FOREWORD

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This thematic component of the *UNSW Law Journal* focuses on stigma. In its dictionary definitions, stigma is commonly understood as a mark of shame or discredit. Etymologically, its original 16th century meaning was a mark made on the skin by burning with a hot iron. Signs were cut or burnt into a human body to mark an individual as being of diminished moral status. These were people to be avoided, particularly in public space: slaves, criminals and traitors.[1]

The seminal work on stigma was written by sociologist Erving Goffman in the early 1960s. Goffman analysed the experience of stigma through case studies and autobiographies. He defined stigma as a particular relationship between attribute and stereotype, a social process that is relationship and context-specific.[2] He identified the genesis of stigma in the gap between our expectations of another's social identity and the actuality of that identity.[3] Stigma is thus the expectation of, and failure to realise, a social norm.[4] In the process of stigmatisation, the individual is socially discredited, moving from normal, 'whole' and 'usual' to a person who is 'tainted and discounted'[5] by others. For Goffman, the mark of stigma may be visible or invisible, within or outside control, and is linked to three classes of attribute. The first class is that of physical characteristics, the second is that of character and the third class is that of group membership, the 'tribal stigma of race, nation and religion'.[6]

Since Goffman's work, however, the wide range of circumstances to which stigma has been applied, coupled with the multidisciplinary nature of much of the work around stigma (it features in studies varying from sociology through psychology, history and anthropology), means that there is little consensus on a contemporary definition of stigma.[7] Recent work on the concept defines it as the co-occurrence of its component elements: labelling, stereotyping, status loss

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[1] Erving Goffman, *Stigma*: Notes on the Management of Spoiled Identity (Prentice-Hall, 1963) 1.
[2] Ibid 4.
[3] Ibid 2.
[4] Ibid 6.
[5] Ibid 2.
[6] Ibid 4.
[7] Bruce G Link and Jo C Phelan, 'Conceptualizing Stigma' (2001) 27 *Annual Review of Sociology* 363, 377.

and discrimination.[8] Recent scholarship also offers certain insights into stigma: first, the process of stigmatisation is an exercise of power,[9] a move to induce conformity. Although powerful and powerless groups may stigmatise the other, the beliefs of powerful groups are more likely to prevail, simply because they control access to resources.[10] Secondly, a sort of 'secondary' stigmatisation can arise where individuals come into regular contact with the stigmatised, or are placed in servile relationships: 'Just as individuals have been found to bask in the reflected glory of others, so too may they be tainted by the reflected deficiencies of others'.[11] Thirdly, stigma is not only a social process aimed at achieving conformity; it also functions as a psychosocial process that the marginalised must navigate.[12]

As noted above, stigma has been applied to an extremely wide range of circumstances. In Australia, we are familiar with discussions of stigma, particularly around mental illness and disability in contemporary media discourse – indeed, a quick internet search for 'stigma' will reveal multiple sites relating to mental illness – but in the literature stigma has been studied in a staggering array of circumstances. It has been researched in relation to urinary incontinence, exotic dancing, leprosy, cancer, the unemployed, step-parents, debtors, mothers who are lesbian,[13] poverty[14] and white supremacists.[15] It has featured in recent decisions on refugee status.[16]

Stigma has potentially far-reaching and significant impacts on the target. It is linked to poor mental health, physical illness, academic underachievement, infant mortality, low social status, poverty, and reduced access to housing, education,

