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RMIT Law Students' Society

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CONTENTS

Welcome

Welcome to the second year of the McPherson Papers. This year the Juris Doctor program at RMIT celebrated our 10th Anniversary. During the past ten years the program has established a reputation for producing well rounded, practically focused graduates, able to compete in the rapidly changing employment market.

From the outset, the program has recognised the value of an active law student's society. It has supported students to organize, celebrate, collaborate, and develop a vibrant student network beyond RMIT. The RMIT Law Students Society hosts an inclusive social calendar, a vibrant and stimuating array of pubications, various career events and an active mooting program. The McPherson Papers is another exciting addition to the expanding array of RMIT LSS resources for students.

The essays presented in this publication showcase the practical skills of RMIT students. The contributiosn also display the intellectual rigour, clear analysis and capacity for inspired communication.

The collection demonstrates the values promoted by the RMIT JD. I congratulate the authors and the RMIT LSS on continuting to lift the bar of jurisprudential debate.

Associate Professor Penelope Weller, JD Director
October 2017

Resolving Hard Cases in Common Law: Judicial Creativity of a Discoverable Truth? Declan Holmes

1 *Introduction*

The common law legal system is predicated on the notion that judges create law, and in deciding cases build a body of precedent that can be relied upon for resolving similar cases in the future. It has been argued, however, that judges do not 'make' law when no precedent already exists. Instead, judges 'uncover' the correct decision through distillation of established principles of law and evaluation of moral standards. In this way, any hard case can be decided either correctly or incorrectly – the right answer being revealed only through the logical efforts of the most Herculean judges.

This paper discusses the topic above with regard to the theories of Ronald Dworkin, who developed the 'interpretive' school of thought; and H.L.A. Hart, a prominent legal positivist. An outline of the common law system is necessary to give context, and different positivist viewpoints of whether judges make law are discussed. This discussion focuses primarily on Dworkin's concept of rules and principles, and on the writings of his opponents, such as Hart. Other ways in which judges make law, and are restricted from making law, are considered. It is the contention of this paper that judges do in fact make law, and that there is no universally 'correct' or 'incorrect' answer to a novel case. However, judges are restricted in their ability to make law, and are not able to do so *ad libitum*.

2 *Modern Common law Perspective*

The common law system is based on judge-made law. When a case comes before the Court, and a decision is made, that decision forms part of the case law that can be referred to when a similar case appeals before the Court in the future.

While the legislature is the primary source of law, judges are often required to interpret ambiguous statutes or apply them to new cases. This case law becomes precedent and is binding on all lower courts in the same jurisdiction. The common law system as been described as a 'living organism',[1] where the body of law is constantly growing and evolving as new cases come before the court that require new lines of reasoning. This is important as it provides consistency and certainty for litigants, where like cases are treated alike and the outcome of the proceeding will be somewhat predictable and fair. The working body of rules also allows the law to keep pace with societal changes while maintaining consistency.[2]

Cases where a judge can mechanically apply precedent are known as 'easy' cases – meaning that the facts are so similar as to not require further research or thought. It is recognized that not all cases will be easy,[3]and the judge cannot apply past decisions to new cases when facts are dissimilar or there is some other distinguishing feature. These cases, where no binding precedent exists, are known as 'hard' cases and will be discussed more thoroughly in following sections. From a purely positivist viewpoint, making a decision in these novel cases depends entirely on how existing law can be applied to it. In common law systems, the judge makes law in novel cases by drawing from similar cases or interpreting legislative provisions. Regardless of the moral correctness of the decision or whether individual rights were preserved, the judge has effectively come to a conclusion that now forms part of the growing body of common law.

3 *Positivist Perspective*

(a) Judges as Lawmakers

The positivist school of jurisprudence is generally founded on the behalf that the law and morality are separate.[4] John Austin advocated this 'separation thesis', and, drawing from the utilitarian teachings of Jeremy Bentham, argued that the law is a social construction without a moral basis, instead being formed on what benefits the greater good.[5] This philosophy was presented in opposition to the then-popular theory of natural law, which asserted that all legal rules were underpinned by a common moral standard. Using empirical methods, the law could be 'posited' rather than discovered. A core principle of Austin's is that the sovereign passes law, and that lawmaking power is distributed to the Court to resolve disputes where statute law is not clear. This makes

[1]Anthony Mason, 'The Judge as Law-maker' (1996) 3 *James Cook University Law Review*, 1, 5.
[2]Michael Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet & Maxwell, 9thed, 2014), 1587.
[3]Ibid, 1551.
[4]Ibid, 210.
[5]Scot J Shapiro, 'The "Hart-Dworkin" Debate: A Short Guide for the Perplexed' (Working Paper No 77, University of Michigan Public Law, 2 February 2007) 16.

judges instrumental in the creation of law: 'I cannot understand how any person…can suppose that society could possibly have gone on if judges had not legislated'.[6] This comment cemented the view that the 'negligence or the incapacity of the avowed legislator'[7]often leaves gaps in the law that needed to be filled by judges.

In contrast to Austin's exclusive positivism, philosophers such as HLA Hart and Joseph Raz opt for a more inclusive approach, where it is recognized that morality is not completely separated from law. So-called 'soft' positivists still agree that the law is not drawn from moral principles, though they acknowledge that morality can coexist with the law. Hart identifies that the wording of legislation can often be ambiguous, or will not always be specific enough to apply to any given situation. For this reason, he argues that judges must use their discretion to resolve disputes where no precedent exists, and may be guided by social standards at the time to determine what is the correct way to decide the case.[8]

Raz agrees with this argument, noting that when no precedent exits for the case at hand, the judge is obliged to identify and apply the most morally correct legal principle.[9] This also applies when there is disagreement on which principle is to be applied; the most morally correct one should be preferred.[10] Keeping in line with positivist views, Raz makes it clear that it is possible to use moral standards as a guide to filling the gaps without directly incorporating morality into the creation of new law.[11]

4 *Validity of Judge-made Law*

The aforementioned positivist authors have asserted that judges are required to make law in hard cases. Are these laws legitimate if they do not follow moral standards? Austin argues that a law is valid as long as it has been enacted by the sovereign, being the accepted body of lawmakers.[12] Provided the courts, as enforcers of the law, have been granted the power to make new law or adapt existing law the laws created by them are valid. Austin explains this as the 'command theory': that laws are commands of the sovereign backed by threats of punishment for disobedience.[13] This created in all people an obligation to follow the law.

Hart, on the other hand, disagrees with the command theory, which he perceives to be an 'outdated' and 'monolithic' model that is incompatible with the modern, empowering system of law.[14] In examining Austin's idea of an obligation, Hart presents the analogy of a gunman demanding valuables. While a person is not obligated to comply with the gunman, they may feel obliged to do so to avoid penalty.[15] In the same way, the community might not feel that the law is morally correct, but will follow it to avoid sanction. Hart argues instead that a law is valid only if it is recognized and accepted by the community.[16] Hart's version of the legal system is made up of a system of primary and secondary rules. Primary rules are those that create obligations by restricting conduct. Secondary rules then exit as a way of regulating the modification of the primary rules when required.[17] For example, the rule of adjudication grants the courts power to resolve disputes by creating law, while the rule of recognition allow the identification of laws that are not valid.[18]

While Hart considers morality to be an important factor in hard cases, he makes it clear that the law is not based on moral rules. He notes that moral values will change based on the time and place, and 'there are no moral legislatures or moral courts'[19] to identify, interpret, and change values. Both inclusive and exclusive positivists agree that a law created by the court is correct, provided that the law is either passed by the sovereign or accepted by society. Both agree that moral principles have no bearing on the legitimacy of common law.

5 *Interpretive Perspective*

Ronald Dworkin's interpretive philosophy of law is presented in direct opposition to positivism. Rather than focusing on how laws are formed, it illustrates the way in which laws are applied to a case. Dworkin asserts

[6]H L Hart, el al, *The Concept of Law* (Oxford University Press, 1961) 132.

[7]Ibid.

[8]Shapiro, above n 5, 16.

[9]Ibid, 21.

[10]Jules L Coleman, 'Negative and Positive Positivism' (1982) 11(1) *The Journal of Legal Studies* 139, 156.

[11]Joseph Raz, *The Authority of Law* (Oxford University Press, 1979) 46.

[12]Ronald M Dworkin, 'The Model of Rules' (1967) 35 *University of Chicago Law Review* 14, 18.

[13]Samuel Enoch Stumpf, 'Austin's theory of the separation of law and morals' (1960) 14 *Vanderbilt Law Review* 117, 121.

[14]Freeman, above n 2, 215.

[15]Robert Summers, 'Professor H.L.A. Hart's Concept of Law' (1963) 12(4) *Duke Law Journal* 629, 634.

[16]Ronald M Dworkin, 'The Model of Rules' (1967) 35 *University of Chicago Law Review* 14, 21.

[17]Ibid, 19.

[18]Summers, above n 15, 634.

[19]Ibid, 649.

that intrinsic legal principles exist and can be discovered. The law as a set of legal rules can then be drawn from interpretation of those principles.

(a) Hard Cases

As explained previously, hard cases are those where no existing rule can be applied to the case before the court. Dworkin argues that in an ideal legal system, a precedent would always be available to apply, but he recognizes that this is not practicable.[20] Statutes are often vague, confusing, ambiguous, or may simply be silent on a particular area. Existing rules may not be able to be stretched or reinterpreted to fit the novel case at hand. If such a hard case arises, the courts will then need to interpret underlying legal principles so they can be applied to the case, thus creating a guide for future cases involving similar circumstances.

A classic example often quoted by Dworkin is the case of *Riggs v Palmer*,[21]a case where a young heir murdered his grandfather in order to secure his inheritance. No case law existed to decide the case, and there was no legal rule to prevent a murderer from claiming the property promised to him in the deceased's will, despite the crime. However, to follow the absence of such a rule would clearly fail in a rights context. Instead, the court drew upon the common law principle that 'no man should benefit from his wrongdoing' and the offender was denied his inheritance. In this hard case, the court had the opportunity to stay silent on the issue and decide the case based on the fact that the absence of a law stayed their hand. However, the court instead recognized that it would be morally correct to draw upon an existing legal principle to decide a case where there was a gap in the law. Dworkin sees this to be a critical example of his philosophy, as it demonstrates the triumph of moral principle over inflexible adherence to precedent.[22]

In comparison, Dworkin criticizes the decision of the court in the case of *Spartan Steel*. [23] The employees of the defendant accidentally cut a power cable that supplied power to the plaintiff, and no rule existed whereby the plaintiff could sue for damage caused to the property of another. The court chose to decide the case on policy grounds instead of drawing on legal principles, a result which Dworkin considers to be incorrect, and indicative of the court being swayed by public policy and undertaking the role of 'deputy legislators'.[24] Dworkin ultimately believes that in any hard case, there is a correct decision that can be reached that is morally correct, based on legal principles, and does not sacrifice rights.

(b) Rules and Principles

Central to the philosophy of Dworkin is the distinction between rules and principles. He defines *principles* as lines of reasoning and legal concepts based on a public standard of morality that exist at the root of any legal system. In comparison, legal rules are directions for conduct that are extracted from the underlying principle.[25]

The essential difference is that principles establish individual rights and offers a particular line of reasoning to be pursued. A principle only becomes a rule when the judge declares it as precedent in the determination of a case. Dworkin describes the law as a 'seamless web', where a correct answer to a hard case is always present – it is a matter of choosing the most correct principle to apply. This generally involves a balance of rights. For example, the issue of abortion is a challenge between the right to life and the right to freedom of choice. Dworkin would argue that there is a correct answer to the debate – a judge need only consider the legal principles that underpin these concepts, weigh them up, and decide which is the more correct decision, morally speaking. He argues that 'in most cases, there are right answers to be hunted by reason'.[26] Principles are balanced by assessing their overall 'weight', selecting the one with the greatest gravity, and shaping it to apply to the facts.[27]

Rules do not have weight attributed to them. They operate in an 'all-or-nothing' fashion.[28] Dworkin argues that if a rule applies to a particular set of facts, and those facts are present, the rule must be accepted. If, however, two rules conflict, then one rule must not be valid.[29] Raz disagrees with Dworkin's idea of principles being always present yet hidden. He argues that principles can be overwritten in the same way rules

[20]Ronald Dworkin, 'Hard Cases' (1975) 88(6) *Harvard Law Review* 1057, 1058.

[21]115 NY 506 (1889).

[22]Ronald Dworkin, 'Hard Cases' (1975) 88(6) *Harvard Law Review* 1057, 1060.

[23]*Spartan Steel & Alloys Ltd v Martin & Co* [1973] 1 QB 27 (*'Spartan Steel'*).

[24]Ronald Dworkin, 'Hard Cases' (1975) 88(6) *Harvard Law Review* 1057, 1087.

[25]Ronald Dworkin, 'The Model Rules' (1967) 35 *University of Chicago Law Review* 14, 29.

[26]Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986) viii-ix.

[27]Shapiro, above n 5, 8.

[28]Ronald M Dworkin, 'The Model of Rules' (1967) 35 *University of Chicago Law Review* 14, 27.

[29]Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978) 24-5.

can, and are subject to change by authoritative bodies.[30] Ultimately, Dworkin argues that it is impossible for judges to create law because it already exists. Law is inferred from moral and legal principles, and rules that align with these principles are stated as law.

