

CONVICT AND FORGET? THE FAILURE TO REMEDIATE 15,000 WRONGFUL CRIMINAL CONVICTIONS IN SOCIAL SECURITY

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Studies of social security law in 21st century Australia have justifiably focused on the Robodebt scandal. However, an earlier welfare matter, described herein as ‘the omissions affair’, equally illustrates the injustices endured by Australian welfare recipients, as well as the power dynamics in Australia’s criminal justice system. Between 1991 and 2011, some 15,000 criminal convictions were recorded against apparently innocent people for social security offences – though these matters have long been ‘forgotten’. The first aim of this article is to analyse the decisions of the High Court of Australia that elucidated the principles establishing these wrongful convictions. The second aim is to consider the varied impacts of these convictions, whether they could be appealed today, and what reforms, if any, could help avoid the recurrence of such miscarriages in future. The article concludes by suggesting how the omissions affair played an important role in the eventual development of the Robodebt scheme.

I INTRODUCTION

The Robodebt scandal (‘Robodebt’)¹ and the Royal Commission into the Robodebt Scheme (‘RRC’)² in 2023 have disclosed deep asymmetries of power in the Australian social security system.³ That picture has been enhanced by a

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1 ‘Robodebts’ were identified as alleged welfare overpayments not adequately supported by evidence as early as 18 January 2016 in the Social Services and Child Support Division of the Administrative Appeals Tribunal: see *Royal Commission into the Robodebt Scheme* (Report, 7 July 2023) vol 3, lxix, ccxvi–ccxvii (‘*Robodebt Report*’). See also Order of Davies J in *Amato v Commonwealth* (Federal Court of Australia, VID611/2019, 27 November 2019) 2 [4], 6 [9]; *Prygodicz v Commonwealth [No 2]* (2021) 173 ALD 277, 280 [4] (Murphy J) (‘*Prygodicz*’). Consideration of the unlawfulness of Robodebts appears in Terry Carney, ‘Robo-Debt Illegality: The Seven Veils of Failed Guarantees of the Rule of Law?’ (2019) 44(1) *Alternative Law Journal* 5 <<https://doi.org/10.1177/1037969X18815913>> (‘Robo-Debt Illegality’); Peter Hanks, ‘Administrative Law and Welfare Rights: A 40-Year Story from *Green v Daniels* to “Robot Debt Recovery”’ (2017) 89 (October) *Australian Institute of Administrative Law Forum* 1.

2 See *Robodebt Report* (n 1).

3 See Robert van Krieken, ‘The Organization of Ignorance: The Australian “Robodebt” Affair, Bureaucracy, Law and Politics’ (2024) 50(7–8) *Critical Sociology* 1379 <<https://doi.org/10.1177/08969205241245257>>.

growing body of legal scholarship that examines the uses of automation in the administrative welfare state.⁴ Much rarer have been studies of the wholesale criminalisation of welfare recipients, and the disruption of that process through two successful criminal appeals in 2011 and 2013.⁵ Surprisingly, almost no legal scholarship has focused on a most significant legal error that is thought to have affected about 40% of criminal convictions for summary welfare offences⁶ over as many as two decades between 1991 and 2011.⁷

The full scale of this legal error was first disclosed by the Commonwealth Government in 2011. While tabling legislation in the House of Representatives, the then Minister for Social Inclusion and Human Services stated that 15,000 social security offence convictions⁸ recorded between 2001 and 2011 were ‘open to

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- 4 See, eg, Terry Carney, ‘The New Digital Future for Welfare: Debts without Legal Proofs or Moral Authority?’ [2018] (1) *University of New South Wales Law Journal Forum* 1; Anna Huggins, ‘Addressing Disconnection: Automated Decision-Making, Administrative Law and Regulatory Reform’ (2021) 44(3) *University of New South Wales Law Journal* 1048 <<https://doi.org/10.53637/WCGG2401>>; Margaret Allars, ‘Automated Decision-Making and Review of Administrative Decisions’ (2024) 58(3) *Georgia Law Review* 1145; Mona Nikidehaghani, Jane Andrew and Corinne Cortese, ‘Algorithmic Accountability: Robodebt and the Making of Welfare Cheats’ (2022) 36(2) *Accounting, Auditing and Accountability Journal* 677 <<https://doi.org/10.1108/AAAJ-02-2022-5666>>; Andrew Ray, Bridie Adams and Dilan Thampapillai, ‘Access to Algorithms Post-Robodebt: Do Freedom of Information Laws Extend to Automated Systems?’ (2022) 47(1) *Alternative Law Journal* 10 <<https://doi.org/10.1177/1037969X211029434>>; Yee-Fui Ng and Stephen Gray, ‘Disadvantage and the Automated Decision’ (2022) 43(2) *Adelaide Law Review* 641; Terry Carney, ‘Artificial Intelligence in Welfare: Striking the Vulnerability Balance?’ (2020) 46(2) *Monash University Law Review* 23 <<https://doi.org/10.26180/13370369.v2>> (‘Artificial Intelligence in Welfare’).
- 5 See, eg, Scarlet Wilcock, ‘(De-)Criminalizing Welfare? The Rise and Fall of Social Security Fraud Prosecutions in Australia’ (2019) 59(6) *The British Journal of Criminology* 1498 <<https://doi.org/10.1093/bjcr/azz027>> (‘Rise and Fall’); Scarlet Wilcock, ‘Policing Welfare: Risk, Gender and Criminality’ (2016) 5(1) *International Journal for Crime, Justice and Social Democracy* 113 <<https://doi.org/10.5204/ijcsd.v5i1.296>> (‘Risk, Gender and Criminality’); Tim Prenzler, ‘Reducing Welfare Fraud: An Australian Case Study’ (2017) 30(2) *Security Journal* 569 <<https://doi.org/10.1057/sj.2014.36>> (‘Reducing Welfare Fraud’).
- 6 The relevant offence is at *Criminal Code Act 1995* (Cth) s 135.2(1) (‘Code’). Since s 135.2(1) was inserted into the Code by schedule 1 of the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* (Cth) (‘Fraud Amendment Act’), it has been ‘the most commonly prosecuted social security offence’: see Scarlet Wilcock, *Policing Welfare Fraud: The Government of Welfare Fraud and Non-Compliance* (Routledge, 2024) 51 <<https://doi.org/10.4324/9780429277306>> (‘Policing Welfare Fraud’); New South Wales Sentencing Council, *Fraud* (Report, 14 June 2023) 129 [C.3] (‘NSW Sentencing Council Report’).
- 7 The 40% figure is taken from the Minister’s second reading speech: see Commonwealth, *Parliamentary Debates*, House of Representatives, 6 July 2011, 7830 (Tanya Plibersek, Minister for Social Inclusion and Minister for Human Services). The 1991 date is taken from ‘Centrelink Fraud Prosecutions Manual’ (Exhibit No 3–4033, Royal Commission into the Robodebt Scheme, 31 July 2017) 36 [12.8] <<https://robodebt.royalcommission.gov.au/publications/exhibit-3-4033-cdp000100146700-0271-centrelink-fraud-pm-v1-310717>> (‘CDPP Fraud Manual’).
- 8 In early news reports of the time, the higher figure of ‘more than 16,500’ was cited: see Sue Dunlevy, ‘Government Closes Welfare Loophole Threatening Fraud Convictions’, *The Australian* (online, 24 June 2011) <<https://www.theaustralian.com.au/nation/politics/government-closes-welfare-loophole-threatening-fraud-convictions/news-story/4fab3d86ce76c98577f730ef59370f0b>>; Luke Geary and Melinda Wong, ‘Omissions under the Criminal Code: A (Rather Costly) Point of Principle’ [2012] (February) *Law Society Journal* 80, 81. According to the ‘CDPP Fraud Manual’ (n 7) 36 [12.8]: ‘The number of affected convictions is unknown, but is significant and has been estimated to be in the vicinity of 15,000’.

question'.⁹ As I will explicate below, however, these questionable convictions may be reasonably presumed to be 'wrongful convictions' – or, in the relevant language of the 'common form' appeal provisions,¹⁰ substantial miscarriages of justice.¹¹ Documents published for the first time during the RRC further indicate the view within the Office of the Commonwealth Director of Public Prosecutions ('CDPP') that these unsound convictions may date from 1991.¹² Nevertheless, scholars, as well as governments, appear to have neglected this historical matter.¹³ Certainly, no substantial attempts to 'regularise' the suspected miscarriages have occurred.¹⁴

Inattention to wrongful convictions might once have been rationalised when such matters were 'ignored or overlooked' by criminologists and scholars in the United States ('US').¹⁵ But American attitudes underwent a shift in the 1990s. As Richard A Leo argues, advancements in forensic technology at this time led to a raft of 'DNA exonerations' and 'shattered' the 'myth of infallibility' that had long underlaid the US criminal justice system.¹⁶ Similar attitudinal shifts are apparent in Australia in the

9 See Commonwealth, *Parliamentary Debates*, House of Representatives, 6 July 2011.

10 See discussion below in Part IV(B).

11 Why these convictions may and should be described as wrongful is considered below in Part III(D). In summary, I subscribe to David Hamer's contention that 'it would be counterproductive to deny that convictions of the legally innocent are also wrongful': David Hamer, 'Wrongful Convictions, Appeals, and the Finality Principle: The Need for a Criminal Cases Review Commission' (2014) 37(1) *University of New South Wales Law Journal* 270, 274 ('Wrongful Convictions').

12 That view was expressed as follows:

The High Court's decisions in *Poniatowska* and *Keating* are also relevant to past convictions for social security fraud. Although the decisions relate to the operation of the *Criminal Code*, which came into operation in 2001, it was in 1991 that the duty to advise Centrelink of a change in circumstances was removed from the social security legislation. It may therefore be argued that the decisions affect convictions from 1991.

'CDPP Fraud Manual' (n 7) 36 [12.8]. Furthermore, a CDPP practice instruction, which outlines the CDPP's approach to charging 'less serious' social security offences before 2 October 2001 (when the *Code* (n 6) came into force), indicates that convictions secured between 1991 and 2001 under sections 212–14 of the *Social Security (Administration) Act 1999* (Cth) ('*Administration Act*') may be affected by *DPP (Cth) v Keating* (2013) 248 CLR 459 ('*Keating*'): see 'General Charging Policy in Social Security Fraud Matters' (Instruction No 6, Revenue & Benefits Fraud Practice Group, Commonwealth Director of Public Prosecutions, 19 December 2014) 2–3 [15] <<https://www.cdpp.gov.au/system/files/PGI-RBF-006.pdf>> ('Charging Policy').

13 But see the question asked by Senator Rachel Siewert in Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Group 3: Question No 63* (Answers to Questions, 27 June 2014) <https://www.aph.gov.au/~media/Committees/legcon_ctte/estimates/add_1314/AGD/AGD-AE14-063.pdf> ('*Answers to Additional Estimates Questions 63*'). Although Victoria Legal Aid was responsible for preparing submissions and facilitating the appeal in *Keating* (n 12), few legal and social security organisations have been proactively involved in this matter: see, eg, Victoria Legal Aid, *Inquiry into Access to Justice* (Report, November 2013).

14 The term 'regularise' in law denotes the correction of an invalid legal decision: see, eg, discussion of attempts to 'regularise the consequences of invalid convictions and punishments' in *Haskins v The Commonwealth* (2011) 244 CLR 22, 59 [98] (Heydon J).

15 Richard A Leo, 'The Criminology of Wrongful Conviction: A Decade Later' (2017) 33(1) *Journal of Contemporary Criminal Justice* 82 <<https://doi.org/10.1177/1043986216673013>> ('A Decade Later'). See also Richard A Leo, 'Rethinking the Study of Miscarriages of Justice: Developing a Criminology of Wrongful Conviction' (2005) 21(3) *Journal of Contemporary Criminal Justice* 201 <<https://doi.org/10.1177/1043986205277477>>.

16 Leo, 'A Decade Later' (n 15) 83.

1990s. After the exoneration of the Chamberlains in 1988, criminologists increasingly paid attention to wrongful convictions,¹⁷ while judicial authorities acknowledged the gravity of these errors,¹⁸ including when Australia's first 'DNA exoneration' occurred in 2001.¹⁹ While a modest decline in Australians' 'public concern for wrongful convictions' has been reported over the last decade,²⁰ academic and public interest in post-conviction review has intensified more recently.²¹

That little interest has been shown in these suspected 15,000 wrongful convictions is difficult to explain. It might be hypothesised that social security offending, or so-called 'welfare fraud',²² is not commonly studied in criminology,²³ especially if it is not 'serious'.²⁴ Equally, it might be supposed that public attention to Robodebt since 2017 has diverted attention away from this earlier matter.²⁵ Similarly, a lack of political debate about social security matters in the 2013–14

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- 17 See, eg, Joseph MacFarlane and Greg Stratton, 'Marginalisation, Managerialism and Wrongful Conviction in Australia' (2016) 27(3) *Current Issues in Criminal Justice* 303 <<https://doi.org/10.1080/10345329.2016.12036048>>. See also Kerry Carrington et al (eds), *Travesty! Miscarriages of Justice* (Pluto Press, 1991); Joanna Kyriakakis, 'Lessons from the Chamberlain Case: The Human Cost of Wrongful Conviction', *The Conversation* (online, 19 June 2012) <<https://theconversation.com/lessons-from-the-chamberlain-case-the-human-cost-of-wrongful-conviction-7730>>.
- 18 For instance, in *Van der Meer v The Queen* (1988) 82 ALR 10, Deane J said, at 31, that the:
[S]earing injustice and consequential social injury of a wrongful conviction which is involved when the law turns upon itself and convicts an innocent person far outweigh the failure of justice and the consequential social injury involved when the processes of the law proclaim the innocence of a guilty one.
- 19 Williams JA described the day on which the Court of Appeal quashed the 'false' conviction of the appellant as 'a black day in the history of the administration of criminal justice in Queensland': *R v Button* [2001] QCA 133, 2. See also Justice Michael Kirby, 'Black and White Lessons for the Australian Judiciary' (2002) 23(2) *Adelaide Law Review* 195; Jeremy Gans and Gregor Urbas, 'DNA Identification in the Criminal Justice System' (Trends and Issues in Crime and Criminal Justice Paper No 226, Australian Institute of Criminology, May 2002) <<http://www.aic.gov.au/publications/tandi/tandi226>>.
- 20 See Harley Williamson, Mai Sato and Rachel Dioso-Villa, 'Wrongful Convictions and Erroneous Acquittals: Applying Packer's Model to Examine Public Perceptions of Judicial Errors in Australia' (2023) 67(8) *International Journal of Offender Therapy and Comparative Criminology* 783 <<https://doi.org/10.1177/0306624X211066826>>; Moulin Xiong, Richard G Greenleaf and Jona Goldschmidt, 'Citizen Attitudes toward Errors in Criminal Justice: Implications of the Declining Acceptance of Blackstone's Ratio' (2017) 48 (March) *International Journal of Law, Crime and Justice* 14 <<https://doi.org/10.1016/j.ijlcrj.2016.10.001>>.
- 21 See, eg, Kylie Lingard, 'Accessing Justice after Conviction: A Review of the *Crimes (Appeal and Review) Act 2001* (NSW) Part 7 Division 3' (2024) 47(3) *University of New South Wales Law Journal* 880 <<https://doi.org/10.53637/YDBY4196>>; Hamer, 'Wrongful Convictions' (n 11); David Hamer and Andrew Dyer, 'Kathleen Folbigg Pardon Shows Australia Needs a Dedicated Body to Investigate Wrongful Convictions', *The Conversation* (online, 5 June 2023) <<https://theconversation.com/kathleen-folbigg-pardon-shows-australia-needs-a-dedicated-body-to-investigate-wrongful-convictions-205645>>.
- 22 See Tim Prenzler, 'Welfare Fraud Prevention in Australia: A Follow-up Study' (2016) 18(3) *Crime Prevention and Community Safety* 187 <<https://doi.org/10.1057/cpcs.2016.5>> ('Welfare Fraud Prevention').
- 23 The works of Prenzler and Wilcock, cited throughout these footnotes, are exceptions. On social welfare and criminology generally, see Stephen J Morse, 'The Twilight of Welfare Criminology' (1977) 49(1) *New York State Bar Journal* 11.
- 24 Although, as I will suggest in Part III(A), many people were likely incarcerated for these convictions.
- 25 While considerations of this kind remain speculative only, it is notable that the Terms of Reference for the RRC imputed a start date of 1 July 2015, with the result that the RRC did not substantively investigate connections between the omissions affair and the design of the scheme: see *Robodebt Report* (n 1) vol I, x–xii. Nevertheless, some reporting during the RRC considered the impact of the omissions affair: see Rick Morton, 'Robo-Debt Shonky from the Start', *The Saturday Paper* (online, 20

period, when these events occurred (and when the government changed), may have reduced public awareness of the omissions affair.²⁶ However, for reasons advanced in Part II, this historical episode is a complex but significant legal problem that merits detailed scholarly attention.

The first objective of this article is to analyse the two cases that elucidated the principles that established this significant number of wrongful convictions. For reasons explained hereafter, I will describe these cases and the events comprising this incident as ‘the omissions affair’. Though the primary appeal cases have been subject to some commentary, no sustained analysis of the legal issues has been undertaken.²⁷ Part II will thus analyse the background and appeals preceding the delivery of judgments in *Director of Public Prosecutions (Cth) v Poniatowska* (*‘Poniatowska High Court Appeal’*)²⁸ in the High Court of Australia. That Part will then consider the Commonwealth Parliament’s attempt to enact a curative amendment to retrospectively close the so-called ‘loophole’ that had rendered so many convictions unsound. The Part will subsequently analyse the unanimous High Court decision in *Director of Public Prosecutions (Cth) v Keating* (*‘Keating’*),²⁹ which found the retrospective operation of that amendment to be ‘a statutory fiction’.³⁰

February 2021) <<https://www.thesaturdaypaper.com.au/news/politics/2021/02/20/robo-debt-shonky-the-start/161373960011136#hrd>>.

- 26 See discussion of the parliamentary debates in Part II(D). It may also be that, until each of these miscarriages has been reviewed by the courts, they will be regarded as hypothetical only; or, as was said in the second reading speech for the Social Security and Other Legislation Amendment (Miscellaneous Measures) Bill 2011 (*‘Social Security Amendment Bill’*), the offences will be regarded merely as ‘previously unidentified legal technicalities’: Commonwealth, *Parliamentary Debates*, House of Representatives, 6 July 2011, 7832 (Tanya Plibersek, Minister for Social Inclusion and Minister for Human Services).
- 27 But see Guy Cumes’s detailed consideration of the ‘principle of legality’ as it arose in the omissions affair: Guy Cumes, ‘The Nullum Crimen, Nulla Poena Sine Lege Principle: The Principle of Legality in Australian Common Law’ (2015) 39(2) *Criminal Law Journal* 77, 89–90. See, eg, Nive Achuthan, David Grove and Fiona Brice, ‘High Court Decision Provides Much Needed Clarity about the Law Surrounding Social Security Fraud: But More Questions Remain to Be Answered’, *Human Rights Law Centre* (Web Page, 8 May 2013) <<https://www.hrlc.org.au/human-rights-case-summaries/high-court-decision-provides-much-needed-clarity-about-the-law-surrounding-social-security-fraud-but-more-questions-remain-to-be-answered>>; Natalie Burgess, ‘Fiction and Certainty in Social Security Prosecutions: *DPP (Cth) v Keating*’, *Opinions on High* (Blog Post, 25 July 2013) <<https://blogs.unimelb.edu.au/opinionsonhigh/2013/07/25/burgess-keating/>>; Justin Wong, ‘Changes in Circumstances and Centrelink Fraud’ (2013) 51(9) *Law Society Journal* 42; Simon Lauder, ‘High Court Says Welfare Fraud Law Is a “Statutory Fiction”’, *The World Today* (ABC Radio National, 8 May 2013) 0:04:07 <<https://www.abc.net.au/listen/programs/worldtoday/high-court-says-welfare-fraud-law-is-a-statutory/4677290>>; Katie Miller, ‘Connecting the Dots: A Case Study of the Robodebt Communities’ (2017) 89 (October) *Australian Institute of Administrative Law Forum* 50; Morton (n 25); Peter Sutherland, ‘Social Security Overpayments and Debt Recovery: Key Developments’ (2017) 89 (October) *Australian Institute of Administrative Law Forum* 69; Geary and Wong (n 8); Wilcock, *Policing Welfare Fraud* (n 6) 170–1; Don Mathias, ‘A Failed Attempt at Retrospective Criminalisation’, *Criminal Law Casebook* (Blog, 9 May 2013) <<https://donmathias.wordpress.com/2013/05/09/a-failed-attempt-at-retrospective-criminalisation/>>.
- 28 (2011) 244 CLR 408 (*‘Poniatowska High Court Appeal’*).
- 29 *Keating* (n 12).
- 30 See Transcript of Proceedings, *Keating v DPP (Cth)* [2012] HCATrans 346 (*‘Keating HCA Transcript’*).

The second objective of this article is to explore a series of unresolved questions arising from the omissions affair. It does so in Parts III and IV. Materials made available through Freedom of Information ('FOI') requests and documents released for the first time during the RRC will inform this analysis. However, a lack of data means that the findings in these Parts must remain provisional. Part III considers the apparently small number of appeals against convictions for omissions following the decisions in *Poniatowska High Court Appeal* and *Keating*. It also analyses the likely characteristics of the affected cohort, as well as the mental health, employment and possible secondary criminal liability impacts of those convictions. As these convictions became known as '*Keating*-affected convictions' in the CDPP's records system after *Keating*,³¹ I will refer to them as such hereafter. Part III also considers the nature of these convictions as 'wrongful'. Part IV will consider post-conviction review in Australia and the particular issues attending *Keating*-affected convictions, such as finality. Drawing on the United Kingdom's ('UK') Horizon Scandal, this Part will also consider possible reforms to improve the Australian post-conviction review landscape.

Part V concludes by examining the connection between the omissions affair and the Robodebt scheme. It argues that the omissions affair's significant disruption to the 'welfare prosecution system', combined with changes to Centrelink's funding structure in 2009, played a crucial role in Robodebt's emergence. While brief, it is hoped this analysis will stimulate further research into this historical connection.

