach to interpretation leaves the judges much less constrained in achieving the outcomes they desire. In fact, Tom Campbell makes the case in detail of just how far judges can travel simply by using statutory (not even constitutionalised) bill of rights-based interpretive techniques.\textsuperscript{33}

Nor, perhaps, should this be at all surprising. Think back to Justice Scalia’s distinction between an amendatory and confirmatory bill of rights. How does one interpret the former? As Scalia says, it cannot be on the basis of how the right or freedom was treated previously. It is just such treatment, after all, that the introduction of the amendatory bill of rights was seeking to repudiate.

There is no way to interpret [an amendatory bill of rights’ provisions, say freedom of religion] except as an appeal – not to traditional national or international legal concepts – but to some Platonic ideal of freedom of religion that judges will ultimately have to invent.\textsuperscript{34}

This sort of bill of rights, therefore, appears to place relatively few constraints on the judiciary, at least initially until a body of case law can be built up and until judges become reluctant to stray from it.

Unless the judge is bound to give content to these generalities by referring to pre-existing practice, he is left to govern society on the basis of his own philosophy, his own biases, or his own worldview…. The judge is left to make up those details as he sees fit…. There are no answers to these questions — or at least no answers that courts (that is to say, committees of lawyers) can figure out through their accustomed analytical processes…. But if past practice does not matter, how am I to decide the point? Has Harvard Law School prepared me for this? Of course not.\textsuperscript{35}

\textsuperscript{32} See the main text to \textit{Ministry of Transport}, above n27.
\textsuperscript{34} Scalia, above n2 at 20.
Can anything more, in the way of constraints, be hoped for from a confirmatory bill of rights? If so, there would still be powerful democratic objections to the adoption of a bill of rights, but at least we might anticipate that judges would feel more limited in what they can and cannot do. They would, perhaps, feel limited by past practice and by the intentions of the enactors or adopters. There would then be an external standard to use to give the articulated rights — rights expressed overwhelmingly in indeterminate and amorphous terms — a ‘content specific to the case at hand’.

Alas, this hope too may prove ephemeral. Many judges, certainly what to me seems to be a majority in most common law jurisdictions today — though Bill of Rights lacking Australia, or at least the current High Court, is largely an exception — like to think of their constitutions, constitutionalised bills of rights and quasi-constitutionalised (ie, statutory) bills of rights as ‘living trees’ or ‘living organisms’. They want to have the freedom to enable the terms used in these documents to keep pace with a changing society’s changing values (or rather with their view of what those values are). They deplore ‘the dead hand of the past’ and deride constraints stemming from the enactors’ or adopters’ intentions as a form of ‘ancestor worship’. Huscroft sums up this prevalent judicial attitude in these terms:

Arguments that a bill of rights means what it says, or what it was intended to mean, have become the stuff of parody — ‘ancestor worship’ to some.

Justice Scalia is more scathing:

The argument often made in defence of a bill of rights untethered to original understandings and susceptible of judicial evolution is that a constitution, after all, is meant to endure for many years and hence must be flexible. It is a ‘living organism’ that must ‘grow’ with the society that it governs…. [Of course] a constitution is not an organism. It is a democratically adopted law, and should… [not be interpreted] to commit the future of society to management by an unelected judiciary. And if you believe that the enthusiasts of a ‘living constitution’ are seeking to bring us flexibility, you are wrong.

35 Id at 23–24.
36 For the best contemporary critique of strong judicial review under a bill of rights see Jeremy Waldron, Law and Disagreement (1999). Waldron there considers and rejects all of the best-known arguments in favour of strong judicial review.
37 See the main text to Brennan, above n14.
38 Of course, not all Australian judges stand out against this larger trend. See Justice Michael Kirby, ‘Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?’ (2000) 24 MULR at 1. But see too the powerful reply by Jeffrey Goldsworthy, ‘Interpreting the Constitution in its Second Century’ (2000) 24 MULR at 677. ‘Whenever non-originalists trot out the tired old refrain that “we”, “today’s Australians”, “the present generation”, etc, should not be bound by “the dead hand of the past”; they really mean that the judges should not be bound by it. They assume that the judges speak for “us”, and imply that to limit the judges’ ability to change the Constitution by pseudo-interpretation is to limit “our” ability to do so democratically. The assumption is highly questionable, and the implication plainly false.’ (Id at 686–687, internal footnote omitted).
39 Grant Huscroft, ‘Rights, Bills of Rights and the Role of Courts and Legislatures’, in Litigating Rights above n2 at 4 (internal footnote to Kirby’s article cited in the note above omitted).
In either version, however, the point is the same. A constitutionalised or quasi-
constitutionalised bill of rights will lock in everyone except the judges (and less
directly, the lawyers). Gone from the realm of acceptable political debate and
negotiation will be any questioning or rejecting of the case by case specific
interpretations these judges have given to the enumerated rights. We, the people,
will all be locked in; the judges, with their ‘living tree’ interpretations, will not be;
to over-rule them we will have to resort to a constitutional amendment or repeal of
a statute built up to be somehow on a par with the constitution; they can change the
effect of the bill of rights any time they like simply by changing their interpretation
of the unchanged words. The fact our imagined bill of rights was sold as a
confirmatory document will not prevent this.

I surmised earlier in this paper that for some people who are undecided about
the desirability of a bill of rights, the probable judicial approach to interpreting it
might be the decisive factor. In other words, for some (perhaps many) people there
will be a connection between the motivation for wanting (or not wanting) a bill of
rights and the likely judicial approach to interpreting it. If that be true, if support
for a bill of rights tends to decline, the more judges are seen to feel free to treat it
as a living organism granting them (and only them) an expansive licence to make
legislation conform to their particular biases and worldviews, then our imagined
Australian bill of rights is becoming distinctly more imaginary. My guess is that it
will be much harder for advocates of an Australian bill of rights to realise their
ambition if people are aware of how such a document (be it constitutionalised or
statutory) is likely to be used and interpreted by the judiciary.

Another way of putting the same hypothesis is to assert that it is easier to sell
a bill of rights than it is to sell any form of strong judicial review. In order to have
any prospect of succeeding, therefore, it is wise to keep concealed Grant
Huscroft’s observations that:

Far from being a mere corollary of the importance of protecting rights, judicial
review is the raison d’être for modern bills of rights…. So a bill of rights is not
simply a matter of empowering the courts to protect rights; it is about empowering
the courts to determine what rights we have…. Not only is it impossible to limit
the scope of judicial review but, as I have suggested, it is contrary to the purpose
of modern bills of rights in any event.42

40 Scalia, above n2 at 26 (italics mine).
41 It is important to stress, yet again, that in my view this reasoning applies equally to a statutory
bill of rights. In fact, I have argued at length that statutory bills of rights or over-ride clauses do
little, if anything, to diminish the power of judges. (See my writings in nn1, 12 & 22 above.)
Jeffrey Goldsworthy, in a review of two of Jeremy Waldron’s books (‘Legislation,
Interpretation and Judicial Review’ (2001) 51 U of Toronto L J 75), notes that the Canadian
over-ride is phrased such that the legislatures seem to be given a power to over-ride the Charter
of Rights itself — not a power to over-rule a particular interpretation given it by the judges,
which is what would really be happening. Hence, ‘the legislature cannot ensure that its view will
prevail without appearing to override the Charter itself. This makes it vulnerable to the
politically lethal objection that the legislature is openly and self-confessedly subverting the
Constitution.’ (see at 81) The same point is made by Grant Huscroft, above n30.
42 Huscroft, above n2 at 4, 6 & 7.
Obversely, those, like me, who are opposed to bills of rights in countries — like Australia — with strong democratic traditions and credentials need to try to make the link and raison d’être apparent.

Conclusion

In this paper I began by imagining that Australia had just managed to adopt a bill of rights. I then argued that it would have been sold to the public on a confirmatory basis but that it would nevertheless be interpreted expansively, liberally and generously. This would plainly give those same judges doing the interpreting a significantly greater role in social policy-making in Australia. I went on to venture the opinion that a widespread awareness of these effects would make it much more difficult for advocates of an Australian bill of rights to realise their ambition. The imagined would slip further into the realm of the fanciful and chimerical.

That is what I have done in this paper. What I have not done is to say why giving judges this power would be a bad thing. But it is evident I happen to believe that in the context of a moderately well functioning democracy, and so a fortiori in Australia, it is a bad thing. And I have argued this belief at length elsewhere. I will not repeat the arguments here.

What I will do to conclude is to return to the title of this paper. Look around the law schools of Canada, New Zealand, the UK and Australia and ask yourself whether or not the desirability of some sort of bill of rights has become elevated to the level of taken-for-granted, indisputable, unimpeachable dogma. It seems to me that, with exceptions here and there, it has. The slant taken towards bills of rights by law societies and other bodies representing lawyers is much the same. And yet this faith in these instruments, and so, implicitly, in judges, co-exists with an over-the-top cynicism of the motives, ethical stances and moral perspicacity of lawyers. The latter are unduly distrusted and yet the moment one of them is appointed to the bench he or she is unduly trusted to decide where to draw lines (in contentious matters of social policy-making) for the rest of us. The juxtaposition of this faith, that judges do a better job giving specific content to rights than we and our elected representatives can and do, with the cynicism concerning the motives and actions of lawyers generally is jarring.

Be that as it may, and whatever the causes for this misplaced faith and cynicism, I think it crucial to challenge the dogma surrounding bills of rights. In a well-established democracy like Australia, important rights, important human interests, can be (and generally are) as well — if not better — protected without a bill of rights. There is no good reason in Australia to pay for the comfort of dogma.

43 I have done so not just in the complementary paper to this one, Allan, ‘A Defence of the Status Quo’ above n1, but inter alia in the following: James Allan, ‘Oh That I Were Made Judge in the Land’ (2002) 30 Federal Law Review at 561; Allan, ‘Rights, paternalism, constitutions and judges’ in Litigating Rights above n12; the articles cited in n22 above; ‘Bills of Rights and Judicial Power — A Liberal’s Quandary’ (1996) 16 Oxford Journal of Legal Studies 337; and ‘A Bill of Rights Odyssey for Australia: The Sirens are Calling’ (1997) 19 University of Queensland Law Journal 171 (co-written with Richard Cullen). And of course, as I noted in n36 above, Jeremy Waldron makes the most powerful case today against bills of rights.
1. Introduction

‘Waltzing Matilda’, written by Banjo Patterson in the late nineteenth century, is one of the most widely recognised Australian songs throughout the world. Indeed, there have been calls for it to be made Australia’s national anthem as it is generally considered to celebrate freedom and adventure. What few Australians realise is that this song tells the tale of a homeless man who commits suicide to prevent being arrested for stealing a sheep, an offence that he presumably committed as a means of providing himself with sustenance.

‘Matilda’ is nineteenth century slang for a swag, that is, a cloth or blanket in which a ‘swagman’, or wanderer, carried his belongings. Thus, ‘waltzing matilda’ means to travel the open road with a swag on your back, thereby denoting that the man described in the song is homeless, with few possessions and no reliable source of food. Further evidence of his poverty is provided by the fact that he stuffs the sheep (‘jumbuck’) he steals into his ‘tuckerbag’, that is, a bag in which food is kept. The fact that the swagman preferred to die rather than be caught by the police (‘troopers’) implies that the penalty for theft of a sheep at the time the song was written involved the curtailment of an offender’s freedom, presumably by virtue of a lengthy prison sentence, or perhaps worse.

One hundred years later, homeless persons are still amongst the most criminalised of all population groups in Australia, and they are still mostly arrested and imprisoned for minor property offences and summary offences.1

Queensland is one of the only jurisdictions in Australia to retain offences that are directly and specifically targeted at homeless persons. ‘Vagrancy’ is still an offence in Queensland under s4 of the Vagrants, Gaming and Other Offences Act 1931 (Qld) (hereinafter the Vagrants Act), and it is punishable by a penalty of $100 or six months’ imprisonment. Offences that amount to vagrancy include having no

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visible lawful means of support, begging and habitual drunkenness. Such behaviour is generally associated with poor and homeless people, and thus the offence of vagrancy effectively criminalises homelessness.

While it has been claimed by Queensland Police that it is against departmental policy for these provisions to be used, the statistics demonstrate that many people are still being arrested for and charged with vagrancy. In 2000–2001, 943 people were charged with these three forms of vagrancy alone. Of these, 430 (46 per cent) were convicted but not punished. The remainder were penalised, with 13 going directly to gaol.

The offence of vagrancy is a source of grave injustice. As will be seen, the provisions target already disadvantaged members of society, and they are viewed with contempt by the higher courts. They also place significant pressure on the public purse, both through the diversion of police resources and their contribution to the prison population.

This paper will provide an overview of the commonly cited reasons for the retention of the offence of vagrancy on modern statute books. It will be recommended that the offence of vagrancy be repealed in Queensland, and that offences akin to it throughout Australia be repealed also.

2. The History of the Offence of Vagrancy

Queensland’s vagrancy provisions originate from the English Poor Law which was first enacted in the twelfth century to deal with social conditions subsequent to the Black Death. The first Act criminalising vagrancy was passed in 1349. A consolidating Vagrancy Act was passed in England in 1824 and it is this legislation that formed the basis for similar legislation in the Australian colonies.

Initially, the main form of punishment for vagrancy was corporal; however penalties became increasingly punitive and by 1530 a vagrant could lose an ear, be tied to a cart and whipped, or even executed. By the mid nineteenth century, imprisonment had become the most likely outcome of a vagrancy conviction; in 1858, 42 per cent of women in prison were serving sentences for vagrancy.

The crime of vagrancy stemmed from the social perception of homelessness as a form of deliberate deviance, linked to both idleness and crime. As the Protestant work ethic became secularised and internalised, poverty and homelessness were
increasingly seen as symptomatic of individual moral failing. Vagrancy was
viewed as a choice in favour of idleness at the expense of honest hard work, and it
was generally believed that ‘by far the greatest number come to want and
wretchedness through their own immoralties’.

The interference of the voluntary sector, police and magistrates into the lives
of the poor and homeless was justified as being necessary to save them from
themselves. ‘Asylums’ were built to house and provide work to those unable to
support themselves, the result being that such persons were both patronised and
stigmatised. Police were known to arrest homeless persons ‘for their own good’,
and magistrates would send the homeless to gaol and their children to orphanages
in an attempt to discipline them.

Institutionalisation and imprisonment of homeless people were also justified
by concerns for public welfare. The upper classes called for such ‘undesirables’
to be removed from public view in order that their delicate sensibilities might be
protected, and so young people and servants might be prevented from following
their example. There was also a concern amongst the upper echelon of colonial
society that vagrants and beggars reduced a town’s aesthetic appeal – a desire to
impress visiting notables required that such persons be swept from the streets.
In addition, it was widely believed that ‘idle hands’ were certain to turn to crime, so
the arrest and conviction of beggars and vagrants were considered to be necessary
to nip serious crime in the bud. Punitive approaches to vagrancy resulted in
homeless people being frequently brought before the courts, leading to the
perception that these ‘sinners’ were also criminals.

Thus, the arrest and detention of homeless people were traditionally justified
in terms of both social and public welfare, and prisons and ‘asylums’ were
considered to have the twin functions of public order and remoralisation.

10 Weber argues that at the dawn of capitalism, material success was viewed as evidence of one’s
eternal salvation by God, and thus idleness was seen as evidence of immorality. See further Max
11 The Benevolent Society, Annual Report (1828) at 11; cited by Rosemary Berreen, ‘And Thereby
to Discountenance Mendicity: Practices of Charity in Early Nineteenth Century Australia’, in
Michael Wearing & Rosemary Berreen (eds), Welfare and Social Policy in Australia: The
12 ‘Asylums’ were a form of institutional care run by benevolent associations for those judged
unable to support themselves; Berreen, id at 13.
13 Above n9; Berreen, above n11 at 7, 12.
publications/ lcj/ working/index.html>.
15 Ibid.
16 Ibid.
17 Ibid.
18 Above n9 at 238.
19 Id at 238; Berreen, above n11 at 7, 10.
3. **Homeless People and the Criminal Justice System in Australia Today**

Homeless persons are still particularly vulnerable to police contact, arrest and imprisonment in our modern society. In NSW, approximately 10 per cent of prisoners report being homeless or at risk of homelessness prior to their incarceration.\(^{20}\) In a study conducted in Brisbane, over 50 per cent of a sample of 70 intellectually disabled homeless people had been charged with an offence in the past and a further 31 per cent described themselves as ‘known to police’.\(^{21}\) In a study conducted in Melbourne, 29 per cent of a sample of 383 homeless persons reported a history of incarceration.\(^{22}\)

### A. Vagrancy in Queensland

In Queensland, homeless persons are directly targeted by the *Vagrants Act*, which lists a number of offences that are considered to amount to vagrancy, including where a person:

- has no visible lawful means of support, or insufficient lawful means, where he/she cannot give to the court’s satisfaction a good account of his/her means of support (s 4(1)(a)), except where that person is bona fide out of work and bona fide in search of employment (s 4(1A));
- being an habitual drunkard, behaves in a riotous, disorderly or indecent manner in any public place (s 4(1)(c)); and
- loiters or places himself/herself in a public place to beg or gather alms (s 4(1)(k)).