(c) Rights as Trumps

Dworkin rejects the concept of utilitarianism – that something is correct if it benefits the greatest number of people. He argues that rights trump all else, and thus hard cases should be dealt with in a rights context. In every hard case, he says, there are fundamental rights that cannot be sacrificed for the benefit of others, and argues that 'if rights are to be taken seriously, they must have a threshold weight against community goals.'[31] *Spartan Steel* was an example of unjust creation of law, according to Dworkin. It is unjust to surrender individual rights for the greater good, effectively punishing one party.[32]

To clarify the concept of rights as trumps, Dworkin introduces the 'ideal' judge. Judge Hercules is 'a lawyer of superhuman skill, learning, patience and acumen',[33] and is responsible in hard cases for examining underlying legal principles to discover the rule that can best be applied to the facts. That rule must be the most morally correct one, and will not sacrifice rights in favour of community goals. A good judge has a duty to find the principle that is closest to the moral truth, and use that as a basis for deciding the hard case. Only then will that rule be legitimate. Whether rights have been balanced is an additional factor to consider when determining if law produced by judges is correct. As Dworkin argues, 'the good judge prefers justice to law'.[34]

(d) Judicial Discretion

One question that arises when considering Dworkin's concept of principles and rules is whether judges can simply ignore the principle and make law based on their own opinion. Once judges have discovered the applicable principle, and have developed a rule to address the hard case, how much discretion do they have? Dworkin recognizes two types of discretion: strong and weak. To clarify what is meant by these terms, an example will be borrowed from Dworkin. He considers a scenario where a sergeant has been directed by his superior to take his 'five best soldiers' out on patrol. The sergeant in this case has 'weak' discretion, as his decision is constrained by the parameters that they be his best soldiers. He cannot pick any five from the platoon, but is limited to a small set that he considers the best. Alternatively, if the sergeant was directed to take 'any five soldiers' on patrol, the sergeant has 'strong' discretion, effectively allowing him unfettered choice from the entire platoon. Dworkin argues that judges do not have strong discretion, as they are bound not only by existing precedent, but also by the principles that underpin the legal system.[35]

Judges have discretion in the weak sense, as they must exercise their judgment based on existing principles, and have a duty to choose the most morally correct option. They are constrained by authority, and must utilize existing rules as a resource with which to make a decision.[36] A judge may also have weak discretion to introduce some of their own personal preference on the matter, or to look beyond the law, although it is important to note that these factors would have far less weight in a hard case than a legal principle. When considering hard cases, Dworkin argues that the court is not creating law but is only discovering existing principles of law. The discretion they have in the actual formation of law is limited to the announcement of a new rule drawn from the principle itself.[37]

6 *When Do Judges Make Law?*

In opposition to Dworkin's theory of the discovery of law, when might judges be said to invent law? If judges do indeed draw legal rules from underlying hidden principles, it is the legal rule that is considered to be the 'law' that generates a legal obligation in the community.[38] And, as Dworkin acknowledges, the judge creates the rule. When creating these rules, there is not necessarily a 'correct' or 'incorrect' answer according to moral principle. If a judge creates a rule that contravenes an existing one, or makes an error in applying the rule to the facts, the acknowledged fallibility of judges ensures that the incorrect law can be reversed in an appellate court. But the law is rarely incorrect just because the judge did not consider moral

[30] Joseph Raz, 'Legal Principles and the Limits of Law' (1972) 81(5) *Yale Law Review* 823, 848.

[31] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978) 44.

[32] Ronald Dworkin, 'Hard Cases' (1975) 88(6) *Harvard Law Review* 1057, 1061.

[33] Ibid, 1083.

[34] Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986) 8.

[35] Ibid, 10.

[36] Ronald M Dworkin, 'The Model of Rules' (1967) 35 *University of Chicago Law Review* 14, 22.

[37] Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986) 6.

[38] Shapiro, above n 5, 8.

ideals. Dworkin acknowledges that a judge has made law even when that law is wrong, as its specific authority continues until is overturned.[39]

While Dworkin objects to judges having quasi-legislative powers, it is recognized that judges often have a law-making role when filling gaps left by statute law.[40] When considering the different legal options available in a hard case, 'a judge must choose and in doing so he makes law.'[41] Legislation is sometimes based on common law rules, but it would be incorrect to say that the rule created by the judge is not law before becoming statute. For example, in the case of *Mabo*,[42] the legal principle of *terra nullius* was extinguished by the High Court. Shortly after, Parliament enacted the *Native Title Act 1993* to reflect this new legal rule. Similarly, in the United Kingdom, the House of Lords overturned an established legal principle and declared that a husband could be found guilty of raping his wife.[43] The High Court of Australia will be sometimes be called to decide the legitimacy of legislation, and can declare it to be unconstitutional. This power demonstrates a judge's ability (albeit in limited circumstances) to create law by overturning statutory rules. While Parliament in Australia is the supreme law-making body, judges do make law. While moral standards can be weighed up to make a decision on a hard case, the correctness of the law is not dependent on any intrinsic moral principle.

7 *Limitations*

Judges can only make law in certain circumstances, and even then can only do so in a limited fashion. They are restricted by jurisdiction, and can only create law when a hard case comes before them.[44] If the facts of the case attract a particular rule to be applied, the judge is bound to apply that rule unless it can be distinguished in some way. They are further bound by the decisions of higher courts, and are subject to the sovereignty of parliament[45]- in most cases they will be unable to disagree with the law set out by statute, and must interpret laws within the lines of legislative intention.[46] Judicial creativity is generally discouraged, and judges are generally expected to develop the law based on existing rules, rather than creating new ones.

Judges in the real world will rarely imitate Dworkin's idea of the Herculean judge, carefully examining moral and legal principles with which to make their decision. The reason for this is that judges are human and, in expressing their humanity, will disagree on what is morally or legally 'correct'.[47] A judge's discretion to make law is limited by certain factors in the common law system, but would rarely be limited by considerations of public policy and principles of moral correctness.

8 *Conclusion*

Judges make law in hard cases, though their discretion to do so is limited. Moral guidelines can be used to a conclusion about how the case can best be decided, but cannot be relied upon as discoverable universal standard. In easy cases, judges are able to rely on precedent to provide a consistent and clear resolution. Inclusive positivist scholars argue that judges make law in hard cases, and can rely on community standards of morality where no precedent exists to ensure the outcome is fair. The interpretive perspective opposes positivism, and contends that judges do not 'create', but 'discover' law. By studying the legal and moral principles that are intrinsic to our society, judges can extricate rules to be applied to the hard case before them. When no case law can be relied upon, and multiple principles suggest alternative avenues for resolution, they will be expected to apply the most morally correct one – typically the one which defends the rights of all parties.

However, judges are also seen to create law in many ways that are not representative of a Herculean labour of reason and logic. When deciding hard cases, interpreting statute, or even when making a mistake, judges make law. The existence of fundamental principles that can be discovered is made useless in the creation of law, simply for the fact that principles of moral and legal correctness are often very subjective. Moral values can change over time, and legal principles can be overturned with a stroke of the drafter's pen. The observer might pronounce a particular ruling to be correct or incorrect depending on their perspective, but judge-made law is still law.

[39]Ronald Dworkin, 'Hard Cases' (1975) 88(6) *Harvard Law Review* 1057, 110.

[40]Freeman, above n 2, 595.

[41]Ibid, 1552.

[42]*Mabo v Queensland (No.2)* (1992) 175 CLR 1.

[43]*R v R* (1992) 94 Cr App R 216.

[44]Mason, above n 1, 7.

[45]Ibid 9-10.

[46]Freeman, above n 2, 611.

[47]Ronald Dworkin, 'Hard Cases' (1975) 88(6) *Harvard Law Review* 1057, 1108.

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Blockchain Reactions ***Elise Steegstra***

1 *Executive Summary*

By considering the principles that form the basis of contract law, and assessing how these might be interpreted in relation to a blockchain smart contract, this essay looks at some issues relating to blockchain smart contracts and the jurisdiction of the courts when issues arise from those contracts.

Firstly, this essay looks at what a blockchain is and how it is used in contracting. Further, using the example from The DAO hard fork, this essay discusses how and when a blockchain may be undone. Next, we look at contract law principles relating to formation of a contract. Again, we explore how these may relate to a blockchain, and whether a contract "signed" with a private key would be acceptable under international law as a validly signed contract. Then the essay examines the jurisdiction of the courts of Australia, both under their own laws, and under international laws and conventions. Whether the courts in Australia would be able to exercise sufficient jurisdiction to order the reversal of a blockchain remains a key issue when considering vitiating factors in contract law. Finally, some solutions and work arounds are offered for governments, businesses and individuals looking to contract with a blockchain, when consideration is given to the above issues as discussed.

2 *Introduction*

As a distributed ledger system for smart contract verification, a blockchain can lower costs and formalities related to transactions.[1] This is because the independent verification system across the various blockchain platforms reduces the need for third parties like lawyers and banks to be part of the transaction.[2] The concept is that blockchain technology democratises transactions, making them cheap, quicker and more transparent;'…on the blockchain, trust is established, not by powerful intermediaries like banks, governments and technology companies, but through mass collaboration and clever code.'[3]The ease with which a blockchain transaction can be completed is part of the attraction of such technologies.

However, issues around blockchain technology will inevitably arise when a smart contract transaction goes wrong. Firstly, there are ideological issues relating to whether the contract has been properly formed and whether it can be properly avoided if necessary - given the indelible nature of the blocks in the chains. Taking a line of code into a court room or arbitral process and hoping that the decision maker can not only identify the issue but also has the power to enforce such a contract is currently a vexed problem. Some lawyers have recommended a dual process of a paper contract which is then translated into or 'wrapped around' a blockchain contract for execution purposes.[4] This duality would allow for a contract to be presented in court and adjudicated upon, however it reduces the attractions of the cost effectiveness and ease of blockchain transactions. Double handling in this fashion also increases the risk of mistranslation, gaps or issues related to versioning. While this is a useful function for dispute resolution or for contracts of significant value, it is not a viable solution for a majority of smaller transactions, and would greatly reduce the viability of blockchain platforms as a contracting alternative.

Further the issue of jurisdiction is significant. As most blockchain platforms are decentralised and are not recognised legal entities,[5] the courts may not be able to ensure their power to reverse a fraudulent or incorrect transaction. The court may be found to not have jurisdiction over a transaction, if *lex loci* is found to be a foreign country or perhaps, no country at all. The courts may have difficulty identifying parties, across borders, across networks, and where parties purposely anonymous. Judges may have to rely on international treaties and domestic laws to clarify the enforcement of

[1]Christian Catalini, and Joshua SGans, 'Some Simple Economics of the Blockchain'(2016)*Social Science Research Network*, <ssrn.2874598>.
[2] Marco Iansiti, and Karim R Lakhani, 'The Truth About Blockchain,' (2017) 1 *Harvard Business Review* 118–127.
[3]Don Tapscott and Alex Tapscott, 'The Impact of the Blockchain Goes Beyond Financial Services', (2016) 5*Harvard Business Review*.
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[5]AllensLinklaters, 'Blockchain Reaction - Understanding the opportunities and navigating the legal frameworks of distributed ledger technology and blockchain' (Allens, 2016), 15.

the powers of the court. Some of these issues will be discussed in this paper, but no certain answers will be available until these concepts are tested in a court of law. The area of technology is advancing at such a rapid pace that the law often has a difficult time catching up, and must apply traditional concepts to vastly different scenarios than those first imagined.

3 *Background- What is Blockchain?*

A blockchain is a ledger of records or 'blocks', which are contained in a database which is distributed across a wide number of nodes.[6]Blocks are essentially unable to be modified; once the data has been recorded and verified, then the block is made which contains this validated data.[7]The blocks are linked to the previous block and contain timestamp information. Blockchains are 'an open, distributed ledger that can record transactions between two parties efficiently and in a verifiable and permanent way. The ledger itself can also be programmed to trigger transactions automatically.'[8] The ease, automation and speed of the blockchain make it an attractive proposition for businesses and individuals.

As the database is distributed widely, it is difficult to hack or disable. Attacking any one node will not affect the details contained in the blocks, because any change to a block is verified across the nodes and only made when there is a consensus across a majority of the nodes.[9]To initiate a change in the block, each user has their own private key. Other nodes then verify that against the public key and if the transaction is verified, then the record is added to the block. On a traditional network, taking out one node can bring down the whole network, whereas the blockchain has the same information replicated and stored across many nodes. Further, as the nodes are distributed widely, there is no central point at which the block is controlled. The decentralised nature of the blockchain adds to its stability and security, but also means that no single entity is able to control or modify the blockchain.

Bitcoin is one example of a cryptocurrency which uses blockchain technology to allow each 'bit' to only be spent once. Ethereum is another blockchain platform that incorporates smart contracts and other applications as well as a separate cryptocurrency in the form of Ether (ETH). These platforms allow for many users to establish nodes and thereby become 'miners', or be compensated for providing a node on the chain platform. The Ethereum organisation maintains that the facility for anyone to become involved increases the privacy of users and encourages the decentralisation of the internet, 'like the Internet was supposed to work.'[10]Ethereum claim that as the platform is decentralised and allows applications to run exactly as programmed, the applications operate 'without any chance of fraud, censorship, or third-party influence.'[11] However, as discussed below in the section, 'Case Study: Undoing the Blockchain', this security is by no means a certainty.

However, the general web community seems excited by the possibilities of blockchain technology and what it means for the future of contracting. Business writers, technology writers, lawyers and many others have written a number of blogs, think pieces, articles and journals about blockchain. For example in *Harvard Business Review*, Marco Iansiti and Karim Lakhani write that, 'With blockchain, we can imagine a world in which contracts are embedded in digital code and stored in transparent, shared databases, where they are protected from deletion, tampering, and revision.'[12]The security and validation offered by a blockchain, and the transparency of process are exciting opportunities. Iansiti and Lahhani continue, 'Individuals, organizations, machines, and algorithms would freely transact and interact with one another with little friction. This is the immense potential of blockchain.'[13] The future for blockchain technology seems bright and rapidly growing.