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8   Ibid.
9   Ibid 367.
10   Brenda Major and Laurie T O'Brien, 'The Social Psychology of Stigma' (2005) 56 *Annual Review of Psychology* 393, 395.
11   Blake E Ashforth and Glen E Kreiner, 'Dirty Work and Dirtier Work: Differences in Countering Physical, Social, and Moral Stigma' (2014) 10 *Management and Organization Review* 81, 83. Interestingly, places, as well as people, can be stigmatised by association. See, eg, Debra Wilson, 'For Sale: Beautiful Family Home, 3 Bedrooms, Friendly Poltergeist and Unique Reputation as Local Murder Site – The Obligations of Disclosure on Real Estate Agents under the *Fair Trading Act* (NZ)/*Trade Practices Act* (Cth)' (2008) 1 *Journal of the Australasian Law Teachers Association* 313.
12   Jennifer Ahern, Jennifer Stuber and Sandro Galea, 'Stigma, Discrimination and the Health of Illicit Drug Users' (2007) 88 *Drug and Alcohol Dependence* 188, 189.
13   Link and Phelan, above n 7, 363–4.
14   Deborah Warr, 'There Goes the Neighbourhood: The Malign Effects of Stigma' (Paper presented at the 2nd Bi-annual National Conference on the State of Australian Cities, Brisbane, Queensland, 30 November – 2 December 2005) <https://www.griffith.edu.au/__data/assets/pdf_file/0014/81410/social-city-19-warr.pdf>.
15   Matthew W Hughey, 'Stigma Allure and White Antiracist Identity Management' (2012) 75 *Social Psychology Quarterly* 219.
16   See, eg, 1100816 [2011] RRTA 356 (Unreported, Member Short, 3 May 2011); 0903707 [2009] RRTA 758 (Unreported, Member Hodgkinson, 18 August 2009); 1008364 [2010] RRTA 1135 (Unreported, Member Leehy, 22 December 2010) where the applicants, in arguing for refugee status, highlighted the stigma of HIV status in South Africa, Vietnam and Indonesia respectively. See also 1219395 [2013] RRTA 633 (Unreported, Member Marquard, 26 June 2013) where the applicant raised the stigma of mental illness in Ghana.

and jobs.[17] Some commentators have argued that it is, in fact, a major social determinant of population health.[18]

At the same time, there is significant variability in the responses to stigma on the part of the stigmatised, ranging from vulnerability and a susceptibility to mental illness through indifference to resilience and a sense of empowerment.[19] Managing stigma is an ongoing project, with the stigmatised seeking to 'create, present, and sustain personal identities that are congruent with and supportive of the self-concept'.[20] Goffman was particularly interested in the ways in which the stigmatised dealt with social rejection and found that some stigmatised individuals are relatively unmoved by their failure to live up to societal expectations.[21] And, although some stigmatised persons may try to hide their otherness, others may embrace stigma as a signifier of identity, authenticity or moral commitment, a phenomenon referred to by Hughey as 'stigma allure'.[22]

Despite the range of detrimental impacts of stigma, Angela Ragusa and Philip Groves observe in their article in this Issue that the contemporary focus on legislation to prevent the formal and institutionalised consequences of stigma, although 'admirable', does not create significant societal change. Perhaps one reason for this is that, despite Goffman's call for a focus on relationships rather than attributes,[23] we tend to concentrate our efforts on the individual,[24] overlooking the ways in which broader social factors, such as culture, status, discrimination and power, emerge and combine to construct stigma.

There is a growing awareness, however, of the ways in which law may contribute to, or seek to protect against, stigma. For instance, there have been recent studies into the ways in which mental health law might contribute to the perpetuation of stigma by removing power and responsibility from the hands of service users;[25] the ways in which the law contributes to the continued stigmatisation of illegitimacy;[26] the way in which access to law enforcement and primary healthcare can be important to improve the conditions of sex workers (a

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17   Major and O'Brien, above n 10, 394.

18   Mark L Hatzenbuehler, Jo C Phelan and Bruce G Link, 'Stigma as a Fundamental Cause of Population Health Inequalities' (2013) 103(5) *American Journal of Public Health* 813.

19   Nicolas Rüsch et al, 'Brief Reports: Self-Stigma, Empowerment, and Perceived Legitimacy of Discrimination among Women with Mental Illness' (2006) 57 *Psychiatric Services* 399, 399; Major and O'Brien, above n 10, 395.

20   David A Snow and Leon Anderson, 'Identity Work among the Homeless: The Verbal Construction and Avowal of Personal Identities' (1987) 92 *American Journal of Sociology* 1336, 1348.

21   Goffman, above n 1, 6.

22   Hughey, above n 15, 219.

23   Goffman, above n 1, 3.

24   Hughey, above n 15, 221.

25   L Bates and T Stickley, 'Confronting Goffman: How Can Mental Health Nurses Effectively Challenge Stigma? A Critical Review of the Literature' (2013) 20 *Journal of Psychiatric and Mental Health Nursing* 569.