The retention of vagrancy as an offence in Queensland amounts to the criminalisation of homelessness. The offence of begging criminalises conduct that is unequivocally indicative of extreme poverty and/or homelessness, and the offence of having no visible lawful means of support has been used by police to arrest homeless persons who sleep in public places and/or eat out of garbage bins.\(^{23}\) Section 4(1A) states that those who are bona fide unemployed and in search of employment are exempt from the offence under s4(1)(a); however this does not assist homeless persons who are unable to compete in the labour market due to their impoverished state, and want of a fixed address. The offence of being an habitual drunkard under the *Vagrants Act* also contributes to the criminalisation of homelessness. Alcoholism is extremely prevalent amongst homeless persons,\(^{24}\) so this offence also leads to the over-policing and over-imprisonment of the homeless.

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\(^{20}\) Tony Butler, *NSW Corrections Health Service Inmate Health Survey* (1997) at 23.


In 1999–2000, 2460 people were arrested for trespass/vagrancy in Queensland. Of these, 282 were charged with begging, and 15 were charged with having no visible lawful means of support. Eighty three of the 297 people charged with begging or insufficient lawful means of support were imprisoned, and a further 112 received a fine whereby default would lead directly to imprisonment. Only one received a conviction without penalty, and only 12 received a community service order. In addition, 347 people were convicted of drunkenness, four of whom were imprisoned. A further 135 received a fine whereby default would lead directly to imprisonment. Only one person received a community service order for drunkenness. (See Tables 1 and 2) Thus, the offence of vagrancy is a significant pathway into the prison system for the poor and homeless.

Table 1: Disposal of begging and no visible lawful means of support charges in Queensland Courts 1999/2000

<table>
<thead>
<tr>
<th>Disposal Type</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fine (with default imprisonment)</td>
<td>112</td>
</tr>
<tr>
<td>Imprisonment</td>
<td>83</td>
</tr>
<tr>
<td>Suspended sentence</td>
<td>40</td>
</tr>
<tr>
<td>Probation</td>
<td>24</td>
</tr>
<tr>
<td>Good behaviour bond</td>
<td>14</td>
</tr>
<tr>
<td>Community service order</td>
<td>12</td>
</tr>
<tr>
<td>Conviction no penalty</td>
<td>1</td>
</tr>
<tr>
<td>Other</td>
<td>11</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>297</strong></td>
</tr>
</tbody>
</table>

24 For example, Kermode et al found that 74 per cent of their sample of homeless persons in Melbourne were current users of alcohol. The median number of standard drinks consumed on a typical drinking day was 11.5: above n22 at 467.
26 Above n3.
27 Ibid.
28 Ibid.
29 Ibid.
30 Ibid.
31 Ibid.
32 OESR, above n25; above n3.
Table 2: Disposal of habitual drunkenness charges in Queensland Courts 1999/2000

<table>
<thead>
<tr>
<th>Penalty Type</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conviction no penalty</td>
<td>137</td>
</tr>
<tr>
<td>Fine (with default imprisonment)</td>
<td>135</td>
</tr>
<tr>
<td>Reprimand</td>
<td>56</td>
</tr>
<tr>
<td>Probation</td>
<td>7</td>
</tr>
<tr>
<td>Good behaviour bond</td>
<td>7</td>
</tr>
<tr>
<td>Imprisonment</td>
<td>4</td>
</tr>
<tr>
<td>Community service order</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>347</td>
</tr>
</tbody>
</table>

B. Vagrancy Throughout Australia

Vagrancy offences have been abolished in most Australian states. However, a number of other offences and provisions have sprung up in their place, many of which have the same substantive effect as the vagrancy provisions they replaced.

Queensland is one of only two Australian jurisdictions to have failed to repeal the offence of having no visible lawful means of support. The offence has also been retained in Western Australia under s 65(1) of the Police Act 1892 (WA). Also, Queensland is one of six Australian jurisdictions to retain begging as an offence. Begging is still a crime in Western Australia (Police Act 1892 (WA) s 65(3)), South Australia (Summary Offences Act 1953 (SA) s 12), Tasmania (Police Offences Act 1935 (Tas) s 8(1)(a)) and the Northern Territory (Summary Offences Act 1923 (NT) s 56(1)(c)). In Victoria, the separate offences of begging and soliciting alms under false pretences remain in the Vagrancy Act 1966 (Vic) (ss 6(1)(d), 7); however the ‘false pretences’ requirement in the latter offence may prevent its use against homeless persons in genuine need of support. Regardless, it seems almost certain that the Victorian provisions will be repealed in the very near future. Further, Queensland is one of only two Australian states to have failed to decriminalise public drunkenness. In Victoria the offence of habitual drunkenness was repealed in 1997, but public drunkenness is still an offence (Summary Offences Act 1966 (Vic), ss 13, 14 and 16).

In addition, many other Australian jurisdictions have laws in place that achieve the same results as these provisions. For example, in the Northern Territory, being found without lawful means of support ceased to be an offence in 1973. However by-law 103 of the Darwin City Council By-Laws makes it an offence to sleep in a

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33 Ibid.
35 Police and Police Offences Ordinance 1973 (NT).
public place at any time between sunrise and sunset. One hundred and eight people were issued with infringement notices for this offence between January and June 1999, 62 of whom were gaoled.

Similarly, in New South Wales, the offences of having insufficient lawful means of support and begging were repealed in 1979. However under s 28F of the Summary Offences Act 1988 (NSW), police have the power to ‘give a direction’ to a person in a public place if that person’s presence is likely to cause fear to another person. Notably, there is no requirement that another person be present at the time the direction is given. Failure to move on as directed may attract a fine of up to $220. It is well established that these powers are disproportionately used against homeless people. In addition, during the Sydney Olympics, there were a number of legislative enactments increasing police powers and outlawing activities associated with poverty and homelessness. For example, s 4 of the Sydney Harbour Foreshore Authority Regulation 1999 (NSW) made it an offence to (inter alia) collect money, busk or sleep out. Such actions were punishable by a fine of up to $2200. Police and other officials were also given extensive powers to remove from a public area anyone causing an ‘annoyance or inconvenience’ to other persons.

In NSW, Tasmania and ACT, while intoxicated persons cannot be charged with drunkenness, they can be detained in prescribed places for the duration of the period of their intoxication. While on its face this appears to be a positive step, intoxicated persons are more often than not still detained in police cells. Indeed, the NSW Intoxicated Persons Act 1979 was amended in 2000 to restrict authorised places of detention to police cells and detention centres. Prior to this, intoxicated

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36 Darwin City Council By-Laws (as in force at 16 August 2002) s103.
38 The relevant sections of the Summary Offences Act 1970 (NSW) were repealed and replaced by the Offences in Public Places Act 1979 (NSW) which was repealed and replaced by the Summary Offences Act 1988 (NSW).
39 That is, two penalty units. One penalty unit is equivalent to a fine of $110; Crimes (Sentencing Procedure) Act 1999 (NSW) s17.
41 Sydney Harbour Foreshore Authority Regulation 1999 (NSW) s4 attracts a penalty of 20 penalty units. One unit is equivalent to a fine of $110; Crimes (Sentencing Procedure) Act 1999 (NSW) s17.
42 Sydney Harbour Foreshore Authority Regulation 1999 (NSW) s13.
43 See Intoxicated Persons Act 1979 (NSW); Police Offences Act 1935 (Tas) ss4A, 4B; Intoxicated Persons (Care and Protection) Act 1994 (ACT).
44 This was recognised by the Royal Commission into Aboriginal Deaths in Custody (see Recommendation 81, Elliot Johnston, Royal Commission into Aboriginal Deaths in Custody, National Report (1991, Volume 5) at 87). See also Victoria Parliament Drugs and Crime Prevention Committee, 'The Experience of Decriminalisation: Two Case Studies', Inquiry into Public Drunkenness (2000) at 41; and Andrew Cornish, ‘Public Drunkenness in New South Wales: From Criminality to Welfare’ (1985) 18(2) ANZJ Crim 73.
45 Intoxicated Persons (Amendment) Act 2000 Schedule 1 (amendment to s3; definition of 'authorised place of detention').
persons could be detained in a variety of other ‘proclaimed places’ including hostels and other supported accommodation facilities.

Thus, most Australian jurisdictions have recognised the social injustice and cost ineffectiveness of vagrancy offences, and have repealed them. However, some of these jurisdictions have laws in place that achieve the same results. Ironically, such modern street-sweeping offences may have a broader application than the original criminal offences. As argued below (see Section V, Part B), the retention of these provisions on statute books throughout Australia results in increased rates of arrest and detention of socially excluded, marginalised people who are in need of treatment, understanding and practical assistance rather than punishment.

4. Why is Vagrancy Still an Offence?

As will be seen, the treatment of homeless persons and the way in which the offence of vagrancy is used has changed little since the nineteenth century. The enforcement of vagrancy laws against homeless people is still justified by the police on the basis of their duty to ensure public welfare and safety, as well as a concern for the social welfare of homeless individuals. However, it is argued that the public safety and social welfare justifications for the retention of the offence of vagrancy were not persuasive 100 years ago, and they are not persuasive now. Rather, they mask the real reasons behind the retention of the offence, which are based on notions of the ‘deserving and undeserving’ and are aimed at maintaining capitalist modes of production.

A. The Public Welfare Justification

As noted above, the offence of vagrancy was traditionally considered to be a mechanism for preventing crime, as it was believed that those who were idle would inevitably engage in criminal conduct of some kind. This belief is still held today: public safety and welfare are still the main arguments advanced in support of the retention of the crime of vagrancy in our modern society. Evidence for this was provided at the inaugural National Local Government Drug Conference in 2001, where the Chief Executive Officer of Brisbane City Council stated that public safety is the primary concern of the Council in its development of strategies to deal with homelessness and vagrancy. She added that the presence of homeless people restricts other members of society ‘in a psychological sense’ making them feel as though they do not have freedom of movement.46 Also, the Western Australian Law Reform Commission reported in 1992 that vagrancy is classified as a ‘preventative offence’, that is, it allows for the arrest and detention of people on suspicion of their involvement (or possible future involvement) in some unspecified wrong-doing.47

However, there is no evidence that vagrancy offences have a crime prevention effect, and it is submitted that public safety fears in relation to homeless persons may be considered ‘moral panic’. Hogg and Brown argue that an unrealistic and ill-informed culture of fear exists in our modern society whereby crime is depicted as a problem of such overwhelming proportions that the very fabric of society is considered to be at risk unless harsh punitive measures are taken to suppress it. The effect of this ‘law and order common sense’ is that law and order policy is based on fear (no matter how irrational), and the retention of crimes such as vagrancy is considered necessary to protect the public. The stereotyping of homeless people as troublesome and dangerous crystallises this popular fear, thereby encouraging and legitimating the intervention of the criminal justice system. However, the reality is that stranger to stranger violence is one of the least frequent types of interpersonal violence committed in Australia; most often, interpersonal violence arises out of family and intimate relationships, and altercations between young males arising out of leisure activities. Thus, strangers loitering or sleeping in public places do not pose a realistic threat to community safety.

Rather than dispelling this fear, politicians appeal to voters by vowing to recruit more police, create tougher penalties and increase police powers. For example, the Queensland Government has recently introduced police ‘move on’ powers, with s 38(1)(a) of the Police Powers and Responsibility Act 2000 (Qld) allowing police to move people on if they cause ‘anxiety’ to others. This may have the effect of legitimating unreasonable fears or discomfort amongst those members of society who feel threatened or uneasy as a result of the mere presence of ‘outlandish’ looking people.

Thus, despite our claims to be a more tolerant society, attitudes towards homeless people have changed very little in the last century. The homeless are still represented as a threat to public safety, even though stranger to stranger violence is one of the least frequent types of interpersonal violence committed in Australia, and they are still viewed as an inconvenience, an affront, and a disturbance to the delicate sensibilities of ‘respectable’ people.

B. The Social Welfare Justification

Traditionally, criminal offences such as vagrancy were considered necessary to enable police and magistrates to save the poor and homeless from themselves. One hundred years ago, the detention of homeless people in prisons or institutional
settings was considered necessary for their own good, so that they might receive discipline and be dissuaded from their idleness.\(^{54}\) This notion still persists today. It is still widely believed that capitalism allows for unbridled social mobility proportionate to one’s diligence and hard work, and that those who are poor have brought their condition upon themselves. The Protestant work ethic is still alive and well.\(^{55}\) Also, some people (including law enforcers) still believe that the homeless may be better off in gaol, and that this justifies the interference of police in their lives.\(^{56}\)

The belief that homelessness is a function of idleness is clearly flawed. Capitalism fails that proportion of the population that is unable to successfully compete in the labour market, particularly those with physical and mental disabilities, and those who have not had access to education or training.\(^{57}\) Homeless people are among those who are excluded from the labour market, as they have no fixed address (which is necessary to receive correspondence) and inadequate resources to enable them to engage in employment (eg, lack of education, lack of appropriate attire, etc).

The belief that homeless people may be better off in prison evinces a lack of understanding regarding the nature of prison life. Imprisonment is a frightening, dehumanising experience which results in feelings of powerlessness and loss of dignity; prisons are often over-crowded, violent and isolating, and their adverse psychological effects may last for years to come.\(^{58}\) Also, imprisonment can prejudice offenders’ chances of obtaining employment upon their release.\(^{59}\) In the case of *Moore v Moulds*, Shanahan DCJ noted the inappropriateness of sending homeless defendants to prison ‘for their own good’, stating that processes other than imprisonment would be a more suitable response to such circumstances.\(^{60}\)

Thus, as demonstrated above, keeping offences such as vagrancy on the statute books is commonly justified on the basis of public safety and social welfare grounds. However, the reality is that public safety is not jeopardised by the presence of homeless people in public spaces, and the incarceration of homeless persons will not benefit them or the community in the long term. The question must therefore be asked: why is vagrancy still a crime in Queensland?

\(^{54}\) Ibid.
\(^{56}\) *Moore v Moulds*, above n23 at 230.
\(^{60}\) *Moore v Moulds*, above n23 at 230.
C. Protecting Capitalism

The answer offered by some commentators is that the real purpose of the crime of vagrancy is to defend capitalism from potential interferences, based on a belief that the use of public space by ‘more deserving’ citizens should be facilitated at the expense of the ‘less deserving’. There are two elements to this.

(i) Preventing Non-Commercial Uses of Commercial Space

First, the offence of vagrancy may be used to ensure that public space is used for commercial uses alone. Large areas of public space have become commercialised in recent years. Shopping centres and malls have been reclaimed by businesspeople and consumers as ‘commercial space’, i.e. spaces specifically designed for the sale and consumption of goods and services. The homeless are not consumers, so they tend to use such spaces for non-commercial uses. They have no choice but to perform activities in public that the majority of the population is able to perform in private. Their presence is, therefore, seen as disruptive. The business community desires the expulsion of the homeless as they create an obstruction and are a potential hindrance to the exchange of goods and services for money, as they may dissuade consumers from entering the commercial space. Consumers also desire the removal of homeless people from commercial space as their presence serves as an unwelcome reminder of the failure of market forces to provide for all members of the community, and this may cause some discomfort.

(ii) Facilitating Urban Renewal

Second, offences such as vagrancy allow for the forced removal of homeless people from inner city suburbs that are the subject of gentrification or renewal projects. The recent trend towards revitalising inner city areas to provide high density housing for wealthy businesspeople has led to the eviction of squatters and low-income tenants, and the displacement of homeless people. In addition, public spaces such as parks are increasingly being revamped by councils to improve the aesthetics of their city/area for marketing reasons. Homeless people may be evicted as a result of this process, or because of the application of private property rights to such areas. For example, title to land owned by the council in fee simple at Southbank Parklands in Brisbane has been vested in the Southbank Corporation via the Southbank Corporation Act 1989 (Qld). Under that Act, the Corporation is given almost unfettered discretion in exercising its objects, functions, powers and duties in respect of the area, including rights to remove any unwanted frequenters. Clearly, this evidences a belief that the use of public space should be reserved for the ‘deserving’ members of society.

