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'Liberty and good government do not exclude each other; and there are excellent reasons why they should go together. Liberty is not a means to a higher political end. It is itself the highest political end. It is not for the sake of a good public administration that it is required, but for security in the pursuit of the highest objects of civil society, and of private life.'

-- Lord Acton, *The History of Freedom in Antiquity*, speech delivered 26 on February 1877 to the Members of the Bridgnorth Institute
I can recall in 1991 on the occasion of my first visit to Russia, from which my father had fled on horseback in 1930 leaving his parents and his brother and sister for ever, an episode occurred which has echoed in my mind ever since. My wife and I were in a park in Leningrad, as St Petersburg was called then. It was a glorious summer’s day in July and two Russian friends had taken us to a park for a picnic. We walked past massive old oak trees and under their dark shade along a gravel path, which wound through the vast grassy parkland. Everything was a bright green of the kind you never see in Queensland. In a mimicry of those clichéd love scenes in movies, in which the lovers skip hand in hand over green grass in slow motion, I took my wife’s hand and we plunged over the grass while I bellowed out a tune, I forget what now, but perhaps the theme from Love Story or some such. I was brought round roughly from this foolishness by my Russian friends who dragged us off the grass and back onto the path. “You can’t go on the grass,” they said. I looked around. There was no ‘Keep off the grass’ sign. Why can’t I go on the grass? “Because you can’t”. I observed that there was no sign saying I couldn’t do so. “No, no,” they insisted. “If it is permissible to tread on the grass there would be a sign giving such permission.”

There, in a brief and otherwise inconsequential human interaction evoking the entirely spontaneous and otherwise mundane reactions of the people involved, is a demonstration of the visceral state of belief of two sets of people brought up within two distinct sets of culture, tradition and history. A lesson in constitutional law as a part of the make-up of a human being.

It had amused me a great deal when I had read, long ago, the catalogue of civil rights which had been conferred upon citizens of the Soviet Union by their written constitution. Those rights were every part the equal of those guaranteed to citizens of the United States of America and of which there is, as you know, no written equivalent in our own country. Of course, those rights were never exercised by anyone in the Soviet Union and, perhaps, there were indeed no legal or practical means to have enforced them anyway.

Why is it then, that in a country which had a written constitutional guarantee of full civil rights, two of its citizens behaved with such an instinctive appreciation that they lacked any such rights; while the two citizens of another

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country, who had never enjoyed the benefit of any written guarantees of civil liberties at all, acted in accordance with a fundamental assumption that they possessed such liberties in full and that liberty under the law means, at least, that any act is permitted if it is not expressly forbidden by a valid law?

Research required by a proposed constitutional challenge has required me to read again the history of the development of our constitutional system from Magna Carta to the enactment of our own Australian Constitution and to the present day.

Freedom, I learned, is the product of civilization, not an inherent attribute of nature. A society will evolve not by deciding upon a set of common laws to obey but by a spontaneous willingness on the part of a group of people to conform to the same standards of conduct. From this habit of principled conformity will evolve an articulation of rules of self-discipline - not to steal, not to murder, not to commit incest and so on.

Such a society will, over the course of time, also determine that there must be some things that nobody has power to do. From this it will follow that minorities will submit to laws conceived by the majority because the majority is prepared to submit itself to those same sets of laws. In due course habituated patterns of law making, voluntary and cheerful obedience to laws justified by the visible application of laws equally to everyone, will result in the evolution of legal institutions of an enduring kind - a legislature, courts, an executive acting in accordance with the rule of law. It is an unshakeable willingness on the part of all of us to conform to these fundamentals which has resulted in our stable constitutional democracy; everything else is just ink on paper.