(a) Case Study: Undoing the Blockchain – The DAO hard fork

An example of how a Blockchain can be undone comes from the Ethereum/The DAO hard fork completed in July 2016. The DAO was a decentralised autonomous organisation[14] which provides venture capital funding to projects via a decentralised system of voting by investors

[6]Morgen Peck, 'The Future of the Web Looks a Lot Like Bitcoin,' *IEEE Spectrum* (1 July 2015) <http://spectrum.ieee.org/computing/networks/the-future-of-the-web-looks-a-lot-like-bitcoin>

[7] A Khan, 'Bitcoin - payment method or fraud prevention tool?'(2015) *Computer Fraud Security*5,16–19; Peck,'The Future of the Web Looks a Lot Like Bitcoin,'above n6.

[8]Marco Iansiti, and Karim R Lakhani, 'The Truth About Blockchain,' (2017) 1 *Harvard Business Review* 118–127.

[9]Siraj Raval, *Decentralized Applications: Harnessing Bitcoin's Blockchain Technology*,(O'Reilly Media, 2016) 1- 2.

[10]www.ethereum.org.

[11] Ibid.

[12]Marco Iansiti, and Karim R Lakhani, 'The Truth About Blockchain,' (2017) 1 *Harvard Business Review* 118–127.

[13] Ibid.

[14]There are a number of different decentralized autonomous organisations (DAO). The DAO is the name of the organization involved in this particular transaction.

or miners.[15] Each investor votes with their tokens which represent their investment in ETH (Ethereum virtual currency).
In June 2016, The DAO was hacked and by exploiting a vulnerability in the code, the hackers were able to transfer one third of The DAO funds to a separate child DAO.[16] The Ethereum community was given the option of rolling back the code, essentially reversing the transaction and creating a 'hard fork'; negotiating with the hackers or just allowing the hackers to keep the stolen funds.[17] Ultimately the Ethereum community decided to 'hardfork' the Blockchain and restore the funds, which occurred on 20 July, 2016.[18] However, this decision was not without controversy; as some miners opted to retain the unforked blockchain as 'Ethereum Classic' and the others moved to the new blockchain where the transactions had been undone. This essentially split Ethereum into two separate incompatible platforms and cryptocurrencies.[19]

Although the 'hard fork' was able to roll back the Ethereum code, it was not able to restore the total amount of the missing funds, only a majority. Each miner on the chain therefore suffered a loss related to the hack. It was the first time that a major blockchain platform reversed a transaction without a valid private key, and the reversal was based on the consensus decision of all miners on the platform.[20] This reliance on consensus allowed for miners to opt in or out of the forked version of Ethereum. It means that a blockchain can be reversed, however the incomplete fashion of reversal may not satisfy a court in relation to voiding a contract or similar order.

In the case of fraud or other vitiating factors, would a court decision ordering a rollback of a blockchain allow for a similar splitting of the platform, or would all miners be obliged to obey the court's directions? As blockchain contracts occur in platforms held by decentralised organisations, like The DAO, how would a court enforce its decision in the platform, given that a majority of the nodes would not be parties to the contract; possibly not even held in the jurisdiction of the court; and possibly not identifiable to the court in any event? These are questions that require further discussion.

4 *Discussion - Contract Formation*

Can a blockchain 'smart contract' be considered to be a properly formed contract? In a traditional sense, a blockchain contract would have an offer and acceptance, consideration and, for the transaction to be completed, it must have certainty for the algorithms to function.[21] However, when considering formalities and similar considerations, arguments may be made that a 'smart contract' does not meet the requisite standard. However, these considerations are mostly addressed by international conventions dealing with electronic commerce. For example, the United Nations has several different conventions dealing with electronic contracts, including the *Model Law on Electronic Commerce*,[22]and the *Convention on the Use of Electronic Communications in International Contracts*.[23]

While much work has gone into determining how and when traditional contracting requirements can be translated into electronic contracts, how the courts interpret these in line with common law contract principles remains to each court in each jurisdiction.The purpose of the Model Law was to remove obstacles to electronic commerce and ensure the validity of electronic transactions,[24] not to determine the underlying contractual principles in play, and to encourage signatories to enact such legislation that would assist in that endeavour. It was considered that the industries which would receive the most benefit from electronic communications were the transport and freight industries, and as such, 'a legal framework facilitating the use of such communications was most urgently

[15] Shannon Finch, et al, '10 things you need to know about decentralised autonomous organisations' on King Wood Mallesons, *KWM Insights* (16 August 2016) <http://www.kwm.com/en/au/knowledge/insights/10-things-decentralised-autonomous-organisations-dao-20160816>
[16]Peter Vessenes, 'Deconstructing the DAO Attack: A Brief Code Tour', on www.vessenes.com, (18 July 2016) < http://vessenes.com/deconstructing-thedao-attack-a-brief-code-tour/>.
[17]Vitalik Buterin, 'CRITICAL UPDATE Re: DAO vulnerability' on Ethereum Organisation, *Ethereum Blog* (17 June 2016) <https://blog.ethereum.org/2016/06/17/critical-update-re-dao-vulnerability/>
[18]Vitalik Buterin, 'Hard Fork Completed' on Ethereum Organisation, *Ethereum Blog* (20 July 2016) <https://blog.ethereum.org/2016/07/20/hard-fork-completed/>
[19] Michael del Castillo, 'Alternative Ethereum Blockchain Gains Support as Price Declines,' *CoinDesk* (25 July 2016) <http://www.coindesk.com/ethereum-classic-price-services-alterative-blockchain/>; Pete Rizzo, 'Ethereum Hard Fork Creates Competing Currencies as Support for Ethereum Classic Rises,' *CoinDesk* (24 July 2016) <Ethereum Hard Fork Creates Competing Currencies as Support for Ethereum Classic Rises>
[20] Morgen Peck, '"Hard Fork" Coming to Restore Ethereum Funds to Investors of Hacked DAO,' *IEEE Spectrum* (19 July 2016) <http://spectrum.ieee.org/tech-talk/computing/networks/hacked-blockchain-fund-the-dao-chooses-a-hard-fork-to-redistribute-funds>
[21]Jeannie Paterson, Andrew Robertson and Arlen Duke, *Principles of Contract Law*, (Thomson Reuters, 2012) Chapter 1.
[22]*UNCITRAL Model Law on Electronic Commerce* (1996) ('the Model Law').
[23]*United Nations Convention on the Use of Electronic Communications in International Contracts* (2007) ('the Convention').
[24]UNCITRAL Secretariat, *Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce* (1996).

needed.'[25] This concept is still relevant today, in that the first blockchain contract executed by a major Australian business was a shipping contract for the sale of cotton from Texas to China.[26] Both the Model Law and the Convention deal with the issues relating to functional forms of traditional contracts, and work with the *United Nations Convention on Contracts for the International Sale of Goods*[27] to provide a uniform set of principles governing contracts of that nature.

While the Convention was established 'to facilitate electronic transactions between parties located in different countries,'[28] through enactment in domestic legislation, many of the same principles from the Convention apply to domestic contracts. It appears that the common law rules of offer and acceptance can be applied to electronic transactions in the same way they can be applied to other forms of communication.[29] However, in the Convention and related domestic laws, there are provisions dealing with general offers made through electronic means being treated as invitations to treat, 'rather than an offer whose acceptance binds the offering party, in line with the corresponding provision of the CISG (Art. 11),'[30]remedies for input errors and facility for contracts to be formed without intervention from a natural person. In Australia, a contract formed between a natural person and an automated system, or between two automated systems, is not invalid merely on the grounds that a natural person was not involved in the process.[31]

Further, the Convention recognises that the legal requirements of contracting that prescribe traditional paper-based documentation, like a signed contract containing all the terms and conditions to be incorporated in the contract, are a difficulty when considering electronic contracts; 'An electronic communication, in and of itself, cannot be regarded as an equivalent of a paper document because it is of a different nature and does not necessarily perform all conceivable functions of a paper document.'[32] A paper document is readable by the human eye; an electronic contract may only be machine readable or need to be translated into a comprehensible form. Similarly, a blockchain contract may be a series of lines of code, which requires some degree of coding literacy to interpret. The Convention addresses form and formalities about contracting 'by way of an extension of the scope of notions such as "writing", "signature" and "original", with a view to encompassing computer-based techniques.'[33] For an example of how this provision has been interpreted, see the case study below from the English High Court.

(a) Case Study: Electronic Signatures - WS Tankship II BV v. The Kwangju Bank Ltd. and another [2011] EWHC 3103

This case was a contractual dispute over a refund guarantee between the buyers of a ship and Korean banks. The English High Court had to consider whether an electronic letter of guarantee complied with the *Statue of Frauds*[34] which required guarantees to be signed to have effect. The disputed guarantee was issued by the seller's bank to the buyer's bank via the SWIFT message system, which is a secure messaging service used by financial institutions. The guarantee had been transmitted via the SWIFT system, however the text of the guarantee did not contain the name of the institution. It was on this basis that the seller's bank argued that the guarantee was not signed.

When considering the matter, the Court stated that authentication via SWIFT message was equivalent to a signature, and therefore the guarantee was 'within the spirit, if not the letter of … the Statute of Frauds.'[35]The secure SWIFT messaging system was taken as sufficient authentication in place of actual text to that effect, as the recipient would know who the message was from, and the act of sending had caused the respondent's name to

[25]UNCITRAL Secretariat, *Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce* (1996), 58.
[26] Chris Pash, 'The Commonwealth Bank just used blockchain in a 'world first' global transaction', 'The Commonwealth Bank just used blockchain in a 'world first' global transaction', *Business Insider*, (24 October 2016).
[27]*United Nations Convention on Contracts for the International Sale of Goods (1980).*
[28] Jeannie Paterson, Andrew Robertson and Arlen Duke, *Principles of Contract Law*, (Thomson Reuters, 2012) 64.
[29]Donald Nolan, 'Offer and Acceptance in the Electronic Age' in A.S. Burrows and Edwin Peel (eds), *Contract Formation and Parties* (Oxford University, 2010), 61-87.
[30]UNCITRAL Secretariat, *Explanatory note on the United Nations Convention on the Use of Electronic Communications in International Contracts*, 2007, §50, 27.
[31]*Electronic Transactions Act* 1999 (Cth), s15C; *Electronic Transactions Act* 2000 (NSW) s14C; *Electronic Transactions Act (Northern Territory)* 2000 (NT) s14C; *Electronic Transactions (Queensland) Act* 2001(QLD) s26C;*Electronic Transaction Act* 2000 (SA) s14C; *Electronic Transaction Act* 2000 (Tas) s12C; *Electronic Transaction Act* 2000 (Vic) s 14C; *Electronic Transactions Act* 2011 (WA) s19.
[32]UNCITRAL Secretariat, *Explanatory note on the United Nations Convention on the Use of Electronic Communications in International Contracts*, 2007, §50, 27.
[33]UNCITRAL Secretariat, *Explanatory note on the United Nations Convention on the Use of Electronic Communications in International Contracts*, 2007, 27.
[34]*Statute of Frauds1677* (UK)
[35]*WS Tankship II BV v. The Kwangju Bank Ltd. and another* [2011] EWHC 3103 [154].

be inserted in the document header. This decision demonstrates the application of functional equivalence between digital and handwritten signatures, which underlies the UNCITRAL texts on electronic commerce. It is likely then that a court in a signatory jurisdiction relying on these principles would accept a blockchain private key as authentication in a similar vein. Further, the Convention, and related national laws where adopted, allow for contracts to be made without actual people. Therefore an offer made through an algorithm and accepted by another algorithm could be considered as a genuine contract.

5 *Jurisdiction*

In traditional contract law, a contract may be reversed or be deemed to be *void ab initio*, non-existent from the start, in certain circumstances like fraud or mistake.[36] The courts have the power to make such orders as would carry out such a ruling. In a blockchain contract, there is no facility for this to occur as the blockchain contains an indelible record of the contract. Even for a simple goods for money transfer contract, the record in the blockchain remains, and remains unamendable. Although a blockchain can be rolled back or 'forked'[37] to a prior version, such an action may reverse all the transactions that took place during that period, not just the individual contract that is in question. It may also be difficult to get sufficient consensus across the nodes to allow for a reversal. Instead, a new block could be added to the chain to nullify the effect of a fraudulent or incorrect transaction, but the record would still remain.[38] Such an order would only satisfy where substantive restoration was made, and may not be possible if complete restoration was required depending on the type of property involved. In the case of fraud or other vitiating factors, would a court decision ordering a rollback of a blockchain force all miners to obey the court's directions, or would there be facility to allow for a 'forking' of the platform?'We give courts the power to order that, if something is wrong, it should be undone.'[39] But in the case of decentralised blockchain platforms, and unknown contracting parties, such orders may be impossible. 'There is also the fundamental question of how we can safeguard fairness and due process within such decentralised networks irrespective of state control.'[40]As blockchain contracts occur in platforms held by decentralised organisations, like The DAO, how would a court enforce its decision in the platform, given that a majority of the nodes would not be parties to the contract; possibly not even held in the jurisdiction of the court; and possibly not identifiable to the court in any event?

Governments have been considering the difficulties of online transactions and cross-border transactions, almost since the inception of the internet. Jurisdictional issues are nothing new. However, when considering that contracts may be entered into and completed without any human oversight, legislative safeguards in place for the protection of contracting parties may be excluded or unable to operate in these spaces. A sales contract occurring in Australia via a blockchain platform is still a sales contract and ought to be covered by protections in the *Australian Consumer Law*.[41] If the court has little understanding of the nature of the contract, and no ability to reverse the contract, the consumer's rights may be at risk.