II THE OMISSIONS AFFAIR

What I call the omissions affair comprises four key events:

- A criminal appeal in 2010: *Poniatowska v Director of Public Prosecutions (Cth)* ('*Poniatowska Full Court Appeal*')³²;
- The legislature's response to that appeal in 2011, which entailed the enactment of 'curative' criminal legislation;
- A second criminal appeal, heard in the High Court of Australia in 2011 (*Poniatowska High Court Appeal*); and, finally,
- A separate criminal hearing in 2013 that challenged the retrospective operation of the curative legislation identified above, but was removed to the High Court of Australia (*Keating*).

Each of these matters involved a determination of whether certain conduct by persons in receipt of a social security benefit from the Commonwealth Services Delivery Agency, trading as 'Centrelink',³³ gave rise to criminal liability. The central issue was whether a person in receipt of a social security benefit who omitted to notify changes in their circumstances to Centrelink (or the Department of Human

31 See below Part III(B).

32 (2010) 107 SASR 578 ('*Poniatowska Full Court Appeal*').

33 Centrelink is the agency responsible for administering social security programs under the *Commonwealth Services Delivery Agency Act 1997* (Cth), although that Act was renamed in 2011 as the *Human Services (Centrelink) Act 1997* (Cth).

Services ('DHS')³⁴ was guilty of a criminal offence under section 135.2(1) of the *Criminal Code Act 1995* (Cth) ('Code'). Ultimately, the answer proved to be as follows. Although it was theoretically possible for an omission to have amounted to a criminal offence before 2011,³⁵ the CDPP had long misconceived the requirements of section 135.2(1) of the *Code*. Accordingly, the particulars, set out in the charge sheets that formed the basis of omissions prosecutions, had been defective since at least 2001, when the offence was introduced.³⁶ Specifically, these charges were under-particularised and thus incapable of satisfying the requisite elements of the alleged offence. As was accepted in the High Court, such charges, so particularised, disclosed no offence known to law.³⁷

Superior courts have examined the particulars of omissions cases in only two instances: *Poniatowska High Court Appeal* and *Keating*. However, during the *Poniatowska* appeals, the Commonwealth conceded that the CDPP had always under-particularised charges for omissions in the same manner as it had in these cases.³⁸ Indeed, in the decade before judgment was delivered in *Poniatowska High Court Appeal*, the CDPP had always relied on inadequate 'short form briefs' of evidence based on information received from Centrelink officers but lacking essential details about the recipient's legal duties.³⁹ Strikingly, no prosecutions were instituted following judgment in *Keating* for omissions prior to 2011 – even though it would have been theoretically possible (if relevant evidence existed to support the prosecution) to particularise those charges in accordance with the requirements

34 While at the time of these events the agency was the Department of Human Services ('DHS'), it is now known as Services Australia. See Services Australia, *Annual Report 2019–20* (Report, 1 October 2020) 162.

35 As discussed below, the reasoning of the unanimous High Court in *Keating* (n 12) confirms that, for any conviction before 2011 based on a reporting omission to have been valid, the CDPP would have had to have alleged and proved to the criminal standard that: the defendant received an information notice issued under sections 67–70 and 70A of the *Administration Act* (n 12); that the terms of the information notice imposed an obligation or duty on the recipient to 'do a thing' for the purposes of section 4.3(b) of the *Code* (n 6) (regardless of whether it also imposed a duty under section 74 of the *Administration Act* (n 12)); that the recipient then intentionally failed to comply with that duty; and that this intentional failure to comply resulted in the recipient obtaining a financial advantage from Centrelink knowing or believing that they were not eligible to receive that financial advantage: see *Keating* (n 12) 474–6 [33]–[39] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ). While the CDPP could and did particularise these allegations in respect of the charges against Ms Keating, that was only possible because the matter was still pending when it was heard, on removal, in the High Court. It would not be possible, as illustrated in *Poniatowska High Court Appeal* (n 28) for the CDPP to alter any charge sheet in any appeal of a decision where a conviction had already been recorded.

36 See below n 139.

37 That a criminal charge sheet or information must be precise and set out the factual ingredients of the offence has been long recognised: see, eg, *John L Pty Ltd v A-G (NSW)* (1987) 163 CLR 508, 519 (Mason CJ, Deane and Dawson JJ); *Johnson v Miller* (1937) 59 CLR 467, 486–7 (Dixon J), 501 (McTiernan J).

38 It was acknowledged during the leave hearing for *Poniatowska High Court Appeal* (n 28) that the case would likely lead to criminal appeals and monetary risks for the Commonwealth. As Gummow J said, 'you want special leave to determine some major point of principle which involves a lot of money to the Commonwealth': see Transcript of Proceedings, *DPP (Cth) v Poniatowska* [2010] HCATrans 304 ('*Poniatowska HCA Leave Hearing Transcript*'). See also discussion of a speech by Kevin Andrews in the House of Representatives, discussed below in Part II(D).

39 See Auditor-General (Cth), *Centrelink Fraud Investigations* (Audit Report No 10 2010–11, 30 September 2010) 119–29 [5.22]–[5.46] <https://www.anao.gov.au/sites/default/files/ANAO_Report_2010-2011_10.pdf> ('*Centrelink Fraud Audit Report*').

revealed to be necessary in *Poniatowska High Court Appeal*.⁴⁰ The conclusion to be inferred from this outcome is that an estimated 15,000 or more individuals have been convicted on the same basis as Ms Poniatowska – that is, on a misconceived basis for an offence ‘unknown to law’ – between 2001–11 (and possibly as early as 1991).⁴¹

The omissions affair remains significant for many reasons.⁴² In the history of the criminal law, few examples can compare with the number of unsafe convictions suspected to have arisen in this matter.⁴³ One recent comparator is the UK’s Horizon Scandal. Although subject to an ongoing inquiry,⁴⁴ that scandal has been denounced as ‘one of the greatest miscarriages of justice in [British] history’.⁴⁵ While no doubt a deeply tragic incident, it is notable that this matter involved fewer convicted individuals than the omissions affair: an estimated 900 wrongful convictions, with some 200 of that cohort serving prison terms. Perhaps more relevantly, the Horizon Scandal has also been remediated, with 111 of those convictions being vacated⁴⁶ and 2,800 affected persons having received compensation.⁴⁷

Another reason the omissions affair is significant is because its impacts are comparable to other widely condemned scandals. While the Robodebt scandal affected a much larger cohort of some 648,000 people,⁴⁸ and its impacts were grave, it remains unclear whether any Robodebt victims were convicted of social security offences for debts wrongly asserted against them. While some documents indicate criminal prosecutions were commenced (if not finalised)

40 See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 6 July 2011, 7832 (Tanya Plibersek, Minister for Social Inclusion and Minister for Human Services).

41 See ‘CDPP Fraud Manual’ (n 7) 36 [12.8].

42 See below Part V. Beyond the legal facts of the omissions affair, *Poniatowska High Court Appeal* (n 28) and *Keating* (n 12) sharpened the Australian common law of criminal responsibility generally, especially in relation to the principles of certainty and retrospectivity: see, eg, Arlie Loughnan, *Self, Others and the State: Relations of Criminal Responsibility* (Cambridge University Press, 2019) 135 <<https://doi.org/10.1017/9781108596367>>; Troy Anderson, *Commonwealth Criminal Law* (Federation Press, 2014) 59–62.

43 Cf Patrick G Lee, ‘Thousands of Potentially Wrongful Convictions: Years of Delayed Action’, *ProPublica* (online, 10 November 2016) <<https://www.propublica.org/article/thousands-of-potentially-wrongful-convictions-years-of-delayed-action>>.

44 See ‘Welcome to the Post Office Horizon IT Inquiry Website’, *Post Office Horizon IT Inquiry* (Web Page) <<http://www.postofficehorizoninquiry.org.uk>>.

45 United Kingdom, *Parliamentary Debates*, House of Commons, 8 January 2024, vol 743, col 81–118.

46 See ‘Overturned Convictions and Financial Redress: Information on Progress’, *Post Office Corporate* (Web Page, 24 May 2024) <<https://corporate.postoffice.co.uk/en/horizon-scandal-pages/overturned-convictions-and-financial-redress-information-on-progress>>.

47 See, eg, Prime Minister’s Office, Kevin Hollinrake and Rishi Sunak, ‘Wrongful Post Office Convictions to Be Quashed through Landmark Legislation’ (Press Release, 13 March 2024) <<https://www.gov.uk/government/news/wrongful-post-office-convictions-to-be-quashed-through-landmark-legislation-13-march-2024>>.

48 This is the number of group members to the class action and remediation scheme: see *Prygodicz* (n 1) 290–1 [48]–[59] (Murphy J). Not all members were eligible for settlement sums, however. Approximately 433,000 received ‘robodebt refunds’ (where those debtors had already made some repayments), while others, who had not made any repayments, had their asserted debts set aside. See Senate Community Affairs References Committee, Parliament of Australia, *Accountability and Justice: Why We Need a Royal Commission into Robodebt* (Final Report, May 2022) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Centrelinkcompliance/Final_Report>.

against individuals,⁴⁹ no criminal prosecutions or convictions are recorded in the report of the *Royal Commission into the Robodebt Scheme* ('*Robodebt Report*').⁵⁰ And a final reason the omissions affair remains important relates to the broader narrative of Australian social security law and policy in the 21st century. As I will suggest in Part V, the *Robodebt Report* has furnished some evidence to suggest that the earliest development of the Robodebt scheme in 2014 was driven by certain obstacles to prosecuting welfare recipients raised by the omissions affair, together with the financial implications of this episode for Centrelink and the DHS.⁵¹

A Background to the Poniatowska Appeals

The omissions affair began in 2008 with the prosecution of Ms Malgorzata Poniatowska. Poniatowska was an eligible recipient of a means-tested social security benefit known as the Parenting Payment Single ('PPS').⁵² She first received the benefit in the early 2000s as a newly single parent⁵³ but continued to receive it when she entered full-time employment in 2006–07. As a property sales consultant, Poniatowska was paid in lump sum commissions at the end of each month.⁵⁴ In May

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- 49 See, eg, 'Matters Flagged by Services Australia: Analysis by CDP (Comments by SA)' (Exhibit No 3-4060, Royal Commission into the Robodebt Scheme, 27 January 2023) <<https://robodebt.royalcommission.gov.au/publications/exhibit-3-4060-cdp000100100633-r-matters-flagged-services-australia-analysis-cdp-comments-sa>>; 'Matters to be Suspended: Potential Robodebt Impacts' (Exhibit No 3-4051, Royal Commission into the Robodebt Scheme, 4 June 2020) <<https://robodebt.royalcommission.gov.au/publications/exhibit-3-4051-cdp000100143973-r-urgent-action-matters-be-suspended-potential-robodebt-impacts-secofficial-sensitive>>; 'Memorandum of Lauren Catanzariti Entitled [Redacted]: Decision to Commence Prosecution following Outcome of Administrative Appeals, (Exhibit 3-4007, Royal Commission into the Robodebt Scheme, 23 January 2023) <<https://robodebt.royalcommission.gov.au/publications/exhibit-3-4007-cdp999900010005-r-0005-exhibit-jec-16-memorandum-lauren-catanzariti-entitled-redacted-decision-commence-prosecution-following-outcome-administrative-appeals>>. Despite the contents of these documents, it is logically unlikely that many, if any, Robodebt victims were convicted due to the response-dependent nature of the scheme. Those accused of receiving overpayments were sent letters requesting further evidence of their income. Those who responded with further evidence may have permitted the Department of Social Services ('DSS') to recalculate the debt manually, converting the alleged debt into a debt calculated in accordance with law. If any such person was prosecuted, the criminal complaint would arguably have not been based on a Robodebt (albeit originating as an alleged Robodebt). By contrast, those who did not cooperate were likely to have had the alleged debt garnished from their tax returns or the debt pursued by private debt collectors; however, it appears no such persons were subject to criminal prosecution.
- 50 See *Robodebt Report* (n 1).
- 51 As Tim Prenzler noted after the affair, 'referrals and prosecutions were abandoned in large numbers': see Prenzler, 'Welfare Fraud Prevention' (n 22) 190. Needless to say, this left a gap in the recovery of welfare 'savings'.
- 52 *Poniatowska v DPP (Cth)* [2010] SASC 1, [3] (David J) ('*Poniatowska Supreme Court*'); *Poniatowska Full Court Appeal* (n 32) 580 [2] (Doyle CJ and Duggan J).
- 53 See *Poniatowska v Channel Seven Sydney Pty Ltd* (2019) 136 SASR 1, 6–7 [18]–[28] (Blue J) ('*Channel Seven*').
- 54 The timing of these payments, together with the explanation given in the majority's reasons as to the 'complex' ways in which the overpayment was calculated, raises questions as to whether Centrelink used unlawful income apportionment to calculate the debt by reference to section 1073B of the *Social Security Act 1991* (Cth) ('*SS Act*'): see *Poniatowska High Court Appeal* (n 28) 415 [15] (French CJ, Gummow, Kiefel and Bell JJ); *Re Secretary, Department of Social Services and FTXB* (2024) 184 ALD 29 (Kyrou P, Senior Member Kennedy and Senior Member Trotter).

2007, Poniatowska's employment was terminated.⁵⁵ However, she continued to receive commission for services rendered while she was employed.⁵⁶ Throughout this period, Poniatowska was required to declare changes in circumstances to Centrelink as an administrative norm. Indeed, that requirement could have transformed into a legal duty if certain information notices were issued and received.⁵⁷ However, Poniatowska had been 'taken off fortnightly reporting requirements' in September 2005 and whether she received any information notices was unclear.⁵⁸

In May 2007, Centrelink conducted an interagency 'data match'⁵⁹ and identified a discrepancy between Poniatowska's income declarations to the Australian Taxation Office and to Centrelink. During the compliance review that resulted, Centrelink obtained further information about her income and, in March 2008, an officer referred a brief of evidence against her to the CDPP.⁶⁰ The next month, the

55 Later, Poniatowska brought successful proceedings against her employer for unlawful termination involving sexual harassment, with discrimination proceedings instituted in the Federal Court of Australia pursuant to section 46PO(1) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth): *Poniatowska v Hickinbotham* [2009] FCA 680 ('Hickinbotham'), affd *Employment Services Australia Pty Ltd v Poniatowska* [2010] FCAFC 92. Leave to appeal was refused: Transcript of Proceedings, *Employment Services Australia Pty Ltd v Poniatowska* [2011] HCATrans 21.

56 After her employment ended, she received 17 lump sum payments totalling \$71,502: *Poniatowska Full Court Appeal* (n 32) 580 [2] (Doyle CJ and Duggan J).

57 The source of this 'requirement' has long been ambiguous. While section 67(2)(a) of the *Administration Act* (n 12) authorises the Department to send recipients certain notices requiring information, and section 74 of the *Administration Act* (n 12) makes non-compliance with such notices an offence, there was no contention in the Poniatowska appeals that a section 67 notice had been sent to Poniatowska, nor that she had failed to comply for the purposes of section 74(1). As the High Court stated, '[i]t [was] not alleged that the respondent was under a duty imposed by a law of the Commonwealth to advise Centrelink of the receipt of those payments': *Poniatowska High Court Appeal* (n 28) 411 [2] (French CJ, Gummow, Kiefel and Bell JJ). See also *Channel Seven* (n 53) 89–90 [463]–[469] (Blue J). To ensure the ambiguity did not continue, section 66A was inserted into the *Administration Act* (n 12) in 2011. The CDPP's Prosecution Manual indicates that the duty to report changes in income was removed from the legislation in 1991: see 'CDPP Fraud Manual' (n 7) 36 [12.8].

58 Being 'taken off reporting' could occur for several reasons; however, it often occurred when a recipient honestly reported no earnings for a fortnight and made no further reports for three successive fortnights thereafter. See, eg, 'Characterisation of Social Security Fraud as Omission or Commission Offending' (Instruction No 4, Revenue & Benefits Fraud Practice Group, Commonwealth Director of Public Prosecutions, 19 December 2014) 1 [5], [7], 2 [15] <<https://www.cdpp.gov.au/system/files/2023-05/PGI-RBF-004.pdf>> ('Charging Instruction No 4 2014').

59 A history of data matching appears in the *Robodebt Report* (n 1) 11 [6.1]. While 'cross-match' and 'cross-check' capabilities are described in the Department of Social Security, Parliament of Australia, *Annual Report for Year 1975–76* (Parliamentary Paper No 239/1976, 21 September 1976) 73, those capabilities were limited: see 'Savings Paper Social Security: Increased Matching of Records between Australian Taxation Office (ATO) and the Department of Social Security (DSS)' (Memorandum No 6339, 9 March 1989) 2, 4 [6]. Even in 1989, there had been a 'question mark over that practice [as] the Privacy Commissioner had raised an issue about its legality in light of recent tax file number and privacy legislation': *Robodebt Report* (n 1) 11 [6.1]. Also see discussion of the program and its use in aiding in prosecutions: 'Program Protocol: Pay-As-You-Go (PAYG) Data Matching May 2004' (Program Protocol, Centrelink, May 2004) 5 [2.1]. The data-matched information was held by the Australian Taxation Office and Centrelink in its reporting records: see *Poniatowska High Court Appeal* (n 28) 415 [18] (French CJ, Gummow, Kiefel and Bell JJ).

60 Liesl Chapman, 'Applicant's Chronology' (Court Document, High Court of Australia, 1 February 2011) 1 <https://www.hcourt.gov.au/assets/cases/a20-2010/Poniatowska_Chrono.pdf> ('Chronology').

CDPP charged Poniatowska with three ‘rolled up’⁶¹ counts of ‘engaging in conduct and obtaining a financial advantage knowing she was not entitled to receive the financial advantage’ contrary to section 135.2(1) of the *Code*.⁶² After several court appearances, however, the CDPP withdrew those charges, determining them inappropriate,⁶³ and filed new charges alleging 17 counts of the same offence with respect to income from a different employer.⁶⁴

Though Poniatowska initially pleaded not guilty to these offences, she later pleaded guilty to all counts on legal advice.⁶⁵ Importantly, the charges against Poniatowska were based on her *omission* to perform an act⁶⁶ rather than any positive act, such as the misreporting of income, or mixed commission and omission conduct (eg, sporadic reporting). The charge sheet alleged Poniatowska had received an overpayment of the PPS benefit of \$20,162.58 by omitting to notify Centrelink of her income. In the Magistrates Court of South Australia, convictions were recorded against Poniatowska on all 17 counts, and she was sentenced to 21 months’ imprisonment, but conditionally released ‘[on] recognizance’ subject to an order that she pay the sum of \$10 and to be of good behaviour for 24 months.⁶⁷

Poniatowska appealed to the Supreme Court of South Australia on the grounds that the sentencing Magistrate erred in failing to consider her extenuating circumstances (the sexual harassment by her employer and her diagnosed psychiatric illness)⁶⁸ and in not discharging her without recording a conviction.⁶⁹ David J rejected these contentions, finding that the Magistrate had considered

61 A potentially unjust aspect of the way the offence appears to have been charged and prosecuted in this period relates to ‘continuous omissions’ and the failure of the CDPP to ‘roll up’ offences committed by omissions conduct. Continuous omissions could occur in the following manner. A person who earned income in a first fortnight but omitted to notify Centrelink of that income would commit an offence. That person could then earn no income in the second fortnight, and omit to make an income report, but commit no offence. The person could then earn income in the third fortnight and, as in the first fortnight, again omit to report it to Centrelink, thus committing a second offence. In these circumstances, a person would be charged with committing two offences under section 135.2(1) of the *Code* (n 6), despite the person’s conduct forming one continuous omission. While Poniatowska’s 17 counts of omission conduct were ‘rolled up’ into one offence, pursuant to section 4K(4) of the *Crimes Act 1914* (Cth) (*‘Crimes Act’*), this was not common: see *Poniatowska Supreme Court* (n 52) [1] (David J). Cf *Pride v The Queen* (2010) 11 DCLR (NSW) 154 (*‘Pride’*), in which two immediately successive omissions were charged as two sequences of section 135.2(1).

62 ‘Chronology’ (n 60) 1; *Channel Seven* (n 53) 32 [131] (Blue J).

63 See *Channel Seven* (n 53) 25 [130], 92 [479] (Blue J).

64 *Ibid* 24 [123], 25 [131] (Blue J).

65 ‘Chronology’ (n 60) 1; *ibid* 73 [375]–[376] (Blue J).

66 The words ‘engage in conduct’ in section 135.2(1)(a) of the *Code* (n 6) must be read with section 4.1(2) of the *Code* (n 6), which provides: ‘In this Code: ... “engage in conduct” means: (a) do an act; or (b) omit to perform an act’.

67 *Poniatowska Supreme Court* (n 52) [1] (David J); *Poniatowska High Court Appeal* (n 28) 411 [3] (French CJ, Gummow, Kiefel and Bell JJ).

68 *Poniatowska Supreme Court* (n 52) [9] (David J). Notably, Poniatowska had commenced separate proceedings in respect of that sexual assault in the Federal Court of Australia in 2009 and was awarded compensation: see above n 57.

69 Section 19B(1)(d) of the *Crimes Act* (n 61) permits an offender to be discharged without proceeding to a conviction; in text mirroring section 19B, section 20 similarly provides for the conditional release of an offender after conviction ‘by recognizance’.

Poniatowska's circumstances⁷⁰ and that Poniatowska's psychiatric condition was commonplace among those convicted of welfare offences, even where such distress had been caused by 'domestic violence, gambling addiction, sexual abuse and violation and other causes'.⁷¹ David J also found Poniatowska had 'full knowledge that what she was doing was wrong'.⁷²

B The Welfare Prosecution 'System'

When Poniatowska appeared before the courts, Australian welfare prosecutions had reached an historical apogee.⁷³ Scarlet Wilcock has ably examined the "'prosecution-first" mentality' that had pervaded Centrelink between 2008 and 2010.⁷⁴ As Wilcock observes, in 2010, the agency referred more briefs to the CDPP than any other Commonwealth agency.⁷⁵ Centrelink's fraud investigation teams ('FIT')⁷⁶ had been assessed via key performance indicators ('KPIs') since 2000; and these required officers to meet minimum CDPP prosecution referrals⁷⁷ that were linked to minimum 'savings outcomes'.⁷⁸ While FIT officers had thus long been required to investigate 'serious' cases of suspected fraud⁷⁹ (eg, those involving identity fraud⁸⁰), between 2008 and 2010, a practice arose in which overpayments of \$5,000 or more were to be 'automatically' referred for investigation, regardless of seriousness or potential criminality.⁸¹

While Centrelink's investigation KPIs were formulated 'in-house', they were also set out in purchaser-provider agreements – Business Partnership Agreements ('BPAs') made between Centrelink and other government agencies.⁸² Their significance was that they identified revenue targets for deliverable activities, driving the DHS's 'performance' in prosecution investigations and referrals.⁸³ As Wilcock's analysis highlights, Centrelink's funding had been tied to its performance under these BPAs before 2009, which had led to a corporatised 'pseudo-market'

70 *Poniatowska Supreme Court* (n 52) [15]. See also *Hickinbotham* (n 55).