When it is seen, then, that institutions such as courts, are really nothing more and nothing less than a combination of people who share a common appreciation of expected behaviour and a common knowledge and recollection of how to behave, some of that knowledge being cultural and ingrained and some of it taught as a body of formal scholarship, it may be accepted that an institution has, for just those reasons, an enduring vitality. It is hard to destroy a group. A single person will find it hard to destroy an institution comprised of numerous people engaged in patterns of repeated behaviour guided by devotion to a principle. A single rotten apple will not, in fact, taint anyone else because the others are repelled by the stench.

Nevertheless, there is no guarantee that any such institution is invulnerable to harm. Our personal concern as lawyers – whether we are lawyers in actual practice or like you, lawyers in the making – is principally with the courts.

Any Australian lawyer who in due time gains a sense of his or her place in the long British, and shorter Australian, tradition of the administration of justice
will come to take for granted that the system generally works, that it is not corrupt nor corruptible and that those who work within it, by and large, are trying to do their best in accordance with proper principle as they see it. Indeed, I believe that to the extent that we take these things for granted and are right for doing so at the particular time, it is proof that these institutions are functioning properly and proof of their enduring strength. They would hardly be stable and abiding institutions if we had to be constantly worried about them.

However, life is not perfect and threats exist. Fortunately in this country, threats to the integrity of the courts do not arise from criminal behaviour on the part of outsiders or those who work within the system itself. Corruption induced by money or threats of harm to judges or lawyers is unknown. Threats to integrity are more likely to arise from the consequences of a defective personality which is driven not by principle but by selfish ambition or an unhealthy desire for power or prestige. In the case of people on the outside of the system, like politicians with power or influence in such matters, we can add as a potential source of harm a lack of proper education or relevant experience, an absent sense of history and an inability to understand what underlies the need for integrity in public office and why appointing friends just because they are friends to important posts won’t work.

People like these draw strength when they misbehave from the timidity and apathy of lawyers who seek a quiet life but who ought instead be reacting with zealous rage. A willingness to harm our precious institutions makes fools of each one of us and we should be strident in our objection to being made fools. The end of liberty in the sense in which we enjoy it in Australia is not now on the horizon and I do not believe that it ever will be. An end to our liberties of a sudden kind could only be brought about by a cataclysmic event and we, as a people, are not prone to initiate or to take part in cataclysms.

The danger does not lie there. It lies, rather, in a gradual erosion of liberty by the glacially slow elimination of rights and privileges, whether by political or by legal acts, or by the failure or refusal of those who are under a duty to act in accordance with expected standards to do so for reasons of a personal kind. Habitual rejection of principled conduct by any of us who serve the ends of justice will, in time, affect people’s expectations and faith in the system which we serve. I believe that we live in a country in which we expect and require that people be appointed to positions of power because they will do what is right and not in order that whatever they do is, for that reason, to be taken to be right. However, that could change and we can find ourselves working in a legal system staffed by political flunkies or friends of political flunkies.
Appointments made for irrelevant purposes, out of mere friendship or to serve some perceived political goal, degrade our system of justice at its foundation because, by definition, an absence of merit in an appointment means an absence of necessary technical skill or personal integrity.

If politicians persist in degrading the quality of our institutions without objection from the rest of us, our ingrained customary belief in our freedom to walk on Australian grass, the product of centuries of thought, work and sacrifice, will be replaced by a cynical, depressing and correct expectation that the grass is reserved only for the feet of those with the right connections.

The only possible way to prevent something like this happening is for those of us whose lives are lived around or within the institutions of the law, particularly lawyers, to react with loud outrage whenever we sense any intrusion upon our precious ways of life. We have examples of such principled reactions easily to hand. The journalists who, in 1986, wrote the articles and TV documentaries which compelled even a corrupt government to establish a commission of inquiry were such people. The lawyers who worked within the resulting commission, the Fitzgerald Inquiry as it came to be known, were also such people. The report of that commission, which I have been re-reading for the reason I have explained, is worth studying even today and a great deal of it has once again become highly relevant, unfortunately so. The lawyers and law students who work for free on difficult cases to defend the rights of asylum seekers (or refugees as they were called when my own parents came here from a refugee camp in the Philippines in 1949) are also of that kind. In fact, any person who feels compelled merely to write a letter to a media outlet, by a sense that an important public principle has been violated, is also in that category.