The classic statement on jurisdiction, although not limited to contractual obligations, comes from the American Law Institute's *Restatement (Second) of Conflict of Laws* (1971)§37, which states 'A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable.'[42] Under this conception, a court has jurisdiction unless the exercise of such a jurisdiction is unreasonable; minimal effects, or a far distant relationship to the state claiming jurisdiction. The High Court of Australia has ruled, in 1955, that, '(T)he function of a court in which proceedings for rescission are taken is to adjudicate upon the validity of a disaffirmance as an act avoiding the transaction ab initio, and, if it is valid, to give effect to it and make appropriate consequential orders…'[43] The court is to determine whether rescission or voiding was appropriate and make

[36]Jeannie Paterson, Andrew Robertson and Arlen Duke, *Principles of Contract Law*, (Thomson Reuters, 2012) 754.
[37]See section above on Case Study: Undoing the Blockchain.
[38]This would be similar to the *United States Constitution*, where no amendments are removed, they just contain later amendments that nullify the effects, e.g. amend XXVIII, banning the sale of liquor, and amend XXI, repealing amend XXVIII.
[39]Hamish Fraser, 'Blockchain - enforcement issues?', *Birdbuzz*, 16 October 2016, <http://www.lexology.com/library/detail.aspx?g=1617ed66-f14b-45d5-b527-906594040194>
[40]Riikka Koulu, "Blockchains and Online Dispute Resolution: Smart Contracts as an Alternative to Enforcement," (2016) 13:1 SCRIPTed 40 [69].
[41]*Competition And Consumer Act* 2010 (Cth)Schedule 2, The Australian Consumer Law.
[42]American Law Institute, *Restatement (Second) of Conflict of Laws* (1971) §37.
[43]*Alati v Kruger* (1955) 94 CLR 216, 222.

orders to that effect. This would only be effective if 'the court through its powers can order that which the party was unable by his own powers to effect.'[44] Again, the courts have the jurisdiction unless they are too remote from the parties. The incomplete nature of a blockchain reversal means that only substantial and not complete restoration is possible.

The issue of mistake may be addressed by the Commonwealth and related state Electronic Transaction Acts, which provides relief where 'a natural person makes an "input error" in the course of a transaction with an automated system.'[45] Where a system provides no opportunity to correct an input error the person making the error is entitled to 'withdraw the portion of the communication in which the input error was made,'[46] provided they do so as soon as possible after learning of the error and so long as they have received no material benefit from goods or services. This is not a legislative provision to withdraw from the contract entirely, however in some circumstances this will be the result. For example, booking an aeroplane ticket for the wrong date and then correcting it, by its very nature affects substantive content in the contract. To allow for these and similar provisions, there may have to be introduced a period of re-verification for a blockchain contract, given the much shorter execution times that are offered by blockchain technology.

6 *Conclusion*

Despite the issues that have just been discussed, it is likely that blockchain technology will continue to flourish and be the subject of investigation to see how best to implement the technology. The benefits of speed, security and certainty are too great for businesses to walk away from these type of platforms. Companies, government and individuals need to be prepared for the future of contracting, which will no doubt include blockchain transactions. Corporations and individuals are seeking ways to lower costs and reduce processing times, and blockchain smart contracts offer this in some senses, 'Just as e-mail enabled bilateral messaging, bitcoin enables bilateral financial transactions.'[47] The ease of doing person-to-person business via a blockchain is greatly increased, particularly as more people become comfortable with the technology, and more businesses facilitate the use of such platforms.

It is likely that courts will hold blockchains as legitimate contracts, especially when considering the ramifications against such a finding. However, courts will need to consider all the relevant factors, and when looking at issues of vitiating factors to a contract, determine the best approach for using the blockchain technology to restore void contracts if necessary. Forcing a party to make a new transaction with their private key that effectively reverses the effects of the fraudulent transaction may be one option. Forcing an entire platform to reverse a blockchain seems less likely.

Governments must consider the needs of business and citizens and look at drafting legislation that is broad enough for future needs. As discussed with the UN Model Rules and the Convention, although these instruments were drafted some years ago, they are still applicable considering the new technologies that have developed in the intervening years. Government need to be nimble enough to identify new technologies that are going to be real industry disruptors, but also foresighted enough to allow for wider interpretations in their legislation drafting, without undermining the entire legislative instrument. A greater emphasis may need to be placed on assisting consumers to consider their rights and options when faced with electronic contracting.

For companies who wish to use blockchain smart contracts, it would be sensible to join a private network of nodes, rather than a public distributed ledger, in the interim until the legislative, jurisdictional and legal challenges have been address. Such a private network would entail a greater level of control over the blockchain, and allow for arbitration and court proceedings to be enforced with the private network.

Blockchain technology is an exciting development in the area of contract law but care must be taken to ensure that the ramifications of an irreversible technology are considered, particularly by the courts and legislators who have to protect business and consumer rights, and ensure that the courts have the power to undo something if it is wrong.

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[44] *Kramer v McMahon* [1970] 1 NSWR 194, 207.

[45] *Electronic Transactions Act* 1999 (Cth), s15D; *Electronic Transactions Act* 2000 (NSW) s14D; *Electronic Transactions Act (Northern Territory)* 2000 (NT) s14D; *Electronic Transactions (Queensland) Act* 2001 (QLD) s26D; *Electronic Transaction Act* 2000 (SA) s14D; *Electronic Transaction Act* 2000 (Tas) s12D; *Electronic Transaction Act* 2000 (Vic) s 14D; *Electronic Transactions Act* 2011 (WA) s20.

[46] Ibid.

[47] Marco Iansiti, and Karim R Lakhani, 'The Truth About Blockchain,' (2017) 1 *Harvard Business Review* 118–127.

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Consent ***Lauren Grixti***

The Law in Victoria is unclear as to when consent can be a defence to assault charges, resulting in inconsistent outcomes. Consent should always be a defence to assault.

1 *Introduction*

There are currently no clear laws in Victoria with regards to the defence of 'consent' where a person is charged with assault. This has led to varying rulings when such cases arise.

This essay will argue that consent should not always be considered a defence for assault. It critically discusses the reasons behind this assertion with reference to a range of cases where consent is considered, as well as current legislation and law reform, and analyses the arguments that may be made regarding the opposing view that consent should always be a defence. The analysis will mainly focus on consent raised as a defence to serious injury caused during sexual activity involving bondage and sadomasochism, as well as bodily harm caused during sporting activities and surgical procedures. It will also discuss the wider societal implications that may occur if such a defence were allowed in all cases of 'consensual assault'.

2 *Consent as a Defence to Assault*

There are a number of arguments as to whether or not consent should always be a valid defence to the charge of assault. One such argument that may be made in favour of consent as a defence is that of personal agency. It could be said that a person should be able to engage in activities that may cause them injury without fear of the law becoming involved if they have freely consented. It may also be reasoned that while there are many 'consensual' activities which result in some degree of serious injury to the 'victim', only some of these may be considered unlawful. For example, physical injury occurs during elective medical procedures, cosmetic surgery and body modification procedures such as tattooing and piercing, however, when the person has consented and the procedure is done by a qualified professional, the bodily injury caused is not considered unlawful.[1] On the other hand, there are occasions where serious bodily harm has occurred during other consensual lawful activities, such as sports games and sexual encounters. It is on these occasions that the legality of the actions and the validity of the victim's 'consent' as a defence has been questioned.

There have been many cases, both in Victoria and elsewhere, where consent has been argued as a defence to assault. While some of these cases involve injuries caused while participating in sports or other physical activities, the majority are in relation to sexual activities, most often involving bondage and sadomasochism. There are some similarities between cases of sports-related injuries and injuries as a result of consensual sexual violence. However, there are also many differences between them, most significantly the different implications for society as a whole. Many of the cases discussed consider the differences between 'consent' to injury caused while participating in a sporting game and 'consent' during sex where bondage is involved.

This will be discussed in greater depth below.

3 *Consent to Sadomasochism*

A prominent case which considers consent as defence to assault in depth is the UK case of *R v Brown* [1994] 1 AC 212 (*R v Brown*). This case involved consensual bondage and sadomasochism between a group of homosexual men. It was held that the consent of the 'victims' was not valid due to the violent nature of the acts. In the decision, much consideration was given to the possible social implications (as opposed to only focusing on the impact on individuals) if consent to certain violent acts was a defence when serious injury is caused, specifically violence within sexual activity. Lord Templeman stated that 'society is entitled and bound to protect itself against a cult of violence, including consensual violence'.[2] He also acknowledged that there are other situations where people are free to participate in dangerous actions that may cause injury, such as sports. However, in this case there was a distinction made between engaging in an activity where bodily injury may occur as a consequence, and specifically inflicting physical harm on another for the sole purpose of sexual gratification. It was determined that the infliction of serious bodily harm for sexual gratification should always be considered

[1] Thalia Anthony et al, *Waller & Williams Criminal Law Text and Cases* (LexisNexis Butterworths) 12th ed, 2013) 101-103.

[2] Ibid.

unlawful, regardless of whether or not the victim has consented.[3] Justice Hawking indicated that, while an individual may consent to violent acts being done against them, this should not mean that they are above the law, stating that ' it is not in the power of any man to give an effectual consent to that which amounts to, or has a direct tendency to create, a breach of the peace'.[4]

In Victoria, the law applied in *R v Brown,*[5] is generally accepted as being correct.[6]In the Victorian case of *R v Stein* [2007] VSCA 300, the court held that the consent of the victim, who had agreed to being bound and gagged by the defendant and his girlfriend as part of bondage sex, was not valid when compared to the level of risk involved, and that it therefore could not be used as a defence to the charges.[7]

Justice Kellam indicated that while the acts that the accused and the deceased were participating in were not themselves unlawful, the risk of serious injury was reasonably foreseeable and, as in *R v Brown*, consent cannot be valid when such a risk of bodily harm exists.[8] It was ruled that there was no real evidence to suggest that the victim had actually consented to the acts. Additionally, it was noted that while the victim consented to being gagged, he presumably did not agree to being left gagged while he was clearly in distress.[9] Recent changes to the definition of 'consent' in the *Crimes Act 1958* (Vic) mean that for consent to exist, both parties must have freely agreed to the acts that they are participating in, and that there must be a reasonable belief by the accused that the victim was consenting.[10] Under section 37G (1), the belief must also be reasonable under the circumstances.[11]

Similarly, in the case of *R v McIntosh* [1999] VSC 358 (*R v McIntosh*), it was determined that even if it can be proven that the victim consented to certain acts, this does not mean that they consented to other acts that may follow.[12] Justice Vincent considered that it could be reasonably inferred that the deceased in this case, who had a rope tied around his neck during bondage sex, 'did not agree to be strangled with the application of sufficient force' as to cause the injuries that were severe enough to be fatal.[13] While the victim may have consented to being strangled by the accused for the purpose of sexual excitement, he may not have 'contemplated that force of such severity' would be used during the session. The victim may have consented to participate in the activity without consideration for the injuries that could be sustained as a result, and may not have consented had he been more aware of the level of risk involved. If this is the case, is should be questioned whether his consent can be considered to have been 'freely given'. Another issue to consider when the victim's consent is in question is that consent may be given under duress, in which case it is not 'freely given'.

The nature of the acts and the extent of the injuries caused to the victim should also be taken into consideration if consent is used as a defence. If the bodily harm caused is severe, it should not be enough that the victim consented. In *R v Emmett* (EWCA, 18 June 1999, unreported) (*R v Emmett*), the victim was, on two separate occasions, at risk of death or serious bodily harm due to the nature of the acts and the physical injury sustained.[14] These injuries were also a result of consensual sadomasochism. As in the case of *R v Brown*, the court in this case ruled that the victim's consent could not be a defence to the acts due to the severe nature of the injuries caused.[15]

It may be argued that these rulings place restrictions on the personal lives of individuals, and that the law should not be able to interfere with the private activities of consenting adult individuals. Some have criticised the decision in *R v Brown*. Dennis J. Baker, in his article *Rethinking Consensual Harm Doing*, draws comparisons between a person choosing to cause harm to themselves by engaging in sadomasochism and a person risking bodily harm by smoking or participating in dangerous sports.[16] Baker acknowledges the argument that overriding the consent given by the victim invalidates their 'personal autonomy', however he also makes note of the fact that the decision in *Brown* also aims to prevent physical harm from being done to others.[17]

[3]Ibid.
[4]Ibid.
[5]*R v Brown* [1994] 1 AC 212.
[6]Anthony et al, above n 1, 97.
[7]*R v Stein* [2007] VSCA 300.
[8]Ibid.
[9]Anthony et al, above n 1, 97.
[10]*Crimes Act 1958* (Vic).
[11]*Crimes Act 1958* (Vic).
[12]*R v McIntosh* [1999] VSC 358
[13]Ibid, 18.
[14]*R v Emmett* (EWCA, 18 June 1999, unreported).
[15]Ibid.
[16]Dennis J Baker, 'Rethinking Consensual Harm Doing' (2008) 12 *University of Western Sydney Law Review* 21.
[17]Ibid.

Despite concerns that laws will be able to infringe on the personal lives of individuals if consent in certain circumstances is invalid, there is legislation which prevents such interference. Section 4(1) of the *Human Rights (Sexual Conduct) Act 1994* (Cth) specifies that 'sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of article 17 of the International Covenant on Civil and Political Rights'.[18] However, this section states that the law may not interfere with the private sexual conduct of consenting adults. When actual bodily harm is caused as a result of that conduct, regardless of whether or not there was consent, the law should be able to become involved.

4 *Consent to Bodily Harm During Sport and Medical Procedures*

Consent has also been raised as an issue in cases where serious bodily harm has occurred during sporting activities. An injury caused during a sports activity is not unlawful when it is not against the rules of the game.[19] If all the players involved have freely consented to participate, and are aware of potential harm that may occur within the rules of the game, then the assault is not unlawful. This was established in the case of *Pallante v Stadiums Pty Ltd* (No 1) [1976] VR 331.[20]

Unlike cases of injury during sadomasochistic activities, where 'consent' may be used to cover abuse and is not always evident, consent to injury during a sport is somewhat easier to prove. It is assumed that participants are aware that some sort of injury is likely depending on the nature of the sport, and if the injury occurs within the rules of the activity and not as a result of malice, then it is fair that consent should be used as a defence in these cases.