61 White, above n51 at 113–114, 121, 124.
62 Id at 113.
63 Ibid.
64 Phil Crane & Mike Dee, ‘Young People, Public Space and New Urbanism’ (2001) 20(1) Youth Studies Australia 11 at 11–19.
65 Southbank Corporation Act 1989 (Qld) ss37A, 37B.
66 Above n64.
Thus, it may be argued that the reason for the retention of vagrancy as an offence is to facilitate commercial exchanges and protect commercial and leisure spaces from unwelcome intrusions by the ‘undeserving’.

5. **Arguments in Favour of the Repeal of the Offence of Vagrancy**

The offence of vagrancy sanctions the arrest, detention and imprisonment of the most vulnerable members of society, the homeless. It is archaic and ill-adapted to modern life, a fact that has been widely recognised by the higher courts. It results in the targeting of vulnerable groups such as indigenous people, young people, and people with a mental illness, and it offends accepted standards of fairness. It may also amount to a contravention of various articles of international covenants to which Australia is a party, and it places pressure on the public purse by diverting police resources and adding to the prison population.

### A. The Law of Vagrancy is Archaic and Ill-Adapted to Our Modern Society

The higher courts have been advocating changes to the law of vagrancy for decades. As early as 1936, English judges stated that vagrancy provisions were out-dated and ill-adapted to modern life. For example, in the case of *Ledwith v Roberts*[^67] where the offence of insufficient lawful means of support was at issue, Scott LJ said:

> It seems to me wrong that these old phrases should still be made the occasion of arrest and prosecution when, in their historical meaning, they are so utterly out of keeping with modern life in England. Is it not time that our relevant statutes should be revisited and that punishment and arrest should no longer depend on words which today have an uncertain sense and which nobody can truly apply to modern conditions?[^68]

In 1962, Australian High Court judges expressed their concurrence with the view of Scott LJ. In *Zanetti v Hill*,[^69] Dixon CJ said:

> [I]t is obvious that to transfer the application of such provisions from rural England in Tudor times and later, to the very different conditions of city life in Perth and give it a just and respectable operation must involve many difficulties.[^70]

In the same case, Kitto J stated that the provision was ‘not directed to the punishment of poverty’ but rather it was targeted at those persons who, having regard to their current mode of living, seemed likely to be resorting for their support to unlawful activities.[^71] Kitto J thereby aimed to restrict the application of the provision to those activities against which society needed to protect itself.[^72]

[^67]: (1936) 3 All ER 570.
[^68]: Id at 598 (Scott LJ).
[^69]: (1962) 108 CLR 433.
[^70]: Id at 437 (Dixon CJ).
[^71]: Id at 441 (Kitto J).
[^72]: Ibid.
This attempt to read down the offence was replicated in the 1981 case of *Moore v Moulds*. In that case a 21 year old Aboriginal woman was questioned by police. She informed them that she had no money in her possession, was unemployed and was not in search of employment. She also admitted to sleeping on the riverbank for a number of days. On the basis of these admissions, she was charged with vagrancy, and the stipendiary magistrate sentenced her to three months imprisonment. This sentence was overturned in the District Court, where Shanahan DCJ said:

> It is not or should not be a criminal offence to be poor. It is not nor should it be a criminal offence per se to sleep on the river bank nor to adopt a lifestyle which differs from that of the majority …. [such persons] do not, as a rule, commit criminal offences but are regarded as “nuisances” and their appearance is an affront to the susceptibilities of those members of the public who do not suffer from their disabilities …

The issue was raised once again in *Parry v Denman*. In the period prior to his arrest, the accused in this case had staggered down the street (clearly drunk), eaten some food taken out of a garbage bin and asked some people for cigarettes. He was sentenced by a magistrate to 10 weeks’ imprisonment – six weeks for the offence of vagrancy and four weeks for failing to appear in court on the scheduled date. White DCJ in the District Court held that the six week sentence for vagrancy was excessive. Indeed, he held that since there was nothing in the defendant’s behaviour that suggested he was likely to engage in any conduct against which society needed to protect itself, the offence was probably not made out.

Thus, despite the numerous expositions by the higher courts that the offence of vagrancy should apply only to persons who are likely to engage in some behaviour against which the public needs to protect itself, cases of persons being charged with this offence who are guilty of nothing more than homelessness, poverty or alcoholism continue to come before the courts.

**B. Misuse of the Offence by Police: The Targeting of Vulnerable Groups**

The offence of vagrancy allows for the targeting of vulnerable groups in two ways. First, prosecution under this offence is based solely on police discretion – police may choose to refer a person to a shelter, hostel or other welfare agency instead of charging them with vagrancy. The elements of vagrancy offences are often so vague and poorly understood that they allow for the over-policing of those groups who are victims of police prejudice such as indigenous people and young people. Second, the offence of vagrancy criminalises poverty. Poverty and homelessness are particularly prevalent amongst indigenous people, young people and people with a mental illness, and thus, such people are more likely to be prosecuted under this offence.

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73 Above n23.
74 Id at 230.
75 West, above n23.
76 Id at 13.
77 Ibid.
78 Above n48 at 241.
Indigenous people are significantly over-represented in custody rates for public order offences such as vagrancy.\(^79\) In 1995, the custody rate for indigenous people where the most serious offence was a good order offence was 233.3 (per 100,000), while the rate for non-indigenous people was 4.3.\(^80\) Fourteen percent of police incidents involving indigenous people were for public order offences, compared with 5 per cent for non-indigenous people.\(^81\) Also, in Queensland, 46.1 per cent of all public drunkenness incidents involved indigenous people in 1995.\(^82\) These figures are alarming, considering that indigenous people comprise only 2 per cent of the Australian population and only 2.9 per cent of the Queensland population.\(^83\)

Further, once arrested for a public order offence, indigenous people remain in custody for a significantly longer period of time. Indigenous people remain in custody for public order offences for an average of 13.7 hours, while non-indigenous people are released after an average of 7.6 hours.\(^84\)

Offences such as vagrancy provide an easy route for the arrest and detention of indigenous people by police.\(^85\) The Royal Commission into Aboriginal Deaths in Custody reported that indigenous people are often over-policed and subjected to heavy-handed policing,\(^86\) and there is little evidence to suggest that the situation has altered in recent years. Criminalisation, racism and ill-treatment by police are still considered to be major problems amongst indigenous communities.\(^87\)

Indigenous people are also more likely to be charged with vagrancy due to their over-representation amongst Queensland’s homeless population. In 2000–2001, 19.9 per cent of clients utilising supported accommodation services in Queensland were indigenous.\(^88\) The fact that indigenous people are often poor may also contribute to their imprisonment levels, as an inability to pay a fine for vagrancy may result in incarceration either directly by order of the court, or under the fine options order provisions in the *State Penalties Enforcement Act 1999* (Qld) and the *Penalties and Sentences Act 1992* (Qld).\(^89\)

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\(^79\) Id at 13–14, 235–236.
\(^81\) Id at 25.
\(^82\) Id at 29.
\(^84\) Above n80 at 44.
\(^86\) Royal Commission into Aboriginal Deaths in Custody, *National Report, Overview and Recommendations* (Canberra, AGPS, 1991). See for example Recommendation 60, which called for the cessation of heavy-handed policing and racist abuse against indigenous people, and Recommendation 88 which called for Police Services to conduct an ongoing review on the issue of over-policing and/or inappropriate policing of indigenous people; Johnston, above n44.
Thus, in this age of reconciliation, the offence of vagrancy is obstructing the path towards indigenous self-determination by increasing indigenous arrest, detention and imprisonment rates.

(ii) Young people

Young people are also over-represented in the custody rates for offences such as vagrancy. In 1995, young people aged between 17 and 19 were detained for good order offences and drunkenness at almost four times the rate of the average person. In Queensland in 1999–2000, 18 young people received a custodial sentence for a vagrancy or trespass offence. It is submitted that this is 18 too many. Clearly, imprisoning young people for such offences is not an appropriate solution. These children require a safe place to sleep and to receive support services – they should not be criminalised, let alone imprisoned, for circumstances which they are unable to control.

Young people may be particularly vulnerable to prosecution for vagrancy due to the over-policing of young people. There is much published literature and research surrounding the issue of the over-policing of young people, particularly those who are members of ethnic minority groups. Increased search and ‘move on’ powers have broadened the scope for police impingement on the lives of young people, and thus police interventions with young people continue to rise, despite the lack of a corresponding rise in juvenile crime.

Young people may also be more likely to be charged with vagrancy due to the fact that they are over-represented amongst the poor and homeless. A report completed in 2000 by The Smith Family found poverty to be particularly acute amongst young people in Australia, as their income from Youth Allowance falls well below the poverty line. A recent study reported that the youth homelessness rate in Queensland is amongst the highest in Australia. This fact is supported by Supported Accommodation Assistance Program (SAAP) statistics; in 2000–2001, 21.7 per cent of clients utilising SAAP services in Queensland were under the age of 20, and a further 14.8 per cent of clients were aged between 20 and 24.

89 Although the fine options order provisions make it more difficult for people to be imprisoned for fine default than previously, imprisonment for fine default is still a possibility. See Part D below.
90 C Carcach, D McDonald, above n 80 at 34.
91 OESR, above n25, Table 2.4.3.,
93 See especially Steve James, Kenneth Polk. ‘Police and Young Australians’ in Duncan Chappell, Paul Wilson (eds), Australian Policing: Contemporary Issues (1996); Chris Cunneen, Rob White, Juvenile Justice: An Australian Perspective (1995).
97 AIHW, above n88 at 10.
(iii) People with a Mental Illness

There is a strong positive association between mental illness and homelessness. Indeed, the rate of mental illness amongst homeless people may be as high as 80 per cent.98 With the closure in recent years of many community-based residential services and treatment programs, the prevalence of homelessness amongst people with mental illness has dramatically increased.99 People with mental illness are also more likely to experience poverty and homelessness due to the interference of their illness with their ability to maintain employment, and the scarcity of low-income and public housing.100

Homeless mentally ill persons are up to 40 times more likely to be arrested and 20 times more likely to be imprisoned than those with stable, suitable accommodation.101 Thus, by default, ‘the criminal justice system has replaced the mental health system as a primary provider of care to many homeless mentally ill persons’.102 Studies around the world have reported a high prevalence of mental illness amongst those charged with vagrancy,103 and it is highly likely that the offence of vagrancy is one of the main avenues for the arrest and detention of such persons in Queensland. Clearly, the arrest, detention and imprisonment of persons, for no other reason than their being mentally ill and homeless, is reprehensible. Such people instead require housing, social support and health care.

C. Offends Accepted Standards of Fairness

The offence of vagrancy may be considered to offend accepted standards of fairness for two reasons. Firstly, most people charged with vagrancy appear unrepresented in court, and plead guilty.104 Nimmer’s narrative paints a similar picture in relation to ‘vagrants’ in America in the 1970s, whose cases were handled ‘in an assembly-line fashion with little more than one minute devoted to each.’105 This is despite the fact that there are a number of potential bases upon which a charge of vagrancy may be defended. For example, with regard to the offence of having no visible lawful means of support, an accused may defend their case by proving that they do indeed have sufficient lawful means of support, for example,
through social security benefits, the support of family or the provision of the voluntary sector. Also, a number of remedies may be available to an accused who can prove that he/she was unlawfully arrested and detained, for example, administrative remedies (such as habeas corpus) or remedies in tort (i.e., for false imprisonment). It has further been argued that the offence of vagrancy under subordinate legislation may be open to a finding of ultra vires by the courts on the basis that it is ‘manifestly unjust’ due to its partial and unequal operation as between different classes of persons. This is reminiscent of the view of the majority of the United States Supreme Court in *Robinson v California*106 which held that the offence of drug addiction was a ‘cruel and unusual punishment’ (in violation of the Eighth and Fourteenth Amendments) as it criminalised the involuntary ‘status’ of a person rather than a wilful act. Eggleston argues that unlike other status offences, vagrancy offences are only committed by those of low socio-economic status from which it is often very difficult to ‘reform’.108

However, far from objecting to the validity of the offence, the vast majority of persons charged with vagrancy appear in court unrepresented by legal counsel, and most plead guilty and incur a penalty.109 In 2000, 1785 (87 per cent) of the 2 055 adults charged with vagrancy or trespass in Queensland were found guilty, and five per cent were sentenced to a gaol term.110 Considering that a number of defences are available to persons charged with such offences, these figures are extraordinarily high. The inability of those charged with vagrancy to defend their case compounds the social injustice being experienced by them, and offends the rule of law. This view was expounded by Shanahan DCJ in *Moore v Moulds* where His Honour stated that as a matter of course, disadvantaged persons charged with this offence should be legally represented, and that proceedings should be stayed until counsel is appointed.111

Secondly, the offence of vagrancy offends accepted principles of criminal law by allowing for the arrest and detention of persons on mere suspicion of their involvement in some unspecified future criminal activity, and where no harm has been inflicted on an identifiable victim. Legislation governing the arrest and detention powers of police around Australia states that police must have a reasonable suspicion that a person is guilty of a specified offence to effect a lawful arrest.112 If these elements are not present, the arrest is open to challenge in the courts. The offence of vagrancy allows for these checks on police powers to be circumvented, which is ‘inconsistent with our national sense of personal liberty or respect for the rule of law’.113

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108 Above n48 at 240.
110 OESR, above n25, Table 2.4.5.
111 *Moore v Moulds*, above n23 at 229.
112 See for example s198 of the *Police Powers and Responsibilities Act* 2000 (Qld).
113 *Ledwith v Roberts*, above n67 at 598 (Scott LJ).
Further, vagrancy offences criminalise behaviour that may not generally be considered ‘criminal’. The offence of habitual drunkenness criminalises addiction, which may be better understood as a medical problem rather than criminal conduct,114 and the behaviour it attempts to regulate could, if necessary, be addressed by utilising other offence categories, such as offensive or disorderly conduct.115 Also, there is some anecdotal evidence to suggest that those who ‘panhandle’ for money often do so in preference to engaging in more serious criminal activity, such as drug trafficking or theft. One young homeless person has been quoted as saying:

[W]hen I walk down the street and I see people panhandling for money, like, I turn around and I look at them, and I go, ‘Why are you sittin’ here panhandling for money? Why don’t you sell some drugs, or go rob someone or somethin’, right?116

Thus the crime of vagrancy offends accepted standards of fairness as it targets vulnerable groups who are unable to defend their case, and it criminalises behaviour that is not strictly criminal in nature.

D. Pressure on the Public Purse

The retention of the offence of vagrancy on Queensland’s statute books is putting intense pressure on the public purse.

First, the offence of vagrancy diverts substantial police resources. The arrest, detention, court appearance and related administrative tasks associated with just one charge of vagrancy can divert up to two days of a police officer’s time.117 If this is multiplied by the number of people arrested for vagrancy per year, the costs to Queensland Police may be considered excessive.

Second, many of those who are charged with vagrancy end up serving a gaol term, either because they are sentenced to imprisonment, or as a result of fine default. Queensland’s imprisonment rates exceed those of Australia as a whole. The imprisonment rate for men in Queensland is 308.5 (per 100 000) as opposed to 284.5 for Australia in general, and the imprisonment rate for women in Queensland is 20.8 as opposed to 19.8 for Australia in general.118 Indigenous people comprise 25 per cent of the Queensland prison population, compared with 19.8 per cent of the Australian prison population.119 Sentences of imprisonment

114 Above n107; President’s Commission on Law Enforcement and Administration of Justice, above n51 at 225–227.
115 President’s Commission on Law Enforcement and Administration of Justice, above n51 at 235–236.
116 Hagan & McCarthy, above n1 at 53.
117 Telephone interview with Duty Sergeant, Brisbane District Communication Centre, 29 July 2002.
119 Ibid.
for public order offences such as vagrancy which do not exist in other states may make some contribution to these higher than average rates.