71 *Poniatowska Supreme Court* (n 52) [10].

72 *Ibid* [16]. The conclusion that the appellant had 'full knowledge' seems to emanate from evidence led in the original trial by a Ms Davidson: at [15].

73 See, eg, Wilcock, 'Rise and Fall' (n 5) 1504.

74 *Ibid*.

75 *Centrelink Fraud Audit Report* (n 39) 25 [28].

76 Centrelink's Fraud Investigation Network comprised 11 such teams: Wilcock, 'Rise and Fall' (n 5) 1504.

77 *Centrelink Fraud Audit Report* (n 39) 27 [35].

78 These were minimum quanta of monetary value to be recovered from recipients pursuant to the budgetary goals of the Commonwealth Executive.

79 *Centrelink Fraud Audit Report* (n 39) 13, 19 [9], 26 [31].

80 Wilcock, 'Rise and Fall' (n 5) 1504.

81 *Ibid*; 'CDPP Fraud Manual' (n 7) [12.8].

82 These included the Department of Education, Employment and Workplace Relations (DEEWR), which was then responsible for income support payments such as Newstart Allowance, Parenting Payments, Youth Allowance, as well as job search facilities: see *Centrelink Fraud Audit Report* (n 39) 143 [6.35].

83 See, eg, Auditor-General (Cth), *The Business Partnership Agreement Between the Department of Education, Employment and Workplace Relations (DEEWR) and Centrelink* (Audit Report No 4 2008–09, 24 September 2008) 86 [4.44], 113–31 <https://www.anao.gov.au/sites/default/files/ANAO_Report_2008-2009_04.pdf> ('DEEWR–Centrelink BPA Audit Report').

for welfare services.⁸⁴ Underlying the BPAs was a quid pro quo. For its part, Centrelink would provide quality fraud investigation activities to a partner agency⁸⁵ – activities ‘delivered efficiently and effectively’ according to Assurance Expectation Matrices⁸⁶ and reported in Centrelink’s Annual Assurance Statements (‘AAS’). In turn, the partner agency would purchase those investigation services, which allowed both agencies to generate ‘program savings’ in social security expenditure.⁸⁷

The BPAs incentivised prosecutions – not just because prosecutions were tied to specific ‘dollar savings’ that contributed ‘to the overall required savings amount’⁸⁸ but because they required Centrelink to fulfill the BPAs’ deliverables to maintain funding for its compliance activities.⁸⁹ In the 2008–10 period, low-ranking Centrelink officers were required to complete just under 100 prosecution reviews, while specialist officers were required to refer around 60 briefs to the CDPP each year and achieve a minimum acceptance rate of 85%.⁹⁰ In its 2007–08 AAS, Centrelink achieved \$1.5 billion in program savings and exceeded its target for compliance reviews.⁹¹ As Centrelink’s revenue was primarily derived from these BPAs, its business operations depended on achieving these prosecution targets.⁹²

Although the BPAs were complex, the KPIs (as wholly quantitative measures) were unsophisticated. They led FIT officers to refer mostly trivial matters to the CDPP ‘at the expense of progressing the more complex, serious fraud investigations’.⁹³ As both Wilcock and Tim Prenzler⁹⁴ contend, these referrals

84 See Wilcock, *Policing Welfare Fraud* (n 6) 49–53.

85 While the ‘quality’ of government investigations was defined by standards in the *Australian Government Investigations Standards 2003*, an evaluation of Centrelink’s fraud investigations conducted by Ernst & Young in 2006 found that Centrelink’s investigation system did not meet those standards: see *Centrelink Fraud Audit Report* (n 39) 100 [4.16], 105 [4.29], 116 [5.12]; *Australian Government Investigations Standards* (Government Report, October 2022) <<https://www.ag.gov.au/integrity/publications/australian-government-investigations-standards>>.

86 The arrangement is explained in *DEEWR–Centrelink BPA Audit Report* (n 83) 7. See also Joint Committee of Public Accounts and Audit, *Review of Auditor-General’s Reports Tabled between September 2008 and January 2009* (Report No 415, November 2009) 4 [2.8] <https://www.aph.gov.au/~media/wopapub/house/committee/jcpaa/auditgen1_09/report/fullreport_pdf.ashx> (‘*JCPAA Report*’).

87 This process was reported in Centrelink’s Annual Assurance Statements: see *JCPAA Report* (n 86) 4 [2.8]. *Centrelink Fraud Audit Report* (n 39) 27 [35].

89 *DEEWR–Centrelink BPA Audit Report* (n 83) 23 n 10.

90 See Table 3.2 in *Centrelink Fraud Audit Report* (n 39) 85 [3.49].

91 *Ibid* 143 [6.36].

92 *Ibid* 10, 18 [6], 42 [1.6].

93 In 2009, the Auditor-General recommended qualitative measures be introduced to validate compliance decision-making: see *ibid* 25 [29]. See also ANAO Recommendation 4: *JCPAA Report* (n 86) 17.

94 See, eg, Wilcock, ‘Rise and Fall’ (n 5); Wilcock, ‘Risk, Gender and Criminality’ (n 5); Tim Prenzler, ‘Welfare Fraud in Australia: Dimensions and Issues’ (Trends and Issues in Crime and Criminal Justice Paper No 421, Australian Institute of Criminology, June 2011) <<https://doi.org/10.52922/ti265535>>; Tim Prenzler, ‘Detecting and Preventing Welfare Fraud’ (Trends and Issues in Crime and Criminal Justice Paper No 418, Australian Institute of Criminology, June 2010) <<https://www.aic.gov.au/publications/tandi/tandi418>>; Tim Prenzler, ‘Responding to Welfare Fraud: The Australian Experience’ (AIC Reports Research and Public Policy Series No 119, Australian Institute of Criminology, 19 December 2012) <<https://www.aic.gov.au/publications/rpp/rpp119>> (‘Responding to Welfare Fraud’); Prenzler, ‘Reducing Welfare Fraud’ (n 5).

did not improve fraud detection but prioritised short-term prosecutions directly tied to ‘achieving savings’, thus protecting Centrelink’s interagency revenue and programmatising welfare recoupment.⁹⁵ The criminalisation of welfare recipients in this period, as Wilcock propounds, reflected certain ‘neoliberal rationalities’ driven not by ‘inherently punitive’ motivations but the goals of ‘increasing efficiency and restraining welfare expenditure’.⁹⁶ The disciplinary forces of the criminal justice system were thus expropriated for financial (rather than penological) objectives.⁹⁷ In 2009, Centrelink was able to directly appropriate its own funding, inaugurating what Wilcock calls the ‘re-bureaucratisation’ of social security.⁹⁸ However, as I will suggest in Part V, the drive to reduce welfare expenditure remained intact after 2009. And this drive, I will contend, led to the conception of the first Robodebt program, an idea which followed the forced and unanticipated end of the end of the welfare prosecution ‘system’, which was itself brought about by the omissions affair.

C The Poniatowska Appeals

Poniatowska appealed David J’s decision to the Full Court of the Supreme Court of South Australia, contending her conviction constituted, among other things, a ‘miscarriage of justice’.⁹⁹ She contended the criminal complaint was defective as none of the pleaded charges ‘disclose[d] an offence known to law’.¹⁰⁰ Both the majorities of the Full Court of the Supreme Court of South Australia and the High Court agreed with the gravamen of these contentions. In defamation proceedings arising from these appeals in 2019, the Full Court of the Supreme Court of South Australia reviewed the findings of *Poniatowska High Court Appeal*, with Blue J summarising the outcome of the appeals tersely: the ‘[c]riminal [c]omplaint was misconceived and did not charge an offence known to law’.¹⁰¹ Given the similarity of the majorities’ reasoning, the following sections analyse the two Poniatowska appeals together.

95 See Wilcock, ‘Rise and Fall’ (n 5).

96 See Wilcock, *Policing Welfare Fraud* (n 6) 7, 43.

97 See Terry Carney, ‘Neoliberal Welfare Reform and “Rights” Compliance under Australian Social Security Law’ (2006) 12(1) *Australian Journal of Human Rights* 223.

98 Wilcock, *Policing Welfare Fraud* (n 6).

99 Miscarriages are discussed below at Parts III(D), IV(A) and (B). The notice further contended (in the alternative) that the complaint had not identified ‘the omission the subject matter of the charge’ nor ‘the factual ingredients of the charge’. It further contended that, on the admitted facts, the appellant’s conduct could not constitute the offence charged in law and that she could not have therefore been convicted in law: see *Poniatowska Full Court Appeal* (n 32) 581 [5] (Doyle CJ and Duggan J).

100 It was so characterised by Heydon J in *Poniatowska High Court Appeal* (n 28) 425 [49] (Heydon J).

101 As Blue J further stated, the ‘Criminal Complaint did not disclose offences in contravention of s[ection] 135.2’; it was ‘fundamentally flawed’ and the ‘guilty pleas were misconceived’: *Channel Seven* (n 53) 70 [357], [363], 72 [366].

1 A ‘Comprehensive’ Code?

The majorities’ reasons in both appeals involved important considerations about the construction of section 135.2(1) of the *Code*.¹⁰² Their approaches recognised the *Code* as intending to establish a system akin to what Jeremy Bentham called a *pannomion*: ‘a map of the law [with] no *terrae incognitae*, no blank spaces [and with] nothing ... omitted, nothing unprovided for’.¹⁰³ Before 2011, appellate authorities had already concluded the *Code* was to be read as a ‘comprehensive’ statement of the law.¹⁰⁴ In 2007, Spigelman CJ had observed that:

Fundamental aspects of the law have been altered by the *Criminal Code* in substantial and indeed critical matters, by the replacement of a body of nuanced case law, which never purported to be comprehensive, with the comparative rigidity of a set of interconnecting verbal formulae which do purport to be comprehensive and which involve the application of a series of cascading provisions, including definitional provisions, expressed in language intended to be capable of only one meaning, which meaning does not necessarily reflect ordinary usage.¹⁰⁵

Consistent with this understanding, the majorities acknowledged that all *Code* offences consisted of physical and fault elements defined by reference to chapter 2: ‘General principles of criminal responsibility’.¹⁰⁶ At issue in the Poniatowska appeals was section 135.2, which contained four elements in paragraphs (a), (aa), (ab) and (b), as follows:

- (1) A person commits an offence if:
 - (a) the person engages in conduct; and
 - (aa) as a result of that conduct, the person obtains a financial advantage for himself or herself from another person; and
 - (ab) the person knows or believes that he or she is not eligible to receive that financial advantage; and
 - (b) the other person is a Commonwealth entity.

Penalty: Imprisonment for 12 months.

(1A) Absolute liability applies to the paragraph (1)(b) element of the offence.

As the High Court majority observed, while paragraphs (a), (aa) and (ab) require both physical and fault elements to be proved, no fault element was

102 On the history of the Model Criminal Code from which the *Code* (n 6) emerges, see Arlie Loughnan, ‘“The Very Foundations of Any System of Criminal Justice”: Criminal Responsibility in the Australian Model Criminal Code’ (2016) 6(3) *International Journal for Crime, Justice and Social Democracy* 8 (‘Australian Model Criminal Code’); Justice Howie, ‘Interpretation of the Criminal Code’ (Conference Paper, Public Defenders Conference, March 2010) <<https://www.publicdefenders.nsw.gov.au/Documents/interpretationofcriminalcode.pdf>>.

103 Jeremy Bentham, *Of Laws in General*, ed HLA Hart (Athlone Press, 1970) 246; Andrew Hemming, ‘Why Bentham’s Vision of a Comprehensive Criminal Code Remains Viable and Desirable as the Model Design for a Code’ (2012) 14 *University of Notre Dame Australia Law Review* 125.

104 Most importantly, *R v JS* (2007) 230 FLR 276, 300–1 [126]–[127] (Spigelman CJ) (‘JS’). See also Ronan Keane, ‘Thirty Years of Law Reform 1975–2005’ (Speech, Farmleigh House, 23 June 2005) 5 <https://www.lawreform.ie/_fileupload/Speeches/Thirty%20Years%20of%20Law%20Reform%201975%20to%202005.pdf>.

105 *JS* (n 104) 303 [145] (Spigelman CJ).

106 By reference to *Code* (n 6) s 5.1. This applies unless the legislature imposes strict or absolute liability for that element: see *Code* (n 6) s 6.2(2)(a); *R v Saengsai-Or* (2004) 61 NSWLR 135, 145 [60] (Bell J). Notably, absolute liability is imposed on the physical element at section 135.2(1)(b) of the *Code* (n 6) by section 135.2(1A).

required for paragraph (b), to which absolute liability applies by reference to section 135.2(1A).¹⁰⁷

Several social security cases had already considered the meaning of ‘knows or believes’ in subsection (1)(ab).¹⁰⁸ They had also confirmed¹⁰⁹ that subsection (1) (a) was a physical element¹¹⁰ to which the fault element of ‘intention’ applies.¹¹¹ But *Poniatowska Full Court Appeal* was the first case to analyse the phrase ‘engages in conduct’ in subsection (1)(a) with respect to an omission to act. Both the Full Court and High Court majorities found that ‘engages in conduct’ meant, by reference to section 4.1(2), either to ‘do an act’ or to ‘omit to perform an act’.¹¹² However, an omission ‘to perform an act’ could only constitute a physical element for the purposes of section 135.2(1)(a) in the following circumstances pursuant to section 4.3:¹¹³

An omission to perform an act can only be a physical element if:

- (a) the law creating the offence makes it so; or
- (b) the law creating the offence impliedly provides that the offence is committed by an omission to perform an act that by law there is a duty to perform.¹¹⁴

The High Court majority characterised these ‘circumstances’ as ‘exceptions’ to the ‘general law principle that criminal liability does not attach to an omission, save the omission of an act a person is under a legal duty to perform’.¹¹⁵ In so doing, it found the *Code* had incorporated what I will call the ‘omissions principle’ – notwithstanding it had not done so ‘in terms’.¹¹⁶ This principle reflects the

107 *Poniatowska High Court Appeal* (n 28) 417 [21] (French CJ, Gummow, Kiefel and Bell JJ).

108 See, eg, *DPP (Cth) v Neamati* [2007] NSWSC 746, [11] (Howie J) (*‘Neamati’*); *DPP (Cth) v Acevedo* [2009] NSWSC 653, [22]–[29] (Davies J).

109 See *Neamati* (n 108) [11] (Howie J). See also *Keating* (n 12) 469 [6] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

110 *Code* (n 6) s 4.1(1).

111 *Ibid* s 5.6(1).

112 *Ibid* s 4.1(2).

113 Indeed, in *Poniatowska High Court Appeal* (n 28), the respondent (for Poniatowska) submitted that: ‘The applicant’s argument ignores the word “only” in s 4.3(a)’: at 410 (ML Abbott QC) (during argument).

114 In 2013, in response to the holding in *Poniatowska High Court Appeal* (n 28), the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013* (Cth) (*‘Crimes Slavery Amendment Act’*) amended section 4.3(b) so that ‘by law there is a duty to perform’ was substituted with ‘there is a duty to perform by a law of the Commonwealth, a State or a Territory, or at common law’. This extended the range of laws that would be capable of giving rise to criminal liability for an omission under section 135.2(1) by reference to section 4.3(b) of the *Code* (n 6). As the majority noted in *Poniatowska High Court Appeal* (n 28) 421 [32] (citations omitted): ‘The Code adopts a more restrictive approach to liability for the omission to act than does the common law. This is because “the law” to which section 4.3(b) refers is a law of the Commonwealth. Section 4.3(b) does not include obligations imposed under the general law’. Following this 2013 amendment, however, the High Court’s observation would no longer be applicable, as section 4.3(b) would now pick up obligations imposed under Commonwealth, State and Territory and general law. See Explanatory Memorandum, *Crimes Legislation Amendment (Slavery, Slavery-Like Conditions and People Trafficking) Bill 2012* (Cth) 7. See also *Keating* (n 12) 469 (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

115 *Poniatowska High Court Appeal* (n 28) 421 [29] (French CJ, Gummow, Kiefel and Bell JJ).

116 See Virginia Bell, ‘Keeping the Criminal Law in “Serviceable Condition”: A Task for the Courts or the Parliament?’ (2016) 27(3) *Current Issues in Criminal Justice* 335, 337–8 <<https://doi.org/10.1080/10345329.2016.12036050>>. On the ‘absence of general interpretation provisions’ in the *Code* (n 6) and the result that ‘courts may take into account pre-existing common law’, see Arlie Loughnan, *Self, Others and the State: Relations of Criminal Responsibility* (Cambridge University Press, 2020) 158–60 <<https://doi.org/10.1017/9781108596367>>.

‘traditional reluctance’ of the law to penalise omissions, regarding such penalties as potential intrusions on liberty.¹¹⁷ However, the majority did not attribute the full breadth of this ‘traditional view’ of the principle to the *Code*; instead, the principle was modified by the ‘exceptions’ under section 4.3, as well as by the word ‘only’ in the chapeau.¹¹⁸ So understood, the essential question was whether Poniatowska’s omission as particularised in the charge sheet – as a failure to report her income¹¹⁹ – satisfied an exception under section 4.3. Yet in both appeals, the only exception said to be engaged was section 4.3(a).¹²⁰

Section 4.3(a) states an omission is ‘only’ a physical element if ‘the law creating the offence makes it so’.¹²¹ The Full Court majority found no part of section 135.2(1) identified ‘the omission in question in such a way as to create a duty to perform the omitted act’.¹²² Similarly, the High Court majority found that ‘the law creating the offence does not make the omission of an act a physical element of the offence within the meaning of s[ection] 4.3(a)’ because it ‘does not criminalise the failure to do a thing’.¹²³ Both majorities identified examples of offences that

117 While there is a wide literature on the omissions principle, much of it involves debate about whether it should continue to be recognised and, if so, under what conditions. See, eg, J Paul McCutcheon, ‘Omissions and Criminal Liability’ [1993–95] 28–30 *Irish Jurist* 56; Graham Hughes, ‘Criminal Omissions’ (1958) 67(4) *Yale Law Journal* 590; John Kleinig, ‘Criminal Liability for Failures to Act’ (1986) 49(3) *Law and Contemporary Problems* 161; Glanville Williams, ‘What Should the Code Do about Omissions?’ (1987) 7(1) *Legal Studies* 92; Arthur Leavens, ‘A Causation Approach to Criminal Omissions’ (1988) 76(3) *California Law Review* 547; Andrew Ashworth, ‘The Scope of Criminal Liability for Omissions’ (1989) 105(3) *Law Quarterly Review* 424; Glanville Williams, ‘Criminal Omissions: The Conventional View’ (1991) 107(1) *Law Quarterly Review* 8; Sally Kift, ‘Criminal Liability and the Bad Samaritan: Failure to Rescue Provisions in the Criminal Law (Part II)’ (1997) 1 *Macquarie Law Review* 258.

118 *Poniatowska High Court Appeal* (n 28) 424 [44] (French CJ, Gummow, Kiefel and Bell JJ).

119 Kift observes that ‘the difficulty of characterising the relevant conduct as act or omission’ has been an obstacle identified by those who argue against criminalising omissions: Kift (n 117) 261–5.

120 While there was reference made in the Full Court to the possibility that sections 67(2) and 77 of the *Administration Act* (n 12) could create a legal duty under for the purposes of section 4.3, it was noted the prosecution ‘did not rely on any provision in [the *Administration Act*] as establishing a duty of disclosure in cases such as the present’ and instead only submitted ‘the obligation was created by s 135.2 itself’: see *Poniatowska Full Court Appeal* (n 32) 584 [18]–[21] (Doyle CJ and Duggan J). Similarly, in the High Court it was said that ‘[t]he applicant concedes that there was no duty or omission of that kind in this case’: see *Poniatowska High Court Appeal* (n 28) 410 (ML Abbott QC) (during argument).

121 The Full Court majority affirmed that the relevant ‘law creating the offence’ was section 135.2: see *Poniatowska Full Court Appeal* (n 32) 586 [29] (Doyle CJ and Duggan J). For Sulan J (dissenting), the question was ‘whether the physical element of the offence, as prescribed by s 4.3(a), is contained within s 135.2’: at 591 [56] (Sulan J) (emphasis added). By contrast, counsel for the respondent (Poniatowska) in the hearing contended that the relevant law in section 4.3(a) ‘need not be the law of the *Code* [but] can be any Commonwealth law’: see Transcript of Proceedings, *DPP (Cth) v Poniatowska* [2011] HCATrans 46 (‘*Poniatowska HCA Full Court Transcript*’).

122 The Full Court majority described the ‘law which makes it an offence for a person to refuse or fail to produce a driver’s licence on request by a police officer’: see *Poniatowska Full Court Appeal* (n 32) 586 [30] (Doyle CJ and Duggan J), while the High Court majority described ‘the failure to comply with a notice requiring a bankrupt to give the official receiver a statement of affairs’ under sections 77CA and 267B of the *Bankruptcy Act 1966* (Cth): *Poniatowska High Court Appeal* (n 28) 422 [33] (French CJ, Gummow, Kiefel and Bell JJ).