There may also be an argument that medical surgery, cosmetic surgery and body modifications, such as piercing and tattooing, are also instances where a person consents to the infliction of bodily harm, and remain lawful. However, as with bodily harm occurring during sport, the harm being inflicted is likely not malicious. For example, a tattooist is inflicting pain and causing injury for the purpose of tattooing the 'victim', and injury caused by surgery is the purpose of a medical procedure. This is clearly different than causing bodily harm for the sole purpose of inflicting pain, or only for sexual gratification, as in many cases involving sadomasochism. In the case of *R v Wilson* [1996] Crim LR 573, it was held that the consent of the defendant's wife was valid as the injury inflicted was comparable to a lawful cosmetic procedure.[21] The act of branding the victim with a hot knife was likened to tattooing or similar body modification, which are also lawful when done consensually. It was also not done maliciously, and was not done for the sole purpose of inflicting pain, or for sexual gratification, as in the case of *R v Brown*, nor were the extent of the injuries life-threatening as in *Emmett*. In these cases, it can be said that consent is a fair and valid defence.

5 *Consent to Risk of Sexually Transmitted Disease*

Another instance where consent to bodily harm is considered is in the case of sexually transmission diseases. Section 19A of the *Crimes Act 1958* (Vic) specifies that it is an offence to intentionally cause another person to become infected with a very serious disease,[22] however 'very serious disease' is defined specifically as HIV in accordance with the meaning of the *Health Act 1958* (Vic).[23] It is still unspecified as to whether the consent of the victim may be used as a defence for the transmission of other serious diseases.

Similar to the issue of consent to injury during bondage activities, allowing consent to always be a defence for the transmission of serious sexual diseases carries the risk of a person claiming that the injured party had consented when this may be untrue. However, consent will only be available as a defence in certain circumstances. This includes the extent of the harm or risk to the victim, and whether the victim gave informed consent.[24] In order for consent to be an invalid defence in this instance, it must be proven beyond a reasonable doubt that informed consent was not given, or that the victim was not made aware of the risks, as in the case of *R v Clarence* (1889) 22 QB 23.[25] If informed consent was communicated to the defendant, the victim's consent is still valid.

6 *Impact on Society*

The issue of consent where serious bodily harm is being

[18] *Human Rights (Sexual Conduct) Act 1994* (Cth) s 4(1).
[19] Anthony et al, above n 1, 101.
[20] *Pallante v Stadiums Pty Ltd* (No 1) [1976] VR 331.
[21] *R v Wilson* [1996] Crim LR 573.
[22] *Crimes Act 1858* (Vic) s 19A.
[23] *Health Act 1958* (Vic).
[24] *Neal v R* [2011] VSCA 172.
[25] *R v Clarence* (1889) 22 QB 23.

inflicted is complex. Individuals should be entitled to privacy and allowed the freedom to choose what happens to their body. However, there should also be limits to what a person is able to consent to, particularly when they are consenting to being physically hurt.

As discussed above, consent is a common issue in cases where injury was caused during sexual activity. In these cases, if 'consent' was always available as a defence to bodily harm caused to another person, there is a danger that it may be used as a defence for injury sustained during sexual assault or domestic abuse, where there was no consent. Things such as bruising or other physical injury would possibly no longer be sufficient proof that an assault had occurred, as the defendant would potentially be able to claim that the injuries were caused during consensual 'rough sex' or other bondage or sadomasochistic activity, and the victim may have difficulty proving otherwise, particularly in cases of domestic violence where the victim is the partner of the accused. In her article *Sex is not a Sport: Consent and Violence in Criminal Law*, law professor Cheryl Hanna calls attention to the social issues that may arise if consent is a defence in sexual violence cases. Hanna argues that if consent is allowed as a defence to violent acts in sadomasochism, there is a danger that this will lead to the 'glorification of sexual violence, rather than the sexual liberation of consenting adult,'[26] and expressed a fear that perpetrators of domestic violence will continue to successfully use consent as a defence to disguise abuse, claiming that their partner's injuries are a result of 'rough sex' or bondage that the victim agreed to participate in.[27] It may also lead to greater acceptance of physical violence which would otherwise be unacceptable, as Justice Vincent stated in *R v McIntosh*:

> *'In the absence of consent, it would have clearly been unlawful. As a matter of public policy...the law cannot countenance the engagement of individuals in such physically abusive and intentionally injurious behaviour, even where there is the full and informed consent of each participant.'*[28]

As in the case of *R v McIntosh*, if there is uncertainty as to whether or not the victim freely consented, it should not be a valid defence. Hanna also states that domestic violence victims may be unwilling to testify against their abusive partners, making it difficult to determine whether or not there was consent to the violence against them.[29]

If consent was not available as a defence in relation to harm or injury caused to a person during sexual encounters, this would be less of an issue. She also suggests that 'the law should not allow consensual violence that results in *actual serious* physical injury outside of highly regulated contexts'.[30] This is where the difference lies between consensual bondage and sadomasochistic activities and other things such as sports games and cosmetic surgery. While all involve consent by the 'victim' as well as some degree of bodily harm, it may be argued that organised sports activities and surgery performed by a professional are far more regulated than bondage and sadomasochism, and are arguably also safer and less likely to result in serious or fatal injury.

7 *Conclusion*

It would be short sighted to assert that consent should be available as a defence to assault in all circumstances, regardless of the nature of the acts which caused harm or the extent or seriousness of the victim's injuries. When considering whether or not it can be a valid defence, wider social impact should be also acknowledged, rather than only considering the impact it may have on individuals.

While there should be laws set in place to prevent unnecessary interference with people's personal lives and personal agency, it is also necessary to ensure that the defence of 'consent' is not taken advantage of.

[26] Cheryl Hanna, 'Sex is Not a Sport: Consent and Violence in Criminal Law' (2004) 42 *Boston College Law Review* 239, 239.
[27] Ibid, 244.
[28] *R v McIntosh* [1999] VSC 358.
[29] Hanna, above n 26, 244-245.
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Is Involuntary Mental Health Treatment Consistent with the *Convention on the Rights of Persons with Disabilities?*

Laura Jackel

Abstract: The United Nations have historically discussed the rights of disabled people but nothing binding was put in place until the *Convention of the Rights of People with Disabilities* ('CRPD') was opened for signature (the pre-ratification stage) in 2007. The CRPD stands as a set of binding human rights to protect people with disabilities from the discrimination and exclusion which continues to exist within societies worldwide, whilst acknowledging the concept of intersectionality, which may see a disabled person discriminated against on other grounds as well (race, gender, age, socioeconomic status etc).

The issues surrounding involuntary treatment of mental illness are a highly contentious issue. Historically, the involuntary treatment of the mentally ill has been quite horrific and as a consequence has raised issues of the rights of patients. Worldwide, countries still use involuntary treatment as a valid method of dealing with people who may be at risk of harming themselves or others. However the CRPD has directly challenged the practice. Hence the question arises as to what extent is the CRPD compatible with involuntary treatment. Relevant articles are 12, 14 and 17.

1 *Introduction*

The United Nations have historically discussed the rights of disabled people but nothing binding was put in place until the Convention of the Rights of People with Disabilities ('CRPD') was opened for signature (the pre-ratification stage) in 2007.[1] The CRPD stands as a set of binding human rights to protect people with disabilities from the discrimination and exclusion which continues to exist within societies worldwide, whilst acknowledging the concept of intersectionality, which may see a disabled person discriminated against on other grounds as well (race, gender, age, socioeconomic status etc).[2]

The issues surrounding involuntary treatment of mental illness are a highly contentious issue. Historically, the involuntary treatment of the mentally ill has been quite horrific and as a consequence has raised issues of the rights of patients.[3] Worldwide, countries still use involuntary treatment as a valid method of dealing with people who may be at risk of harming themselves or others. However the CRPD has directly challenged the practice. Hence the question arises as to what extent is the CRPD compatible with involuntary treatment. Relevant articles are arts 12, 14 and 17.[4]

This paper will discuss Australian laws and their interaction with the CRPD regarding involuntary treatment. It will also use Victorian legislation as an example of how a state's involuntary treatment policies compare to the CRPD. It shall also make a brief mention of EU case law as it relates to the subject.

2 *Australia and the CRPD*

In 2008, Australia ratified the CRPD and the optional protocol for the individual complaints procedure.[5] However the Australian Government did submit an interpretive declaration stating:

'Australia further declares its understanding that the Convention allows for compulsory assistance or treatment of persons, including measures taken for the treatment of mental disability, where such treatment is necessary, as a last resort and subject to safeguards.'[6]

Furthermore, in the initial report by Australia to the Committee of the Rights of People with Disabilities ('CRPD treaty body'), Australia discussed how they

[1] *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) ('*CRPD*').
[2] *CRPD* preamble.
[3] Annegret Kämpf, *The United Nations Convention on the Rights of Persons with Disabilities and Mental Health in Australia* (PhD Thesis, Monash University (2012) 131.
[4] *CRPD* articles 12, 14, 17.
[5] *CRPD, Optional Protocol to theConvention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008)
[6] Australia, *Australia's initial report under the Convention on the Rights of Persons with Disabilities*, (2010), Commonwealth of Australia < *www2.ohchr.org/SPdocs/CRPD/futuresession/CRPD.C.AUS.1-ENG.doc*> 61.

interpreted certain articles of the CRPD (12, 14 and 17).[7] In response to the declaration, the CRPD treaty body in its initial concluding observations, stated that they were unhappy with the interpretive declarations on articles 12 and 17 and considered that Australia should remove these declarations and regarding article 14, plus it should review the laws on involuntary treatment with the aim to 'repeal all legislation that authorizes medical intervention without the free and informed consent of the persons with disabilities concerned.'[8]

This presents an issue of interpretation regarding how the CRPD is to be interpreted. Given the response from the CRPD treaty body, it can easily be deduced that in regards to involuntary treatment, Australia is not interpreting the CRPD as the CRPD treaty body would like it to. Given Australia's dualist nature and views on involuntary treatment, it is no wonder that it has not compelled state governments to change their involuntary treatment laws (if applicable to the jurisdiction), as the interpretation would see nothing wrong with them.

3 *Victoria's involuntary treatment criteria (and how it was established)*

Section 5 of the *Mental Health Act 2014* (Vic) ('MHA') delineates the criteria that a person must fulfil in order to be placed under a treatment order.[9] These criteria are:

- The person must have a mental illness.[10]
- As a result of said mental illness, the person needs immediate treatment to: prevent deterioration of the person's health *or* prevent harm to the person or other people.[11]
- '(T)he immediate treatment will be provided to the person if the person is subject to a Temporary Treatment Order or Treatment Order.'[12]
- '(T)here is no less restrictive means reasonably available to enable the person to receive the immediate treatment.'[13]

In parliament, the MHA was deemed to be compatible with the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Victorian Charter') and particular mention was made to the procedures performed under the Act and safeguards for people undergoing compulsory treatment.[14] Several sections of the Victorian Charter were mentioned in regards to how they were relevant to the MHA and where certain limitations were necessary (especially regarding compulsory treatment).[15] From this it can be understood that the MHA was drafted in the light of global human rights and not just the human rights contained within the Victorian Charter even if the CRPD was not consulted. It is well known that the Victorian Charter contains civil and political rights and these rights do overlap the CRPD.[16] However as the Victorian Charter is a state Act, the Parliament is not bound by it and can limit it through the use of section 7 of the Act as much as they see fit; as is in the case of the MHA.[17]

The concept of involuntary treatment as a process regulated by statutory provisions began as the *parenspatriae* jurisdiction of the Anglo-Norman legal system.[18] Established in the 1200s, the *parenspatriae* jurisdiction is where the legal concepts of 'best interests' and the concept of substituted decision making originated.[19] Historically this has turned out to have very uneven results with judges trying to decide what the 'generic, reasonable lunatic' would want to do in a person's situation.[20] This jurisdiction served the purpose of making orders for the care and administration of those deemed to be 'lunatics' as there has been 'a long history of equating mental illness with legal incapacity'.[21] 'Lunatics' were defined as people 'found by inquisition idiot, lunatic or of unsound mind and incapable of managing himself or his affairs', so basically what in today's vocabulary would be called the

[7] Australia, *Australia's initial report under the Convention on the Rights of Persons with Disabilities*, (2010), Commonwealth of Australia < *www2.ohchr.org/SPdocs/CRPD/futuresession/CRPD.C.AUS.1-ENG.doc*> 16–18, 20–24, 26–29 ('*Aus Initial Report'*).
[8] Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Australia, adopted by the Committee*,10th sess, UN Doc CRPD/C/AUS/CO/1,21 October 2013.
[9] *Mental Health Act 2014* (Vic) s 5.
[10] *Mental Health Act 2014* (Vic) s 5(a).
[11] *Mental Health Act 2014* (Vic) s 5(b).
[12] *Mental Health Act 2014* (Vic) s 5(c).
[13] *Mental Health Act 2014* (Vic) s 5(d).
[14] Parliament of Victoria, *Parliamentary Debates*, Legislative Assembly, 20 February 2014, 458–470 (Mary Woolridge); *Charter of Human Rights and Responsibilities Act 2006* (Vic).
[15] Parliament of Victoria, *Parliamentary Debates*, Legislative Assembly, 20 February 2014, 458–470 (Mary Woolridge).
[16] George Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope' (2006), 30(3) Melbourne University Law Review 880.
[17] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7.
[18] Sascha Callaghan, Christopher Ryan and Ian Kerridge, 'Risk of suicide is insufficient warrant for coercive treatment for mental illness' (2013) 34 *International Journal of Law and Psychiatry* 374, 377.
[19] Sascha Mira Callaghan and Christopher Ryan, 'Is There a Future for Involuntary Treatment in Rights-based Mental Health Law?' 21(5) *Psychiatry, Psychology and Law* 747, 758, 766.
[20] Ibid 757–758.
[21] Callaghan et al, above n 18, 377.

mentally ill and mentally disabled.[22] Ultimately if a person lacked mental capacity, they lacked legal capacity by default. *Parenspatriae* concepts have now in the modern day been incorporated into statute law both in Australia, but these laws still are the descendants of the old English lunacy laws.[23] In 2013, Callaghan et al argued that nearly all statutes providing for involuntary treatment did not require a determination of legal incapacity for the treatment to occur.[24]

The MHA (passed in 2014) *does* have provisions which codify what is considered to be traits of a mentally 'capable' person to refuse treatment.[25] However it still codifies what constitutes incapacity and when a person is to be deemed to need 'treatment' under s 5 of the Act. Herein lies the problem, as Australia takes a dualist national approach, the Federal Government's interpretation of the CRPD allows it to run concurrently with state laws containing concepts derived from *parenspatriae*. The CRPD is in no way compatible with the traditional concept of *parenspatriae* and in fact it exists to empower the mentally ill and sees them as rights bearers. The CRPD exists to extend rights to mentally ill people in order for them to make treatment decisions for themselves and supports the move to supported decision making strategies, such as Advanced Statements and Nominated Persons found in the MHA.[26] Hence the MHA is a conflicted piece of legislation, based in the past, but trying to encompass human rights at the same time. It could be argued that the MHA is the Australian interpretation of the CRPD regarding involuntary treatment realised into an Act of a state parliament.