Of the 2,460 people arrested for trespass/vagrancy in Queensland in 1999–2000, a total of 108 received a custodial sentence. A further 1,474 received a monetary penalty. Due to the nature of the offence, it may be presumed that the majority of those fined for vagrancy would be unable to pay any fine imposed. Under the *State Penalties Enforcement Act 1999* (Qld) and the *Penalties and Sentences Act 1992* (Qld), fine default does not automatically lead to imprisonment. Those who are bona fide unable to pay a court ordered monetary penalty may apply to complete community service work in lieu of payment (ie. a fine options order). However, fine default may still lead to imprisonment if:

- the offender has been judged unsuitable for community service work and/or their debt cannot be satisfied by seizure of their property;
- the offender fails to comply with the fine options order; or
- the offender has been judged unsuitable for community service work for medical or psychiatric reasons, and a good behaviour order has been issued instead of a fine options order; however this good behaviour order has been breached.

Each of these scenarios is more likely to apply to homeless persons than other classes of offenders. First, a homeless person may be considered unsuitable for community service work due to their dependence on alcohol or drugs, lack of transport, etc. Since homeless people rarely possess property of substantial value, seizure of their personal belongings would most likely be insufficient to satisfy their debt. Second, where a fine options order is issued, a homeless person may fail to comply with it by reason of physical or mental illness, lack of understanding of the process, or lack of transport. Third, where a homeless person’s physical or mental illness is recognised, and a good behaviour order is issued in lieu of a fine options order, he/she will be more at risk of breaching it due to their vulnerability to over-policing and excessive surveillance. Thus, although processes are in place in Queensland to prevent the needy from being imprisoned as a result of fine default, homeless persons may be more likely than others to slip through the net.

High rates of imprisonment put intense pressure on the public purse. The NSW Select Committee on the Increase in Prisoner Population found that it costs an average of $138.93 per day to keep one person in prison, while it costs only $8.63 per day to divert that person to a community-based program. It will be almost impossible for demand to be met if the prison population continues to increase at

120 OESR, above n25, Table 2.4.5.
121 *State Penalties Enforcement Act 1999* (Qld) s69(7), *Penalties and Sentences Act 1992* (Qld) s55, 57.
122 *State Penalties Enforcement Act 1999* (Qld) s119(1), *Penalties and Sentences Act 1992* (Qld) s57(1)(b).
123 *State Penalties Enforcement Act 1999* (Qld) s119(2), *Penalties and Sentences Act 1992* (Qld) s74, 78.
124 *State Penalties Enforcement Act 1999* (Qld) s118.
125 NSW Select Committee on the Increase in Prisoner Population, above n99 at 108.
its current rate. Queensland’s imprisonment rate is fast becoming economically unsustainable. Government funds applied to the arrest, detention, prosecution and imprisonment of ‘vagrants’ could be better spent.

E. Contravenes International Covenants

The offence of vagrancy also contravenes a number of international covenants to which Australia is a party. Section 4(1)(a) of Queensland’s Vagrants Act reverses the onus of proof. Under that section, a person found without visible lawful means of support shall be deemed to be a vagrant, unless he/she can give to the court’s satisfaction a good account of his/her means of support. This offends art 11(1) of the Universal Declaration of Human Rights (UDHR) and art 14(2) of the International Covenant on Civil and Political Rights (ICCPR) which state that everyone charged with a penal offence has the right to be presumed innocent until proven guilty.

Article 14(3) of the ICCPR states that everyone has the right to legal representation where the interests of justice so require. Since being found guilty of vagrancy can result in a prison sentence, it may be forcefully argued that the interests of justice require those charged with vagrancy to be legally represented. And as mentioned above, Shanahan DCJ has stated that vagrancy proceedings should be stayed until legal representation is obtained.

Also, art 9 of the UDHR states that no one should be subjected to arbitrary arrest or detention. It may be argued that the crime of vagrancy offends this article because it results in the arrest and detention of people on the sole basis of their poverty. As mentioned above, the higher courts have gone to great length to read down vagrancy provisions in accordance with this criticism; judges have agreed that it is not a crime to be poor, but rather, that the offence of vagrancy should only apply where the conduct in question is something against which society needs to protect itself. Regardless, police and magistrates have continued to arrest and penalise ‘vagrants’ on the basis of their poverty alone (as noted above), and it is submitted that this may indeed amount to arbitrariness.

Further, art 2 of the UDHR and art 26 of the ICCPR state that people should not be subjected to discrimination on the basis of their race, colour, sex and language (inter alia), or ‘any other status’. Since vagrancy effectively criminalises homelessness, this offence may be considered to amount to discrimination on the basis of people’s socio-economic or housing status, which may offend these articles.

Thus, in addition to being held in contempt by the courts, perpetuating social injustice and putting intense pressure on the public purse, the crime of vagrancy may offend a number of articles of international covenants to which Australia is a party.
6. Conclusion

The scenario described in the song ‘Waltzing Matilda’ is still familiar to Australians one hundred years later. Although it is often considered to be a celebration of freedom and adventure, the song actually tells the tale of a homeless man who commits a minor property offence, the penalty for which is presumably imprisonment. In our modern society, homeless people are still arrested, detained and imprisoned for minor offences.

Perhaps the most significant pathway into the criminal justice system for homeless people is the offence of vagrancy, which criminalises behaviour such as begging, habitual drunkenness and having no visible lawful means of support. The retention of this offence on the statute books in Queensland is often justified in terms of public safety and social welfare concerns. However, neither of these justifications are valid, and it has been argued that the real reason for the continued existence of the offence of vagrancy may be the desire by those with political power to protect and promote capitalism.

The offence of vagrancy has been condemned by the higher courts, which have questioned the reasons for which it is utilised by police and magistrates. It perpetuates social injustice, targeting already disadvantaged people, and impacting disproportionately on indigenous people, young people and people with mental illness. It offends accepted standards of fairness, contravenes international human rights covenants and places intense pressure on the public purse. It, and all other offences throughout Australia akin to it, should be abolished.

In our modern society the nomad is a pariah ‘of no fixed address’. By adding these few words to the name of anyone whose appearance they consider irregular, those who make and enforce the laws can decide a man’s fate.126

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126 Isabell Eberhardt 1877–1904, an essay published as ‘Pencilled Notes’ in Paul Bowles, The Oblivion Seekers and Other Writings (1979, trans).
Before the High Court

Applicants S396/2002 and S395/2002, a gay refugee couple from Bangladesh

CATHERINE DAUVERGNE* AND JENNI MILLBANK*

On 11 October 2002 the High Court granted leave to appeal from a decision of the Full Federal Court, Kabir v Minister for Immigration & Multicultural Affairs (MIMA) (hereinafter Kabir). The case concerns a gay couple from Bangladesh seeking asylum. This marks the first time that a final appellate court anywhere in the world will consider a refugee claim based on the ground of sexual orientation. Refugee decision-makers around the world follow each other’s rulings closely and the High Court of Australia has played an important role in developing international refugee jurisprudence to date. The outcome of this case has the potential to influence decision-making in all refugee-receiving states.

1. The Context of the Claim

Canada and Australia have been described as ‘leading the way’ in recognising asylum claims based on sexual orientation. By the time the UK had even accepted that lesbians and gay men were eligible to apply for protection, Australia and Canada had between them evaluated hundreds of claims on the basis of sexual orientation.

Asylum is granted on the basis of the refugee definition agreed upon internationally in the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (hereinafter the Convention). A total of 136 states are parties to the Convention and the Protocol as of 30 September 2002. The definition of a refugee is someone who:

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4 198 UNTS 150.
5 606 UNTS 267.
owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it (Article 1(A)(2)).

Australia has accepted that sexual orientation can form the basis of a ‘particular social group’ claim under the Refugee Convention since 1994. This acceptance was based upon the Supreme Court of Canada decision in Ward v Attorney-General (Canada) (hereinafter Ward). This is vital because refugee protection is extended only to those who face persecution on the basis of one of the five grounds in the Convention definition, not to those who simply face persecution without a demonstrated link to one of the named factors. In early Australian cases the particular social group was defined as ‘homosexuals’ and was subsequently refined as ‘homosexuals in X country’ but the group was never more specifically defined. Tribunal use of the category, for example, is frequently not gender-specific. Moreover, in numerous cases concerning sexual orientation the tribunal does not even state what the particular social group is for the purpose of the claim, or if it is stated does not explain on what basis it is so defined.

In our comparative analysis of over 300 decisions on the basis of sexual orientation from the refugee tribunals of Australia and Canada, we found that Canada’s acceptance rate was over twice that of Australia. One of the major reasons for the sharp disparity in acceptance rates was the Australian ‘discretion’ test. Fully one-third of Australian cases considered whether applicants could avoid persecution by hiding their sexuality. This was required of the applicant in over

6 Australia acceded to the Refugee Convention in 1954. Coming within the refugee definition is the basis for an Australian protection visa under s36 of the Migration Act 1958 (Cth).

7 (1993) 2 SCR 689. The Supreme Court of Canada identified three possible categories under particular social group, ‘1. groups defined by an innate or unchangeable characteristic; 2. groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and 3. groups associated by a former voluntary status, unalterable due to its historical permanence.’ The Court expressly identifies sexual orientation with the first category: at para 103. This categorisation of sexuality as immutable is critiqued in detail by Nicole LaViolette: see ‘The Immutable Refugee: Sexual Orientation in Canada (AG) v Ward’ (1997) 55 University of Toronto Faculty of Law Review 1.

Note that in 1995 when New Zealand accepted sexual orientation under the social group category it held that sexual orientation was ‘either innate or unchangeable or so fundamental to identity or human dignity …’ (emphasis added): Re GJ [1995] Refugee Appeal 1312/93 (Unreported, 30 August 1995); <www.refugee.org.nz/rsaa>. Most Australian decisions appear to have accepted this less categorical approach, as has the US 9th Circuit Court of Appeals in Hernandez-Montiel v INS 225 F3d 1084 (2000).

8 From 1995 through to 1997 in decisions on lesbian claimants, the country evidence utilised the gender-neutral (and usually male-centred) category ‘homosexual’ and the RRT did not even discuss whether or how ‘homosexuals’ were a particular social group: see RRT Reference V95/02999 (Unreported, Boland, 26 April 1995); RRT Reference N95/08186 (Unreported, Gibbons, 23 April 1996); RRT Reference N96/12929 (Unreported, Smidt, 24 March 1997). In 1997 the tribunal finally defined the particular social group more specifically (as ‘lesbians in the Philippines in that case’): RRT Reference N97/13774 (Unreported, Hunt, 30 May 1997).
one-fifth of cases, and when imposed produced a 98 per cent failure rate among applicants. Thus, there was a very strong correlation between the requirement of ‘discretion’ and the applicant’s chances of success. If ‘discretion’ was required and there was even the slightest chance that an applicant could comply, it effectively prevented him or her from qualifying for refugee status in Australia. By way of contrast, ‘discretion’ was imposed in only 4 per cent of Canadian cases and it was rejected as an inherently discriminatory approach very early on in Canadian jurisprudence.

The imposition of the discretion requirement is likely to have increased since the end of our study, as, after divided approaches at tribunal level and mixed responses to the requirement from the Federal Court of Australia in 2000 and 2001, the Full Federal Court appeared to finally endorse the application of the discretion requirement in 2002. This requirement effectively reverses the responsibility of a state to ensure protection from persecution and places the onus instead on the applicant to ensure safety through suppression and secrecy. It constructs a Catch-22 situation for applicants because it imposes a requirement of secrecy but also denies the possibility of persecution if the applicant is secretive. Consequently, the Refugee Review Tribunal (RRT) and Federal Court deny protection to those who do not choose secrecy. In the leave to appeal transcript Kirby J identified the circularity of the RRT reasoning:

It is, in effect, saying you cannot have a well-grounded fear of persecution if the only way you will have that is by living openly and therefore if that is the case you cannot have a well-grounded fear of persecution.

Further, the application of the discretion requirement contradicts Australian refugee jurisprudence where suppression itself has been held to be a form of persecution on religious and political grounds. It also flies in the face of the refugee jurisprudence of comparable nations such as Canada, New Zealand and the USA on sexual orientation, and of international recommendations regarding how the ‘nexus’ requirement in the Refugee Convention ought best be interpreted.

9 Our study focuses on the 6-year period from 1994–2000. 127 of the decisions studied were Canadian and 204 were Australian. In Australia only 22 per cent of claims overall were successful, while in Canada the figure was 54 per cent. For lesbians, Canada’s acceptance rate was almost 10 times higher than Australia: 69 per cent compared to 7 per cent. See also Jenni Millbank, ‘Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia’ (2002) 26 MULR 144.

10 Of the 43 cases in our pool where ‘discretion’ was required, only 1 applicant was successful. In contrast, in 14 of the Australian cases where the tribunal held that it was not possible for the applicant to avoid persecution by being ‘discreet’, 13 of them were successful (93 per cent). Only nine Australian cases held that ‘discretion’ was not a reasonable requirement, and in six of these the applicants (67 per cent) were successful. In a further three cases discretion was mentioned but no firm view was stated.


13 ‘5. An individual shall not be expected to deny his or her protected identity or beliefs in order to avoid coming to the attention of the State or non-governmental agent of persecution’: ‘The Michigan Guidelines on Nexus to a Convention Ground’ (2002) 23 Michigan Journal of International Law 210 at 213.
The discretion requirement is also linked to the definition of the particular social group. As the group is very broadly defined, it is then open to the tribunal to utilise information about the situation of ‘discreet’ members of that group as evidence that the applicant is not at risk. However, the comparisons may well not be valid ones — for example, comparing evidence of the risk of persecution of married men who have occasional and anonymous male–male sex with the risk to a gay identified claimant, or even the risk to a lesbian claimant. The group is very broadly defined for the purposes of eligibility, but the danger of persecution is assessed in relation to one narrower element and then applied to the whole. This process of risk assessment is premised on the same basic assumption as the discretion requirement: that the defining feature of the group is same-sex sexual activity, which is then the only factor at issue in determining risk of persecution.

Although they are clearly related, the issues of ‘discretion/suppression’ and particular social group will be addressed in turn in this paper for the sake of clarity. Recommendations about the proper definition of particular social group follow.

2. The Claim

At the time of the original hearing, K was 28 and R was 47. The couple had lived together for four years in Bangladesh and claimed that they had experienced a variety of violent and harassing incidents prior to coming to Australia. The tribunal expressed serious reservations about the applicants’ credibility and did not believe a number of their claims of experiences of persecution. The tribunal expressly disbelieved K’s evidence that he had complained to the police of harassment on the basis that it was ‘not plausible’ that he would have sought police assistance in the first place, ‘given the attitudes towards homosexuals in Bangladesh’. However, the tribunal did accept that the couple were genuinely gay and in a long-term cohabiting relationship, and accepted that this had led to some of the lesser claims of harassment. On the basis of these findings, the tribunal concluded that the applicants did not have a well-founded fear of persecution as they had:

lived together for over 4 years without experiencing any more than minor problems with anyone outside their own families. They clearly conducted themselves in a discreet manner and there is no reason to suppose that they would not continue to do so if they returned home.

Country evidence utilised in claims by several Bangladeshi gay men, including the case at hand, states that there are no openly gay men or lesbians in Bangladesh, that gay men who have relationships tend not to live together, that there are a number of public places where men may have anonymous male–male sex, the risks of doing so include police bashing and extortion and that, ‘Men who conform outwardly to social norms, most importantly by marrying and having children, can get away with male to male sex provided it is kept secret.’ In Kabir, the tribunal concluded that:

14 RRT Reference N98/28381 & N98/28382 (Unreported, Smidt, 22 February 2002).
15 Ibid.
[i]t is clear that homosexuality is not accepted or condoned by society in Bangladesh and it is not possible to live openly as a homosexual in Bangladesh. To attempt to do so would mean to face problems ranging from being disowned by one’s family and shunned by friends and neighbours to more serious forms of harm, for example the possibility of being bashed by the police. However Bangladeshi men can have homosexual affairs or relationships, provided they are discreet.18

16 And note another invidious Catch 22: discretion cases reasoned that using parks is a way of avoiding attention/persecution. However when this was disproved by a number of cases brought by asylum applicants from China who had been arrested and persecuted doing just that, the RRT refused the claims on the basis that an application of the general criminal law against public decency was not persecution and no convention ground had been invoked: see eg RRT Reference N97/14768 (Unreported, Thomson, 29 April 1998) (ultimately upheld by the Full Federal Court in JMMA v Gui [1999] FCA 1496 (Unreported, Heerey, Carr & Tamberlin JJ, 29 October 1999)). See also RRT Reference N98/25853 & N98/25980 (Unreported, Cristofanini, 11 May 1999).