123 *Poniatowska High Court Appeal* (n 28) 422 [35], 423 [37] (French CJ, Gummow, Kiefel and Bell JJ).

would satisfy the exception,¹²⁴ although the High Court did not hold that the terms of section 135.2 had to ‘criminalise’ or proscribe an omission itself.¹²⁵

As for the second exception under section 4.3(b), all Justices of the Full Court agreed that no law imposed an ‘identifiable duty’ on Poniatowska so as to engage that exception.¹²⁶ As a matter of construction, both the Full Court and High Court majorities observed that similar tests would apply for satisfying sections 4.3(a) and (b). While both paragraphs involved identifying an ‘obligation imposed by law’¹²⁷ that had not been discharged by a defendant, the source of that obligation could differ.¹²⁸ Nevertheless, as section 4.3(b) was not in issue in the Poniatowska appeals, its operation was not canvassed in the judgments. The prosecution had never contended that a law imposed a duty on Poniatowska or that she had failed to perform that duty, much less that section 135.2 ‘impliedly’ made such non-performance an offence.¹²⁹

2 Locating the ‘Omissions Principle’ in the Code

The dispositive question in both appellate proceedings was whether the prosecution case satisfied section 4.3(a). Both majorities found it did not. This conclusion rested not only on the terms of the *Code* (its ‘interconnecting verbal formulae’) but on the import of its legislative history. First, the majority of the High Court analysed the origin of section 4.3, noting it had been ‘drawn directly’¹³⁰ from the Model Criminal Code (‘MCC’) drafted by the Criminal Law Officers Committee of the Standing Committee of the Attorneys-General in 1992.¹³¹ The MCC in turn reflected the principles of criminal responsibility contained in the Modern Penal Code of the American Law Institute (‘MPC’).¹³² As both the draft of section 4.3(a) in the MCC and the equivalent section 2.01(3)(a) of the MPC imposed criminal liability for omissions only when the law creating the offence expressly criminalised that omission,¹³³ the majority found that the *Code*, through section

124 See above n 122.

125 The High Court majority appeared to accept the respondent’s submission that the law making the omission an offence ‘need not be the law of the *Code* [but] can be any Commonwealth law’: see above n 122. However, the report in *Keating* notes that the majority in *Poniatowska High Court Appeal* (n 28) affirmed the Full Court’s holding that ‘[t]he section did not itself impose a legal duty upon a recipient of social security payments to advise of a change in income’: see *Keating* (n 12) 459.

126 In *Poniatowska Full Court Appeal* (n 32), the majority found that ‘[t]he *Administration Act* does not create a separate “stand alone” obligation’ for the purposes of section 4.3(b): at 588 [38] (Doyle CJ and Duggan J). Similarly, Sulan J stated, ‘I agree with the majority that there is no such identifiable duty’: at 591 [56].

127 *Ibid* 584 [16], 586 [27] (Doyle CJ and Duggan J); *Poniatowska High Court Appeal* (n 28) 418 [25] (French CJ, Gummow, Kiefel and Bell JJ).

128 While section 4.3(a) required the offence provision itself or another Commonwealth law, section 4.3(b) would be satisfied if an omission could, by implication, be ‘read in’ to the terms of section 135.2(1) by any other Commonwealth law, such as a provision of the *Administration Act* (n 12): see above n 122.

129 See below n 205.

130 *Poniatowska High Court Appeal* (n 28) 421 [29] (French CJ, Gummow, Kiefel and Bell JJ).

131 Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 2: General Principles of Criminal Responsibility* (Final Report, December 1992).

132 *Poniatowska High Court Appeal* (n 28) 421 [30] (French CJ, Gummow, Kiefel and Bell JJ).

133 *Ibid* 417 [23], 421 [30].

4.3, incorporates the same ‘omissions principle’.¹³⁴ The majority secondly analysed the origin of section 135.2, noting the offence provision was first introduced in 2000, repealed and remade in 2002, and then amended in 2004 – the last change introducing the expression ‘engages in conduct’ into section 135.2(1)(a).¹³⁵ In considering this history, the majority made two findings. First, these amendments were not intended to derogate from the omissions principle but only to simplify the terms of the *Code*.¹³⁶ And second, the introduction of the expression ‘engages in conduct’ did not ‘bring the offence [at section 135.2] within s[ection] 4.3(a)’, as was contended by the applicants.¹³⁷

The majority’s findings confirmed the *Code* incorporates (and continues to incorporate) the omissions principle. They also confirmed that a proper construction of the *Code* could include consideration of whether ‘a particular provision has or has not altered the common law’.¹³⁸ By contrast, Heydon J, endorsing Sulan J’s dissent in the Full Court, focused on the original insertion of section 135.2 into the *Code* in 2000.¹³⁹ These dissentients found the section had been intended precisely to criminalise omissions. And certainly, as Wilcock observes, the absence of a ‘dishonesty’ limb under section 135.2 meant that the section had in fact ‘criminalised a greater range of behaviours’ than had been criminalised previously. Its terms had made it ‘easier for the prosecution to prove criminality’¹⁴⁰ and ensured it became ‘the most commonly prosecuted social security offence’.¹⁴¹

134 Ibid 421–2 [29]–[35].

135 Ibid 423–4 [39]–[42].

136 When section 135.2(1) was inserted into the *Code* (n 6) by the *Fraud Amendment Act* (n 6), it did not include in terms a reference to an omission. Similarly, when the offence was repealed and a new offence substituted by the *Crimes Legislation Amendment (People Smuggling, Firearms Trafficking and Other Measures) Act 2002* (Cth), it did not refer to an omission. When, in 2004, the *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No 2) 2004* (Cth) was assented to, it introduced the wording ‘engages in conduct’, which, when read with section 4.3, permitted the offence to be committed by omission. However, as the High Court majority noted, the Explanatory Memorandum for that amendment also made clear ‘the substance and effect of the offence is not changed by this amendment’: see *Poniatowska High Court Appeal* (n 28) 424 [42] (French CJ, Gummow, Kiefel and Bell JJ); Explanatory Memorandum, *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No 2) 2004* (Cth) 73.

137 *Poniatowska High Court Appeal* (n 28) 423 [39] (French CJ, Gummow, Kiefel and Bell JJ).

138 See *ibid* 410 (WJ Abraham QC) (during argument), citing *Vallance v The Queen* (1961) 108 CLR 56, 75 (Windeyer J); *JS* (n 104) 299–304 (Spigelman CJ); *R v RK* (2008) 73 NSWLR 80, 90 [44] (Spigelman CJ).

139 These were inserted by the *Fraud Amendment Act* (n 6) and were, as Wilcock writes, intended to ‘replace a host of specific fraud offences scattered across different Commonwealth statutes’ and to ‘standardise and centralise Commonwealth fraud provisions’: Wilcock, *Policing Welfare Fraud* (n 6) 51.

140 Wilcock, *Policing Welfare Fraud* (n 6) 51. This view is consistent with that of others, including Gráinne McKeever, who notes that ‘[m]inor fraud is so broadly defined that it encompasses as a norm behaviour that does not uniformly meet proper standards of criminal culpability, pulling into its path claimants who have not intentionally and dishonestly committed fraud’: Gráinne McKeever, ‘Social Citizenship and Social Security Fraud in the UK and Australia’ (2012) 46(4) *Social Policy and Administration* 465, 478 <<https://doi.org/10.1111/j.1467-9515.2012.00844.x>>. See also Tamara Walsh and Greg Marston, ‘Benefit Overpayment, Welfare Fraud and Financial Hardship in Australia’ (2010) 17(2) *Journal of Social Security Law* 100 (‘Benefit Overpayment’).

141 Wilcock, *Policing Welfare Fraud* (n 6) 51. In 2023, the New South Wales Sentencing Council found that sections 134.2(1) and 135.2(1) of the *Code* (n 6) are the two ‘most frequent federal offences’ finalised in New South Wales courts: *NSW Sentencing Council Report* (n 6) 129 [C.3]. While the *Administration Act*

In the Full Court, Sulan J found that section 135.2 had been inserted to ‘overcome the very problem created by the requirement to identify a duty in cases in which a person fails to disclose that they are obtaining a financial advantage’.¹⁴² In support of this conclusion, his Honour cited a report drafted in advance of the amendment by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (‘MCCOC’) titled *Chapter 3: Theft, Fraud, Bribery and Related Offences* (‘MCCOC Fraud Report’), noting that a range of so-called ‘general dishonesty’ offences¹⁴³ had there been proposed to address ‘the ingenuity of fraudsters’, which had left the ‘statute book [with] little or no chance of keeping up with them’.¹⁴⁴ Although section 135.2 was ultimately not enacted as *the* so-called ‘general dishonesty’ offence (that offence would appear at section 135.1), Sulan J concluded, based on text in the *MCCOC Fraud Report*, that section 135.2 was intended to remedy the specific mischief of omission conduct without deception.¹⁴⁵ Construing section 135.2 therefore did ‘not require the Court to look to a duty which the law imposes’ beyond that which was ‘already provided by s[ection] 135.2’.¹⁴⁶ All that was required, his Honour found, was a ‘causative link between the conduct’ under section 135.2(1)(a) – in this case ‘the omission to inform the relevant Department of a change of circumstances’¹⁴⁷ – and ‘the physical element in s[ection] 135.2(1)(aa)’¹⁴⁸ – here the receipt of the financial advantage. In the High Court, Heydon J agreed with Sulan J’s construction, although he did not recapitulate the substance of Sulan J’s reasoning.¹⁴⁹

3 Of Loopholes and Liabilities

Many news reports, government media statements and even a professional article¹⁵⁰ suggested Poniatowska had exploited a ‘loophole’ to escape criminal

(n 12) creates offences related to social security fraud at sections 213 and 216–17, these provisions are less commonly prosecuted than section 135.2 of the *Code* (n 6). But see *DPP (Cth) v Fabri* (2008) 218 FLR 209; *Jasevski v The Queen* [2010] WASC 43.

142 *Poniatowska Full Court Appeal* (n 32) 591–2 [62].

143 Sections 134.1–2, 135.1–4 of the *Code* (n 6) are sometimes known collectively as ‘dishonesty’ or ‘general dishonesty offences’. However, section 135.2 of the *Code* (n 6) does not contain a dishonesty element, unlike each of the other offences. See, eg, ‘Dishonesty Offences under the Criminal Code’ (Instruction No 3, Commercial, Financial & Corruption Practice Group, Commonwealth Director of Public Prosecutions, 16 July 2014) <https://www.cdpp.gov.au/system/files/2023-05/PGI-CFC-003_0.pdf>.

144 *Poniatowska Full Court Appeal* (n 32) 590 [52] (Sulan J).

145 *Ibid* 590 [51]–[52].

146 Contrary to the High Court majority’s approach, in which paragraphs (a), (aa) and (ab) under section 135.2(1) each require both physical and fault elements to be proved, Sulan J appears to have understood paragraphs (a) and (aa) of section 135.2(1) to be the ‘physical element[s]’ of the offence and paragraph (ab) to be the sole ‘fault element’ of the offence: see *Poniatowska Full Court Appeal* (n 32) 591 [58]–[60]. Cf *Poniatowska High Court Appeal* (n 28) 417 [21] (French CJ, Gummow, Kiefel and Bell JJ).

147 *Poniatowska Full Court Appeal* (n 32) 591 [59] (Sulan J).

148 *Ibid* 591–2 [58]–[63].

149 *Poniatowska High Court Appeal* (n 28) 425 [46].

150 See Geary and Wong (n 8) 81. In this article, the authors said that a ‘loophole’ had been ‘left open by the [Full Court’s] decision’ and had prompted the CDPP to place ‘more than 16,500 social security fraud cases on hold’. This is incorrect, however, as the CDPP did not put this number of convictions on hold. Instead, this was an estimate of the number of convictions already recorded.

liability.¹⁵¹ However, that characterisation is contrary to the gravamen of the High Court majority's holding.¹⁵² Although the expression 'loophole' is undoubtedly nebulous, it has been described as an 'imperfection in the linguistic formulation of a legal text' that facilitates a 'literal interpretation of that text' inconsistent with an 'interpretation dictated by a good-faith application of formal legal reasoning'.¹⁵³ Contrary to this formulation, the High Court did not identify or exploit any linguistic defect in the text. Nor did it subject section 135.2(1) to a 'literal' construction. Instead, the majority arrived at its conclusion by attending to the *Code's* unique system of 'verbal formulae', described above, and by considering its purpose by reference to its legislative history.

A better supported proposition is that it was the CDPP and the DHS that had for many years exploited a 'loophole' in section 135.2(1) of the *Code*. Since at least 2001, the agencies had prosecuted thousands of recipients on the unchallenged assumption that no legal duty to report income to Centrelink needed to be identified in the particulars, seemingly because – in 'loophole fashion' – section 135.2(1) of the *Code* did not expressly articulate the breach of a legal duty as an element of the offence.¹⁵⁴ Indeed, the agencies had agreed that short-form briefs containing minimal particulars could be used to expedite the prosecution process.¹⁵⁵

It was later affirmed in *Keating* that an important principle in approaching the *Code* is *lex certa*: the principle of certainty.¹⁵⁶ That principle, described as a 'corollary' or 'attribute' of the 'criminal law version' of the principle of legality,¹⁵⁷ is expressed in the Latin maxim *nullum crimen sine lege, nulla poena sine lege*: 'there must be

- 151 *Channel Seven* (n 53) 50 [284] (Blue J). See 'Channel Seven Loses Long-Running Defamation Case over Today Tonight Story', *ABC News* (online, 1 October 2019) <<https://www.abc.net.au/news/2019-10-01/woman-wins-today-tonight-defamation-case-against-channel-seven/11560586>>; Catherine Hockley, 'Malgorzata Poniatowska Wins Welfare Fraud Appeal in High Court', *Adelaide Now* (online, 27 October 2011) <<https://www.adelaidenow.com.au/news/south-australia/hickinbotham-group-sex-harassment-woman-malgorzata-poniatowska-wins-appeal/news-story/6249d6b1f8a2ac08f9d540d31dbba232>>; Phillip Coorey, 'Government Rushes to Close Costly Welfare Loophole', *The Sydney Morning Herald* (online, 24 June 2011) <<https://www.smh.com.au/national/government-rushes-to-close-costly-welfare-loophole-20110623-1ghoo.html>>; Geesche Jacobsen, 'Judges Tackle Centrelink Loophole', *The Sydney Morning Herald* (online, 13 November 2010) <<https://www.smh.com.au/national/judges-tackle-centrelink-loophole-20101112-17r7q.html>>; 'Centrelink Fraud Judgment a Victory for "Thousands"', *ABC News* (online, 26 October 2011) <<https://www.abc.net.au/news/2011-10-26/centrelink-fraud-judgment-a-victory-for-thousands/3602298>>; Rebecca Puddy, 'Court Awards \$450k to Woman in Centrelink Sexual Harassment Case', *The Australian* (online, 10 February 2011) <<https://archive.md/fu3TM>>; Dunlevy (n 8).
- 152 The substance of one such report was found to be defamatory: *Channel Seven* (n 53) 105–10 [551]–[573] (Blue J).
- 153 See Daniel T Ostas, 'Legal Loopholes and Underenforced Laws: Examining the Ethical Dimensions of Corporate Legal Strategy' (2009) 46(4) *American Business Law Journal* 487 <<https://doi.org/10.1111/j.1744-1714.2009.01084.x>>.
- 154 See Commonwealth Ombudsman, *Centrelink and Commonwealth Director of Public Prosecutions: Review of Circumstances Leading to a Conviction* (Report No 7, May 2010) <<https://www.austlii.edu.au/au/other/AUOmbIRp/2010/7.pdf>>.
- 155 As the Australian National Audit Office recorded in 2010, 'Centrelink and the CDPP have an agreement in place and the [Fraud Investigation Manual] outlines the required format and content of both short and full briefs of evidence': *Centrelink Fraud Audit Report* (n 39) 123 n 173. See also at 124.
- 156 See *Keating* (n 12) 479 [48] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
- 157 Jerome Hall, *General Principles of Criminal Law* (Bobbs-Merrill Company, 2nd ed, 1960) 28, 63; Shahram Dana, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in

no crime or punishment except in accordance with fixed, predetermined law'.¹⁵⁸ While the High Court majority only implicitly referred to *lex certa* in *Poniatowska High Court Appeal* ('the criminal law should be certain'),¹⁵⁹ it was an essential part of its reasons.¹⁶⁰ The majority acknowledged the influence of Bentham's critique of retrospective judge-made law ('dog law')¹⁶¹ on the development of the *Code*, finding that these principles had been imported into the statute:

In his Second Reading Speech for the Bill for the *Criminal Code Act 1995* (Cth), Mr Kerr, then the Minister for Justice, explained that codification of the criminal law had its root in the work of Jeremy Bentham. He referred to Bentham's frequently quoted criticism of the common law (56):

Do you know how they make it? Just as a man makes law for his dog. When your dog does anything you want to break him of, you wait till he does it, and then you beat him for it.

The principles of criminal responsibility stated in the *Code* proceed from the view that the criminal law should be certain and that its reach should be able to be ascertained by those who are the subject of it. Section 4.3 is a reflection of those ideas. The exceptions to the general principle that it states do not extend to criminalising the omission of any act which is able to be causally related to a result of conduct.¹⁶²

The majority thus rejected the argument that section 4.3 had the effect of criminalising any act that could be 'causally related to a result of conduct' for the purposes of section 135.2(1)(aa) (receiving a financial advantage). That, it found, would render the law indeterminate.¹⁶³ Certainly, scholarly debate persists today as

International Criminal Sentencing' (2009) 99(4) *Journal of Criminal Law and Criminology* 857, 864–6, cited in *Cumes* (n 27) 89.

158 My usage accords with that of Guy Cumes, who identifies the maxim with the 'world-wide principle of legality' and distinguishes that from the 'Australian principle of legality,' which is the narrower principle of statutory interpretation in Australia articulated in, eg, *Momcilovic v The Queen* (2011) 245 CLR 1, 46 [43] (French CJ). See *Cumes* (n 27) 81.

159 *Poniatowska High Court Appeal* (n 28) 424 [44] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

160 See *Cumes* (n 27) 90. The principle has long been endorsed in the High Court's jurisprudence. See, eg, *PGA v The Queen* (2012) 245 CLR 355, 416 [165] ('PGA') where Bell J explicitly cites the *nullem crimen* maxim in n 346, citing AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959) 202. See also the dicta of Heydon J in *PGA* (n 160) 409 [146]–[147], citing PJ Fitzgerald, *Criminal Law and Punishment* (Clarendon, 1962) 9–10; *KRM v The Queen* (2001) 206 CLR 221, 255 [100] (Kirby J); *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 575 (Brennan J) ('*Polyukhovich*').

161 *Poniatowska High Court Appeal* (n 28) 424 [43]–[44] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ). On ascertainability and the objection to 'dog law', see Loughnan, 'Australian Model Criminal Code' (n 102) 11; Martin A Kayman, 'A Memorial for Jeremy Bentham: Memory, Fiction, and Writing the Law' (2004) 15(3) *Law and Critique* 207; Jeremy Bentham, 'Truth Versus Ashhurst; or, Law as It Is, Contrasted with What It Is Said to Be' in J Bowring (ed), *The Works of Jeremy Bentham* (Russell & Russell, 1962) vol 5, 231; Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press, 1979) 214 <<https://doi.org/10.1093/acprof:oso/9780198253457.001.0001>>; James Bernard Murphy, *The Philosophy of Customary Law* (Oxford University Press, 2014) 77–81 <<https://doi.org/10.1093/acprof:oso/9780199370627.002.0003>>; Michael Sevel, 'Obeying the Law' (2018) 24(3) *Legal Theory* 191.

162 *Poniatowska High Court Appeal* (n 28) 424 [43]–[44] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

163 *Ibid* 424 [44].

to whether the law is or should be ‘knowable’.¹⁶⁴ However, the majority’s reasons indicate that the *Code* prescribes a minimum standard of knowability in the case of omissions. To engage the exceptions under section 4.3, the reach of the criminal law must be ascertainable, and a duty to act made clear, in an eligible statute.

In contrast to the majority, Heydon J found that to read ‘Benthamite ideals’ into the *Code* reflects only the ‘vanity of human wishes’. ‘[M]any parts of the *Code*,’ he said, ‘including the parts debated in this appeal, are inconsistent with those ideals’.¹⁶⁵ As foreshadowed above, Heydon J’s dissent wholly adopted Sulan J’s textual construction of the *Code*.¹⁶⁶ However, Heydon J also conceded the particulars were ‘inadequate’.¹⁶⁷ But his Honour found this was the inevitable product of the majority’s erroneous decision to grant the appellant leave to change her plea. The ‘central question’ for review, Heydon J concluded, was ‘whether the Full Court should have granted leave to the respondent to change her plea from guilty to not guilty’.¹⁶⁸ To that question, his Honour found leave should have been refused, in which case the question of the defective particulars, or their implications, did not arise.¹⁶⁹

But Heydon J did not attribute the defective particulars solely to the Full Court’s grant of leave. His Honour also attributed this problem to Poniatowska’s original guilty plea. ‘[H]ad [she] pleaded not guilty and complained about the inadequacy of the particulars’, he said, ‘any difficulty [could have been] met by amendment’.¹⁷⁰ Read strictly, his Honour’s reasons are silent as to the fault element (as are those of Sulan J) in section 135.2(1)(a) of the *Code*.¹⁷¹ But Heydon J’s conclusion implies that fault under section 135.2(1)(a) could have been proved had the matter been tried: ‘The respondent knew the details of her own affairs much better than Centrelink did’, he wrote, and by her ‘silence about the state of those affairs’, obtained ‘excessive benefit[s]’.¹⁷² However, Heydon J’s short dissenting

164 See, eg, Lisa Burton Crawford, ‘The Problem of Complex Legislation’ (2024) 30(1) *Legal Theory* 1, 1–2 <<https://doi.org/10.1017/S135232522400003X>>.

165 His Honour also impliedly reproves the legislature’s aspiration that the *Code* (n 6) should reflect those ideals, stating that if ‘criminal litigation under the Code is conducted with any semblance of ordered justice’, it was ‘a tribute to the Australian legal profession, [and] not to the Commonwealth legislature’: *Poniatowska High Court Appeal* (n 28) 425 [47].

166 *Poniatowska High Court Appeal* (n 28) 425 [46]; *Poniatowska Full Court Appeal* (n 32) 591–2 [58]–[63].

167 *Poniatowska High Court Appeal* (n 28) 426 [49].

168 *Ibid* 425 [49].

169 As Heydon J emphasised, ‘if the respondent had pleaded not guilty and complained about the inadequacy of the particulars, that question could have been investigated, and any difficulty met by amendment’: *Poniatowska High Court Appeal* (n 28) 425–6 [49]. Although this inability to amend was important to Heydon J’s dissent, neither he nor the majority Justices referred to any legal principles on this point. It is arguable that an additional aspect of the miscarriage in the Poniatowska appeals was that the particulars were not supplied in circumstances where a defendant is ‘to be apprised not only of the legal nature of the offence with which he is charged but also of the particular act, matter or thing alleged as the foundation of the charge’: *Johnson v Miller* (1937) 59 CLR 467, 489 (Dixon J), quoted in *DPP (Vic) v Jarvis* (2018) VR 543, 547 [11] (Maxwell P, Niall and Weinberg JJA).