4 *Interpretations of rights in the CRPD*

This section will discuss the rights contained in CRPD articles 12, 14 and 17 in relation to the issue of involuntary treatment.[27]

(a) Article 12 - Equal recognition before the law

Article 12(a) states that people with disabilities have the right to be recognised by the law and article 12(b) states that people with disabilities shall have legal capacity on an equal basis with all other members of society.[28] In Victoria, the MHA s 70 (3) and 71 as well as part 4 (Compulsory Patients) does not give the same legal rights to mentally ill people as other people with non-mental illnesses have.[29] So if a person with cancer can refuse treatment, but a person with severe bipolar cannot if they can not comply with the capacity and informed consent criteria set out in part 5(1) of the MHA, it can be argued that those with mental, psychosocial and psychiatric disabilities are not equal before the law.[30]

Paragraph 13 of the General Comment on Article 12 of the CRPD ('GC12') discussed that legal and mental capacity are separate concepts and that any form of 'perceived or actual deficits in mental capacity' can never be used as an excuse to deny a person legal capacity or legal agency.[31] Paragraph 14 continues discussing how legal capacity is an inherent human right which includes people with disabilities.[32] However the most important point of this paragraph is that mental capacity is not a sound concept as it is not 'an objective, scientific and naturally occurring phenomenon' but a concept intertwined with sociopolitical agendas.[33] The MHA follows what the GC12 calls the functional approach to determine the level of mental impairment, a criteria which involves the ability to understand and 'use or weigh' information.[34] This type of approach is found to breach article 12(2) as the criteria and only applied to mentally ill or disabled people and it makes presumptions to understand what is inside people's minds. Thus when a person fails a capacity test and refuses treatment, it is a breach of their right to be equal before the law to treat them.[35]

Article 12(3) follows by compelling State Parties to provide 'appropriate measures' to support people with disabilities in exercising their legal capacity.[36] Article 12(4) elaborates upon article 12(3) by stating that there must be safeguards to protect disabled people and the system of supported decision making from abuse.[37] Regarding article 12, Australia stated that 'substituted decision-making will only be used as a measure of last resort where such arrangements are considered necessary' and stated that this form of decision making

[22] Ibid.
[23] Ibid.
[24] Ibid.
[25] *Mental Health Act 2014* (Vic) ss 5, 68, 69.
[26] *Mental Health Act 2014* (Vic) part 3(4), part 3(5).
[27] *CRPD* arts 12, 14, 17.
[28] *CRPD* arts 12(1), 12(2).
[29] *Mental Health Act 2014* (Vic) ss 70(3), 71, part 4.
[30] *Mental Health Act 2014* (Vic) part 5(1).
[31] Committee on the Rights of People with Disabilities, General Comment No 1: Article 12: Equal recognition before the law, 11th sess, UN DocCRPD/C/GC/1, (19 May 2014) ('*CRPD art 12 GC*') para 13.
[32] Ibid para 14.
[33] Ibid.
[34] *Mental Health Act 2014* (Vic) part 5(1); *CRPD art 12 GC* 15.
[35] *CRPD art 12 GC* 15.
[36] *CRPD* art 12(3).
[37] *CRPD* arts 12(3), 12(4).

was subjected to safeguards.[38] It then followed by stating that Australian state jurisdictions have levels of guardianship law and supported decision making is important to states in Australia, such as the MHA.[39]

The GC12 states that the 'best interests' principle needs to be replaced with a 'will and preferences paradigm' in relation to adults. What both Australia and GC12 agree on is that there needs to be safeguards to protect vulnerable mentally ill or disabled from abuse and undue influence from those who are in the supportive role of supported decision making.[40] Although the MHA has provisions for Advanced Statements and Nominated Persons ('NP'), the Mental Health Tribunal is still the body handing out treatment orders and the treating psychiatrist is not actually bound by the opinions of the NP or the person's wishes in the Advanced Statement.[41]

Regarding article 12, involuntary treatment is incompatible with the CRPD. Involuntary treatment denies mentally ill people the right to refuse and hence their right to be equal under the law. It can be argued that being able to protect the legal capacity of the disabled will lead to full realisation of rights under the CRPD.[42] It can also be argued that the exercising of legal capacity is a personal form of self-determination as self-determination is applicable to any legal decision, which encompasses the provision or non-provision of healthcare.[43]

Dawson notes the confusion over the issue as article 12(4) as it arguably provides the same safeguards for people who have mental capacity and those who are deemed to lack mental capacity and may even allow for substituted decision making in severe cases.[44] Dawson, in general, argues for a more realistic interpretation of article 12 than the GC12, which could happen under the MHA as legal standards for mental capacity as time for the person to comprehend information, advance statements and a power to place a person under a compulsory treatment order all exist in the Act.[45] However Dawson does emphasise the need to respect advanced statements and that involuntary treatment must be proportionate to the needs of the patient with a 'no less restrictive means' approach like that of the MHA taken into account.[46]

There has also been confusion as to just how a 'will and preferences paradigm' is meant to work in practice.[47] This is a very real issue as a person with a severe psychosis may refuse all treatment but would at other times be open to receiving treatment. Supported decision making has also been discussed as being unrealistic in certain situations due to the heavy burden it would place upon the system.[48] Despite this, the concept of supported decision making still makes sense as it respects the autonomy of the person and would be a better choice that substituted decision making in the vast majority of cases.

Although the CRPD and the CRPD treaty body via the GC12 (and the concluding observations to Australia) are definitely against involuntary treatment in theory.[49] In practice, the reality of the implementation of article 12 may not be what the CRPD intended it to be.

5 *Article 14 - Liberty and security of person*

Article 14(1)(b) is earmarked as the part of article 14 which prohibits involuntary treatment.[50] Article 14(1)(b) states that disabled people must not be:

'…deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.'[51]

The guidelines on article 14 of the CRPD ('GL14') say that the involuntary treatment breaches article 14 and even more so when read with article 12.[52] What is made very clear by the GL14, is that deprivation of liberty on the basis of some actual or perceived impairment is *absolutely* banned.[53] The GL14 also links article 14 to

[38] *Aus Initial Report* 16–18.
[39] Ibid.
[40] *CRPD art 12 GC*, *Aus Initial Report* 16–20.
[41] *Mental Health Act 2014* (Vic) part 3(4), part 3(5).
[42] Kämpf, above n 3, 133.
[43] Penny Weller, 'Supported Decision-Making and the Achievement of Non-Discrimination: The Promise and Paradox of the Disabilities Convention', (2008) 26 *Law Context: A Socio-Legal Journal* 85, 102.
[44] John Dawson, 'A realistic approach to assessing mental health laws' compliance with the UNCRPD' (2015) 40 *International Journal of Law and Psychiatry* 70, 72, 74.
[45] Dawson, above n 44, 73–74; *Mental Health Act 2014* (Vic) part 5(1).
[46] Ibid. *Mental Health Act 2014* (Vic) s 5(d).
[47] Callaghan and Ryan, above n 19, 748.
[48] Ibid.
[49] *CRPD* art 12; *CRPD art 12 GC*; UN Committee on the Rights of Persons with Disabilities (CRPD), *Concluding observations on the initial report of Australia, adopted by the Committee,*10th sess, UN Doc CRPD/C/AUS/CO/1,21 October 2013.
[50] Committee on the Rights of People with Disabilities, *Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities:* The right to liberty and security of persons with disabilities, 14th sess, UN Doc CRPD/C/12/2, Annex IV, (September 2015) ('*CRPD art 14 Guidelines'*).
[51] *CRPD* art 14(1)(b).
[52] *CRPD art 14 Guidelines.*
[53] Ibid.

article 19 as the deprivation of liberty involved in involuntary treatment deprives a mentally ill or disabled person to live and be involved in their community.[54] Article 14 is also linked to article 25 as involuntary treatment of a mentally ill or disabled person is naturally linked to their human rights relating to health and healthcare.[55]

It is made quite clear by the GL14 that the CRPD is incompatible with involuntary treatment on an inpatient basis. However the GL14 recommends more community based services, which could in theory, allow for a community treatment orders like the MHA provides for.[56] Community treatment orders would likely still be determined to be in breach of articles 12 and 25 of the CRPD, so just because article 14 may allow for community treatment orders, it does not mean other articles will be against them.[57]

Australia as a State Party, considers that there are issues regarding the mentally ill and treatment which they have to address.[58] They stated there was a working group developing a 'best practice framework in relation to restrictive practices'.[59] Australia declared that the mentally ill will only be detained and treated if they are a risk to themselves or to others.[60] As much as the CRPD wishes to have all disabled people on an equal footing, Australia understands that its states have to protect the general public from harm and the health of their citizens. This is why states such as Victoria, have compulsory treatment orders, to protect people.

If a mentally ill person were to refuse treatment, article 14 (and 19) would still not allow for a preventative civil detention scheme where a person who fails a mental capacity test would be placed in order to prevent any real or perceived harm to themselves or others.[61] In fact this would probably be seen as jailing a person for critical mental illness.[62] It is generally agreed that Article 14 is incompatible with involuntary treatment when viewed by the UN.[63] It has been argued that the UN takes a 'purist' approach to the CRPD, whilst Australia takes a more moderate approach to involuntary treatment.[64] In fact, McSherry and Wilson say that Article 14 could be read as allowing involuntary treatment due to 'disability neutral' language 'de-linking' the two concepts.[65] In light of the GL14, this is an exceedingly weak argument as the CRPD grants the mentally ill and disabled to the right to not undergo involuntary treatments.[66] Even when all the arguments about article 14 and involuntary treatment are discussed, the CRPD treaty body has in the GL14 formally declared an incompatibly with the practice. Eventually the CRPD treaty body will make a General Comment on article 14, which will likely confirm the views found in the GL14.

6 *Article 17 - Protecting the integrity of the person*

In whole, article 17 states '(e)very person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.'[67] To involuntarily treat a person disrespects the mental and physical integrity of that person. Given the relative youth of the CRPD, there is no General Comment or guidelines on article 17, so in the interim article 17 will not be so clear to those trying to interpret it. The strongest argument on interpreting article 17 in relation to involuntary treatment would be to examine the official interpretations of articles 12 and 14.[68] The purist approach in interpreting these articles would suggest that article 17 would follow in supporting a complete cessation and ban of involuntary treatment.

Again, Australia mentions safeguards in their declarative interpretation.[69] The MHA does have safeguards regarding the use of electroconvulsive therapy ('ECT') and neurosurgery for mental illness.[70] However, the MHA makes provisions for the use of pharmaceutical drug therapy with no safeguard whatsoever.[71] On examination of the MHA, it allows for:

- pharmaceutical drug therapy
- ECT
- neurosurgery for mental illness

[54]Ibid.
[55]*CRPD* arts 14, 25.
[56]*CRPD art 14 Guidelines*; *Mental Health Act 2014* (Vic) s 52(2).
[57]*CRPD* arts 12, 14, 25.
[58]*Aus Initial Report* 20–24.
[59]*Aus Initial Report* 20–24.
[60]*Aus Initial Report* 20–24.
[61] Callaghan et al, above n 18, 382.
[62] Ibid.
[63] Dawson, above n 44, 753; Bernadette McSherry and Kay Wilson, 'The concept of capacity in Australian mental health law reform: Going in the wrong direction?', (2015) 40 *International Journal of Law and Psychiatry* 60,65; George Szmukler, Rowena Daw and Felicity Callard, 'Mental health law and the UN Convention on the rights of persons with disabilities' (2014) 37 *International Journal of Law and Psychiatry* 245, 247.
[64]McSherry and Wilson, above n 63, 65–66.
[65]Ibid 66.
[66]*CRPD art 14 Guidelines.*
[67]*CRPD* art 17.
[68]*CRPD art 12 GC; CRPD art 14 Guidelines.*
[69]*Aus Initial Report* 26–29.
[70]*Mental Health Act 2014* (Vic) part 5(5), 5(6).
[71]*Mental Health Act 2014* (Vic) s 7(c).