18 RRT Reference N98/28381 & N98/28382 (Unreported, Smidt, 22 February 2002). Note that almost all of the gay men who have applied for refugee status from Bangladesh have failed on this basis: see eg RRT Reference N98/21362 (Unreported, Kelleghan, 28 March 2002); RRT Reference N99/28400 (Unreported, Witton, 26 September 2001); RRT Reference N00/36301 (Unreported, Rosser, 24 December 2001); RRT Reference N99/28009 (Unreported, Smidt, 19 June 2000); RRT Reference N99/20994 (Unreported, Rosser, 4 May 1998); RRT Reference N94/04854 (Unreported, Woodward, 21 July 1998); RRT Reference N95/09552 (Unreported, Woodward 4 September 1998). The country information evidence utilised in the cases on Bangladesh is very general in tone and much of it is very dated. In Kabir, most of the country evidence was five years old at the time of tribunal decision. More recent and more detailed evidence compiled through an NAZ Foundation study of 124 Bangladeshi men who have sex with men documented, in direct contradiction to the tribunal’s repeated findings that Bangladesh is tolerant of male homosexual behaviour, widespread experience of violence at the hands of police and others. The study found that 64 per cent of respondents had faced police harassment, 48 per cent had been sexually assaulted by police and a further 65 per cent had been sexually assaulted by mastaans (thugs, who are often involved with the police through bribery and other practices) while 71 per cent had experienced other forms of harassment, such as extortion and bashings, by mastaans: see NAZ Foundation, ‘Social Justice, Human Rights and MSM’, Briefing Paper No 7, 2002: <http://www.nazfoundation.com/home.html> > Papers, Essays & Reports > Briefing Papers (accessed 13 December 2002). See also the range of information collated in International Gay and Lesbian Human Rights Commission (IGLHRC), Current Update Packet: Bangladesh, 2001.
It is arguable that, at the narrowest level, Kabir was incorrectly decided by the tribunal because all of the evidence was that the applicants in the case at hand did not outwardly conform to social norms; they were openly non-conforming in that they were cohabiting as a gay couple. They could not therefore be rightly characterised as ‘discreet’ according to the country evidence. An earlier RRT decision on Bangladesh made exactly this point in determining that a committed and cohabiting gay male couple could not by that fact alone be ‘discreet’ given the local societal norms. However the Court is restricted in the extent to which it can revisit findings of fact, and the broader issue before the Court is whether applicants should be required to conform to the discretion standard if it is possible for them to do so. It is noteworthy that contradictory approaches to the ‘discretion’ requirement in cases on Bangladesh have lead to one man in a gay couple being granted refugee status while his partner, in a decision by another member, was refused.

The Federal Court and Full Federal Court refused appeals from Kabir. At Federal Court level, the court accepted that the tribunal had made an implicit finding that the police ‘would not have protected Mr Kabir or would themselves have harmed him if he had revealed his homosexuality’. However the court held that this was not a reviewable error as the finding of fact had been that there had been no complaint to the police. The court also accepted that the tribunal had drawn a distinction between ‘living openly as a homosexual’ or being seen as or labelled as homosexual, which could lead to danger, and having ‘discreet’ homosexual ‘affairs’ or ‘relationships’ which would ‘not give rise to problems’. The court held that the tribunal had rightly characterised the applicants as ‘naturally’ belonging to the latter class. The court refused to consider whether discretion/suppression could in principle constitute persecution because the applicants had not complained that they had to ‘modify their behaviour so as not to attract attention’. (Such complaint was not part of the applicants’ case because they claimed to have already attracted such attention.) However, suppression through behaviour ‘modification’ was implicit in the tribunal’s findings about the applicant’s future conduct (as was a failure of police protection in the absence of such suppression). Accordingly, it was a matter which the tribunal ought properly to have addressed in its assessment of a future risk of persecution, and did not do so.

19 RRT References N98/24186 & N98/24187 (Unreported, Hardy, 28 January 2000).
22 Id at para 20. This analysis ought not have a place in refugee decision making where the questions of persecution and state protection are forward looking: they are oriented towards what is likely to happen rather than what happened in the past. In addition, there is no requirement that applicants ‘exhaust local remedies’.
23 This is arguably an error of fact and results from poor evidentiary practices at the tribunal level, see above n18, and discussion in Catherine Dauvergne & Jenni Millbank, ‘Burdened by Proof: How the Australian Refugee Review Tribunal has Failed Lesbian and Gay Asylum Seekers’ forthcoming.
24 Above n21 at para 19.
25 Ibid.
The Full Federal Court also refused to address the argument that modifying behaviour to avoid danger could itself constitute persecution. The Full Court held the trial judge had construed the matter properly and that additional argument before the Full Court took the matter ‘no further’; yet the trial judge had not addressed what legal principles underlay the discretion requirement. The tribunal had been handing down contradictory decisions on the issue for eight years and at that time there were only single judge Federal Court decisions on point — all of which were inconclusive about the bounds of the requirement, whether it was a mandated consideration, and the extent of suppression that would constitute persecution. The Full Federal Court ought to have taken the opportunity to deal with the conflict presented by these cases.27

In the leave to appeal hearing, Kirby and Gaudron JJ suggested in their remarks that the discretion requirement and the definition of the particular social group were both live issues that the court would consider on appeal.

26 In light of the credibility issues in the case it is also important to note that the discretion requirement provides a significant incentive to falsify claims, as the applicants were found to have done, to claim that persecution had already taken place (such that discretion cannot be imposed as it is no longer possible). It is likely that the discretion requirement had a profound impact upon the manner in which the case was put to the tribunal, as well as the manner in which it was construed by the tribunal. It is unhelpfully circular, and ultimately unjust, to then refuse to consider the legality of the discretion requirement on the basis that it was not raised earlier.

27 The second basis on which the Full Court refused to deal with the issue was that it had not been argued before tribunal and so it would be ‘wrong to allow it to be raised’ on appeal. We submit that this conclusion is unsupportable. The tribunal setting is a non-adversarial one in which applicants are generally not represented. The court has therefore held on previous occasions that it is not proper to refuse to hear argument on important legal issues (such as whether suppression constitutes persecution) based on the fact that it was not raised before the tribunal: see Win v MIMA [2001] FCA 132 (hereinafter Win). Win is a very close parallel to Kabir in that the applicants focused their claim at tribunal level upon persecution based on certain past political activities, and they did not address whether suppression preventing them from participating in political activity in the future would be persecution. The Court permitted the question to be fully addressed on appeal, and for support cited to Wilcox and Madgwick JJ in Sellamuthu v MIMA (1999) FCR 287 at para 16: ‘regard may be had to the way a case is presented, but not so as to relieve the Tribunal of the burden of considering the entire case.’
3. Persecution and Discretion in the Australian Case Law

The tribunal has expressed the discretion requirement as a ‘reasonable expectation that persons should, to the extent that it is possible, co-operate in their own protection’. Discretion has been characterised as a corollary to the principle that Australian refugee law limits protection of sexual orientation to private consensual sex and does not extend to ‘indiscriminate disclosure’ such as public manifestations of sexuality or sexual identity.

Under the discretion requirement, claimants on the ground of sexual orientation are expected to conform to their culture or government’s oppressive or persecutory regimes in order to avoid harm, including harm as serious as the death penalty. Decision-makers’ expectation that homosexuality be kept secret has enabled the improbable conclusion that a number of extremely repressive regimes, such as Iran, are ‘tolerant’ of homosexuality (as long as it is kept completely invisible). The tribunal has appeared oblivious to the paradox involved in characterising various regimes as ‘tolerant’ of something that is officially non-...
existent and kept secret through the force of legal proscriptions and extreme cultural hostility.

In a 1998 case concerning a gay man from Sri Lanka the tribunal stated:

The evidence is that he can avoid a real chance of serious harm simply by refraining from making his sexuality widely known — by not saying that he is homosexual and not engaging in public displays of affection towards other men. He will be able to function as a normal member of society if he does this. This does not seem to me to involve any infringement of fundamental human rights. 32

(Emphasis added.)

The tribunal held that there would be a risk of persecution if the applicant’s sexuality were to become public knowledge but that he could avoid this risk ‘provided that he does not openly proclaim himself to be a homosexual or parade his sexual expression in public’. The decision also expressly distinguished case law on religious grounds that

freedom of religion is of course a fundamental human right. Furthermore, the public profession of one’s religion will normally be an essential part of the practice of one’s religion — public manifestations of religious belief and worship being part of what is involved in the concept of religion — so the inability to publicly profess and practice one’s religion is a clear violation of freedom of religion. This is not the case with sexuality. People of many different sexual orientations exist in society and practise their sexual preferences privately without feeling a need to proclaim those preferences to the world. Public manifestation of homosexuality is not an essential part of being homosexual.33

This decision was upheld on appeal to the Federal Court in LSLS v MIMA where the court read the above statement as standing for the principle that a ‘reasonable’ level of discretion for the purpose of avoiding persecution was to be ‘expected’ of the applicant. The court did not find a legal error in the tribunal’s distinction between making one’s sexuality known to the extent ‘necessary to identify prospective partners’ for sex, which was protected, and making one’s sexuality known more widely — which it termed ‘more gratuitous and indiscriminate’ forms of disclosure — which was not protected.34 The court instead characterised the first limb as having ‘proper regard to the practice of a homosexual lifestyle’, including the need to develop and maintain a ‘meaningful

33 RRT Reference V98/08356 (Unreported, Hudson, 28 October 1998).
34 LSLS v MIMA [2000] FCA 211. However, note that in MIMA v Guan [2000] FCA 1033, Moore J held that the tribunal is not required, as a matter of law, to consider ‘discretion’. The Court expressly stated that it did not read LSLS as making a finding of law on discretion: ‘It is clear that Ryan J [in LSLS] was not propounding a principle that, as a matter of law, persecution of a member of a particular social group, namely homosexuals, would not arise if harm was avoided by the member being discreet about their sexuality while being able to give effect to their sexuality privately or at least not publicly’ at para 24. LSLS was not read this way in WABR v MIMA, above n11.
same-sex relationship. The prohibition of a ‘bare right to a public proclamation of one’s sexuality’ was characterised as obiter and the Court avoided making a finding on it.

A series of cases at Federal Court level followed. Decisions tended to avoid grappling with the principles of discretion, suppression and secrecy where at all possible. The Federal Court tended to simply accept the division of seeking sex/indiscriminate disclosure division outlined above without addressing whether it was either practically possible or unlawfully discriminatory. Suppression was on occasion noted as something that could be persecutory, but it was not construed as an issue that required determination (because the applicant was secretive, or had not argued a ‘right of proclamation’ or the tribunal had held that they were not disadvantaged by being secretive). In these cases, the Federal Court applied a standard at the same time that it refused to analyse the legality of that standard. The tribunal has thus been left in disarray to decide hundreds of claims, with claimants never knowing what standard they need to satisfy.

In 2001 the Federal Court held that the Iranian Penal Code prohibiting homosexuality and imposing a death penalty did ‘place limits’ on the applicant’s behaviour in that the applicant had to ‘avoid overt and public, or publicly provocative, homosexual activity. But having to accept those limits did not amount to persecution.’ This case was appealed to the Full Federal Court and the decision handed down just months after Kabir. This decision, WABR v MIMA, expressly endorsed lower court and tribunal findings that ‘Public manifestation of homosexuality is not an essential part of being homosexual.’ The Full Court held that:

35 LSLS v MIMA, id at para 25.
36 See eg, ‘The applicant said that he did not want to live in secrecy as one who is active homosexually needs to do in Iran; he regarded himself as incompatible with Iranian society. That attitude does not sit well with the authorities to which I have just referred. They consider that it is reasonable to expect a measure of discretion to be exercised by those who wish, contrary to the law of their country, to engage in homosexual activity’. The Court did not consider the argument any further. Khanmeeri v MIMA [2002] FCA 625.
37 See eg Khalili v MIMA, above n31, appeal to Full Federal Court reported as SAAF v MIMA, above n31.
38 The Court did not question that a gay man in Iran had a ‘preferred lifestyle of discreet sexuality’ (emphasis added): SAAM v MIMA, above n31. See also Nezhadian v MIMA, above n31.
39 Nezhadian v MIMA, id at para 12.
40 Citing LSLS v MIMA, above n34 and quoting the tribunal level from that decision first, the Full Federal Court stated: ‘The Tribunal had addressed the argument [that the discretion requirement was an error of law] in its reasons, saying inter alia ‘‘People of many sexual orientations exist in society and practise their sexual preferences privately without feeling a need to proclaim those preferences to the world. Public manifestation of homosexuality is not an essential part of being homosexual.” The process by which the Tribunal determined the extent to which the applicant could safely communicate his sexual preference was accepted by Ryan J who considered the process “unexceptionable”. His Honour dismissed the application. We see no reason for departing from the line of authority that has evolved from these single judge decisions’: WABR v MIMA, above n11 at para 23.
it is not appropriate to submit that the ability to proclaim one’s sexual preference is an essential right, the denial of which would or could lead to persecution.\textsuperscript{41}

The Court concluded:

it was open to the Tribunal to conclude, on the material that was before it, that there was no active program for the persecution of homosexuals in Iran, so long as they were discreet and concluded their affairs privately. It was also open to the Tribunal to conclude that it was reasonable to expect that the appellants would accept the constraints that were a consequence of the exercise of that discretion.\textsuperscript{42}

(Emphasis added.)

This approach stands in stark contrast to the Federal Court jurisprudence developed in asylum cases brought on religious and political grounds, discussed below.

4. **What is a Normal Life?**

The Federal Court in \textit{LSLS v MIMA} read the tribunal’s definition of ‘normal’ such that it ‘must include the ability to pursue a homosexual lifestyle, including, for example, meeting prospective sexual partners’.\textsuperscript{43} However this is a generous mis-reading of the tribunal’s decision which had held that the rights of homosexuals did not ‘include’, but were in fact, \textit{limited to}, private sex.\textsuperscript{44} The tribunal member held in this decision that a ‘normal’ life involved the applicant never telling anyone that he was gay.\textsuperscript{45} Numerous tribunal decisions have implicitly or expressly premised the discretion requirement on an assumption that the gay applicant could express his sexuality by having anonymous sex in public places,\textsuperscript{46} or that a lesbian applicant would remain celibate.\textsuperscript{47}

Is this a normal life? Would the court for example hold that a heterosexual person’s fundamental human rights were not infringed if, for ‘safety’s sake’ they had to pretend to be gay in every area of their professional, personal and social life, in every public place, by not living with their partner of choice, never showing affection to their partner or identifying themselves as a couple to friends or family, and only pursuing their heterosexual ‘lifestyle’ by having swift and furtive sex with strangers or prostitutes in a public park? Is such desperate secrecy and deception, undertaken in fear, for months, years, or decades, a \textit{normal life}?

\textsuperscript{41} Id at para 19.
\textsuperscript{42} Id at para 27.
\textsuperscript{43} Id at para 33.
\textsuperscript{44} RRT Reference \textit{V98/08356} (Unreported, Hudson, 28 October 1998).
\textsuperscript{45} Ibid.
\textsuperscript{46} See eg, RRT Reference \textit{N98/2231} (Unreported, Zelinka, 22 September 1998); RRT Reference \textit{V97/0648} (Unreported, Wood, 5 January 1998); RRT Reference \textit{N97/20994} (Unreported, Rosser, 4 May 1998).
\textsuperscript{47} See eg, RRT Reference \textit{V95/02999} (Unreported, Boland, 26 April 1995); RRT Reference \textit{V97/06802} (Unreported, Wood, 30 September 1997).
In some instances the tribunal has seen gay men and lesbians as whole people rather than as merely a private sexual act to be undertaken in whatever circumstances were available. A noteworthy contrast is provided by a decision in 2000 also concerning a gay male couple from Bangladesh, where the tribunal held that the deliberate breaking up of a committed same-sex relationship could be compared to ‘that of an inter-caste, inter-racial or inter-religious couple in a country where [such] marriages were effectively outlawed’.48 Likewise, in a 1999 case from China the tribunal considered country evidence very similar to that from the Bangladesh cases, that if same sex partners ‘don’t attract attention and don’t display the fact in public that they are a committed couple’ authorities would ‘probably leave them alone but not necessarily’. The tribunal continued, however:

If a same sex couple in China attempt to live a normal life, that is, go to restaurants, clubs, bars, theatre and make it obvious that they are a unit, they will sooner or later attract the adverse attention of the authorities … Their lives are lived at the level of furtiveness and fear brought about by the intolerance of the state.49 (Emphasis added.)