170 *Poniatowska High Court Appeal* (n 28) 426 [49].

171 Conversely, the majority starts from this premise, stating that ‘[a]t issue are the circumstances in which the intentional omission to perform an act may ground liability for the offence’: *Poniatowska High Court Appeal* (n 28) 417 [23] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

172 *Ibid* 426 [49].

reasons do not identify where in time the omission might have occurred; nor do they show how and when the requisite intention to omit may have arisen.¹⁷³

In the later defamation proceedings of 2019, Blue J explicated the problem clearly. Where the '[c]riminal [c]omplaint did not allege the first element' of the offence, he wrote, 'it cannot be said that somehow the guilty plea amounted to an admission of the other elements which were dependent on it'.¹⁷⁴ That was so because 'the first element [at section 135.2(1)(a)] is central to the structure of the offence', and '[w]ithout it, the second, third, fourth and fifth elements [referring to the subsequent physical and fault elements concerning the financial advantage, knowledge of ineligibility, and the nature of the entity from which the advantage was obtained] cannot exist because they all refer to and depend on an omission to act in breach of a duty'.¹⁷⁵ Similarly, as French CJ observed during oral argument, to approach section 135.2(1) without defining the nature or timing of the omission was to 'collapse down' the offence to one of merely 'receiving a financial benefit to which you are not entitled and failing to give it back'.¹⁷⁶ To thus 'collapse down' the offence was to critically misdescribe it; and where the particulars had framed the conduct in this manner, a guilty plea could 'not convert [the] bad complaint into a good one'.¹⁷⁷ The inadequate particulars were thus fatal.

These textual difficulties were not merely semantic. They implied material questions about criminal responsibility: namely, what degree of knowledge about a proposed legal requirement (or duty) could be attributed to social security recipients – and when?¹⁷⁸ In this connection, Michael Sevel's consideration of the varieties of legal knowledge is apposite:

One may know the core of a legal requirement without knowing the particulars; in the extreme, one may manifest sufficient knowledge of a legal norm only by using what [Gertrude EM] Anscombe once called a 'stopping modal,' a deontic locution that is opaque with regard to the content of the relevant norm, but references it nonetheless ('You can't cross the street there,' 'You have to pay the fine,' and so on).¹⁷⁹

173 In *Keating* (n 12), the CDPP contended that the prosecution was not required to prove, as a matter of law, that the intention-based fault element of section 135.2(1)(a) involved an intention to breach a legal duty. However, the unanimous High Court found this was immaterial because 'the failure to do a thing is not an offence in the absence of a legal duty to do the thing'. In other words, no prosecutor would ever be in a position to prove a legal duty had been breached where it could not be shown that such a duty existed in the first place: see *Keating* (n 12) 478 [45], 479 [48] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ). Nevertheless, in circumstances such as those identified by Heydon and Sulan JJ, whose dissents reject the requirement for a duty to be identified, it would still be necessary to consider how and whether the 'intention' fault element in section 135.2(1)(a) is made out. However, their Honours' separate dissents do not address this requirement.

174 *Channel Seven* (n 53) 72 [367].

175 *Ibid.*

176 *Poniatowska HCA Leave Hearing Transcript* (n 38).

177 *Ibid.*

178 Recall that David J stated that Poniatowska had acted 'with full knowledge that what [she] was doing was wrong': *Poniatowska Supreme Court* (n 52) [10] (David J). Similarly, the suggestion that recipients in Poniatowska's position would have possessed the requisite knowledge were raised in Parliament on the voting of the Social Security Amendment Bill (n 26): Commonwealth, *Parliamentary Debates*, House of Representatives, 6 July 2011, 7833 (Kevin Andrews).

179 In 2018, Sevel observed that '[t]he character of legal knowledge has received scarce attention from philosophers of law' and while 'obedience to law allows for such knowledge to take many forms', a

When does one know of a ‘core of a legal requirement’ and what might constitute ‘sufficient knowledge of a legal norm’?¹⁸⁰ As with the examples Sevel gives of certain opaque ‘deontic locutions’, the CDPP contended that Poniatowska’s guilty plea established her knowledge of a core legal norm, if not a legal duty.¹⁸¹ As the CDPP articulated in its own ‘deontic locution’ during its oral submissions: ‘You know you are not supposed to be getting an income and receiving this benefit’ and then ‘[y]ou make a decision, “I am not going to inform Centrelink of that.”’¹⁸² However, as Poniatowska’s counsel said in reply (during argument): ‘The plea of guilty never admitted breach of any duty to act or omit to perform an act because it was not contended there was any [such duty]’.¹⁸³

D ‘15,000 Convictions May Now Be Open to Question’

After the hearing but before judgment in *Poniatowska High Court Appeal*,¹⁸⁴ the Commonwealth Government’s Minister for Human Services introduced legislation into the Commonwealth House of Representatives to address the outcome in *Poniatowska Full Court Appeal*.¹⁸⁵ In the second reading speech for the Social Security and Other Legislation Amendment (Miscellaneous Measures) Bill 2011 (Cth) (‘Social Security Amendment Bill’), the Minister explained that a new section would be inserted into the *Social Security (Administration) Act 1999* (Cth) (‘*Administration Act*’) to impose a ‘stand-alone legal duty’ on welfare recipients. The new duty would require recipients to inform the DHS of any event or change in circumstances that ‘might affect the payment of the social security payment’ they received ‘within 14 days after the day on which the event or change occurs’.¹⁸⁶

In this case, the defect, revealed by the majority’s reasons in *Poniatowska Full Court Appeal*, was the absence of an ascertainable legal duty, both in past charges and for future prosecutions.¹⁸⁷ Curiously, however, the amendment did not insert a legal duty into the offence provision at section 135.2(1)(a) of the *Code* so that it would make omissions offences for the purpose of enlivening the exception in

‘person who obeys [the law] both recognizes a legal norm as an authoritative directive and allows that fact to make a difference, both causal and normative, in the production of her action’. See Sevel (n 161) 210, citing GEM Anscombe, *The Collected Philosophical Papers of GEM Anscombe* (Basil Blackwell, 1981) vol 3, 130.

180 The perception of legal authorities of welfare recipients’ understandings of the law has been described as a form of ‘second-order legal consciousness’: see Spencer Headworth, ‘The Power of Second-Order Legal Consciousness: Authorities’ Perceptions of “Street Policy” and Welfare Fraud Enforcement’ (2020) 54(2) *Law and Society Review* 320.

181 Indeed, counsel for the CDPP acknowledged the fault element of intention under section 135.2(1)(a): *Poniatowska High Court Appeal* (n 28) 409 (WJ Abraham QC) (during argument).

182 *Poniatowska HCA Leave Hearing Transcript* (n 38) (WJ Abraham QC).

183 *Poniatowska HCA Full Court Transcript* (n 121) (ML Abbott QC).

184 As Kevin Andrews said, ‘[i]t could be argued that the parliament should wait for the High Court to hand down its judgment’: Commonwealth, *Parliamentary Debates*, House of Representatives, 6 July 2011, 7833.

185 Ibid 7832 (Tanya Plibersek, Minister for Social Inclusion and Minister for Human Services).

186 See *Administration Act* (n 12) s 66A.

187 The language of ‘stand-alone legal duty’ comes directly from the defect identified in *Poniatowska Full Court Appeal* (n 32), where the majority found that the *Administration Act* (n 12) ‘does not create a separate “stand alone” obligation’: at 588 [38] (Doyle CJ and Duggan JJ).

section 4.3(a) – the disputed section in *Poniatowska Full Court Appeal*. Instead, the amendment sought to engage the alternative exception at section 4.3(b) and thus inserted a new obligation into the *Administration Act* at section 66A to permit the offence provision, when read with section 4.3(b), to ‘impliedly’ provide that the offence could be ‘committed by an omission to perform an act that there is a duty to perform by a law’.¹⁸⁸

That legal duty (‘by a law’) would now arise under section 66A of the *Administration Act*, which would positively require recipients to inform the DHS of changes. Presumably, the CDPP would now be capable of adequately particularising charges by reference to the legal duty under section 66A. In turn, a defendant would now be able to ascertain the ‘reach’ of the criminal law. Thus, by their intentional failure to perform this newly ascertainable duty, a defendant could be criminally responsible for committing the physical and fault elements in the first limb – in subsection (1)(a) – of section 135.2 of the *Code*.

Importantly, the amendment would operate not just prospectively but retrospectively.¹⁸⁹ Section 66A would ‘commence’ on ‘20 March 2000, the date the *Administration Act* had commenced’.¹⁹⁰ Arguably, this aspect of the amendment subverted the *Code*’s underlying policy. As the majority would observe in *Poniatowska High Court Appeal*, the *Code* reflects Bentham’s aversion to retroactive ‘dog law’.¹⁹¹ And yet this amendment would permit the *Code* not just to adapt in response to new conduct (‘as a man makes law for his dog’) but to impose those adaptations on defendants retroactively – for past conduct whose criminality was now questionable. Yet the Minister justified this effect as follows:

Since the 2000–01 financial year, the CDPP has prosecuted approximately 36,500 defendants for social security fraud. Without a detailed analysis of each case, it is not possible to state definitively how many matters of social security fraud have been committed via omission since the introduction of the Criminal Code. The government’s best estimate is that as many as 40 per cent of this number, or around 15,000 convictions, may now be open to question as a consequence of the decision in *Poniatowska*. To ensure the past convictions cannot be called into question, this bill amends the [A]dministration [A]ct to insert a stand-alone obligation for a person to inform the department of events or changes of circumstances that might affect the

188 *Code* (n 6) s 4.3(b).

189 The legality of retrospective criminal laws in Australia has been much analysed and will not be examined in this article. Before the omissions affair, the High Court had many times found that retrospective criminal laws are not prohibited by the *Constitution* and do not infringe Ch III of the *Constitution*: see *R v Kidman* (1915) 20 CLR 425, 451 (Higgins J); *R v Snow* (1917) 23 CLR 256, 265 (Barton ACJ); *Ex parte Walsh and Johnson*; *Re Yates* (1925) 37 CLR 36, 86 (Isaacs J), 124–5 (Higgins J); *Millner v Raith* (1942) 66 CLR 1, 9 (Williams J); *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 172 (Latham CJ); *Polyukhovich* (n 160) 533–40 (Mason CJ), 643–51 (Dawson J), 689–90 (Toohey J), 717–21 (McHugh J); *University of Wollongong v Metwally* (1984) 158 CLR 447, 461 (Mason J), 484 (Dawson J); *Nicholas v The Queen* (1998) 193 CLR 173, 234 [149] (Gummow J).

190 Of course, that was the earliest date on which an amendment housed in that Act *could* commence. See Commonwealth, *Parliamentary Debates*, House of Representatives, 6 July 2011, 7832 (Tanya Plibersek, Minister for Social Inclusion and Minister for Human Services).

191 See above Part II(B)(3).

payment of a social security payment to the person or the person's qualification for a concession card.¹⁹²

While opposition Member of Parliament Mr Kevin Andrews indicated it might be preferable for Parliament to 'wait for the High Court to hand down its judgment', he said there was 'danger' in doing so:

If the legislation does not pass and the High Court upholds the majority finding in the South Australian Supreme Court, ... many people who had been convicted of offences before may be able to seek to have those convictions quashed and be paid compensation.¹⁹³

However, Mr Andrews also adverted to issues of knowledge ascription discussed above. They 'knew they had to report', he said, because the 'social security legislation contains provisions that require a person whose circumstances have changed financially to notify the department or to notify Centrelink about those changes' and those obligations are 'commonly understood and known throughout the Australian population'.¹⁹⁴ And yet if the obligations were as clear as the law had required, there would have been no need for the amendment.¹⁹⁵

The Commonwealth introduced the Social Security Amendment Bill into Parliament before the High Court had an opportunity to hand down its decision in *Poniatowska High Court Appeal*.¹⁹⁶ That circumstance led Heydon J to characterise the intervention as a pre-emptive 'retaliation': 'It is common for the decisions of courts to be reversed by the legislature after they have been delivered. It is less common for this to take place even before they have been delivered. Yet the legislature has got its retaliation in first in relation to this appeal.'¹⁹⁷

While Heydon J's wry observation portrays the relationship between the legislative and judicial powers as generally dissonant, his Honour's remarks also suggest the particular motivations of the legislature to protect against any further judicial curtailment of the 'prosecution system' that had been established in preceding years. Indeed, the decision in *Poniatowska Full Court Appeal* had already led to an effective pause on that system.¹⁹⁸

192 This subset was said to have constituted 40% of the full cohort of people convicted of that offence in those years (36,500); however, this number would be much higher if counted from the 1991–92 financial year: Commonwealth, *Parliamentary Debates*, House of Representatives, 6 July 2011, 7831–2 (Tanya Plibersek, Minister for Social Inclusion and Minister for Human Services).

193 Ibid 7834 (Kevin Andrews).

194 Ibid 7833.

195 For a discussion of the differences in attribution between welfare recipients and welfare fraud investigators with respect to certain actions, see Spencer Headworth, 'Broke People, Broken Rules: Explaining Welfare Fraud Investigators' Attributions' (2021) 23(1) *Punishment and Society* 24 <<https://doi.org/10.1177/14624745209281>>.

196 See above n 12, which confirms that no duty had been contained in the legislation since 1991, meaning that convictions dating back to that year may be affected by the decision.

197 *Poniatowska High Court Appeal* (n 28) 424–5 [45].

198 As discussed below in Part III(B), there were several New South Wales matters subject to warrant and annulled when *Poniatowska Full Court Appeal* (n 32) was decided. As the Explanatory Memorandum for the Social Security Amendment Bill (n 26) noted that 'the CDPP has adjourned or discontinued a large number of matters of this kind before the courts' and will be 'not commencing new proceedings of this kind, pending the determination of the appeal before the High Court': Explanatory Memorandum, Social Security and Other Legislation Amendment (Miscellaneous Measures) Bill 2011 (Cth) 5.

In any event, it soon became clear that the retrospective operation of section 66A for past prosecutions was problematic. It will be recalled that Poniatowska's charge sheet did not identify or rely on any legal duty – such as sections 67 and 74 of the *Administration Act* – to make good the first limb of section 135.2(1) of the *Code*. How, then, could it be said of any criminal complaint before 2011, composed of similarly defective particulars,¹⁹⁹ that it relied on the retroactive (but then non-extant) section 66A of the *Administration Act*? In the alternative, how would section 66A be relied on in any future prosecutions for pre-2011 conduct in circumstances where the legal duty imposed by section 66A had not, at the time of the offending, existed? Could a defendant charged in 2010 for offences against section 135.2(1) of the *Code* commit those offences by omission even though 'as a matter of fact' there was no standalone legislative duty to inform the DHS during the benefit period?²⁰⁰ Such questions would be central to the hearing in *Keating*.²⁰¹

E *Keating*

In 2010, Ms Kelli Anne Keating was charged with offences under section 135.2(1) of the *Code*. As with Poniatowska, Keating was an eligible recipient of the means-tested PPS benefit. Although she had received the benefit for two years, Keating did not inform the DHS of fluctuations in her casual income that may have affected the value of her payment.²⁰² Accordingly, three charges were laid against Keating, each alleging she had omitted to inform the DHS of changes in her circumstances 'as required by law' and had, as a result, obtained a financial advantage from the Commonwealth contrary to section 135.2(1).²⁰³

Whereas the Poniatowska appeals fastened on whether the exception to the 'omissions principle' at section 4.3(a) of the *Code* was engaged so as to criminalise Poniatowska's omissions, *Keating* was concerned with whether section 4.3(b)

When the removal hearing for *Keating* (n 12) was heard in the High Court, evidence adduced by the Commonwealth indicated that 330 current prosecutions involved omissions and that 350 Centrelink briefs (presumably already referred to the CDPP but not yet directed for prosecution) involved omissions: see *Keating HCA Transcript* (n 30) 3 (DS Mortimer SC).

199 The CDPP had not relied on these sections in any past prosecutions: see Commonwealth, *Parliamentary Debates*, House of Representatives, 6 July 2011, 7832 (Tanya Plibersek, Minister for Social Inclusion and Minister for Human Services); *Keating* (n 12) 477 [41] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

200 This is how the Attorney-General of the Commonwealth (intervening) framed the matter in its amended submissions: see Attorney-General (Cth), 'Amended Annotated Submission of the Attorney-General of the Commonwealth (Intervening)', Submission in *DPP (Cth) v Keating*, M5/2013, 27 March 2013, 4–5 [21].

201 Notably, while the *Robodebt Report* (n 1) describes the operation of sections 68 and 66A of the *Administration Act* (n 12) (*Robodebt Report* (n 1) 9, 19 n 63), it does not provide any explanation of its origin in the *Social Security and Other Legislation Amendment (Miscellaneous Measures) Act 2011* (Cth). While section 68 of the *Administration Act* (n 12) empowers the Secretary of the Department of Social Services or their delegate to seek information about events or changes of circumstances affecting a person's social security payment, it imposes no standalone obligation on the person to update the Department of any such changes. Instead, section 66A(2) imposes that obligation.

202 *Keating* (n 12) 460–1.

203 *Ibid* 472–3 [19]–[23] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

was engaged for that same purpose.²⁰⁴ Counsel for the CDPP (as ‘informant’) in *Keating* did not submit (as was contended in *Poniatowska High Court Appeal*) that it was unnecessary to identify a legal duty for the purposes of section 4.3(a) (as section 135.2(1) criminalised omissions implicitly). Rather, the CDPP in *Keating* accepted, consistent with the terms of section 4.3(b), that it was necessary to identify a legal duty – to show that section 135.2(1) ‘impliedly provides that the offence is committed by an omission to perform an act that *by law* there is a duty to perform’, that being a law of the Commonwealth.²⁰⁵

As *Keating* was not an appeal but a removal hearing, the CDPP faced no difficulties of the kind it had faced in the *Poniatowska* appeals in amending what might have been inadequate particulars.²⁰⁶ In fact, the charges laid against Keating were amended following the *Poniatowska High Court Appeal* in 2012.²⁰⁷ Still, at the time of the removal hearing, the charges remained surprisingly under-particularised. They did not specify the ‘law’ on which the CDPP relied to engage the exception in section 4.3(b) of the *Code*.²⁰⁸ Ultimately, however, the CDPP identified two sources of that legal duty in the stated case: the ‘stand alone’ duty imposed by the ‘new’ section 66A of the *Administration Act*, and the duty imposed by section 74 of the *Administration Act* requiring a recipient to comply with certain information notices issued under sections 67(2) and 68(2) of that Act.²⁰⁹

1 The Stated Case

While the stated case comprised three reserved questions,²¹⁰ the first proved the most important. It asked whether the ‘stand alone duty’ imposed by section 66A(2) of the *Administration Act* – which required recipients to inform the DHS of circumstantial changes that might affect the payment of their benefit – could have retroactive operation so as to ‘create a duty from 20 March 2000’ and up to 4 August 2011.²¹¹ As discussed below, the unanimous High Court ultimately found that, on the CDPP’s construction, section 66A(2) created a ‘statutory fiction’ and did not impose that retroactive duty.²¹²

204 Ibid 468 [2], 469 [7].

205 These were the terms of *Code* (n 6) s 4.3(b) before an amendment was made by the *Crimes Slavery Amendment Act* (n 114) sch 1 item 1. That amendment changed the meaning of ‘law’ in section 4.3(b) to include not only a law of the Commonwealth, but also a State or Territory law or a common law. As this amendment was not retrospective, however, it did not apply to Keating, and the duty referred to in section 4.3(b) had to be derived from a Commonwealth law. The CDPP contended that the relevant law for that purpose was section 66A of the *Administration Act* (n 12): see *Poniatowska High Court Appeal* (n 28) 421 n 50 (French CJ, Gummow, Kiefel and Bell JJ); *Keating* (n 12) 469 n 63 (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

206 See *Poniatowska High Court Appeal* (n 28) 426 [49] (Heydon J).

207 These particulars were amended on 7 February 2012: see *Keating* (n 12) 461.

208 Ibid 469 [6] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

209 Ibid 469 [6], 474–6 [33]–[39].

210 Ibid 461.

211 *Administration Act* (n 12) s 66A(2), sch 1; *Keating* (n 12) 468–9 [4]–[5] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

212 *Keating* (n 12) 478 [46]–[47], 479 [49] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

The second question asked whether section 66A of the *Administration Act* was invalid insofar as its retroactive operation infringed the separation of judicial and legislative powers under the *Constitution*.²¹³ The third question asked whether certain notices alleged to have been issued to Keating under sections 67(2) and 68(2) of the *Administration Act*, when read with section 74(1) of that Act (which required recipients to comply with information notices), were capable of making an omission to comply with the notices ‘engaging in conduct’ for the purposes of *Code* section 135.2(1)(a).²¹⁴ As noted above, this argument could not be advanced in the Poniatowska appeals because the CDPP had conceded it did not rely on any legal duty arising in respect of such notices to found liability for omissions under section 4.3(a) of the *Code*.

While Keating advanced arguments for each reserved question, only the first and third were considered by the High Court.²¹⁵

2 Statutory Fictions

In essence, Keating’s first argument was that section 4.3(b) required a defendant charged with offences under section 135.2(1) to have been subject to a legal duty *at the time* they omitted to discharge the duty.²¹⁶ The CDPP submitted, by contrast, that section 135.2(1) did not require a person to have intentionally breached a legal duty knowingly (after all, the *Code* at section 9.3(1) provided that ignorance of the law would afford no excuse for criminal liability).²¹⁷ All that was required, rather, was that a recipient, as a matter of fact, had intentionally failed to do an act; and that, as a matter of law, there had been a duty to perform that act.²¹⁸

However, as the High Court observed, that submission ignored that where there was an ‘absence of a legal duty’ it was immaterial whether the defendant knew of that duty, much less whether ignorance afforded an excuse.²¹⁹ In short, the High Court found that the ‘principal contention’ of the CDPP was ‘that s 4.3(b) is silent as to the point in time at which the duty to act is imposed’²²⁰ and that therefore a ‘statutory fiction’ could be used to affix a duty to the recipient at any point in time, even retrospectively.²²¹

The unanimous High Court rejected this contention on two grounds. First, the High Court found it could not apply the ‘statutory fiction’ contended for by the CDPP.²²² To do so would require the Court to ascertain, as a matter of orthodox statutory construction,²²³ a ‘clear statement of legislative intention’ directing the

213 Ibid 470 [10].

214 Ibid. See *Administration Act* (n 12) ss 67(2), 74(1).

215 *Keating* (n 12) 471 [11] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

216 Ibid 470 [8].

217 Ibid 478 [45].

218 Ibid 464 (WJ Abraham QC) (during argument).

219 Ibid 479 [48] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

220 Ibid 478 [45].

221 Ibid 478 [46].

222 Ibid.

223 Ibid 478 [47], citing *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 31 [4] (French CJ), 46–7 [47] (Hayne, Heydon, Crennan and Kiefel JJ) (*‘Alcan Alumina’*).

judicature to impose criminal liability for ‘a serious Commonwealth offence’ contrary to the established principles of criminal law.²²⁴ Those principles included, the High Court said, that ‘the criminal law should be certain’ and that criminal statutes should be interpreted with a strong ‘presumption against retrospectivity’ (principles discussed above as the *lex certa* and the *nullum crimen maxim*).²²⁵

Second, the High Court found that the use of the present tense in section 4.3(b) was important. The exception to the omissions principle under section 4.3(b) could be enlivened only if an ‘offence *is* committed by an omission to perform an act that by law there *is* a duty to perform’.²²⁶ The use of the present tense in section 4.3(b) indicated that the exceptions in section 4.3 were ‘confined to the failure to do a thing that *at the time of the failure* the law requires the person to do’.²²⁷ Any obligation on a recipient, the Court found, had to be ‘coincident with the failure to discharge it’.²²⁸ Accordingly, the enactment of section 66A on 4 August 2011 could not impose a duty on Keating that was coincident with her omissions to report her income before that date.