- restrictive interventions.[72]

All of these can be either described as breaching the physical and or mental integrity of the person and not treating the person with a disability on an equal basis with others. The 'equal basis with others' can link article 17 to article 12 of the CRPD.[73] This would put the MHA and Victorian compulsory treatment orders in breach of article 17 of the CRPD and human rights. Article 17 is succinct in its simplicity and no amount of safeguards will stop a mentally ill or disabled person's human rights being violated under this provision if the domestic laws allow for the violation to occur.

It has been noted that the reporting guidelines for article 17 (for State Parties) have made mention of free and informed consent and interpretation in Concluding Observation to other countries have made this point.[74] Thus linking article 17 to article 25 as well as article 12. Callaghan and Ryan argue that article 17 does indeed ban involuntary treatment.[75] However article 17 may be seen as so brief as the drafting committee could not come to any agreement.[76] One specific draft made mention of reducing forced institutionalisation, medical emergencies, public safety and allowed for involuntary treatment under certain circumstances.[77] This really underpins the issues State Parties such as Australia have with the CRPD; what are they supposed to do in exceptional circumstances if involuntary treatment is forbidden? As mentioned, it is likely the official interpretation of article 17 will prohibit involuntary treatment, but it can be hoped for that they do address the concept of 'exceptional circumstances' and real world issues that State Parties face in trying to comply with the CRPD.

7 *Involuntary treatment and full realization of Article 25*

The CRPD must also be examined as an entire treaty. As seen above, rights in one article do not stand alone as they interlink and overlap each other in a way to prevent loopholes and protect rights in more than one way. Article 25 has several ways to actually reduce the need to have involuntary treatment.[78] Article 25 (a) discusses 'free and affordable healthcare as provided to others' whilst article 25 (b) discusses disability specific treatment with special mention of 'early identification and intervention'.[79] Australia lacks a *comprehensive* free and affordable mental healthcare system; instead it relies on a user pays system which disadvantages low socio-economic groups. It does not provide a system to help identify mental illness and treat it early but instead it allows the mental health of its citizenry go largely unchecked to the point that some people are placed under compulsory treatment orders. To reduce the numbers of people in involuntary treatment to comply with articles 12, 14, 17 and in some cases 19, a State Party would have to do it's best to fully realise the rights found in article 25 in regards to mental illness and disability (including the part about free and informed consent). This is unlikely to happen in Australia due to the nature of current governments (State and Federal) and that the *parenspatriae* system is already there to deal to involuntary treatment cases.

8 *International Cases and the CRPD*

There is a case from the European Court of Human Rights ('ECHR') which demonstrates the use of the CRPD an instrument of law *per se* (*Stanev v Bulgaria*).[80] The ECHR can use the CRPD as it has been cited in case law they have used, however breaches of it must be brought through and attached to sections of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR') and are not fully considered.[81] Hence Mr Stanev was found to have his liberty arbitrarily deprived of him, but it was through article 5(1) and 5(4) of the ECHR, *not* articles 12 and 14 of the CRPD.[82] The ECHR still does allow involuntary treatment, hence it is arguably at odds with the CRPD in this area.[83] It is argued that it will hold the CRPD back, mainly because ECHR decisions are binding but CRPD treaty body decisions are not.[84] However there is some new ECHR case law which does contain complaints about breaches of the CRPD and involuntary treatment like *Stanev* and *Pleso v Hungary*

[72]*Mental Health Act 2014* (Vic) s 7(c), part 5(5), 5(6), part 6.
[73]*CRPD* arts 12, 17.
[74]Szmukler et al, above n 63, 247.
[75]Callaghan and Ryan, above n 19, 753.
[76]Ibid 749.
[77]Szmukler et al, above n 63, 250.
[78]*CRPD*art 25.
[79]*CRPD*arts 25(a), 25(b).
[80]*Stanev v. Bulgaria* (2012) Eur Court HR App No 36760/06; Jennifer Brown, '*The changing purpose of mental health law: From medicalism to legalism to new legalism*' (2016) 47 *International Journal of Law and Psychiatry* 1, 7.
[81]European Union Agency for Fundamental Rights, *Involuntary placement and involuntary treatment of persons with mental health problems*, Final Report (2012) 9; Council of Europe,*European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5 ('ECHR').
[82]*ECHR* arts 5(1), 5(4); *CRPD* arts 12, 14.
[83] Brown, above n 80, 6.
[84]Ibid.

which have been successful.[85] These cases can be used as persuasive cases in international law, but not in any dualist Common Law jurisdiction. Given there are no decisions from the CRPD treaty body on complaints about involuntary treatment, it *is* important to look at ECtHR cases for the purposes of insight and persuasion.

9 *Conclusion*

On examination of the CRPD and relevant UN documents, it is clear that the CRPD is not in any way compatible with involuntary treatment. The CRPD is definitely incompatible with the *parenspatriae* system and concepts that exist in Australia, the UK and other Common Law jurisdictions. The CRPD is very strict when discussing autonomy and legal capacity; it is made very clear that a mentally ill person retains legal capacity in a crisis situation. The CRPD challenges the concept of mental capacity as it is fundamentally discriminatory against the mentally ill and disabled. The CRPD also challenges the practice of involuntary treatment by insisting on the transition to a 'will and preferences' model of supported decision making from a 'best interests' substituted decision making model thus directly challenging *parenspatriae*. The CRPD challenges practices which treat the mentally ill as less than equal. Practices such as involuntarily treating the mentally ill deprive them of liberty, security and integrity, whether a State Party agrees or not. Involuntary treatment violates the human rights of the people who are forced to undergo it, without question. The CRPD is an idealistic treaty and State Parties who ratify or accede to it do legally bind themselves to follow it in good faith. It is up to the State Parties to conduct research and reform their mental health system to protect human rights. Politics and dualism as a concept are not excuses to violate a person's human rights. It is very clear what the CRPD considers involuntary treatment to be, a now, very deliberate violation of a person's human rights.

[85] Ibid 7; *Stanev v. Bulgaria* (2012) Eur Court HR App No 36760/06;*Pleso v Hungary* (2012) Eur Court HR App No 41242/08.

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Sexual Assault Reform *Christine Adamou*

Reform of sexual assaults and rape law in Australia was necessary and overdue. The relevant laws have recently been 'amended in the most fundamental fashion'. These reforms are the result of a long process of evaluation, recommendations to legislative powers and amendments to existing laws and new acts...

Issues with the old legal classification of sexual assault laws are obvious to a reformist observer or a victim of sexual assault. The heavy moral reasoning of the judiciary of the English courts (from which the common law of rape derived) became out of date with the passage of time.

While crimes against the state treat accused persons as objectively equal, there are people who are objectively different to those members of the community of a sound mind. Different laws for objectively different people is not necessarily a breach of the principles of *legal liberalism* which underpins Western-Liberal law and is worth exploring to foresee how effectively these new laws will deliver justice and fairness in charges brought under sexual assault and rape laws to both victim and offender.

1 *Introduction*

Reform of sexual assaults and rape law in Australia was necessary and overdue. The relevant laws have recently been 'amended in the most fundamental fashion'.[1] These reforms are the result of a long process of evaluation, recommendations to legislative powers and amendments to existing laws and new acts.

Issues with the old legal classification of sexual assault laws are obvious to a reformist observer or a victim of sexual assault. The law as it once stood was at the very least outdated, at worst unjust. The heavy moral reasoning of the judiciary of the English courts (from which the common law of rape derived) became out of date with the passage of time.[2]

While crimes against the state treat accused persons as objectively equal, there are people who are objectively different to those members of the community of a sound mind. Different laws for objectively different people is not necessarily a breach of the principles of *legal liberalism* which underpins Western-Liberal (and more relevantly Victorian) law and is worth exploring to foresee how effectively these new laws will deliver justice and fairness in charges brought under sexual assault and rape laws to both victim and offender.[3]

The focus of this essay will be on Autism Spectrum Disorder ('ASD'), how its sufferers deal with life and how this may affect their experiences with the criminal justice system.

2 *Law Reform Process*

(a) VLRC Report 2004

The Victorian Law Reform Commission reported in 2004 on the sufficiency of the criminal justice system in responding to complainants in sexual offence cases.[4] The key recommendation was to achieve both decent treatment for complainants and ensuring a fair trial for accused persons.[5] The Commission viewed the criminal justice system as more than just an instrument of natural justice; it is in the public interest ('a public service') when people make complaints about alleged sexual offences.[6] The Report (among other reform instruments) led to passing of the *Crimes Amendment (Sexual Offences and other Matters) 2014 Act* to amend the *Victorian Crimes Act 1958.*

[1] Thalia Anthony et al, *Waller and Williams Criminal Law Texts and Cases* (12th ed, 2013, LexisNexis Butterworths), 107 [3.2].

[2] See for example *R v Eastwood* [1998] VSCA 42 at [31]: 'the concept of virginity, the effect of intercourse upon the hymen and that a pregnancy may result from intercourse; that most of the community draw a distinction in "quality" between the act of intercourse and other intimate acts and that consent or refusal involves a moral judgment.'

[3] See Lord Bingham, 'The Rule of Law'(Lecture), [2008: 1] 121 *Judicial Studies Institute Journal*, 129: the third sub-rule: the law of the land should apply to all, save for objective differences justifying any difference in application.

[4] Victoria, Victorian Law Reform Commission, *Sexual Offences: Final Report*, Report No 5 (2004). The Report's *Background* suggest that it consulted widely with police, non-government organisations supporting victims of sexual offences, the legal profession and people who struggle to participate in the criminal justice process.

[5] Ibid, xxii.

[6] Ibid.

(b) Mens rea

The Commission's proposed changes were to stop accused persons avoiding responsibility if reasonable steps were not taken to determine whether *consent* was present, based on the known circumstances at the time of the act.[7] At the time, Victorian law required proof of *intentional penetration*, without consent, and critically, that the accused was aware of the complainant's non-consent or that the victim might not be consenting.[8] An *honest belief* in consent, no matter how unreasonable that may have been, would not prove the necessary *mens rea* needed to prove a rape charge.[9]

(c) Actus reus

The *Crimes (Rape) Act 1991* updated the elements of rape and carry over in current legislation.[10] These amendments accounted for the ruling in *R v Cogley* [1989] VR 799 and resulted in clarification of what constitutes 'vagina' for purposes of the provision.[11] This resulted in giving the act of rape a wider definition applicable to more people than before; people who did not have a male or female identity are now protected by the law of rape.[12]

At this early stage in the reform process one can see the purposes of the act are the same as they are today. The legislative objects were: to clarify consent, 'reaffirm the fundamental right of a person not to engage in sexual activity' and afford greater protection to complainants in court proceedings.[13]

(d) Jury directions

The jury would have to assess whether an accused's belief in *consent* being present was 'reasonable in all the relevant circumstances'.[14] The *Jury Directions Act* now provides for the prosecution or defence counsel to request the trial judge to 'inform' the jury on what is the *capability to consent*, *withdrawal* of consent and to 'warn' about what is a lack of evidence surrounding whether a person consented or not.[15]

3 *The Current State of the Law in Victoria*

(a) The current statutory definition of rape

Firstly, the causal elements *of rape* are now further clarified and simplified into the *Crimes Act*. In one neat provision it describes rape as: an intentional penetration, without consent and without reasonable belief of consent.[16] Similar wording describes 'Sexual assault'.[17] Secondly, the necessary mind set for rape is also reformed. If an accused holds belief in consent, that belief must be *reasonable*.[18]

(b) The 'Consent Model'

This definition of *consent* essentially is affirmed in the *Crimes Act* after the 2014-15 amendments.[19] The speech also reminded of the unacceptableness of engaging in sexual acts in complete indifference to the other person's agreement. Any doubt that exists in the mind of the instigator must be removed by communicating with the other person.[20]

(c) Summary

The reforms represent a higher standard than the common law did previously, benefiting the community by making unwanted sexual acts easier to prosecute once they have occurred. This would be in agreeance with the intent of the parliament over several legislative reforms and the VLRC's landmark report.

However, the focus of this paper is on the test of 'reasonable belief' and how it may affect those who may struggle to develop or consistently hold onto reasonable beliefs. This legal test needs to be assessed for potential flaws in how it treats accused persons with a mental illness or cognitive impairment. Just as the law was reformed to clarify and widen the coverage of protection by statute, the law may well have contracted in a way that could hurt people who suffer from mental illness or cognitive impairments.

[7] Ibid, 407 [8.1].

[8] Ibid [8.2], the Commission state the common law of rape in Victoria followed the ruling in *DPP v Morgan* [1976] AC 182.

[9] Ibid.

[10] *Crimes Rape Act 1991* (Vic), s 35(1)(a)(b).

[11] *R v Cogley* [1989] VR 799: The Full Court overruled the trial judge and said the question of the victim's gender should be left to the jury.

[12] Above, n 1, 158-9 [3.28].

[13] *Crimes Rape Act 1991* (Vic), s 1(a)(b)(c).

[14] Ibid, s 37(c), now s 37G(1)(2), s 38(1)(c).

[15] Jury Directions Act 2015 (Vic), s 46(3)(4).

[16] *Crimes Act 1958* (Vic), s 38(1)(a)(b)(c).

[17] Ibid, s 40(1)-(4).

[18] Crimes Act (1958) Vic, s 38(1)(c).

[19] Crimes Act, s 34C (1): 'For the purposes of Subdivisions (8A) to (8D), consent means free agreement.'

[20] Victorian Parliamentary Hansard, Second Reading Speech, *Crimes Amendment (Rape) Bill*, 22nd August, 2007: The community expects that where someone is intending to engage in a sexual act with another person, they will ensure that the other person is freely agreeing to engage in that act. It is not acceptable for a person to engage in a sexual act whilst being completely indifferent to whether the other person agrees. Where there is any doubt in the mind of the person instigating the sexual act, there is a responsibility upon that person to communicate with the other person in order to remove that doubt.