This expresses a very different conception of what a normal life is, including going out socially, and talking to one’s friends. It is also a remarkable contrast to the ‘discretion’ decisions in that it discloses the motivation behind ‘discretion’: fear. To re-read every decision referred to above, replacing ‘discreet’ and ‘discretion’ with ‘furtive’ and ‘fear’ is very revealing indeed. This renders it considerably more difficult to see the ‘discretion requirement’ as a ‘reasonable’ limit on behaviour that causes ‘no disadvantage’ to the applicant.

In some cases, the tribunal took the discretion requirement to the extreme of suggesting that the applicant could avoid persecution by marrying and having a secret gay life.50 While this finding faced strong disapproval in Federal Court obiter,51 numerous cases have continued to rely upon country evidence centred on married or non-gay identified men who have occasional male-to-male sex to find that if ‘discreet’, gay identified applicants are relatively safe from persecution. The ‘normal life’ of heterosexual marriage continues to be taken as a given, as if being compelled to live out a relationship that is antithetical to one’s sexual orientation is not persecutory.

48 RRT References N98/24186 & N98/24187 (Unreported, Hardy, 28 January 2000).
49 RRT decision quoted in MIMA v Guan, above n34 at para 7.
50 See RRT Reference N97/14489 (Unreported, Gutman, 23 July 1998) and RRT Reference N98/23933 (Unreported, Gutman, 24 September 1998), both concerning claims from Nepal.
51 See Bhattachan v MIMA [1999] FCA 547.
5. **Is the Discretion Requirement Discriminatory?**

At times the tribunal has opined that the issue is ‘not whether homosexuals enjoy the same rights as heterosexuals’. The tribunal and the Federal Court have repeatedly failed to find that the discretion requirement is discriminatory by using superficial and false comparators between heterosexual people and lesbians and gay men. Some cases have held that the discretion requirement is not discriminatory because it applies ‘equally’ to heterosexuals. So for example in another 2001 decision concerning a gay man from Bangladesh the tribunal held:

> The Tribunal accepts that a person should not have to act “discreetly” to hide one’s sexual orientation. However, the independent evidence, which the Tribunal accepts, states that “Sexual issues are not normally discussed” and indicates that as Bangladesh is a very conservative society, the sexual practices and behaviour of all people, whether heterosexual or homosexual, are not matters that are made public. In light of this evidence, the Tribunal finds that any requirement to be discreet with regard to sexual behaviour is not selectively applied to homosexuals and hence does not involve the selective element which is inherent in the concept of persecution.

Other decisions have found that there is no discrimination because unmarried heterosexual people also have to be discreet in the sending country. While it may be difficult for heterosexual people to have extra-marital affairs or relationships prior to marriage in some cultures, this equation fundamentally misconceives the position of lesbians and gay men, for whom there is no acceptable form in which to have a same-sex relationship. It also overlooks the extent to which heterosexuality is constantly assumed and expressed publicly. In Cheshire Calhoun’s words,

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52 RRT Reference V98/08356 (Unreported, Hudson, 28 October 1998).
54 The Tribunal also found in a number of cases that pressured marriage, if sufficiently detrimental to be persecutory, would not be ‘for reason of the applicant’s homosexuality’ as this is a pressure placed on all single adults. See RRT Reference N99/28400 (Unreported, Witton, 26 September 2001); RRT Reference N99/20994 (Unreported, Rosser, 4 May 1998); on appeal MMM v MIMA [1999] 1664 FCA.
55 Kris Walker argues that, ‘This is not the same as a right to engage in sexual activity in public … but rather a right to express one’s identity as gay, lesbian, transgendered or bisexual, to live openly in a sexual relationship with one’s partner of choice, and to express intimacy in ways that are socially acceptable for heterosexual members of society. Although public expressions of intimacy may be proscribed for heterosexuals in some societies, this is by no means always the case; and some ways of expressing heterosexual identity are permitted in even the most restrictive societies, such as the right to live openly with one’s sexual partner if the couple is married. Thus Burchett J’s comment that ‘all persons in Iran … have to be discreet in sexual matters’ (in F v MIMA, above n53) fails to recognise the many ways in which heterosexuals do not have to be discreet. Simply to represent oneself as married is to announce one’s heterosexual identity, in a way denied to gay men and lesbians. Of course, in Iran an unmarried couple must be discreet, but heterosexuals generally have the option of marriage, which is denied to gay men and lesbians. Thus there is no way for a gay or lesbian couple to live openly together and avoid persecution’: Walker, above n3 at 205–206. The tribunal and Federal Court have also failed to grapple with the reality that pressure to marry affects lesbians and gay men very differently to heterosexual people.
like the love that ‘dare not speak its name’, heterosexuality is the love whose name is continually spoken in the everyday routines and institutions of public social life. Heterosexuals move about in the public sphere as heterosexuals, and that identity is by no means a private matter. Public social interaction and the structure of public institutions are pervaded with the assumption that public actors are heterosexual and with opportunities to represent themselves as such.

Decision-makers may be so accustomed to the assumption of heterosexuality in their own societies that they are unaware of the way that unconscious gestures of familiarity or affection, signs such as wedding rings, the use of specific language about partners (such as ‘wife’ or ‘girlfriend’), and cultural codes embedded in mass advertising and popular culture, make expressions of heterosexuality identity universally assumed, ‘normal’, and patently indiscreet. There is considerable slippage in the decisions regarding expression of sexual identity which is often construed as if it is public sexual behaviour.

There has been ongoing division within the tribunal over whether the discretion requirement is unlawfully discriminatory. As early as 1995 an applicant’s adviser ‘trenchantly criticised’ the discretion requirement, and drew the tribunal’s attention to refugee expert James Hathaway’s view that

Besides the purpose of refugee law is to protect persons from abusive national authority, there is no reason to exclude persons who could avoid risk only by refraining from the exercise of their inalienable rights.


57 This point is discussed more fully in Jenni Millbank, *Gender, Sex and Visibility in Refugee Decisions on the Basis of Sexual Orientation*, forthcoming.

58 Note that the requirement was rejected as inherently discriminatory as early as 1996: RRT Reference V95/03527 (Unreported, Brewer, 9 February 1996). See also RRT Reference N96/11136 (Unreported, Rosser, 27 October 1997). However, the lack of a precedent system within the tribunal means that the division has continued.

59 Quoted in RRT Reference V95/03188 (Unreported, Hudson, 12 October 1995).
Yet a secret gay life has repeatedly been defined by members imposing the discretion requirement as ‘giving up something less’ than a fundamental human right.60 That ‘something less’ has been expressed as ‘indiscriminate disclosure’, ‘flaunting’, ‘parading’ and ‘proclaim[ing] publicly’61 rather than as a fundamental human right such as the right to family life,62 freedom of expression,63 or freedom of association.64 The tribunal has repeatedly construed the fundamental rights of homosexuals as extending only to private same-sex sexual activity.

The discretion cases are based on the express premise that gay and lesbian rights are distinct from, and lesser than, other human rights. Some tribunal decisions in 1994 and 199565 relied upon (then current) decisions of the European Court of Human Rights (ECHR) and opinions issued by the United Nations Human Rights Committee (HRC) to find that the rights of homosexuals were limited to privacy and did not extend to the right to equality or to family life. It is

60 ‘It is all a question of what one means by being “discreet”. If this is taken to mean giving up a fundamental human right, then clearly the expectation or requirement is not reasonable. If, on the other hand, it means giving up something less, then it may well be reasonable’: RRT Reference V95/03188 (Unreported, Hudson, 12 October 1995).
62 In one case the member concluded: ‘international jurisprudence does not show that homosexuals have inalienable human rights relating to their sexuality which extend beyond the right to private consensual adult sex. I therefore think it is correct to say that it can be reasonable to expect a homosexual to avoid persecution by being discreet in his conduct where this discretion does not involve giving up this right’: RRT Reference V95/03188 (Unreported, Hudson, 12 October 1995).
63 In one case, the tribunal characterised the issue of discretion as one of freedom of expression under Art 19(3) of the ICCPR and cited a decision of the HRC on ‘homosexuality in the context of freedom of expression’ that held when ‘public morals’ differ a margin of discretion ought to be accorded to the State: Hertzberg v Finland, Communication R.14/61, Report of the Human Rights Committee, 37 UN GAOR Supp. (No. 40), UN Doc. A/37/40 (1982). The tribunal used this decision to support its view that, ‘Given the conservative nature of Chinese society … it is not unreasonable for the applicant to exercise discretion in giving expression to his homosexuality and that this restriction on his activities would not constitute persecution’: RRT Reference BV93/00242 (Unreported, Glaros, 10 June 1994). The country evidence and the entire process of reasoning that followed is repeated verbatim, without attribution, in RRT Reference V94/02607 (Unreported, Kelleghan, 29 June 1999). It is perhaps worth noting that the opinion of the HRC itself was a divided one, with three Committee members sharply dissenting on the issue even in 1982 when the consideration of sexual orientation issues in human rights law was in its infancy: see Douglas Saunders, ‘Human Rights and Sexual Orientation in International Law’ (2002) 25 International Journal of Public Administration 13 at 31. Saunders also argues that the HRC decision in Toonen v Australia in 1994 implicitly departs from Hertzberg v Finland.
64 A 1999 RRT case held that a gay Chinese man could avoid a risk of harm from the authorities by not frequenting gay meeting places and that this did not derogate from his fundamental right to express his sexuality: RRT Reference V98/09564 (Unreported, Vrachnas, 4 May 1999).
65 RRT Reference BV93/00242 (Unreported, Glaros, 10 June 1994); RRT Reference V95/03188 (Unreported, Hudson, 12 October 1995).
arguable that such decisions should never have been literally applied, not least of all because the standards and objects of proof that they relate to differ so substantially: the ECHR applies a ‘margin of appreciation’ in favour of member states in balancing the rights of the individual and the state when determining if an individual’s right has been breached, while the test for refugee determinations is a real chance of persecution of the individual. Even taken at face value, however, it is noteworthy that such decisions have since been completely overtaken by the fast developing international human rights jurisprudence on sexual orientation.66

Much condemnation of the discretion requirement has drawn express parallels between persecution on the grounds of sexuality and that of political expression67 and religious belief.68 Justice McHugh’s parallel between Christians and homosexuals in Applicant A v Minister for Immigration and Ethnic Affairs 66 See Robert Wintemute & Mads Andenæs (eds), Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law (2001). While the ECHR and UN HRC interpreted the positive assertion of a right to marry and found a family narrowly in two decisions in 2002 (Frette v France Hudoc REF 00003291 (26 February 2002) denying a gay man eligibility to apply for an adoption order, and Joslin v New Zealand UN Doc CCPR/C/75/D/902/1999 (17 July 2002) denying same-sex couples legal marriage) there have been suggestions in a recent ECHR decision that the Court is moving towards a non-gender specific reading of the right to marry and found a family: Goodwin v United Kingdom [2002] 2 FCR 577 (ECHR). Moreover, decisions on assertions of the negative right of freedom from state interference in family, such as those found in Art 8 have tended to be far stronger: see eg, Salgueiro da Silva Mouta v Portugal [2001] 1 FCR 653 (ECHR) (finding a breach of Art 8 right to privacy and family life, and Art 14 equality, when a gay man was denied custody of his children on the basis of his sexuality). The English Court of Appeal recently interpreted Art 8 of the ECHR as potentially protecting a gay or lesbian relationship from forced separation: Secretary of State for the Home Department v Z & Ors [2002] EWCA Civ 952. See also constitutional jurisprudence on equality, privacy and family rights evolving in Canada and South Africa, in cases such as: M v H [1999] 2 SCR 3; National Coalition for Gay and Lesbian Equality v Minister of Home Affairs (Constitutional Court of South Africa, No CCT10/99, 2 December 1999): <http://www.concourt.gov.za/judgments/1999/natcoal.pdf> (accessed 18 December 2002); Satchwell v President of the Republic of South Africa (Constitutional Court of South Africa, No CCT45/01, 25 July 2002): <http://www.concourt.gov.za/judgments/2002/satchwell.pdf> (accessed 18 December 2002); Du Toit v Minister for Welfare and Population Development (Constitutional Court of South Africa, No CCT 40/01, 10 September 2002) <http://www.concourt.gov.za/judgments/2002/dutoit.pdf> (accessed 18 December 2002).

67 Eg, ‘As to the legal irrelevance of that comment, let it be assumed that the relevant social group were those of a particular political opinion, say fascism, to which another political opinion was opposed, say communism. Would it be an answer to persecution on the grounds that a person was a member of a group espousing fascism to say that person might well cohabit with persons of the opposite political persuasion thereby disguising his or her political opinion? That is to say nothing about the appalling consequences to both the applicant and the person with whom it was suggested he should cohabit to conceal his sexual orientation’: Bhattachan v MIMA, above n51 at para 10 (Hill J).

68 See eg, ‘If the claimant were a Christian and the country conditions were such that he could have lived a reasonably okay life if he were discreet about his Christianity, we would never have asked him to be discreet about his Christianity. The question before us is whether we should demand that of someone who is homosexual. Why should he have to live a discreet life as a homosexual in any country, if homosexuality and his right to be a homosexual is something that is a basic fundamental human right for him?’: Re VAC [1998] CRDD No 161 (QL), IRB Reference V96-03502.
(hereinafter Applicant A)\textsuperscript{69} supports the view that it is appropriate to compare experiences of persecution across groups under the Convention in order to develop refugee jurisprudence:

A group may qualify as a particular social group, however, even though the distinguishing features of the group do not have a public face. … In Roman times, for example, Christians were a particular social as well as a religious group although they were forced to practise their religion in the catacombs. If the homosexual members of a particular society are perceived in that society to have characteristics or attributes that unite them as a group and distinguish them from society as a whole, they will qualify for refugee status.\textsuperscript{70}

The tribunal has evaded grappling with the essence of these important parallels by employing two strategies. One is to draw a ‘vital distinction between religion and politics, which require public manifestations, and sexuality, which does not’.\textsuperscript{71} This reflects assumptions, discussed above, about homosexuality as only a private sexual experience, and a secret life as a normal life. The other avenue is to accept the principle that serious suppression can in and of itself constitute evidence of a well-founded fear of persecution,\textsuperscript{72} but then to repeatedly distinguish it as inapplicable to the case at hand. The employment of this distinction again sets sexuality apart on a discriminatory basis by holding that it is not unreasonable to live a closeted life, and that any applicant who has nevertheless managed to be at all sexually active was therefore not disadvantaged by doing so.\textsuperscript{73} The questions that are never addressed are: What exactly does a closeted life entail in the sending country? How sustainable is it? Reasonable compared with what? What level of secrecy and suppression would be unreasonable? And disadvantaged compared with whom?

\textsuperscript{69}  (1997) 142 ALR 331 at 359–360.
\textsuperscript{70}  Ibid.
\textsuperscript{71}  RRT Reference V98/08356 (Unreported, Hudson, 28 October 1998). Upheld on appeal to the Federal Court in LSLS v MIMA, above n34.
\textsuperscript{72}  ‘The applicant did not supply material dealing with the nature of religious observances which his faith requires. It is reasonable to assume, however, that some form of public worship would be amongst them. In the absence of evidence that the applicant could conceal his faith, consistently with practising it, it was not open to the first respondent to conclude he would not be persecuted because his faith was unknown to the authorities. The mere fact of the necessity to conceal would amount to support for the proposition that the applicant had a well-founded fear of persecution on religious grounds’: Woudneh v Inder \& MILGEA (Federal Court, Gray J, 16 September 1988) at 19.
\textsuperscript{73}  See eg, RRT Reference N94/04854 (Unreported, Woodward, 21 July 1998); RRT Reference N98/23813 (Unreported, Rosser, 8 January 1999); RRT Reference N98/23086 (Unreported, Rosser, 8 July 1998); RRT Reference N98/20994 (Unreported, Rosser, 4 May 1998); RRT Reference N01/37352 (Unreported, Witton, 24 April 2001).
It is noteworthy that when the Australian government argued for ‘discretion’ in a 2001 case involving political expression, the Federal Court rejected it with force. In *Win v MIMA*, a Burmese couple had been politically active in a clandestine manner for some years in Burma without being caught. They were denied refugee status by the RRT on the basis that if they returned to Burma and continued to be clandestine, the likelihood of persecution was low. On appeal, they argued that the RRT had failed to consider whether such suppression of their political freedom was in itself capable of amounting to persecution. Madgwick J responded eloquently:

There appears to be no reason why, similarly, a denial of freedom to express one’s political opinion may not, of itself, constitute persecution. To illustrate this point by reference to an historical example, upon the approach suggested by counsel for the respondent, Anne Frank, terrified as a Jew and hiding for her life in Nazi-occupied Holland, would not be a refugee: if the Tribunal were satisfied that the possibility of her being discovered by the authorities was remote, she would be sent back to live in the attic. It is inconceivable that the framers of the Convention ever did have, or should be imputed to have had, such a result in contemplation.