3 Information Notices: Important or Immaterial?

In response to the prosecution’s alternative case, Keating advanced three arguments contending that section 74(1) of the *Administration Act* did not criminalise a failure to comply with information notices for the purposes of section 135.2(1). First, the alleged legal duty was too uncertain; second, it was ‘qualified’ insofar as it was contingent on a person’s ability to comply; and third, that the duty only arose in respect of the offence regime of the *Administration Act* and could only be understood in terms of the penalties prescribed under section 74(1). To construe the duty under section 74(1) as a ‘general duty’ extending to the *Code* would ‘subvert’ this scheme of the *Administration Act*.²²⁹ None of these arguments quite succeeded.²³⁰ Instead, the unanimous High Court found that an information

224 *Keating* (n 12) 478 [47] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), citing *Alcan Alumina* (n 223) 31 [4] (French CJ), 46–7 [47] (Hayne, Heydon, Crennan and Kiefel JJ). Several authorities were cited in support of this rule, including *CTM v The Queen* (2008) 236 CLR 440, 446–7 [7] (Gleeson CJ, Gummow, Crennan and Kiefel JJ); *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 [19] (Gleeson CJ); *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 553 [11] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), 562–3 [43] (McHugh J), 576 [88] (Kirby J), 592–3 [134] (Callinan J).

225 *Keating* (n 12) 479 [48] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), citing *Poniatowska High Court Appeal* (n 28) (French CJ, Gummow, Kiefel and Bell JJ); Glanville Williams, *Criminal Law: The General Part* (Stevens & Sons, 2nd ed, 1961) 579–80; Andrew Ashworth, ‘Public Duties and Criminal Omissions: Some Unresolved Questions’ (2011) 1 *Journal of Commonwealth Criminal Law* 1.

226 *Keating* (n 12) 479 [49] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) (emphasis in original).

227 *Ibid* (emphasis in original).

228 *Ibid*.

229 *Ibid* 475 [34].

230 However, it might be said that the second argument – that the duty under section 74(1) of the *Administration Act* (n 12) was a ‘qualified’ duty – was partially accepted by the unanimous High Court. The Court’s reasons imply that a duty might not arise if imposing a legal duty is not within ‘the scope of the obligation created by the notices, which are in varying terms’; or if service of the notice cannot be deemed to have been effected or the notice was not received by the defendant; or finally, if the ‘form of

notice issued under the *Administration Act*²³¹ was ‘capable’ of founding a legal duty to ‘do a thing’ for the purposes of section 4.3(b) of the *Code*, such that omitting to discharge the duty could amount to ‘engag[ing] in conduct’ for the purposes of section 135.2(1)(a).

The High Court made clear that, in respect of any duty said to arise under section 74(1), the prosecution would be required, first, to prove that the terms of the information notice on which it relied did in fact create the duty; and second, that service had been effected. As neither of these issues were raised for consideration in the stated case, they could only be determined on remitter to the Magistrates Court of Victoria.²³²

It became clear, subsequently, that relying on notices in the way the High Court suggested would be difficult for several reasons. As was said in the Explanatory Memorandum for the Social Security Amendment Bill:

The CDPP did not, in past prosecutions, rely on the notices given to the person by Centrelink to establish the person was under a duty to inform Centrelink as it was understood that this was not required. It is not possible to defend past convictions appealed on the basis of the reasoning in *Poniatowska* by seeking to introduce such notices into evidence to establish the duty. In addition, it has become apparent that it may not be able to be proved beyond reasonable doubt that such notices have complied with the requirements of section 6A of the *Administration Act* during the relevant period of time.²³³

Given these forensic difficulties in using the information notices to establish a duty, it is unsurprising that, in the hearing remitted by the High Court to the Magistrates’ Court of Victoria, the CDPP withdrew the criminal complaint and the prosecution against Keating.²³⁴ Indeed, because the CDPP had never argued in past prosecutions that defendants had received information notices, the receipt of these

the charges’ (ie, the particulars) is defective: *ibid* 476 [38]–[39] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

231 See, eg, *Administration Act* (n 12) ss 67–70, 70A, 74(1).

232 *Keating* (n 12) 476 [38]–[39] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ). Of course, for criminal liability to arise under section 135.2(1) of the *Code*, the recipient would also have to have the other elements proved against them: that they had received a financial advantage as a result of the omission conduct under subsection (1)(aa), and that they knew or believed they were not eligible to receive that financial advantage under subsection (1)(ab).

233 See Explanatory Memorandum, Social Security and Other Legislation Amendment (Miscellaneous Measures) Bill 2011 (Cth) 5. This Explanatory Memorandum also reveals a different concern regarding s 6A of the *Administration Act* (n 12). Section 6A operates to deem decisions made by computer programs under the Secretary’s control decisions of the Secretary. However, the concern expressed in this Memorandum – that information notices issued to social security recipients may not have complied with section 6A – indicates that the legislature had concluded that prosecutors would be unable to prove to the criminal standard that the Secretary had ‘arranged for the use, under the Secretary’s control, of the computer program(s) to make the relevant decision(s)’ for the purpose of this section. As this was regarded as yet another reason why those convicted previously might have unsound convictions, the Bill deemed the requirements of s 6A(1) to have been satisfied retrospectively for the period 12 June 2001 to Royal Assent: see sch 3, item 1. See also Wong (n 27) 43.

234 See Shannon Deery, ‘Single Mother Wins High Court Fraud Fight over Centrelink Payments in Landmark Ruling’, *News.com.au* (online, 24 July 2013) <<https://www.news.com.au/national/victoria/single-mother-wins-high-court-fraud-fight-over-centrelink-payments-in-landmark-ruling/news-story/52af9137a3520e909908c6cecf787996>>.

notices could not be relied on in any future appeals of convictions for omission conduct under section 135.2(1) of the *Code*.²³⁵

III IMPACT OF *KEATING*-AFFECTED CONVICTIONS

A The Impact of Conviction

A criminal conviction can be devastating for the convicted.²³⁶ Studies have identified adverse impacts on the convicted's relationships, accommodation and travel options.²³⁷ Those who live with past criminal convictions also face clear disadvantages in securing employment.²³⁸

As discussed below, wrongful convictions in particular may trigger feelings of trauma, loss, anger, paranoia and betrayal.²³⁹ Additionally, 'criminal record discrimination' is, in some circumstances, lawful in Australia, with recent reforms arguably expanding the scope of this exception.²⁴⁰

Welfare recipients are among the least well-prepared for overcoming these barriers, as they typically face what has been called 'double regulation' after conviction: continuing 'poverty' (arising from unemployment) combined with increased penological risks in a punitive welfare system.²⁴¹ As widely canvassed

235 On the necessity that the CDPP must satisfy the appeal court beyond a reasonable doubt that the defendant received the notice, see Wong (n 27) 43. See also above n 35. On the difficulty of addressing information notices in matters prior to *Keating*, see, eg, *Neuss v Magistrates' Court (Vic)* [2013] VSC 321 [24], [77] (Lansdowne AsJ) ('*Neuss*').

236 See, eg, Naomi F Sugie and Kristin Turney, 'Beyond Incarceration: Criminal Justice Contact and Mental Health' (2017) 82(4) *American Sociological Review* 719. On criminal convictions as 'criminogenic', see Don Weatherburn, Andrew McGrath and Lorana Bartles, 'Three Dogmas of Juvenile Justice' (2012) 35(3) *University of New South Wales Law Journal* 779.

237 See, eg, Simon Lenton et al, 'Infringement Versus Conviction: The Social Impact of a Minor Cannabis Offence in South Australia and Western Australia' (2000) 19(3) *Drug and Alcohol Review* 257, 260–2.

238 See 'Human Rights: Discrimination in Employment on the Basis of Criminal Record', *Australian Human Rights Commission* (Web Page, December 2004) <<https://humanrights.gov.au/our-work/rights-and-freedoms/human-rights-discrimination-employment-basis-criminal-record>>. See also Adrian Cherney and Robin Fitzgerald, 'Finding and Keeping a Job: The Value and Meaning of Employment for Parolees' (2016) 60(1) *International Journal of Offender Therapy and Comparative Criminology* 21 <<https://doi.org/10.1177/0306624X14548858>>.

239 Adrian Grounds, 'Psychological Consequences of Wrongful Conviction and Imprisonment' (2004) 46(2) *Canadian Journal of Criminology and Criminal Justice* 165; Adrien Hoel, 'Compensation for Wrongful Conviction' (Trends and Issues in Criminal Justice Paper No 356, May 2008) <<https://www.aic.gov.au/sites/default/files/2020-05/tandi356.pdf>>.

240 In 2019, the *Australian Human Rights Commissions Regulations 2019* (Cth) ('*Human Rights Regulations*') revised the definition of discrimination under *Australian Human Rights Commission Act 1986* (Cth) s 3(1) so as to include 'any distinction, exclusion or preference made on the ground of ... an irrelevant criminal record': *Human Rights Regulations* (n 240) reg 6(a)(iii). This change responded to the Australian Human Rights Commission's finding in *BE v Suncorp Group Ltd* [2018] AusHRC 121 that an employer had discriminated against a job applicant on the basis of his child pornography convictions. The previous regulations prohibited employers from discriminating on the basis of any criminal record, unless the criminal record related to the 'inherent requirements' of a position; however, arguably, after this change in regulations, the ability of employers to discriminate has widened.

241 See, eg, Loïc Wacquant, 'Crafting the Neoliberal State: Workfare, Prisonfare, and Social Insecurity' (2010) 25(2) *Sociological Forum* 197, 203 <<https://doi.org/10.1111/j.1573-7861.2010.01173.x>>; Mimi

in previous scholarship, many challenges face criminal appellants in Australia – especially those who are wrongfully convicted.²⁴² For those with *Keating*-affected convictions, these barriers are especially pronounced.²⁴³

Terry Carney has drawn on Martha Fineman’s theorisation of vulnerability and the state²⁴⁴ to ‘map’ welfare vulnerability, both ‘narrowly’ in terms of ‘income or assets’ and ‘broadly as encompassing other relevant aspects of quality of life’, including ‘health, personal resources (education, skills, resilience and social networks) [and] disability status’.²⁴⁵ As Carney suggests, when combined with an ‘income security architecture and administration inimical to vulnerability’, these factors place welfare recipients in an invidious position, where the ‘complexity overload’ of the law can ‘exclude and oppress’.²⁴⁶ For those prosecuted for welfare offences, understanding the criminal allegations, much less appealing a conviction,²⁴⁷ may inflict a legalistic form of what Miranda Fricker calls ‘hermeneutical injustice’, dispossessing the prosecuted of the conceptual tools they need to make sense of their experience.²⁴⁸ As one witness in the RRC observed, when the first iteration of Robodebt was proposed, it was obvious the ‘difficulties that social security recipients, who included very vulnerable cohorts, would have in disputing the asserted debts’.²⁴⁹

Abramovitz, ‘From the Welfare State to the Carceral State: Whither Social Reproduction?’ (2022) 38(1) *Affilia* 20 <<https://doi.org/10.1177/08861099221137580>>.

- 242 See, eg, Robyn Blewer et al, ‘Miscarriages of Justice in Australia’ in Jon Robins (ed), *Murder, Wrongful Conviction and the Law: An International Comparative Analysis* (Routledge, 2023) 185, 190–2 <<https://doi.org/10.4324/9781003251484>>; Hamer, ‘Wrongful Convictions’ (n 11) 279–86; David Hamer, ‘The Eastman Case: Implications for an Australian Criminal Cases Review Commission’ (2015) 17(2) *Flinders Law Journal* 433, 455–7 (‘The Eastman Case’); Rachel Dioso-Villa et al, ‘Investigation to Exoneration: A Systemic Review of Wrongful Conviction in Australia’ (2016) 28(2) *Current Issues in Criminal Justice* 157, 164.
- 243 See Camilla Hughes, Social Action and Research Centre Anglicare Tasmania, *Caught in the Safety Net: The Costs of Centrelink Debt Recovery and Prosecution* (Report, April 2008) 37 (‘Caught in the Safety Net’).
- 244 See, eg, Martha Albertson Fineman, ‘The Vulnerable Subject and the Responsive State’ (2010) 60(2) *Emory Law Journal* 251; Martha Albertson Fineman, ‘Vulnerability and Social Justice’ (2019) 53(2) *Valparaiso University Law Review* 341.
- 245 Terry Carney, ‘Vulnerability: False Hope for Vulnerable Social Security Clients?’ (2018) 41(3) *University of New South Wales Law Journal* 783 <<https://doi.org/10.53637/SJAL7506>> (‘Vulnerable Social Security Clients’); Carney, ‘Artificial Intelligence in Welfare’ (n 4). See also Gráinne McKeever, ‘Vulnerability in the Social Security System’ [2024] (April) *Public Law* 194; Maria O’Sullivan, ‘The Vulnerability of Social Security Recipients in the Age of Automation: The Role of Public Law’ [2024] (April) *Public Law* 203.
- 246 See Carney, ‘Vulnerable Social Security Clients’ (n 245) 803, citing Anna Lawson and Mark Priestley, ‘The Social Model of Disability: Questions for Law and Legal Scholarship?’ in Peter Blanck and Eilionóir Flynn (eds), *Routledge Handbook of Disability Law and Human Rights* (Routledge, 2017) 3, 4–9 <<https://doi.org/10.4324/9781315612881>>.
- 247 See *Caught in the Safety Net* (n 243) 37–40.
- 248 On the ‘shift in power away from the individual that can challenge or disable their ability to contest [injustices]’, see Emilie van den Hoven, ‘Hermeneutical Injustice and The Computational Turn in Law’ (2021) 1(1) *Journal of Cross-Disciplinary Research in Computational Law* 1, 2 <<https://journalcrcl.org/crcl/article/view/6>>.
- 249 *Robodebt Report* (n 1) 41. See also at ch 11, which is titled ‘The Concept of Vulnerability’ and devoted to deficiencies in the identification and treatment of vulnerable social security recipients.

Evidence of recipients' vulnerabilities pervades reports of proceedings in the tribunal now known as Administrative Review Tribunal,²⁵⁰ where recipients sometimes seek 'special circumstances' waivers of debts under section 1237AAD of the *Social Security Act 1991* (Cth).²⁵¹ As the authorities make clear, the waiver provision will be enlivened only where a recipient's circumstances are 'out of the ordinary'.²⁵² Many situations of grave concern, however, fail to meet that threshold,²⁵³ recalling David J's comments to Poniatowska (quoted in Part II(B), above) that distress arising from 'domestic violence' or 'sexual abuse and violation' are common, rather than 'out of the ordinary' among cases of alleged social security debts.²⁵⁴

Although no specific data indicate how many people were sentenced to custodial terms for *Keating*-affected offences, reasonable hypotheses can be made. Generally, courts are not obliged to impose sentences of imprisonment²⁵⁵ and will do so only when no other sentence is appropriate.²⁵⁶ Yet a longstanding sentencing principle in Australia is that, for 'fraud upon the social security system, a custodial sentence is to be imposed unless there exist very special circumstances justifying some lesser order'.²⁵⁷ Data disclosed by the CDPP under the *Freedom of Information Act 1982* (Cth) ('*FOI Act*') indicate that, in 2018–19 and across 489 'matters' involving charges under section 135.2(1), Australian courts sentenced 16 people to gaol (3.27%), 10 to intensive correction orders (2.04%) and 27 to

250 Formerly the Administrative Appeals Tribunal.

251 See *SS Act* (n 54) s 1237AAD. By section 1236, debts may be 'written off' by the Secretary.

252 See, eg, *Re Ivovic and Director-General of Social Services* (1981) 3 ALN N95, [61] (Senior Member Hall, Member Billings and Member Tickle); *Re Beadle and Director-General of Social Security* (1984) 6 ALD 1, 3 (Toohey J); *Beadle v Director-General of Social Security* (1985) 7 ALD 670, 672 (Bowen CJ, Fisher and Lockhart JJ); *Groth v Secretary, Department of Social Security* (1995) 40 ALD 541, 545 (Kiefel J); *Dranichnikov v Centrelink* (2003) 75 ALD 134, 148 [66] (Hill J); *Angelakos v Secretary, Department of Employment and Workplace Relations* (2007) 100 ALD 9, 17 [33] (Besanko J); *Davy v Secretary Department of Employment and Workplace Relations* (2007) 94 ALD 693, 715 [80] (Deputy President Fergie).

253 See, eg, *Lym and Secretary, Department of Social Services (Social Services Second Review)* [2021] AATA 1916, [93] (Member Burke); *Innes and Secretary, Department of Social Services (Social Services Second Review)* [2022] AATA 3977, [105], [108] (Member Mitchell). In *Bensen and Secretary, Department of Social Services (Social Services Second Review)* [2018] AATA 1076, [69] (Deputy President Sosso), it was suggested that if an applicant was 'homeless, destitute, impecunious, living on the streets or otherwise "in extremis"' they may then be regarded as experiencing 'special circumstances' for the purposes of waiver in section 1237AAD of the *SS Act* (n 54).

254 Relevantly, Carney has contended for the greater use of this discretionary power as one way the law could express receptiveness to the idea of vulnerable recipients: Carney, 'Vulnerable Social Security Clients' (n 245) 806–9.

255 A wide range of sentencing alternatives are available to magistrates in social security fraud cases, including good behaviour bonds, community service orders, and suspended sentences: see above n 69.

256 See *Crimes Act* (n 61) s 17A. See also Greg Marston and Tamara Walsh, 'A Case of Misrepresentation: Social Security Fraud and the Criminal Justice System in Australia' (2008) 17(1) *Griffith Law Review* 285, 291, 292 <<https://doi.org/10.1080/10383441.2008.10854611>> ('A Case of Misrepresentation').

257 *R v Purdon* (New South Wales Court of Criminal Appeal, Hunt CJ at CL, McInerney J and Donovan JA, 27 March 1997). The case was applied in, eg, *R v West* [2015] ACTSC 134; *Thomson v The Queen* [2014] NSWCCA 88; *Ivanovic v The Queen* [2009] NSWCCA 28.

community service orders (5.52%).²⁵⁸ Data collected by Prenzler for 2009–10 similarly indicate that 284 people (7%) were gaoled for ‘Centrelink offences’ in that year alone.²⁵⁹ And general data from the Australian Bureau of Statistics for 2012–13 indicate that custodial orders were made in 11% of all offences.²⁶⁰ If a conservative figure of 5% is assumed in relation to the estimated 15,000 people with *Keating*-affected convictions, then 750 people may have been imprisoned on wrongful convictions.

The use of criminal history screening in employment settings has long been of concern to criminologists.²⁶¹ However, if it may be assumed that most *Keating*-affected convictions resulting in sentences of imprisonment would have been eligible to become spent convictions,²⁶² these would have become ‘spent’ within approximately 10 years.²⁶³ As the last *Keating*-affected convictions would have been recorded before judgment was delivered in *Keating* in May 2013, even the most recent convictions would likely have become spent in May 2023 and would not today be a ‘disclosable court outcome’ in an ordinary criminal history employment check.²⁶⁴

Nevertheless, convictions with longer sentences may be excluded from the spent conviction regime, and some exceptions to the spent convictions scheme may undermine its protections. For instance, some bodies accredited by the Australian Criminal Intelligence Commission²⁶⁵ require job applicants to consent to ‘full’ criminal record checks;²⁶⁶ some organisations are exempted from the

258 Analysis conducted on Commonwealth Director of Public Prosecutions, ‘CDPP201902.xlsx’, *Disclosure Log* (Spreadsheet, 28 March 2019) <<https://www.cdpp.gov.au/contact-us/freedom-information/disclosure-log>>.

259 See Table 10 in Prenzler, ‘Responding to Welfare Fraud’ (n 94) 32.

260 Australian Bureau of Statistics, *Criminal Courts, Australia, 2012–13* (Catalogue No 4513.0, 27 March 2014) <<https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4513.0main+features162012-13>>. Notably, since the 1980s, incarceration rates have generally risen in Australia: see Andrew Leigh, ‘The Second Convict Age: Explaining the Return of Mass Imprisonment in Australia’ (2020) 96(313) *Economic Record* 187.

261 See, eg, Bronwyn Naylor, Moira Paterson and Marilyn Pittard, ‘In the Shadow of a Criminal Record: Proposing a Just Model of Criminal Record Employment Checks’ (2008) 32(1) *Melbourne University Law Review* 171; Bronwyn Naylor, ‘Criminal Records and Rehabilitation in Australia’ (2011) 3(1) *European Journal of Probation* 79 <<https://doi.org/10.1177/206622031100300107>>; Rebecca Bradfield, ‘Sentences without Conviction: Protecting an Offender from Unwarranted Discrimination in Employment’ (2015) 41(1) *Monash University Law Review* 40; Suzanne O’Toole and Patrick Keyzer, ‘*Rudy Frugtniet v ASIC*: Things to Consider if Victoria Introduces a Spent Convictions Regime (with “a Message to You, Rudy”)’ (2019) 44(4) *Alternative Law Journal* 260 <<https://doi.org/10.1177/1037969X19877034>>.