26   Solangel Maldonado, 'Illegitimate Harm: Law, Stigma, and Discrimination against Nonmarital Children' (2011) 63 *Florida Law Review* 345.

traditionally stigmatised group);[27] the links between stigma and privacy law;[28] stigma, genetics and discrimination law;[29] and the links between stigma, law, abortion and surrogacy.[30]

This thematic component of the *UNSW Law Journal* explores the relationship between law and stigma in a variety of areas in contemporary Australia. Bankruptcy has traditionally been indicative of moral inadequacy and thus has also been a source of stigma. Two articles in this issue explore law and the stigma of bankruptcy. In 'Short a Few Quid: Bankruptcy Stigma in Contemporary Australia', Paul Ali, Lucinda O'Brien and Ian Ramsay observe that despite acknowledgement that bankruptcy performs useful social functions, its stigma remains. Indeed, they note that the stigma of bankruptcy is of very long standing: the initial Elizabethan legislation on the topic deemed bankruptcy to be quasi-criminal in nature, punishable by public shaming, imprisonment and even death. In the Victorian period, the bankrupt was stigmatised as an 'audacious scoundrel'. In the United States, despite a greater regard for entrepreneurialism and the risks it necessarily entails, bankruptcy was still stigmatised as indicative of failure. Bankruptcy laws have thus served historically to reinforce social and moral norms around property, money and debt. In the modern era, however, there has been a decline in bankruptcy stigma. With this has come anxiety that this decline in stigma is linked to an increase in bankruptcies. The authors trace empirical studies in other jurisdictions, and examine the purpose and operation of Australian bankruptcy law. They consider differentiating between honest and culpable bankruptcy, calling for a wider public discussion about rising levels of household debt and encouraging a discourse that reframes bankruptcy as a social issue, rather than simply a matter of personal morality.

The anxiety arising from loss of bankruptcy stigma is also a theme explored by Nicola Howell and Rosalind Mason in 'Reinforcing Stigma or Delivering a Fresh Start: Bankruptcy and Future Engagement in the Workforce'. In their article, Howell and Mason explore the ways in which stigma attaches to bankrupt individuals, before comprehensively considering the ways in which law (including, but not confined to specific bankruptcy law) enacts and entrenches bankruptcy stigma. They argue that the stigma of bankruptcy, as entrenched by the law, is in conflict with the contemporary goal of bankruptcy to allow a 'fresh start'. It adversely impacts on the bankrupt's employment and work opportunities, thus hindering former bankrupts from becoming independent economic actors once again. In making their argument, the authors highlight the

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27   Kate Bodkin, Alannah Delahunty-Pike and Tim O'Shea, 'Reducing Stigma in Healthcare and Law Enforcement: A Novel Approach to Service Provision for Street Level Sex Workers' (2015) 14 *International Journal for Equity in Health* <http://www.equityhealthj.com/content/pdf/s12939-015-0156-0.pdf>.

28   Jake Goldenfein, 'Police Photography and Privacy: Identity, Stigma and Reasonable Expectation' (2013) 36 *University of New South Wales Law Journal* 256.

29   Karen O'Connell, 'The Clean and Proper Body: Genetics, Stigma and Disability Discrimination Laws' (2009) 14(2) *Australian Journal of Human Rights* 139.

30   Paula Abrams, 'The Bad Mother: Stigma, Abortion and Surrogacy' (2015) 43 *Journal of Law, Medicine & Ethics* 179.

fact that the characteristics of people who become bankrupt, and the circumstances leading to their bankruptcy, are highly variable. This means it is difficult to identify personal characteristics, in particular, moral failings, that can be attributed to bankrupts. There is no strong evidence to link bankruptcy with poor job performance or increased propensity for irresponsibility, theft or fraud. The authors thus make a series of recommendations to align the law more closely with its intended purpose of allowing the bankrupt a fresh start.

The relationship of stigma and the workplace is explored by two articles in this issue. In 'The Sexual Legal Geography in *Comcare v PVYW*', Brad Jessup and Clare McIlwraith explore stigma through a contemporary legal dispute which revolved around a workers' compensation case for injury suffered by an employee on a work trip who engaged in sex in a motel room. In 'Stigmatisation and the Social Construction of Bullying in Australian Administrative Law: You Can't Make an Omelette without Cracking an Egg', Angela Ragusa and Philip Groves explore the phenomenon of workplace bullying and the stigma that attaches to both perpetrator and target.