... The principle, it seems to me, is that a denial of such civil rights would amount to persecution when that denial is so complete and effective that it actually and seriously offends a real aspiration so held by an asylum seeker that it can be fairly said to be integral to his or her human dignity. It is not fatal to such a claim of persecution that the claimant fails to show that he or she is a leading exponent of a claim to, or the wish to, exercise such rights, let alone that he or she exhibits a capacity for martyrdom. The Convention aims at the protection of those whose human dignity is imperilled, the timorous as well as the bold, the inarticulate as well as the outspoken, the followers as well as the leaders in religious, political or social causes, in a word, the ordinary person as well as the extraordinary one.

Madgwick J went on to state that it is unclear ‘exactly what civil and political rights the Convention extends to protect’ but concluded that under Australian jurisprudence free speech is certainly one of them and recommended the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) as reliable guides in determining the scope of such protections.

Under Madgwick J’s analysis, lesbians and gay men from all countries where they are ‘tolerated’ if secret/discreet but face the chance of serious harm if they were openly gay are being denied the right to express a fundamental aspect of their human dignity by Australian law. They are persecuted through suppression, yet are being sent back to live in the attic in Bangladesh, as well as countries such as Iran, Sri Lanka, Ghana, Lebanon and Pakistan. This is reasonable, under Australian law, because it does not disadvantage them; they are leading a ‘normal life’.

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74 *Win*, above n27.
75 Ibid.
76 Id at para 18.
77 Id at para 21–22.
6. Other Jurisdictions

The jurisprudence from Canada, New Zealand and the USA directly contradicts Australia on the issue of secrecy.

In Canada the Immigration and Refugee Board (IRB) rejected the discretion requirement in the strongest terms in 1995. In numerous cases the IRB has explicitly credited applicants with the right to be openly identified as gay or lesbian and connected this to human rights concepts such as freedom of expression and association. The IRB has never accepted, as the Australian tribunal has, that being gay means only the ability to have secret gay sex:

The claimant stated that if he were sent back to Malaysia, he would have to hide the fact that he is gay in order to be safe. It is not possible to be openly gay. He would have to fit into a heterosexual lifestyle and try to be something that he is not. He would have to suppress his feelings. The claimant explained that being gay is more than simply about sex; he wishes to be acknowledged as a person … The claimant has accepted that he is gay and is not ashamed of it. On the contrary, he is proud of it.

78 In a passage similar to that of Madgwick J’s in Win, id at paras 18, 20, the IRB held that, ‘To find that one can remove one’s fear of persecution by successfully hiding is perverse because it puts the onus of removing the fear of persecution on the victim, rather than on the perpetrator. There are many ways of “hiding”. One can conceal oneself in a cave, or an attic, or a friend’s apartment. One can also attempt to hide one’s race, religion, nationality or indeed any one of the attributes of the person which fall under Convention grounds — for example, by practising the official state religion in public and one’s own faith only in secret, or by carrying false identification and “passing” for someone of another race or nationality. At the heart of the Convention definition of a refugee is the concept that no person should face a reasonable chance of persecution because of her or his race, religion, nationality, membership in a particular social group or political opinion. To deny refugee status to someone who cannot or will not conceal one of these immutable or fundamental attributes, on the grounds that by such a concealment he or she could remove the fear of persecution, would make a mockery of the Convention’: Re XMU [1995] CRDD No 146 (QL), IRB Reference T94-06899 (Griffith, Rucker, 23 January 1995) at paras 100–102.

79 See eg, a 1999 Canadian case involving a gay Mexican man who ‘does, from time to time, dress as a transvestite’: ‘The panel is of the opinion that the claimant’s profile is fairly high, that if he were to return to Mexico and continue to pursue the lifestyle that he feels he needs live in order to preserve his human dignity, that he would no doubt come to the attention of the police and others …’: Re EHF [1999] CRDD No 142 (QL), IRB Reference T98-03951 (Wolman, Okhovati, 24 June 1999).

80 See also a direct contrast between Canada and Australia in decisions on gay men from Singapore. In 1996 the IRB assumed and approved openness in a positive decision, stating: ‘the claimant is a person who has now accepted he is gay and who is fiercely proud of it’, and concluding that he would therefore be at risk: Re OPK [1996] CRDD No 88 (QL), IRB Reference U95-04575 (Schlanger, Jackson, 24 May 1996). In 1999 the RRT rejected a similarly situated man on the basis that he would be ‘unlikely to experience trouble’ ‘unless he openly flaunts his lifestyle’: RRT Reference N98/24008 (Unreported, Gutman, 7 January 1999).

The New Zealand Refugee Status Authority (RSA) in the 1995 decision of *Re GJ*,\(^8^2\) considered whether the applicant ‘could avoid persecution by being careful to live a hidden inconspicuous life’ and held that ‘to expect of him the total denial of an essential part of his identity would be both inappropriate and unacceptable’.\(^8^3\)

The New Zealand RSA referred to a 1983 decision of the German Administrative Court\(^8^4\) stating:

The Court believed that telling a homosexual asylum seeker that he can avoid persecution by being careful to live a hidden, inconspicuous life is as unacceptable as suggesting that someone deny and hide his religious beliefs, or try to change his skin colour.\(^8^5\)

In 2000 the US Court of Appeals 9th Circuit considered the claim of a Mexican man who identified as gay but also sometimes cross-dressed as a woman. At first instance and on appeal to the Board of Immigration Appeals (BIA) the applicant’s claim was rejected. The BIA held that the way the applicant appeared in public was a choice, and that therefore his ‘mistreatment arose from his conduct’. (In the Australian parlance, he was a ‘flaunter’.) The Court of Appeals forcefully rejected the premise that the onus was on the applicant to avoid the persecution:

Perhaps, then, by “conduct”, the BIA was referring to Geovanni’s effeminate dress or his sexual orientation as a gay man, as a justification for the police officers’ raping him. The ‘you asked for it’ excuse for rape is offensive to this court and has been discounted by courts and commentators alike.\(^8^6\)

The Court determined that the proper particular social group of the applicant was ‘homosexual men with a female sexual identity’ and held that the applicant was under no duty to hide this just because he had on some occasions in the past, or could in the future, dress as a man.\(^8^7\)

Case law from the UK remains unsettled, as sexual orientation was only accepted as definitively qualifying as a particular social group in 1999. Jurisprudence from that jurisdiction is now further complicated by the fact that the Immigration Appeal Tribunal may have to consider both whether applicants face

\(^8^2\) *Re GJ*, above n5.

\(^8^3\) Ibid.


\(^8^5\) *Re GJ*, above n7.

\(^8^6\) *Hernandez-Montiel v INS*, above n7 at 1098.

\(^8^7\) The Court used the particular social group test of *Re GJ*, above n7 (either immutable or so fundamental to dignity, modified from *Ward*, above n7): ‘Geovanni should not be required to change his sexual orientation or identity … Because we conclude that Geovanni should not be required to change his sexual orientation or identity, we need not address whether Geovanni could change them’: at 1095. Later, the Court added, ‘This case is about sexual identity, not fashion’: at 1096.
a risk of persecution under the Convention and whether if returned they face torture, inhuman or degrading treatment under Article 3 of the European Convention for the Protection of Human Rights (ECPR), or a breach of any other ECPR right, such as the right to family life and privacy under Article 8. It appears from recent decisions that Article 8 could prevent refoulement where an applicant would be returned to a sending country where suppression was necessary to ensure freedom from persecution, or where it would break up a same-sex relationship.

7. How Should the Particular Social Group be Defined?

Since the early Australian decisions establishing that lesbians and gay men may constitute a particular social group in terms of refugee jurisprudence, there has been little analysis of the contours of this social group in any particular claim. In this regard, lesbians and gay men have been treated differently to others claiming on the basis of their membership in a particular social group. The careful analysis which the High Court set up as a model for claims on the ‘particular social group’ ground in Applicant A has not been taken up in the cases of lesbians and gay men. Instead, the RRT and the Federal Court have treated the particular social group of homosexuals in their country of origin as a given. In one sense this is an important advantage for lesbian and gay claimants, as proving the existence of a social group that may have little cohesion, organisation or voice — and may indeed be officially non-existent in the sending country — would be a difficult, or even impossible, hurdle for many applicants.

The automatic ascription of membership to a particular social group may reflect an inability to imagine a society where gay men and lesbians are not perceived as socially distinct, and discriminated against, on the basis of their non-conformity to societal norms around family, gender and sexuality. While experience of, and identity categories around, sexual orientation may vary widely around the world, we argue that the ascription of a group identity status to sexual orientation is correct in refugee law. It is not that sexual identity is universal. Rather, while sexual identity, and proscriptions around it, vary enormously, there is a unifying feature: in each context there is a continuum of disapprobation and
persecution that is directly connected to non-conformity to heterosexual norms.93 So while there may be culturally relative experiences of sexual orientation, such as male-to-male sex being, in some circumstances, acceptable, there is always a point — such as rejecting marriage, identifying as gay, or taking on a non-conforming gender identity — where tolerance ends and persecution of same-sex attracted individuals begins.

However, using a broad particular social group category is at odds with the approach to other particular social group claims where the contours of, and social reactions to, the group in question have been analysed in detail, in keeping with the view that the existence of a particular social group in a given refugee claim is a question of fact to be determined in each case.94 In Reg v IAT ex parte Shah (hereinafter Shah)95 (approved by the High Court in Minister for Immigration & Ethnic Affairs v Khawar)96, Lord Steyn stated the principle thus:

Generalisations about the position of women in particular countries are out of place in regard to issues of refugee status. Everything depends on the evidence and findings of fact in the particular case.97

When the existence of a marginalised group labelled homosexual is assumed, the analytic opportunity to consider how that group is constituted, identified, and discriminated against or persecuted in a particular society, may be lost. The decision-maker seemingly assumes that the place of homophobic discrimination is a familiar quantity, rather than considering the social place of a social group.98

Omitting an analysis of how discrimination operates and of how the social group is identified in a given setting has, in the RRT’s ‘discretion’ jurisprudence,
led to a confusing slippage in group definition. While the particular social group has been broadly defined by the RRT since 1994 as ‘homosexuals’, the ‘inherent characteristic’ or ‘fundamental human dignity interest’ of that group — to use the Ward99 language — has been narrowed. By defining private sexual activity100 — not sexual identity, not same-sex relationships, and emphatically not public expressions of sexual identity — as the protected ground, the tribunal has very narrowly defined the experience of lesbian and gay lives as if they were always and only sex. In this sense the group has been implicitly defined in two different ways within the decisions: homosexual is the group for the purposes of eligibility, but when the questions of persecution and nexus are raised the narrower group of ‘person wanting to have same-sex intercourse under secretive (possibly anonymous) circumstances’ is the category under assessment.

In our view, the best way to resolve the tension between broad and narrow definitions of the group in question is to follow the High Court’s own jurisprudence: define the group broadly as ‘homosexuals’ but then assess persecution and nexus with an appropriate understanding of the diversity of experiences and identities that are captured by this category. This is in keeping with Justice McHugh’s approach in Applicant A, where he describes the potentially eligible social groups as ‘disparate in character’, but continues, ‘what distinguishes their members from other persons in their country is a common attribute and a societal perception that they stand apart’.101 The group is set apart on the basis of external perception,102 without this the discrimination which is the core logic of the refugee definition would not be present.

It is an error to allow the label ‘homosexual’ to lead to a conclusion that all members of the group experience or express their sexuality or identity in the same or even similar ways. The label is the product of discrimination and oppression, not of the identities it names. It is important, therefore, to use two principles in the analysis: first, to follow existing jurisprudence by not requiring that all members of the group must experience persecution; and second, to ensure the evidence about some members of the group is not taken as necessarily applicable to all members.

The first point is well supported and leads directly to the second. The Convention mandates an individual and future-looking analysis of persecution. The question must be whether this individual faces a real chance of persecution if the individual returns to his or her homeland and is not affected by finding that

99 Above n7.
100 The tribunal concluded that if a gay person was ‘unable to safely reveal is or her sexual preferences, and the consequence is that he or she is unable to safely engage in private consensual sexual activity, then … we have a violation of a fundamental human right such that the protection of the convention is legitimately attracted.’ RRT Reference V95/03188 (Unreported, Hudson, 12 October 1995).
101 Above n69 at 360.
102 Justice McHugh states: ‘The fact that the actions of the persecutors can serve to identify or even create a “particular social group” emphasises the point that the existence of such a group depends in most, perhaps all, cases on external perceptions of the group’ (id at 359).
some members of the same group are not persecuted. The United Nations High Commissioner for Refugees (UNHCR) states:

An applicant need not demonstrate that all members of a particular social group are at risk of persecution in order to establish the existence of a particular social group. As with the other grounds, it is not necessary to establish that all persons in the political party or ethnic group have been singled out for persecution. Certain members of the group may not be at risk if, for example, they hide their shared characteristic, they are not known to the persecutors, or they cooperate with the persecutor.103 (Emphasis added.)

The UNHCR has clearly averted to the issue of ‘discretion’ and has found it has no place in the law.

The question of whether all members of the group must be at risk was before the House of Lords in Shah.104 In strongly rejecting that proposition, Lord Steyn stated:

I regard it as established that depending on the evidence homosexuals may in some countries qualify as members of a particular social group. Yet some homosexuals may be able to escape persecution because of their relatively privileged circumstances. By itself that circumstance does not mean that the social group of homosexuals cannot exist. Historically, under even the most brutal and repressive regimes some individuals in targeted groups have been able to avoid persecution. Nazi Germany, Stalinist Russia and other examples spring to mind. To treat this factor as negating a Convention Ground under article 1A(2) would drive a juggernaut through the Convention.105

Lord Hoffman used particularly evocative language:

Suppose oneself in Germany in 1935. There is discrimination against Jews in general, but not all Jews are persecuted. Those who conform to the discriminatory laws, wear yellow stars out of doors and so forth can go about their ordinary business. But those who contravene the racial laws are persecuted. Are they being persecuted on grounds of race? In my opinion they plainly are. It is therefore a fallacy to say that because not all members of a class are being persecuted, it follows that persecution of a few cannot be on grounds of membership in that class.106

Lords Steyn and Hoffman, writing majority opinions, each followed the principles set out by the Australian High Court in Applicant A.107 Their argument, that protection for some through hiding, collaborating, or economic privilege does not negate the refugee status of others, fits within the High Court’s framework. The

104 Above n94.
105 Id at 644–645.
High Court’s decision in *Khawar* also allows for this possibility, although it was not finally determined by the Court as the matter was returned to the RRT.

The facts and argument in *Shah* forced the issue of whether all need be persecuted because of a debate about whether the group in question ought be framed broadly as ‘women in Pakistan’ or narrowly as ‘women in Pakistan suspected of adultery and unprotected by a male relative’. The tension between a broadly defined group and a narrowly defined one parallels the implicit tension in much of the RRT’s decision-making between ‘homosexuals’ and some narrow construction such as ‘men/women wanting to have same-sex intercourse under secretive (possibly anonymous) circumstances’. The resolution which the House of Lords offers is instructive. The majority found that the relevant group was ‘women in Pakistan’. They also found that the narrow construction is a result of an inappropriate analysis of the ‘nexus’ issue in the refugee definition, that is, the question of whether the persecution is ‘for reasons of’ group membership. Once it is established that not all members of the group need fear persecution for one to be a refugee, the nexus issue which forces a narrow definition of the group is resolved. It is for this reason that the particular social group should be defined broadly as homosexuals, but that the questions of persecution and of the nexus with the group definition must be analysed in light of the variety of experience and identity which the broad label encompasses.