4 *Autism as a Mental Impairment*

(a) Autism, according to Neil Brewer and Robyn Young, Professors of Psychology:

People who have social and communication difficulties, and in addition to that they have difficulties with obsessive behaviours, often ritualistic behaviours. There are certain characteristics of individuals with ASD that might make them vulnerable to involvement in crime given certain situational disorders or, as we put it in the book, if they have a monumental dose of bad luck.[21]

(b) Trish Johnson, criminal defence lawyer:

People with autism don't have that ability often to react to normal social cues that you or I might notice, and so that might lead to them for example committing a sexual offence because they're just getting the fact that the other person isn't interested in having that intimate contact.[22]

5 *The Rationale Behind Reasonable Belief*

(a) DPP v Morgan, quoting Bridge J:

The rationale of requiring reasonable grounds for the mistaken belief must lie in the law's consideration that a bald assertion of belief for which the accused can indicate no reasonable ground is evidence of insufficient substance to raise any issue requiring the jury's consideration.[23]

With a new statutorily-defined crime of rape, the balance has shifted back towards the victim, for an accused can no longer raise the *Morgan* ruling which allowed for a mistaken belief in consent. To a person who bears no illness of the mind or other cognitive impairment this is an acceptable standard. These people should be capable of determining prior to committing an act, whether the other person consents to that act. The person initiating the act should also be able to maintain awareness of consent during the act and respond to the other person should they withdraw their consent by stopping the act as soon as they are aware of that withdrawal.[24]

On the other hand, the loss of a subjective test could affect an accused with cognitive impairments. How can an accused now raise the defence of relying on a mistaken belief in consent? How could an accused respond to a submission of withdrawn consent, where the accused was not able to form the necessary thoughts together in his mind as to how consent could be withdrawn during an act, perhaps after having received some form of consent prior to engaging in a sexual act?[25]

The new objective test found in Section 38(1)(c) accounts for accused persons who are of sound mine and intelligence, as in *Morgan*. Their fault was not taking reasonable steps to determine whether the victim actually consented to sex, by simply asking her to confirm the words of her husband which they relied on. It is a stretch to agree that the accused persons had an *honest* belief, since they did not bother asking the complainant for her consent. This would have gone against the words of the husband who effectively said the victim preferred sex in such a manner that would result in a physical struggle.

(b) Section 37AA Crimes Act 1958 (applicable prior to July 2015):

Prior to the recent legislative reforms, the judge could direct the jury to consider an accused's belief in consent, but it only had to be assessed as to whether an accused actually held that belief, not whether the belief itself is *reasonable*.[26]

This may be lost on an accused with cognitive impairments, not necessarily in a factual scenario as in *Morgan*, but likely a more ordinary situation where consent was either implied in the mind of the accused, or even if it was freely agreed to by the victim, it was withdrawn during the act and the accused was incapable of responding.

(c) Section 37G(1)(2) (applicable from July 2015):

One can see a pattern emerging: the new reforms are well able to discourage what the VLRC called the *'assumption of consent in ambiguous situations'*.[27] But in so doing, it has become rigid as to lose the distinction that could be drawn by a judge and jury. It would no doubt be obvious to a court room and able to be confirmed through admission of expert evidence supporting an accused's claim of impairment, but now that has been lost, at least through the 2014 legislative amendments. Relief for

[21] ABC RN, 'Autism spectrum disorder and the criminal justice system', Law Report (Radio Program), ABC Radio National 14/09/15: A report on the experiences of autism sufferers who come into contact with the criminal justice system.<http://www.abc.net.au/radionational/programs/lawreport/the-autism-spectrum-and-the-criminal-justice-system/6755196#transcript>

[22] Ibid.

[23] *DPP v Morgan* [1976] AC 182, quoting Bridge J.

[24] *Crimes Act 1958* (Vic), s 38(1)(a)(b)(c).

[25] *Crimes Act 1958* (Vic), s 34C(2)(l).

[26] As is now the law: *Crimes Act 1958* (Vic), s 37G(1).

[27] Above, n 4, 412 [8.15].

impaired accused persons will have to be found elsewhere in the legislation.

That being said, the *circumstances* defined in Section 37G(2) take into account any steps taken to find out whether the other person consented or not. This will not be beyond the capabilities of every person suffering impairment, but it cannot be regarded as easily doable for some persons in the community living with intellectual disability.

(d) R v Getachew:

… 'Belief in consent and awareness of the possibility of an absence of consent are not mutually exclusive.'[28]

Again it can be asked: how would an accused with intellectual impairments or a mental disorder be able to be held as having been aware that the complainant was not consenting? The *Crimes Act* now states a list of circumstances in which one *does not* consent, including: where the complainant does not realise the act is sexual in nature and where the complainant is mistaken about the sexual nature of the act.[29]

6 *Case Law Analysis*

(a) R v Eastwood [1998] VSCA 42 (17 September 1998), quoting Justice Callaway:

A person may understand the sexual nature of an act but be incapable of freely agreeing to it.

This is reflected in the statutory provisions of *Crimes Act*.[30]

(b) Aubertin v The State of Western Australia [2006] WASCA 229:

It is clear that a requirement that a belief be on reasonable grounds does not equate to a requirement that a reasonable person would have held it.[31]

The impairment of a complainant is relevant to an accused's *reasonable belief of consent*. This is in agreeance with the *Crimes Act* which now assesses *reasonable belief* per Section 37G.[32] It is unlikely however, that an accused with mental or cognitive impairment would be in a position to do such a thing.

(c) R v Dunrobin [2008] QCA 116 (16 May 2008):

The jury should have been instructed also that the appellant's mental condition was relevant to the appreciation of what, on his part, constituted a reasonable belief. In that regard the jury should have been referred by the primary judge to the evidence of Dr. De Alwis which bore on the appellant's capacity to comprehend completely and accurately what the complainant was attempting to convey to him at relevant times by words and conduct. The jury, uninstructed, was not in a position to know the relevance of the appellant's psychiatric condition to the questions to be determined by them in relation to the s 24 defence.

This ruling suggests that sufferers of mental impairment can raise this as a matter to be taken into account when determining whether, under Section 37G, an accused person held a reasonable belief of consent. Note however it is from a Western Australian court which operates under a pure 'code' system of criminal law. This could be persuasive in Victorian courts but caution should be taken as it is from a different jurisdiction and critically, there is not yet a higher authority decision on the new Victorian statutory reforms.

7 *Accused Persons With Autism – Case Study*

(a) Autism Spectrum Disorder ("ASD") and its effect on criminal proceedings

ABC Radio National ran an interesting and useful report on autism sufferers who come into contact with the criminal justice system. Trish Johnson, criminal defence lawyer said of autism sufferers:

People with autism don't have that ability often to react to normal social cues that you or I might notice, and so that might lead to them for example committing a sexual offence because they're just getting the fact that the other person isn't interested in having that intimate contact.[33]

[28] *R v Getachew* [2012] HCA 10; (2012) 286 ALR 196, [26], quoting *Crimes Amendment (Rape) Bill 2007* (Vic), Explanatory Memorandum, at 4.

[29] *Crimes Act 1958* (Vic), s 34C(2)(f)(g).

[30] *Crimes Act*, s 34C(2)(f)(g).

[31] *Aubertin v The State of Western Australia* [2006] WASCA 229, quoting Holmes J in R vMrzljak.

[32] *Crimes Act*, s 37G(1)(2).

[33] ABC RN, 'Autism spectrum disorder and the criminal justice system', Law Report (Radio Program), ABC Radio National 14/09/15 <http://www.abc.net.au/radionational/programs/lawreport/the-autism-spectrum-and-the-criminal-justice-system/6755196#transcript>

This could be particularly disastrous for accused's facing prospects of imprisonment, where unless diverted into an alternative correctional facility or program could face huge issues coping with imprisonment.

But, in discussing the *intention* of someone diagnosed with ASD:

If they were not intending to have sexual contact with another person without their consent but they were missing the cues, you would raise the issue of lack of intention in that case.

Regarding pressing charges:

Sometimes it has to go to trial and it has to be argued with the assistance of expert reports. But certainly I have had cases not proceed because of reports that are provided to prosecution which establish that lack of understanding. The fact is that they just miss those cues.[34]

This 'missing of cues' is critical to understanding ASD in all its facets. While some sufferers will be so affected in one way as to make sexual relations not an issue, others who may be so-called higher functioning will be of concern. These people, as Johnson noted in her discussion are those who have some contact with the world around them and ordinary non-sufferers of mental illness. This is where they find themselves in trouble as people mislead or deceive them and they naively go along with it until they find themselves in breach of the law.

If there is a connection between the offending and their condition, even if they don't have a defence, they are fit to stand trial, if we can show that there is a connection between that condition and the behaviour which amounts to an offence, the court have some regard to that, and it would certainly be a mitigating factor, and it would also mean that it would be inappropriate for the court to hold them up as an example to the community and place a great deal of weight on issues such as general deterrence.[35]

(b) ASD characteristics applicable to legal analysis

Brewer and Young explore the links between ASD and crime in depth in a recent book.[36] They highlight the characteristics of ASD that are found in various crimes committed by sufferers.[37] Using a case example, they found that social and communication difficulties (for example: an adherence to literal interpretations) led to an accused's behavior (a sexual assault on a friend while asleep and surrounded by other friends) and therefore could raise ASD as contributing factor in a charge of sexual assault.[38] What was insightful in this case was that the accused admitted to his act to the boyfriend of the victim, himself present the evening of the act. This is something one would not expect from an accused of sound mind, who would likely avoid admitting wrongdoing of such acts to anyone; affirming the experience of Johnson in VI-1 regarding the defences of impaired sufferers in court.[39]

8 *Legislative Relief*

(a) Sentencing Act

Applying the *Sentencing Act* to Johnson's advice, the defence would attempt to demonstrate to the court (through expert evidence) that an accused's conduct can be mitigated by their condition. A judge should be directed to consider the relevant purposes of the Act, among which are a requirement to punish offenders only 'to the extent justified by' (among several other factors): their degree of responsibility and the presence of aggravating or mitigating factors.[40]

Furthermore, a judge must follow the overarching sentencing guidelines found in Section 5. Establishment of conditions for rehabilitation is a relevant guideline which will be of importance to impaired persons where they are found guilty of committing an act.[41]

(b) Crimes Act

Applying the *Crimes Act* is less useful and by Johnson's advice seems to confirm (although note she is practicing out of South Australia) that the criminal justice process is inflexible towards offenders with impairments and they will likely stand trial as any other accused.

The objectives of the rape provisions are to uphold the right to consent and to protect children and those with cognitive impairments from sexual exploitation.[42]

The principles go a step further and include quite politically-charged talking points which date the amendments to the present day, where there is a

[34] Ibid.
[35] Ibid.
[36] Neil Brewer and Robyn Young, *Crime and Autism Spectrum Disorder* (eBook) *(2015, Jessica Kingsley).*
[37] Ibid, 52.
[38] Ibid 52-54.
[39] Ibid and Above, n 33, citing Trish Johnson.
[40] *Sentencing Act 1991* (Vic), s 1(d)(iv)(B)(C).
[41] Ibid, s 5(1)(c), see also the rest of the guidelines at s 5(1)(a)-(f) which also will be of importance.
[42] *Crimes Act*, s 37A(a)(b).

supportive media profile given to the issues of sexual violence and violence against women.[43] Mention is made again of acts committed against people with cognitive impairments.[44]

The *Crimes Act* does not appear to be concerned with the rights or vulnerabilities of the accused and is a law to define and detail crimes against the state.

(c) Summary

There is some scope for impaired accused persons to be given relief during the trial process or prior to commencement of court proceedings,[45] but there does not appear to be any legislative grounds for dealing with a mentally impaired accused.

9 *Conclusion*

Brewer proposes an investment in what he calls 'experimental studies', to aid understanding of how 'social cognitive deficits' of varying degrees of severity may result in involvement in criminal activity. This may be a useful long-term preventative measure but does not address the short-term reality that people with mental impairments and cognitive deficits will be charged and declared fit to stand trial.[46]

Police, jurors, lawyers and legislators are aware they are dealing with people of a different composition, people objectively different to members of the community of a sound mind. The reforms to sexual assault and rape laws have been expressed in modern legal liberalism: the right to choose and consent, taking away all the onus from the complainant and putting responsibility onto the initiator to seek consent and not hide behind a mistaken belief or a lack of thought. Since these members of the community are of objectively different circumstances and characteristics, it is arguable that they're in need of laws which cater to their circumstances. On the other hand, there is not available an authority from the High Court of other jurisdictions which addresses the 2014 *Amendment Act* on a question of law with relevance to impaired persons. The situation as of writing is very much wait and see, but it seems like there are clear issues with the way that people not of sound mind and suffering from recognized psychiatric illness are so easily brought before a criminal justice system which, if not designed to address such people, is indiscriminately doing so in its administration of justice for crimes against the state as a whole.

[43] Ibid, s 37B(a)-(e), see generally Veronica Wensing, 'When People We Love Do Awful Things, We Can't Excuse Them', The Huffington Post (Australia) (Online) 13/9/16 <http://www.huffingtonpost.com.au/veronica-wensing/when-people-we-love-do-awful-things-we-cant-excuse-them/?utm_hp_ref=au-homepage>

[44] Ibid s 37B(c).

[45] Above, n 33, quoting Trish Johnson: A common issue would be their ability to understand their rights. One of the rights is their right to remain silent, and I've seen lots of examples where a defendant has had his rights explained, he's been asked, 'Do you understand?' And the common response is, 'Yes.' Similarly to people with intellectual impairment, the automatic response is, 'Yes, I understand,' when more often than not they don't. Probably out of a sense of embarrassment, not wanting to admit that, 'I don't understand what you just said to me,' and that can obviously lead to applications to have a record of interview excluded once that matter hits court.

[46] Above, n 35, citing Brewer and Johnson.

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