Taking a critical feminist and legal geography analysis, Brad Jessup and Clare McIlwraith argue that the High Court's decision in *Comcare v PVYW* relies upon a legally constructed view about the division of human private and public personas. In this case, PVYW was denied compensation for an injury sustained during sex while on a work trip in a motel booked and paid for by the employer. A majority of the High Court found that the injury was not caused through an activity encouraged or induced by the employer, or was not considered 'referable' to a hotel stay. In their article, the authors explore the relationship between law, geography and morality. They highlight the ways in which legal and sexual geographies enforce norms of conduct through stigma and related discourses around 'disorder', 'disgust' and 'immorality'. The authors explore the various judgments in the case, not to claim the decision was right or wrong, but to reveal the underlying moral judgments that influenced the majority decision. They argue that these moral judgments served to stigmatise the complainant, and render invisible the sexual conduct and the injuries sustained during an interval within an overall period of work. In turn, they note that the infamy of the case has further stigmatised the complainant.

In their exploration of workplace bullying, Angela Ragusa and Philip Groves note the lack of definitional clarity around the term 'bullying' but observe that despite this ambiguity, the concept has mobilised a considerable and diverse legal response. They argue that the result is that the law may serve to perpetuate the stigma of bullying, and promote damaging misinterpretations of negative social behaviour. In particular, they highlight the fact that, when an individual self-labels as a victim of bullying, they risk stigma and negative health consequences. The problem here is that behaviour that is erroneously described as bullying, may have serious implications for the mental health of individuals who then wrongly self-label as victims. The article focuses on the authors' empirical work into the social construction of bullying in the Workers Compensation Commission disputed arbitrations for the period 1 January 2002 – 31 December 2014. The analysis yielded two discernible trends: first, the label of bullying was

predominantly applied by the worker; and secondly, the Arbitrator's use of the eggshell psyche principle arose consistently. The authors conclude that until bullying can be adequately defined and its aftermath managed, the legal system will not only fail to address the issues adequately, but may actively contribute to the perpetuation of stigma attached to workplace bullying.

Stigma attaches to particular bodies, but it is also present in the disciplines through which the body is understood. With increasing knowledge of genetics and biotechnology, hitherto stigmatised bodies and behaviours may be recast in terms of disability. But disability carries stigma of its own. In their article 'Stigmatising the "Normal": The Legal Regulation of Behaviour as a Disability', Isabel Karpin and Karen O'Connell examine the ways in which disability discrimination law, applied in the education context, has served to import stereotypes of disability and gender and served to contribute to the stigmatisation of individuals with challenging behaviour, even as it seeks to protect them. The authors also interrogate the way that genetic testing, used to avoid Autism Spectrum Disorder ('ASD'), depends on certain stereotypical and gendered assumptions. The authors find that the contemporary focus upon the body has at least two effects: first, because stigma attaches so distinctly to specific aspects of the sexed, raced, disabled or aged body, the body's visibility can make the accompanying inequality or stigma more apparent. Secondly, an undue focus upon the body can limit the capacity to see the social and political construction of disability. Rather, what emerges is the notion of fixed and immutable impairment residing in the individual. The authors emphasise that the categories of 'disability' and 'normality' are not stable. Thus our changes to the definitional boundaries of disability are, equally, changes to the definitional boundaries of 'normalcy'. This latter category, that of the neutral, natural, and unmarked,[31] is one which the authors argue we too frequently take for granted. They advocate that we include normalcy and its variants in our discussions of human behaviour, that is, we should 'stigmatise the normal' so we can avoid responding to scientific advances in ways that simply reinforce existing inequalities.

The articles in this thematic issue remind us of the fragility of the categories of normality and otherness, however that otherness may be constructed: sex, gender, race, belief, age, physical capacity, mental health, financial status and so on. O'Connell has pointed out elsewhere that in the process of stigmatisation, we project onto the other those abject qualities of incapacity or vulnerability that the privileged societal norm seeks to deny.[32] As one writer observed of her own experience with mental illness, '[o]nce you were marked, the mark stayed with you; visible to all, misunderstood by most, feared by many'.[33] These keywords of fragility, fear and projection identify the dark heart of stigmatisation. We fear the stigmatised and project our abject qualities onto the other, because of the fragility of categorisation. At any moment, any of us can move from the categories of

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31   Hughey, above n 15, 219.
32   O'Connell, above n 29, 139.
33   Alex Frederickson, *Labelled: Inside the Stigmatised World of Mental Illness* (Plantapress, 2014).

'normalcy' to a category of stigmatised otherness. The threat of stigma is ever-present and ubiquitous. As Goffman pointed out, the issue is not whether a person has experience with a stigma of their own, because they inevitably have, but rather how many varieties of stigma each individual has personally experienced.[34]

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34   Goffman, above n 1, 129.