262 For example, less than 6 months’ imprisonment in New South Wales or less than 30 months’ imprisonment in Victoria: *Criminal Records Act 1991* (NSW) s 7(1)(a) (‘*NSW Criminal Records Act*’); *Spent Convictions Act 2021* (Vic) s 5 (‘*Vic Spent Convictions Act*’). See also *Spent Convictions Act 2009* (SA) ss 3, 7 (less than 12 months’ imprisonment); *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 3 (less than 30 months’ imprisonment).

263 See, eg, Moira Paterson and Bronwyn Naylor, ‘Australian Spent Convictions Reform: A Contextual Analysis’ (2011) 34(3) *University of New South Wales Law Journal* 938, 961.

264 See, eg, *NSW Criminal Records Act* (n 262) s 7; *Spent Convictions Act 1988* (WA) ss 6–7, 9–11.

265 See *Australian Crime Commission Act 2002* (Cth).

266 But see changes made in 2018 to the ‘fit2work’ National Police Checking Service from Equifax based on new contractual arrangements with the Australian Criminal Intelligence Commission: see ‘NPCS Information Sheet’, *Equifax* (Web Page) <<https://www.equifax.com.au/acic>>.

spent convictions regime;²⁶⁷ and the recency of Victoria's legislation means that a Victorian with a *Keating*-affected conviction from 2001 would have still been beset by that record until 2021.²⁶⁸

Some employers might understand that criminal offences in welfare can arise from systemic problems and errors (including by prosecutors),²⁶⁹ or even that the offence under section 135.2(1) of the *Code* does not include dishonesty.²⁷⁰ But others will inevitably regard social security offences as a proxy for untrustworthiness.²⁷¹ In his analysis of Robodebt, Carney underlines the serious 'moral and practical gravity' that even 'alleging a debt' imparts.²⁷² As Carney notes, the 'moral gravity is the stigma of being a debtor; the practical consequences are the impact on credit rating or even admission to professional practice such as a lawyer'.²⁷³

For those who wish to enter the legal profession (or other professions involving trust), a 'Centrelink offence' is particularly serious. As Brownhill J said in 2021, 'obtaining Centrelink overpayments by serious deception and patent dishonesty may be inimical to fitness to practice as a legal practitioner'.²⁷⁴ Mark Thomas' study of the impacts of welfare overpayments on admission to the legal profession is instructive.²⁷⁵ As Thomas observes, 'the default position' of the courts hearing applications for admission has been that welfare offences are 'glaringly inimical to the honesty integral to fitness to practise as a legal practitioner'²⁷⁶ where 'absolute trust must be of the essence'.²⁷⁷

Yet Thomas's study does not consider the disincentives to criminal appellants seeking admission to the legal profession. For those who may have been prosecuted as law students, the shame of the criminal conviction (and the prospect of being identified through the appeal and admissions hearings)²⁷⁸ may be critically

267 See, eg 'National Criminal History Record Check (NCHRC) Application' (Application Form, Department of Health, Government of Western Australia, December 2011) 4 <https://www.ecu.edu.au/_data/assets/pdf_file/0005/682241/WA-DoH-national-criminal-history-record-check-Dec-2011.pdf>; 'Exemptions for Disclosing a Spent Conviction', *Victoria State Government* (Web Page, 15 July 2024) <<https://www.justice.vic.gov.au/exemptions-for-disclosing-a-spent-conviction>>.

268 See *Vic Spent Convictions Act* (n 262).

269 See, eg, *Caught in the Safety Net* (n 243) 15, 54.

270 See, eg, Dominique Moran, 'Prisoner Reintegration and the Stigma of Prison Time Inscribed on the Body' (2012) 14(5) *Punishment and Society* 564 <<https://doi.org/10.1177/1462474512464008>>.

271 See, eg, Richelle S Swan et al, 'The Untold Story of Welfare Fraud' (2008) 35(3) *Journal of Sociology and Social Welfare* 133, 145 <<https://doi.org/10.15453/0191-5096.3360>>; Mark Thomas, 'Disclosable, but Not Necessarily Fatal? Welfare Overpayments in the Uncertain Landscape of Fitness for Practice' (2017) 40(3) *University of New South Wales Law Journal* 1072 <<https://doi.org/10.53637/LRVR9162>>.

272 Carney, 'Robo-Debt Illegality' (n 1) 5.

273 *Ibid* 5 n 12.

274 See *Re Fincher* [2021] NTSC 22, [14]. See also *Re Shepherd* [2007] QCA 83 at 1 (de Jersey CJ, Muir and Douglas JJ agreeing) ('*Re Shepherd*').

275 See Thomas (n 271).

276 *Ibid* 1086, citing *Thomas v Legal Practitioners Admission Board* [2005] 1 Qd R 331, 334 (de Jersey CJ).

277 Thomas (n 271) 1094, citing *Re Shepherd* (n 274) 1 (de Jersey CJ).

278 For example, most of the cases cited in Thomas (n 271) identify the applicant in full. Similarly, open justice principles captured in statute indicate that there would likely be inadequate grounds for appellants to seek suppression or non-publication orders under the relevant law: see, eg, *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8. See especially at s 8(e).

dissuasive.²⁷⁹ Indeed, ‘anticipated stigma’ may disincentivise even those with high prospects of a quashed conviction.²⁸⁰ Further disincentives may also include the cost of the appeal, which, if counsel were retained, may well outstrip the original debt amount.²⁸¹

Related to these disincentives are the mental health impacts of wrongful convictions. Bethany Growsns and colleagues have recently found that, among those wrongly accused and convicted in the Horizon Scandal, more than 60% reported clinically significant mental ill-health.²⁸² Then again, awareness of an injustice may worsen a person’s psychosocial wellbeing; and, as no remediation has occurred with respect to *Keating*-affected matters, many living with these convictions may be unaware they are unsound.²⁸³

It is also possible that some people convicted of *Keating*-affected convictions may have had further contact with the criminal justice system, and that their criminal history may have aggravated any later penalty or sentence. In 2014, after *Keating*, the CDPP confirmed it ‘does not rely at sentencing upon any prior convictions which are or might be affected by the decision [*Keating*]’.²⁸⁴ It is unclear, however, whether the CDPP had adopted this approach prior to this announcement, nor whether this policy has been communicated widely.²⁸⁵

B Have Appeals Been Lodged?

Strikingly, it appears almost no independent appeals have been lodged as a result of the omissions affair.²⁸⁶ While some cases were the subject of appeal applications

279 For a comprehensive study of the maladaptive psychological effects of self-stigma on those with criminal convictions, see Kelly E Moore et al, ‘Self-Stigma among Criminal Offenders: Risk and Protective Factors’ (2018) 3(3) *Stigma and Health* 241.

280 See Kelly E Moore and June P Tangney, ‘Managing the Concealable Stigma of Criminal Justice System Involvement: A Longitudinal Examination of Anticipated Stigma, Social Withdrawal, and Post-release Adjustment’ (2017) 73(2) *Journal of Social Issues* 322 <<https://doi.org/10.1111/josi.12219>>.

281 While various discretionary ex gratia payment schemes operate throughout Australia, there is no statutory right to compensation for losses associated with wrongful convictions. While section 23 of the *Human Rights Act 2004* (ACT) allows a wrongfully convicted person to be compensated, it is unclear whether this provision has ever been used.

282 Bethany Growsns et al, ‘The Post Office Scandal in the United Kingdom: Mental Health and Social Experiences of Wrongly Convicted and Wrongly Accused Individuals’ (2024) 29(1) *Legal and Criminological Psychology* 17, 17 <<https://doi.org/10.1111/lcrp.12247>>.

283 While neuroscientific evidence indicates that information may be ‘coded’ differently by optimists, such studies assume that one’s ability to respond to (or cope with) ‘hypothetical outcomes’ (ie, ‘I may have been wrongfully convicted’) is more flexible than the one’s ability to respond to (or cope with) *actual* experiences (ie, ‘I have been wrongfully convicted’): see Tali Sharot, Christopher W Korn and Raymond J Dolan, ‘How Unrealistic Optimism Is Maintained in the Face of Reality’ (2011) 14(11) *Nature Neuroscience* 1475.

284 *Answers to Additional Estimates Questions* 63 (n 13).

285 But see the CDPP’s recent assurances in this regard with respect to social security convictions that are likely to have been affected by an unlawful practice known as income apportionment: Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Question on Notice No 79* (Portfolio Question No SBE24-054, 8 November 2024) <<https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-CommitteeId6-EstimatesRoundId25-PortfolioId5-QuestionNumber79>>.

286 Several cases give clues as to the existence of unreported cases. *Neuss* (n 235) was a case in which the CDPP (in the name of informant Mr Neuss) sought judicial review of a decision of Magistrate Fleming, in

before *Keating* was handed down, they were obviously unable to apply the holding in *Keating*.²⁸⁷ In December 2020, the CDPP compiled a list of all known *Keating*-affected annulments and released that information on an ‘administrative access’ basis in response to an FOI request.²⁸⁸ Presumably the CDPP was not aware at the time that it had long maintained a database for *Keating*-affected matters. It could therefore not warrant, as required by the *FOI Act*, that all *Keating*-affected matters would be identified in this release.²⁸⁹ This discrepancy became clear when the CDPP’s Fraud Manual was made public as part of the RRC, disclosing that all *Keating*-affected matters about which an inquiry had been made were recorded within its ‘CRIMS database’ and tagged as ‘*Keating* affected’.²⁹⁰

In any event, the information disclosed by the CDPP’s administrative release of December 2020 revealed that 21 post-conviction matters had been heard for omission conduct, all unreported, between 2013 and 2016. Of these, 10 appellants were granted leave to appeal out of time, each having their convictions quashed.²⁹¹ Staff from Victoria Legal Aid noted that some of the Victorian appeals had been conducted ‘on the papers’.²⁹² Additionally, some 11 annulments of convictions had been made under section 5 of the *Crimes (Appeal and Review) Act 2001* (NSW).²⁹³ Three involved charges being withdrawn and seven involved a warrant being recalled. It appears that the New South Wales matters were not appeals following conviction but withdrawals of charges and warrants by the CDPP.²⁹⁴ If only these *Keating*-affected matters have been subject to review, then only 0.14% of those 15,000 matters understood to be unsound following by *Poniatowska High Court Appeal* and *Keating* have been remediated.

which certain proceedings against an accused had been struck out as ‘doomed to fail’. While the decision of Lansdowne J considers the decision in *Poniatowska Full Court Appeal* (n 32) in the ‘broader context’ of the proceedings, the matter appears (unless there is a typographical error) to have concerned section 134.2(1) of the *Code* (n 6) rather than section 135.2(1): *Neuss* (n 235) [2], [11]–[12].

- 287 For example, *Jones v Commonwealth Services Delivery* [2012] SASFC 113 (*‘Jones’*) was an application for permission to appeal to the Full Court of the South Australian Supreme Court that was made while *Keating* (n 12) was still awaiting hearing in the High Court. The Full Court decided to refer the application to ‘the Full Court so that it can consider it further in the light of the progress of the Victorian matter’: *Jones* (n 287) [5] (Kourakis CJ, Blue and Stanley JJ). See also *Pride* (n 61); *DPP (Cth) v Jovanovic* [2013] SASFC 33.
- 288 See ‘Administrative Access’, *Office of the Australian Information Commissioner* (Web Page, 25 September 2018) <<https://www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/proactive-publication-and-administrative-access/administrative-access>>.
- 289 Letter from Kirstin Duncan to Humphry Smythies, 18 December 2020 <<https://www.rudge.tv/wp-content/uploads/2024/10/Smythies-Admin-Release-18-12-20-2.pdf>> (*‘CDPP Administrative Release’*).
- 290 See ‘CDPP Fraud Manual’ (n 7) [12.9]. The manual instructs that ‘*Keating* affected [matters] should be recorded in CRIMS by choosing the relevant text type’ and it then illustrates this process with multiple screen captures. It further notes that: ‘If a request for information about a previous conviction is received from a convicted person or their legal representative as a result of *Keating*, an “Application” phase should be opened in CRIMS and the text type “*Keating* request from defendant” should be used.’
- 291 These included one person in the Australian Capital Territory; two in the Northern Territory; one in Queensland and six in Victoria: see CDPP Administrative Release (n 289).
- 292 Email from Len Jaffit to Christopher Rudge, 5 May 2020.
- 293 See *Crimes (Appeal and Review) Act 2011* (NSW) ss 4A, 5.
- 294 These 21 prosecutions involved overpayments of between \$3,595 and \$65,426: CDPP Administrative Release (n 289).

C The Affected Cohort

Information disclosed by the CDPP under FOI indicates that in every financial year between 2002–03 and 2020–21, more women than men have been convicted under the *Code* for Centrelink offences.²⁹⁵ Indeed, a surfeit of Australian evidence indicates that ‘the majority of those convicted of social security fraud are women’ and that such defendants are ‘a vulnerable group of first offenders who have engaged in less complex offences involving overpayment’.²⁹⁶ (A similar preponderance of evidence indicates that women are criminalised for social security offences at much higher rates than men, in North America and elsewhere).²⁹⁷ A study of welfare recipients conducted in New South Wales in 2008–10 found that 57% of those prosecuted were women, most of whom were receiving a parenting payment (43%) and worked in precarious employment (72%), often as cleaning, retail or hospitality workers.²⁹⁸ These data strongly suggest the composition of those who might populate the cohort of the estimated 15,000 *Keating*-affected convicted. As Wilcock posits, the overrepresentation of women in Australian welfare crime statistics is ‘propelled by the gendered nature of welfare fraud policing’ systems that ‘disproportionately target and impact women’.²⁹⁹

295 See Commonwealth Director of Public Prosecutions, ‘CDPP2021-1.xlsx’, *Disclosure Log* (Spreadsheet, 2 September 2021) <<https://www.cdpp.gov.au/contact-us/freedom-information/disclosure-log>>; Commonwealth Director of Public Prosecutions, ‘CDPP20170x’, *Disclosure Log* (Spreadsheet, 19 January 2017) <<https://www.cdpp.gov.au/contact-us/freedom-information/disclosure-log>>.

296 See Legal Aid NSW, Submission No 8 to Senate Legal and Constitutional Affairs Legislation Committee, *Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017* (June 2017) 8, 9–10. See also Andrew James McGrath, ‘The Subjective Impact of Contact with the Criminal Justice System: The Role of Gender and Stigmatization’ (2014) 60(6) *Crime and Delinquency* 884, 888–9 <<https://doi.org/10.1177/0011128710389589>>. See also Walsh and Marston, ‘Benefit Overpayment’ (n 140); Margaret Wilkie, *Women Social Security Offenders: Experiences of the Criminal Justice System in Western Australia* (Report No 8, 1993).

297 See, eg, Shelley AM Gavigan and Dorothy E Chunn, ‘From Welfare Fraud to Welfare as Fraud: The Criminalization of Poverty’ in Gillian Balfour and Elizabeth Comack (eds), *Criminalizing Women: Gender and (In)justice in Neo-Liberal Times* (Fernwood Publishing, 2006) 197; Shelley AM Gavigan and Dorothy E Chunn, *The Legal Tender of Gender: Welfare Law and the Regulation of Women’s Poverty* (Hart Publishing, 2010); Patricia M Evans, ‘Divided Citizenship? Gender, Income Security, and the Welfare State’ in Patricia M Evans and Gerda R Wekerle (eds), *Women and the Canadian Welfare State: Challenges and Change* (University of Toronto Press, 1997) 99; Kenneth J Neubeck and Noel A Cazenave, *Welfare Racism: Playing the Race Card Against America’s Poor* (Routledge, 2001) 28. Cf Samuel Kirwan, who notes that benefit overpayment ‘fraud’ is ‘one of the few crimes for which women and men are charged and prosecuted in relatively equal numbers’, although he also notes, with reference to ‘living together’ or ‘undeclared partner’ cases, that these are areas ‘in which the risks of overpayment and fraud disproportionately fall upon women’: see Samuel Kirwan, ‘Benefits Overpayments and the Criminalisation of Female Poverty’ in Saul Schwartz (ed), *Oppressed by Debt: Government and the Justice System as a Creditor of the Poor* (Routledge, 2022) 21, 24 <<https://doi.org/10.4324/9780367816216>>.

298 Freda Hui, Lee Moerman and Kathy Rudkin, *Centrelink Prosecutions at the Employment/Benefit Nexus: A Case Study of Wollongong* (Report No 1, 1 January 2011) <https://ro.uow.edu.au/articles/report/Centrelink_Prosecutions_at_the_Employment_Benefit_Nexus_A_Case_Study_of_Wollongong/27801897?file=50574417>. Similarly, a Queensland study reported 53% of defendants in welfare prosecutions were women and most (59%) had not previously offended: see Marston and Walsh, ‘A Case of Misrepresentation’ (n 256) 293–4.

299 Wilcock, *Policing Welfare Fraud* (n 6) 8, 76. See also Scarlet Wilcock, ‘Official Discourses of the Australian “Welfare Cheat”’ (2014) 26(2) *Current Issues in Criminal Justice* 177 <<https://www.doi.org/10.1080/10345329.2014.12036014>>. See also Kieran Tranter, Lyndal Sleep and John Stannard, ‘The

D Are These ‘Wrongful Convictions’?

While definitions of ‘wrongful conviction’ vary,³⁰⁰ many scholars contend that the expression refers to ‘factual innocence’: that is, where the convicted person did not in fact commit the wrongful act (such as where it has been committed by another person).³⁰¹ Others, however, accept that the expression encompasses ‘legal innocence’: where the person did the act or omission in question, but this did not, by reason of some defect or exception in the criminal justice process, sound in criminal responsibility.³⁰² However, the expression’s ‘elasticity, inconsistencies and contradictions’ have also been recognised.³⁰³ David Hamer, for instance, argues that while the conviction of a factually innocent person is a more ‘searing’ injustice, convictions against the legally innocent are similarly ‘wrongful’ and to deny as much can be ‘counterproductive’.³⁰⁴

Although the question of whether those with *Keating*-affected convictions are factually or legally innocent has little import for the appeal process (discussed below), it underscores the fuzziness of the factual–legal distinction, especially in the case of criminal omissions.³⁰⁵ Recognising that the ‘omissions principle’ poses particular problems for ‘ascriptive responsibility’ (discussed in Part II), some scholars have argued that omissions should be treated as ‘special’ – that is, with particular scepticism.³⁰⁶ In any case, where a person omitted to inform the DHS of income and there was no clear legal duty to do so, it is consistent with the English

Cohabitation Rule: Indeterminacy and Oppression in Australian Social Security Law’ (2008) 32(2) *Melbourne University Law Review* 698; Lyndal Sleep, ‘Female Dependents, Individual Customers and Promiscuous Digital Personas: The Multiple Governing of Women through the Australian Social Security Couple Rule’ (2022) 43(2) *Critical Social Policy* 193 <<https://doi.org/10.1177/02610183221089265>>; Lyndal Sleep, ‘Entrapment and Institutional Collusion: Domestic Violence Police Reports and the “Couple Rule” in Social Security Law’ (2019) 44(1) *Alternative Law Journal* 17. See also *R v Mears* (1991) 53 A Crim R 141, 143 (Lee CJ at CL).

300 See Hoel (n 239); Rachel Dioso-Villa, ‘A Repository of Wrongful Convictions in Australia: First Steps toward Estimating Prevalence and Causal Contributing Factors’ (2015) 17(2) *Flinders Law Journal* 163 (‘A Repository of Wrongful Convictions’).

301 Dioso-Villa, ‘A Repository of Wrongful Convictions’ (n 300) 166. Sometimes, the expression is further confined to those convictions against the factually innocent which have not been corrected through ‘the routine safeguard of the regular appeal’: Hamer, ‘Wrongful Convictions’ (n 11) 273.

302 Steven Greer refers to ‘defects in substantive criminal law and procedure’ as wrongful convictions equivalent to those involving factual innocence: Steven Greer, ‘Miscarriages of Criminal Justice Reconsidered’ (1994) 57(1) *Modern Law Review* 58, 59 n 9, 74.

303 See Hannah Quirk, ‘Identifying Miscarriages of Justice: Why Innocence in the UK Is Not the Answer’ (2007) 70(5) *Modern Law Review* 759.

304 Hamer, ‘Wrongful Convictions’ (n 11) 274.

305 There is an apparent paradox in mapping the concepts of ‘factual’ or ‘legal’ innocence onto omission conduct, and this may emerge from the fact that criminal omissions are rare, and thus will often not be recognised as crimes – neither by omitters nor witnesses. Indeed, the very *facticity* of an omission as a criminal wrong may depend on the content of ‘legal’ rules not readily apparent or intelligible to lay (non-legal) actors nor, as the omissions affair suggests, even to administrators of the law.

306 In this regard, see discussion of why ‘not-doings’ are ‘special’ in Andrew P Simester, *Fundamentals of Criminal Law: Responsibility, Culpability, and Wrongdoing* (Oxford University Press, 2021) ch 6 <<https://doi.org/10.1093/oso/9780198853145.001.0001>>. But see Kate Greasley, ‘How Omissions Aren’t Special’ (2023) *Criminal Law and Philosophy* (advance) <<https://doi.org/10.1007/s11572-023-09711-6>>.

and Australian legal theory of innocence to describe convictions of a person for that conduct as wrongful.

IV THE PATH TO REMEDIATION

In recent years, post-conviction review has been subject to considerable academic and public debate; and proposals for an Australian version of the UK's Criminal Case Review Commission ('CCRC') have drawn considerable support – and some scepticism.³⁰⁷ But the failure by the Commonwealth Government or its agencies to review or otherwise engage with the many likely wrongful convictions resulting from the omissions affair represents one compelling case for reform in this area.

A The Invisibility of Wrongful Convictions in Australia

It is well-recognised that Australia lacks a dedicated system for tracking wrongful convictions, which makes estimating the volume of these convictions unfeasible.³⁰⁸ In 2015, the Australian socio-legal scholar Rachel Dioso-Villa sought to create the first national repository of wrongful convictions.³⁰⁹ Her study found that there had been 71 wrongful convictions between 1922 and 2015.³¹⁰ A quarter of those 71 wrongfully convicted were sentenced to life imprisonment or death, while the other three-quarters were sentenced to custodial prison terms of, on average, 9.5 years.³¹¹ Of course, Dioso-Villa and others³¹² hypothesise that the 'real' total of wrongful convictions in Australia in that period is higher than just 71. After all, Dioso-Villa's repository is limited to known cases (eg, those appearing in media reports and elsewhere in the public domain) and does not account for unreported decisions.³¹³ Unsurprisingly, Dioso-Villa's dataset did not include the estimated 15,000 wrongful convictions arising from the omissions affair.