Analysing in this way leads necessarily to the conclusion that the ‘discretion’ requirement is wrong in law. While some individuals may choose to attempt to

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106 Id at 653. Lord Hoffman continued: ‘… suppose that the Nazi government in those early days did not actively organise violence against Jews, but pursued a policy of not giving any protection to Jews subjected to violence by neighbours. A Jewish shopkeeper is attacked by a gang organised by an Aryan competitor who smash his shop, beat him up and threaten to do it again if he remains in business. The competitor and his gang are motivated by business rivalry and a desire to settle old personal scores, but they would not have done what they did unless they knew that the authorities would allow them to act with impunity. And the ground upon which they enjoyed impunity was that the victim was a Jew. Is he being persecuted on grounds of race? Again, in my opinion, he is. An essential element in the persecution, the failure of the authorities to provide protection, is based upon race. It is true that one answer to the question “Why was he attacked?” would be “because a competitor wanted to drive him out of business.” But another answer, in my view the right answer in the context of the Convention, would be “he was attacked by a competitor who knew that he would receive no protection because he was a Jew”: id at 653–654.

107 Above n69.

108 Above n94.

109 Above n95.

110 Lord Hoffman stated: ‘The reason why the appellants chose to put forward this restricted and artificial definition of their social group was to pre-empt the question of whether their feared persecution was “for reasons of” their membership of the wider group of women. It was argued for the Secretary of State that they could not fear persecution simply for the reason that they were women. The vast majority of women in Pakistan conformed to the customs of their society, did not chafe against discrimination or have bullying husbands, and were not persecuted. Being a woman could not therefore be a reason for persecution …. I do not need to express a view about whether this strategy should have succeeded because, as I shall explain in a moment, I think that the argument on causation which it was designed to meet is fallacious: id at 652–653.'
escape persecution, refugee protection is not denied to those who do not make that choice. The gay man or lesbian who lives and socialises with a partner and is persecuted because of that ‘choice’ must be protected as a matter of fundamental human right, in the same way as the Jewish person in 1935 who refuses to wear a yellow star and is then persecuted for his or her ‘choice’. It is discriminatory in law to mandate that gay men and lesbians must remain closeted in order to protect themselves.

Moreover, the discretion requirement is also, in many contexts, impossible in fact. The question of being ‘out’ is never answered once and for all, it is a decision made over and over, each day and in each new social situation. The country evidence on Bangladesh indicates that same-sex activity may be ignored between men if the partners are both young or are married, but not if they are gay-identified. This standard almost certainly does not apply to women, but even for men as they get older their status as ‘closeted’ may shift whether they choose it or not. While one may be able to maintain a closeted life in a country such as Bangladesh for weeks, months or years, an unconscious gesture, an inquisitive neighbour, a 20-year cohabitation with ‘a friend’, or a change of heart, render the state of ‘closeted-ness’ always a potentially permeable one. Many lesbian and gay asylum seekers from countries as varied as Malaysia, India, Bangladesh and Iran, testify that to remain unmarried through adulthood would in and of itself be interpreted as evidence that they were homosexual and expose them to risk. It is arguable that in such cultures even an applicant who desperately wishes — and takes all possible steps — to remain closeted does, in fact, become increasingly ‘visible’ with the passage of time.

Gail Mason, a criminologist who has written extensively on homophobic violence has argued that, as ‘it is never possible to be completely closeted, it is likely that it is never possible to be completely safe from homophobic violence’.111 Refugee decision-makers have not understood that being closeted or open are not static, self-contained and opposing states. In one UK case, an openly gay man from Pakistan argued that he would be in danger if returned because he was out, but the tribunal, and court on appeal, held that he was not really out — because neither his work colleagues nor his family knew he was gay. Hence, they reasoned, being ‘out’ was not accomplished, and being closeted was still a viable option (which they then imposed upon him).112

Using a narrow particular social group based upon definitions such as open/ closeted is also problematic for other reasons. The tribunal has tended to assume that applicants who have been closeted in the past will always remain so, and have

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112 *T v Special Immigration Adjudicator* [2000] EWJ 3020. The tribunal continued, ‘His fear is of persecution should he return to Pakistan and behave there as an open andouted homosexual and in a promiscuous manner’: quoted on appeal at para 11. The tribunal reasoned that as there weren’t gay clubs in Pakistan the applicant would probably return to ‘his former lifestyle’ of occasional covert sex and noted that ‘It is of course not a Convention reason that an asylum seeker returning to his own country is unable to enjoy the peripheral benefits of westernised and so called liberalised behaviour’: quoted on appeal at para 12.
disregarded the future focus of the assessment of persecution in holding that they are therefore safe.\textsuperscript{113} Moreover, applicants facing a tribunal are very unlikely to assert that they are or will be ‘out’ when doing so confronts both their own societal norms and those of the decision-maker. This is especially so when decision-makers have labelled such conduct with value-laden and negative terms such as ‘flaunting’ or creating ‘embarrassing public situations’,\textsuperscript{114} and have elicited information about the applicants’ expression of their identity by questioning them about whether they behave ‘modestly’ or ‘appropriately’. Very few refugee claimants in such a context would have the courage to assert that they are at future risk through belonging to the ‘open’ particular social group if it were so defined.

Should the court choose nevertheless to adopt a narrower particular social group, taking factors such as secrecy to be definitional of the group, we alternatively submit that in the case of applicants S396 and S395, the appropriate narrowly defined social group to consider in Bangladesh is not ‘men who have sex with men’ but rather, ‘gay men in committed cohabiting relationships with male partners, who are unmarried and beyond the age where the societal norm is for men to marry’.\textsuperscript{115} Independent country information shows that the risk of persecution for K and R increases over time as they remain unmarried. Defining the group in this way would create an alternative means of avoiding the pitfall of inappropriate evidence.\textsuperscript{116} The tribunal has frequently used a broad and homogenous category to determine eligibility but then utilised country information from the broadly drawn group to find that there is no danger of persecution or that discretion is acceptable. This evidence is frequently drawn from, and relevant to, a quite distinct group — such as married men who have anonymous gay sex in parks. This may not reflect the applicant’s own position at all, if he is, as the applicants in the case at hand are, a gay-identified man or in a cohabiting gay relationship. Because the group is so broadly drawn it is possible for the tribunal and the court to treat both groups identically and to apply evidence from one to the situation of the other.\textsuperscript{117}

\textsuperscript{113} This approach has been even more common in the Australian decisions where if applicants had secret lives up to the point of departure, the RRT simply assumed that this would continue in the future. See eg, RRT Reference V97/07412 (Unreported, Haig, 24 December 1997); RRT Reference V97/06802 (Unreported, Wood, 30 September 1997); RRT Reference N94/04834 (Unreported, Woodward, 21 July 1998); RRT Reference N95/09552 (Unreported, Woodward, 4 September 1998); RRT Reference N98/23086 (Unreported, Rosser, 8 July 1998).

\textsuperscript{114} See RRT Reference N98/21362 (Unreported, Kelleghan, 28 March 2002).

\textsuperscript{115} See also the suggestion of a particular social group of ‘homosexuals who have entered into and seek to remain in an intimate and exclusive relationship’ in a case involving a gay couple from Bangladesh where the tribunal held that, ‘this case provokes consideration not merely of the Applicants’ fears in relation to being perceived as ‘homosexuals in Bangladesh’, but also of the Applicants’ particular relationship. This is evidently intimate, exclusive and of some long standing, like a marriage, and may be perceived by Bangladesh society as an outward sign of their homosexuality that, even if they try to do so, they may ultimately be unable to hide’: RRT References N98/24186 & N98/24187 (Unreported, Hardy, 28 January 2000).

\textsuperscript{116} It would also allow for a self-definition of the contours of the group based upon the applicant’s own sense of their identity and could also therefore contradict the discretion requirement. For instance, See Re ORC [1997] CRDD No 66 (QL), IRB Reference V96-00083, where the IRB construed the particular social group as ‘Moroccan men wishing to live within, and to exhibit, a homosexual identity in Morocco’.
8. Conclusion

The discretion requirement takes the focus away from persecution and reverses the onus to instead question what is ‘reasonable’ about the applicants’ behaviour and the extent to which they should live a life of secrecy and fear. In doing so, the discretion standard arguably distracts decision-makers from properly dealing with the real issues in front of them, such as the real chance of future persecution. The requirement of discretion is discriminatory and as such is antithetical to the central aims of the Refugee Convention.

In asylum claims on other grounds, suppression of key aspects of the claimant’s identity or expression of their core human rights has been held to constitute persecution. The requirement has been rejected by many of the other key refugee-receiving nations at tribunal and intermediate court levels. The High Court should take this opportunity to eliminate the discretion standard from Australian jurisprudence, and to provide international leadership on this point. The most effective way to do so is to maintain a broadly defined social group but clearly establish that not every member of a particular social group need be persecuted for the feared harm to be for a Convention reason.

117 The broadly drawn and particular social group was a contributing factor in the frequently gender inappropriate usage of evidence: see Dauvergne & Millbank, above n23.
Australia’s origins as a federation of British colonies seems to have engendered a certain ambivalence in notions of ‘citizenship’ in this country. While the Australian Constitution set all the parameters necessary for the creation of a new nation in 1901, it did not create the legal status of Australian citizen. As Kim Rubenstein documents in her excellent study of citizenship law in Australia, the Constitution is strangely silent on what is required for a person to be regarded as a constituent member of the Australian community. It was not until 1948 that the formal integers of citizenship in this country were codified into law with the enactment of the *Australian Citizenship Act* 1948 (Cth).

The failure to embrace a notion of Australian citizenship at Federation did not just create ambiguities for those seeking admission to Australia. Australians have also been slow and at times conflicted in their attempts to articulate what it means in legal, social and cultural terms to be a citizen. Rubenstein describes the social aspects of citizenship as entitlement to benefits and/or inclusion in a range of activities, which are expressive of membership of a community. In this regard, she provides readers with a neat introduction to the discourse on citizenship as a normative construct, asking what citizenship does or should mean in real terms as well as in a formalistic, legal sense. Australian women were among the first in the world to win the right to vote – the most obvious example of an activity open to citizens. Yet, many would argue that female suffrage did not bring with it the type of citizenship enjoyed by men in Australia. It is only in recent times that attention has been paid to the differential ability of women and of various minority groups to participate in the public process integral to citizenship as active membership of a community.

In recent years, Rubenstein has established herself as a scholar of Australian citizenship in all of its varied meanings – legal and normative. Her book brings together the fruits of her doctrinal and theoretical research. The earliest, and in my personal view, most interesting, chapters of the work examine the evolution of the legal concept of Australian citizenship. She provides a fascinating account of the Convention Debates that accompanied the drafting of the Constitution, drawing out explanations of why a definition of citizenship never made it through to the final document. She argues convincingly that the silences in the Constitution on citizenship were deliberate, designed as exclusionary devices that worked against the interests of Australia’s first peoples as well as against migrants from cultures that differed from the Anglo-Celtic norms of the first settlers. This theme of citizenship as both an inclusionary and exclusionary device recurs throughout the book.
In view of the current, pointed, conflict between the courts and the government in matters pertaining to immigration control, the trust placed in the judiciary in the early days looks quite extraordinary. Without express legislation governing citizenship, it fell to the courts to determine who was or was not a constituent member of the Australian community. The exclusionary device was an apparently colour-blind ‘dictation test’ whereby ‘immigrants’ were required to write out at dictation 50 words in an European language. In ruling on who was or was not an immigrant for these purposes, the courts established the parameters of the White Australia Policy. The early cases confirm that the white, Anglo-Saxon judges generally used self-referential standards in distinguishing between immigrants (who were required to submit to the dictation test) and ‘non-immigrant’ persons who could not be tested as a matter of law. The latter group might be entering Australia without English language skills, after a long absence or even for the first time; yet because of their appearance or heritage they were deemed to be ‘returning home’.1 In her excellent discussion of Re Patterson; Ex parte TaylorT2 Rubenstein traces the contemporary resonances of these historical antecedents. In that case the High Court recognised that long-term British subjects lawfully resident in Australia hold a constitutional immunity from deportation or removal from the country. The case created a new class of non-removable non-citizen, recognising that British nationality until recent times had a status in Australia that was equated with Australian citizenship. Her discussion of Australian ‘subjecthood’ before the enactment of the citizenship laws of 1948 builds on the work of Chesterman and others3 who have demonstrated the inequities of the early laws for those who did not fit the paradigms for membership and participation of (White) Australia.

The central chapters of the book are devoted to the ‘black letter’ of contemporary citizenship law. Chapter 4 contains a wealth of information about both the evolution and current interpretations of the Australian Citizenship Act 1948 (Cth). It is this part of the book which most clearly succeeds the work of Michael Pryles whose text on Australian Citizenship was published in 1981.4 The chapter concludes with reference lists of cases that have been decided on individual sections of this Act.

Rubenstein turns her attention to citizenship as a normative concept in Chapter 5 which is entitled ‘The Legal Consequences of Citizenship’. The most interesting parts of this chapter are at the beginning where the author explores different theories about citizenship, asking basic questions about why notions of citizenship might be useful as a device for bringing communities together and for binding communities in common enterprise. The bulk of this chapter is devoted to what Rubenstein terms the ‘reality’ of citizenship. She examines the benefits and burdens of the legal status by cataloguing all the pieces of legislation that operate to create the rights and obligations attendant upon citizenship in Australia. The author’s research is impressive in its coverage of Commonwealth Acts of

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2 (2001) 75 ALJR 1439.
3 See John Chesterman & Brian Galligan (eds), Citizens Without Rights (1997).
Parliament, although the fluency of the chapter is hampered somewhat by her taxonomical approach. One suggestion may be that the listing of data without critical or analytical comment is done more appropriately through the use of appendices. This treatment of Parliament’s characterisation of citizenship is then balanced with a discussion in Chapter 6 of how the High Court has treated notions of citizenship. Looking at several hundred High Court decisions, she draws out the subtle differences in the way the court uses the term citizen, developing her theme of the varying meanings of the term and the complicated notion of membership with which the High Court has to contend.

The book concludes with a brief chapter on the future of Australian citizenship, incorporating interdisciplinary material about globalization and its impact upon citizenship and drawing together her concerns for a more inclusive approach to Australian citizenship. Rubenstein discusses the continuing uncertainties that flow from the Constitution’s failure to deal expressly with matters pertaining to citizenship. One enduring issue relates to the extent to which the power to legislate with respect to nationalisation and aliens implies a power to revoke as well as grant citizenship, given the ruling in Patterson; Ex parte Taylor. The High Court has indicated recently that the special status afforded British nationals who have spent many years in Australia does not extend automatically to non-citizens of other nationalities. However, the diversity of the rationes in Patterson’s case make it difficult to determine how the High Court will respond to future attempts to deport permanent resident ‘aliens’ who have become fully integrated into the Australian community by virtue of the length and nature of their tenure in the country.

The final chapter also explores the impact of globalization on citizenship, both within Australia and in more general terms. Australia’s response to the pressures of the changing world has been mixed. On the one hand, amendments to the Australian Citizenship Act in 2002 permitted Australians to acquire second or subsequent citizenships without losing their Australian nationality. On the other side of the ledger is the xenophobia and raft of defensive, introspective legislation excited by the ‘Tampa’ affair. The advent of the new millennium also saw the imposition of immigration barriers for New Zealanders wishing to cross the Tasman to live in Australia, effectively removing the quasi-citizen status enjoyed by nationals of Australia’s most culturally aligned neighbour. Rubenstein concludes with a discussion of the challenges to democratic governance posed by the globalised power of multinational business, and the concentration of wealth and power in fewer and fewer states and individuals. She writes:

There needs to be a conscious and active commitment to linking citizenship in the twentieth century global context to substantive political participation of all groups within society.

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5 Re Minister for Immigration and Multicultural Affairs; Ex parte Te [2002] HCA 48; Re Minister for Immigration and Multicultural Affairs; Ex parte Dang [2002] HCA 48.
6 See Australian Citizenship Amendment Act 2002 (Cth), which repealed s17 of the Australian Citizenship Act 1948. The amending Act came into operation on 4 April 2002.
7 See Rubenstein, above n1, 293-4.
She applies her prescription for the future at both national and international levels, demanding the recognition and redress of major societal power imbalances, through measures designed to expand the range and nature of groups allowed to participate in critical decision-making processes. As the world stands on the brink of serious conflict of global proportions, it is heartening to find a young academic who still dares to dream.

This book should become a standard reference text for both practitioners who need to know about citizenship law, and for researchers and others with an interest in policy development or citizenship theory. There is considerable challenge in trying to bring together a discussion of ‘citizenship’ given the wide diversity of meanings that are ascribed to the term, and the variety of disciplines for which the concept has importance. The author has walked the line between theory and practice well. The result is a book that is both instructive and interesting. It is deserving of a wide readership.

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