307 Critics include Michele Ruyters and Jarryd Bartle, 'The Problem of Post-conviction Review in Australia' (2024) 49(4) *Alternative Law Journal* 288 <<https://doi.org/10.1177/1037969X24128955>>. Proponents include Lingard (n 21) 880; Law Council of Australia, *Policy Statement on Commonwealth Criminal Cases Review Commission* (Policy Statement, 27 April 2012) <<https://lawcouncil.au/resources/policies-and-guidelines/policy-statement-commonwealth-criminal-cases-review-commission>>; Hamer and Dyer (n 21); Jane Tudor-Owen et al, 'Perceptions of Exonerees in Australia' (2019) 26(2) *Psychiatry, Psychology and Law* 206; Rachel Dioso-Villa, 'Without Legal Obligation: Compensating the Wrongfully Convicted in Australia' (2012) 75(3) *Albany Law Review* 1329; Dioso-Villa, 'A Repository of Wrongful Convictions' (n 300); Rachel Dioso-Villa et al, 'Investigation to Exoneration: A Systemic Review of Wrongful Conviction in Australia' (2016) 28(2) *Current Issues in Criminal Justice* 157; Caitlin Nash, Rachel Dioso-Villa and Louise Porter, 'Identifying a "Miscarriage of Justice": Factors Influencing a Successful Appeal against a Guilty Plea Conviction in Australia' (2023) 34(4) *Criminal Justice Policy Review* 361 <<https://doi.org/10.1177/08874034231162776>>.

308 Hamer, 'Wrongful Convictions' (n 11) 272.

309 Dioso-Villa, 'A Repository of Wrongful Convictions' (n 300) 179.

310 Ibid. See also Blewer et al (n 242).

311 Dioso-Villa, 'A Repository of Wrongful Convictions' (n 300).

312 Ibid 180. See, eg, Blewer et al (n 242) 186.

313 Dioso-Villa, 'A Repository of Wrongful Convictions' (n 300) 180.

Evidence from common law jurisdictions comparable to Australia suggests wrongful convictions are generally underestimated. Since it was established in 1997, the CCRC has referred 848 cases to the Court of Appeal Criminal Division ('CACD'), resulting in 588 (69.7%) being quashed.³¹⁴ These data indicate the value of a review body like the CCRC in revealing legal miscarriages and facilitating appeals and judicial remediation. Many empirical studies of wrongful convictions in the US, where various 'innocence projects' have arisen since the 1970s, have tended to focus on wrongful convictions leading to capital punishment. A study authored by Michael Risinger reported that between 1973 and 1989 some 2.3% of prisoners sentenced to death had been wrongfully convicted; it also found that, in one category of violent offending, some 3.3% of cases involved wrongful conviction.³¹⁵

Although lacking data, it is unlikely that Australia would be an exception to these trends, especially since, as Blewer et al notes generally, our criminal 'processes are based on the same English common law system'.³¹⁶ In 2014, Hamer (adopting Risinger's results) postulated that 'we would expect about 350 convictions a year to be factually wrong and left uncorrected by appeal, with about 90 of these from NSW'.³¹⁷ Still, as the omissions affair demonstrates, unsafe or wrongful convictions in Australia are liable to remain uncorrected in the absence of any suitable review body. While the estimated 15,000 *Keating*-affected convictions may be distinguishable from some other categories of wrongful convictions (as discussed above), the absence of an institutional detection or correction system largely explains why the omissions affair has received so little attention.

B Miscarriage, Finality and the Possibility of Appeal

If it were possible to facilitate the appeal of these *Keating*-affected convictions, what might be their prospects of success? Australian criminal appeal statutes in each state jurisdiction adopt what is called a 'common form criminal appeal provision'.³¹⁸ Although these provisions vary and can be more complex, these provisions will generally empower an appeal court to quash a conviction where the trial verdict was unreasonable, legally erroneous, or resulted in substantial miscarriage.³¹⁹ However, a standard 'proviso' allows the appeal court to dismiss

314 See 'Facts and Figures', *Criminal Cases Review Commission* (Web Page, August 2024) <<https://ccrc.gov.uk/facts-figures/>>.

315 See Michael Risinger, 'Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate' (2007) 97(3) *Journal of Criminal Law and Criminology* 761, cited in Hamer, 'Wrongful Convictions' (n 11) 276. See also Samuel R Gross and Barbara O'Brien, 'Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases' (2008) 5(4) *Journal of Empirical Legal Studies* 927, 948 <<https://doi.org/10.1111/j.1740-1461.2008.00146.x>>.

316 Blewer et al (n 242) 186. A similar point is made in MacFarlane and Stratton (n 17), where the authors suggest that Australian 'wrongful convictions are the result of the same failures of their international counterparts': at 304.

317 Hamer, 'Wrongful Convictions' (n 11) 276.

318 This is derived from the *Criminal Appeal Act 1907* (UK): see *Baini v The Queen* (2012) 246 CLR 469, 477 [15] (French CJ, Hayne, Crennan, Kiefel and Bell JJ) ('*Baini*'). See also Chris Corns and Gregor Urbas, 'Introduction' (2008) 26(1) *Law in Context* 1, 3; Ruyters and Bartle (n 307).

319 See the elaborations of these rules in, eg, *Criminal Appeal Act 1912* (NSW) s 6(1); *Criminal Procedure Act 2009* (Vic) s 274 ('*Vic Criminal Procedure Act*').

an appeal where it finds no substantial miscarriage has arisen. It is arguable that a wholly *Keating*-affected conviction (that is, involving no commissions) will amount to a substantial miscarriage because, consistent with the reasons of the High Court, an omission to report income before 2011 could not amount to a criminal offence in the absence of a particularised duty. Nonetheless, the High Court has also observed that ‘no single universally applicable description can be given for what is a “substantial miscarriage of justice”’.³²⁰

Those with *Keating*-affected convictions are very likely to have pleaded guilty. In 2010, for instance, the Auditor-General found that 98% of people charged with offences under *Code* section 135.2(1) pleaded guilty. Perhaps more strikingly, 100% of all prosecutions led to conviction.³²¹ As Caitlin Nash and others have observed, however, Australian defendants who plead guilty may face difficulties in later changing this ‘judicial confession’.³²² That is because, as the High Court has held, a guilty plea is to be taken as an admission of all the ‘essential legal ingredients of the offence admitted by the plea’.³²³ Thus, appeal courts will grant leave to appellants seeking to change their pleas with a ‘caution bordering upon circumspection’, including because there is ‘high public interest in the finality of legal proceedings’.³²⁴ That said, guilty pleas may nonetheless be changed if ‘it can be shown that a miscarriage of justice has occurred’.³²⁵ In circumstances where, as discussed above, the Court of Appeal in *Poniatowska Full Court Appeal* accepted the notice of contention that a miscarriage had occurred for the purposes of granting leave to appeal, it is likely that those with *Keating*-affected convictions could similarly show miscarriage.

As indicated above, the law recognises that finality serves many public interests in the appeal process, as ‘a party should not be twice vexed in the same matter’,³²⁶ as both the victims and the community should be protected against further adverse impacts,³²⁷ and because the ‘cost of litigation’ should be restrained.³²⁸ Given the considerable time since the *Keating* decision (2013), and the even greater age of the *Keating*-affected convictions themselves (recorded before 2013), considerations of finality will loom large in any appeal process.³²⁹ In this respect, the CDPP’s

320 *Baini* (n 318) 479 [26] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

321 *Centrelink Fraud Audit Report* (n 39) 112 [5.3].

322 Nash, Dioso-Villa and Porter (n 307) 361, citing Juliet Horne, ‘Plea Bargains, Guilty Pleas and the Consequences for Appeal in England and Wales’ (Warwick School of Law Research Paper No 10, 9 July 2013) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2286681>.

323 See *Meissner v The Queen* (1995) 184 CLR 132, 157 (Dawson J); *R v O’Neill* [1979] 2 NSWLR 582, 588 (Moffitt ACJ) (*O’Neill*).

324 See *R v Liberti* (1991) 55 A Crim R 120, 122 (Kirby P). See, eg, *O’Neill* (n 323) 595 (Moffitt ACJ); Nash, Dioso-Villa and Porter (n 307) 364.

325 *R v Boag* (1994) 73 A Crim R 35, 36–8 (Hunt CJ at CL, McInerney J agreeing at 39, James J agreeing at 40); *White v R* (2022) 110 NSWLR 163, 184 [58], 184–5 [62]–[63] (Bell CJ, Button and Adams JJ).

326 *Johnson v Gore Wood and Co* [2002] 2 AC 1, 31 (Lord Bingham).

327 *Kentwell v The Queen* (2014) 252 CLR 601, 614 [31] (French CJ, Hayne, Bell and Keane JJ).

328 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 434–5 (Deane J); *Clone Pty Ltd v Players Pty Ltd (in liq)* (2018) 264 CLR 165, 197–8 [69]–[70] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ). See also discussion in Hamer, ‘The Eastman Case’ (n 242) 455–9.

329 See Hamer, ‘The Eastman Case’ (n 242) 455–9.

Fraud Manual – made public in 2023 through the RRC – is instructive. It records that, while ‘the original position [of the CDPP] was to concede all appeals against *Keating* affected convictions’, the Director approved a new approach on 6 May 2014 whereby the CDPP will consider ‘opposing extensions of time, relying on the principle of finality, unless there is a satisfactory explanation for the delay’ or an extension is otherwise required by justice.³³⁰ In this regard, any appellant would likely be required to explain why they had not sought leave to appeal their conviction earlier, although it is unclear what kind of explanation might suffice.³³¹

C Addressing Post-conviction Inaction

Beyond the safeguard of the criminal appeals process, few mechanisms permit reviews or remedies for suspected wrongful convictions in Australia.³³² One rarely exercised mechanism is a grant of mercy.³³³ Another involves releasing a prisoner ‘on licence’ in exceptional circumstances (as occurred for one *Keating*-affected convict).³³⁴ And yet other forms of review are also possible, including Royal Commissions³³⁵ and independent judicial inquiries.³³⁶ But these mechanisms are expensive, time-consuming and, as Lynne Weathered posits, unlikely to be established without substantial public disquiet.³³⁷ As the omissions affair illustrates, inaction on the part of both the public and government in Australia may contribute to an environment in which many wrongful convictions remain uncorrected or ‘forgotten’.

As suggested above, an Australian CCRC may serve to remedy this inertia by spurring both appellants and appeal courts to action. However, two other matters may briefly be raised to illustrate areas where reform might be considered, both for individual wrongful convictions and suspected large-scale miscarriages like the omissions affair. It is first worth reviewing what might be called the ‘default response’ of the CDPP and Commonwealth Government where wrongful

330 ‘CDPP Fraud Manual’ (n 7) 36–7.

331 It is well established, however, that a ‘change in the law, even a change whose effect is that a conviction would be quashed on appeal, is not of itself sufficient to warrant the granting of an extension of time in which to appeal’: *Montero v The Queen* (2013) 234 A Crim R 532, 534 [2] (Leeming JA). See also *R v Unger* [1977] 2 NSWLR 990, 994B (Street CJ, Begg and Ash JJ agreeing). For a detailed discussion of statutory appeal rules in various Australian jurisdictions but particularly the post-conviction landscape in New South Wales, see Lingard (n 21) 881–7.

332 See generally Blewer et al (n 242) 190–2.

333 See Julian Murphy et al, ‘An Ancient Remedy for Modern Ills: The Prerogative of Mercy and Mandatory Sentencing’ (2020) 46(3) *Monash Law Review* 252.

334 Pursuant to *Crimes Act* (n 61) s 19AP. Notably, one person imprisoned for a *Keating*-affected conviction was released on licence by the Attorney-General: see Letter from Luke Brown to Christopher Rudge, 31 October 2022 <<https://www.rudge.tv/wp-content/uploads/2024/12/FOI22208-Decision-Letter-and-Attachments-A-C-1.pdf>>; *Answers to Additional Estimates Questions* 63 (n 13).

335 One such Royal Commission was established to review the convictions of Lindy and Michael Chamberlain: see generally Blewer et al (n 242) 191.

336 For example, a judicial inquiry was established to review the conviction of Kathleen Folbigg. See generally Peter Timms, Millie Roberts and Giselle Wakatama, ‘Kathleen Folbigg has Convictions for Killing Her Four Children Overturned’, *ABC News* (online, 14 December 2023) <<https://www.abc.net.au/news/2023-12-14/kathleen-folbigg-court-of-criminal-appeal-charges/103224344>>.

337 Lynne Weathered, ‘Pardon Me: Current Avenues for the Correction of Wrongful Conviction in Australia’ (2005) 17(2) *Current Issues in Criminal Justice* 203, 213.

convictions are alleged. That position was illustrated by the following question on notice (asked by Senator Rachel Siewert) and answer (of the CDPP) in 2014:

What is the Commonwealth Department of Public Prosecutions doing to identify past prosecutions that may have led to wrongful convictions in light of the decision in [*Keating*] and communicating it to persons affected?

...

In relation to past convictions where the sentence has been served, the CDPP considers each request from persons (or their legal representatives) who are concerned that a conviction may be affected by the decision.³³⁸

Rather than taking proactive steps to inform the public, or to advise individuals, about suspected wrongful convictions, the CDPP adopts a passive position. While this appears consistent with the prosecutor's duty of disclosure, which is generally discretionary and owed to the courts (rather than to the public generally),³³⁹ the apparent fact that the CDPP's disclosure obligations will only be enlivened when it receives a request from a concerned person places considerable limits on the *ex ante* ability of affected parties to learn of their predicament (another 'hermeneutical injustice')³⁴⁰ and thus to access justice.

By contrast with the passive approach to wrongful convictions in Australia, actions by the UK Government in the wake of the Horizon Scandal appear strikingly proactive. Responding to the prospect of large-scale miscarriages, legislation was enacted in the UK and Scotland to quash certain 'convictions of dishonesty' connected to the Horizon Scandal.³⁴¹ Unsurprisingly, these enactments have been roundly criticised for undermining the separation of powers and circumventing the judiciary's exclusive authority to review convictions.³⁴² However, it is arguable that where injustice occurs on a large scale, as may reasonably be suspected concerning the omissions affair, the numerous merits of such a mechanism – efficiency, justice and remediation – warrant serious consideration.³⁴³

338 *Answers to Additional Estimates Questions* 63 (n 13).

339 See *Cannon v Tahche* (2002) 5 VR 317, 341 [59] (Winneke P, Charles and Chernov JJA). See also 'Statement on Disclosure: Statement on Disclosure in Prosecutions Conducted by the Commonwealth' (Statement, Commonwealth Director of Public Prosecutions, 22 March 2017) 4 [8], 7 [26]. Several statutory provisions throughout Australia also confirm that the duty of disclosure is ongoing, and continues after trial and appeals: see, eg, *Criminal Code Act 1899* (Qld) s 590AL; *Vic Criminal Procedure Act* (n 319) ss 42, 111, 185; *Director of Public Prosecutions Act 1986* (NSW) s 13.

340 See above Part III(A).

341 See *Post Office (Horizon System) Offences Act 2024* (UK); *Post Office (Horizon System) Offences (Scotland) Act 2024* (UK).

342 See, eg, Holly Marston, 'The Post Office Scandal: Is the Circumvention of the Courts a Justice or Injustice?', *The Justice Gap* (online, 14 February 2024) <<https://www.thejusticegap.com/the-post-office-scandal-is-the-circumvention-of-the-courts-a-justice-or-injustice/>>; Daniel Boffey, 'No Precedent: Why Commons' Approach to Post Office Scandal Has Lawyers Nervous', *The Guardian* (online, 11 January 2024) <<https://www.theguardian.com/uk-news/2024/jan/10/no-precedent-why-commons-approach-to-post-office-scandal-has-lawyers-nervous>>.

343 See, eg, Kate Dewsnip, 'The Post Office Bill: Constitutionally Unusual, but Not Inappropriate', *The Constitution Society* (Blog Post, 24 April 2024) <<https://consoc.org.uk/the-post-office-bill/>>.

V CONCLUSION: SOCIAL SECURITY LAW IN 21ST CENTURY AUSTRALIA

This article has analysed a series of important events and legal cases not previously studied in detail. Although the omissions affair remains important in its own right, material made public in 2023 through the RRC has shed further light on the connection between the omissions affair and the earliest conception of the Robodebt scheme. Taken together, the omissions affair and the Robodebt scandal represent a deep structural problem in Australian social security law, a full accounting of which is beyond the scope of this article. Yet this concluding Part will explore an important historical bridge between these events: the transformation of Centrelink's 'welfare prosecution system.' While that system first underwent change in 2009, it was compelled to change again by the omissions affair in 2013.

As illustrated above in Part II(B), before 2009, certain BPAs provided for the transfer of funding to Centrelink from other agencies on the condition that Centrelink achieved certain performance targets, including fraud prosecution referrals.³⁴⁴ From the mid-1990s through to 2009, Centrelink depended on these BPAs to fund its departmental activities. Wilcock has characterised this period as one of corporatisation and managerialism and the period after 2009, when Centrelink was permitted to directly appropriate funding for itself, as one of 're-bureaucratisation'.³⁴⁵ However, what has not yet been considered is the precise way in which the 're-bureaucratisation' of Centrelink in 2009 coincided and combined with the omissions affair so as to give rise to the circumstances in which Robodebt would be conceived.

As intimated in Part II, the omissions affair posed significant risks to the Commonwealth in terms of the potential costs of remediating thousands of convictions. However, the omissions affair also threatened the effectiveness of the 'welfare prosecution system' as it had subsisted before 2011. While Centrelink had not depended on prosecution referrals under the BPAs since 2009, the CDPP continued to depend on Centrelink referrals for much of its funding. In a 2015 letter drafted for (and signed by) the Secretary of DHS (Kathryn Campbell) to the Director of the CDPP, it was noted that 'CDPP funding is tied to the volume of briefs received per referring agency'.³⁴⁶ As the letter further explained,

Prior to November 2011, the department was able to lodge prosecution referrals to the CDPP with short-form briefs ... The CDPP's decision to change this policy and require a full brief for all referred matters meant that fewer investigations could be completed by the department without a significant increase in resourcing. This has reduced the number of prosecution referrals in recent years.³⁴⁷

344 Wilcock, *Policing Welfare Fraud* (n 6) 50.

345 Ibid 49–51.

346 'Letter to the Commonwealth Director of Public Prosecutions, Mr Robert Bromwich SC' (Exhibit 3-4021, Royal Commission into the Robodebt Scheme, 24 March 2015) <<https://robodebt.royalcommission.gov.au/publications/exhibit-3-4021-cth309500029240-r-eb15-212-signed>> ('Exhibit 3-4021').

347 Ibid.

As this letter further suggested, in June 2013, following the outcomes in *Keating*, the CDPP Director had decided that no past prosecutions would be commenced where a matter was ‘entirely *Keating* affected’.³⁴⁸ From mid-2014, the CDPP further introduced three new charging policies for ‘Centrelink Omissions’ into its practice instructions; they required ‘full brief[s] for all referred matters’ to be provided to the CDPP and identified strict conditions for the prosecution of commission- and omission-related conduct.³⁴⁹ As indicated in the Secretary’s letter, these changes had not only reduced prosecution referrals from Centrelink to the CDPP but had seen the CDPP’s ‘funding reduced’ for the 2013–14 period, with ‘a reduction of \$11.182m (11.8%) from the previous year’.³⁵⁰

The effect of the post-*Keating* policy changes was to preclude the prosecution of welfare recipients for overpayments occurring before 2013. When Centrelink was re-bureaucratized in 2009, it had already been disincentivised to refer individuals to the CDPP; however, now that most (if not all) referrals for section 135.2(1) offences would require long-form briefs of evidence, Centrelink was doubly disincentivised to persist with the welfare prosecution system of the 2000s. Indeed, despite a loss of funding (noted above), the CDPP was also disincentivised to prosecute welfare recipients in light of the complications arising in the omissions affair.

It is therefore notable that the target of the first iteration of the Robodebt scheme when it was conceptualised in early 2015 was ‘866,857 uninitiated PAYG compliance matches from the 2010–11, 2011–12 and 2012–13 financial years’.³⁵¹ This was the very cohort for whom the prosecution system had now become unviable. And given that an estimated 40% of all prosecutions had been *Keating*-affected between 2001–11, there would have been concerns from June 2013 that not only would prosecutions be more complicated than before, but that many of these compliance matches would have been unprosecutable – even with more resources committed to that end. In short, the omissions affair engendered the very conditions in which an alternative ‘civil’ system of welfare policing, such as Robodebt, was required. That system had to address the same compliance matches that had previously been managed (and flagged) through the now-unfeasible welfare prosecution system. While more analysis of this connection will increase understandings of welfare law in the 21st century, it is clear that Robodebt was not (only) a *sui generis* product of misguided policymaking but the somewhat predictable result of both internal changes at Centrelink (‘re-bureaucratization’) and external developments in Australia’s criminal jurisprudence (the omissions affair).

348 ‘CDPP Fraud Manual’ (n 7) 31.

349 See ‘Charging Policy’ (n 12); ‘Charging Centrelink Omission Prosecutions Pursuant to Section 135.2 of the *Criminal Code*’ (Instruction No 1, Revenue & Benefits Fraud Practice Group, Commonwealth Director of Public Prosecutions, 23 June 2014) <<https://www.cdpp.gov.au/system/files/2023-05/PGI-RBF-001.pdf>>; ‘Charging Instruction No 4 2014’ (n 58).

350 See ‘Exhibit 3-4021’ (n 346). For the 2013–14 year, the CDPP’s funding was reduced by \$11.182 million from the previous year: see Robert Bromwich, *Commonwealth Director of Public Prosecutions Annual Report 2013–14* (Report, 30 September 2014) 88.

351 See *Robodebt Report* (n 1) 39.

As this article has endeavoured to show, this omissions affair represents a complex and important event in Australian legal history, with wide implications for social security law and the limits of criminal responsibility. While the *Poniatowska High Court Appeal* and *Keating* decisions have resolved several questions of law relating to criminal omissions, they also indicate that many thousands of people have been wrongfully convicted. Without increased attention to this miscarriage, the possibility of remediation may soon pass.