Malice, ignorance and selfishness hate the embarrassment of publicity. What all of the protectors of liberty have had in common, from Tom Paine to the lawyers who at the present time act without hope of personal gain for indigent clients oppressed by executive action, is that the remedy they seek always involves a public vindication of rights. They welcome bringing the issues into the public eye upon the grounds of reasoned principle; their opponents hate it.

And what of you, the law student?

I believe that the moment when you begin to regard yourself as a full participant in the administration of justice and a defender of its institutions comes when you decide it has come. It can be now or it may be never. But one thing is true: you do not need a degree or a practicing certificate to consider yourself qualified to be one of those at the barricades.
And you do not need to be a highly experienced lawyer to have a significant effect. In 1977 it was a law student (not me, although I wish it had been) who initiated a private prosecution against the Premier of Queensland alleging a conspiracy to pervert the course of justice. He lost the case, he could hardly have won it, but he won the point: a demonstration that the law applies to everyone equally and that anyone is free to approach the courts for a remedy. And, moreover, he demonstrated that if you have a point to make in defence of liberty and the law you will often find that you are not alone but that others, perhaps powerful others, will come to stand with you if you are prepared, at first, to do it alone.
A NOTE FROM THE EDITORS

We are fortunate to live in Australia. Unlike many other parts of the world, we live in a system where our officials recognise and obey the rule of law, where individuals can elect to identify as adherents of a particular religion or to reject religion entirely, where there is a commonly held expectation that one is able to say, do or be who or what they want.

The reason for this has been the development of our laws and system of governance over the centuries to promote individual liberties, freedoms and rights as an expression of the polity. A key mechanism through which rights have been maintained is the entrenchment of the separation of powers between legislature, executive and judiciary. This does not mean the system is perfect, or that efforts do not need to be devoted to ensuring these fundamental liberties are upheld. Citizens retain a critical role in upholding the independence of our institutions and the fundamental principles upon which they are predicated.

Indeed, in a nation where our constitutional structure is not framed in terms of express individual rights, the need to vigilantly uphold law, liberties and rights is particularly significant.

This year Pandora's Box has combined a domestic evaluation of the Australian civil liberty and human rights experience with a number of diverse comparative international contributions. In the Australian context, this year's edition addresses topical legal issues including civil liberties and police powers, constitutional law and indigenous issues. Internationally, we have sourced articles whose subject matter includes issues as diverse as the regulation of the use of weapons in 21st century conflicts, US refugee and immigration policies, the development of domestic violence law in China and the contrasting approaches to the protection of rights in constitutions. What these perspectives illustrate is that law, liberties and rights are not uniquely Australian concepts, nor constructs native to the common law. Indeed, rights are truly universal issues.

We believe that stimulating awareness and discussion regarding the law’s role in upholding individual liberties is crucial to a comprehensive legal education. In legal practice, as Holmes would attest, the morality or personal convictions of the lawyer rarely enter into the equation. Conversely, the lawyer's personal and ancillary role as a guardian of the legal system requires that they be aware of the 'bigger picture' and be prepared to sustain discussion on the issues of law, liberties and rights.
With the aim of building upon this discourse, we are proud to present *Pandora’s Box: law, liberties and rights.*

This edition would not have been possible without the assistance of others. First of all, we must thank our sponsors the Queensland Law Society. We also owe a considerable debt to our predecessors William Isdale, Samuel Walpole and Allister Harrison for creating the intellectual foundation on which this edition is built. We like to extend special thanks to William Isdale for his cover design, Balawyn Jones for her keen eye for detail and to Samuel Walpole for his continuing and tireless contributions to this year’s edition. Finally, we would like to thank our contributors, without whom this edition would never have been possible. We hope that you enjoy reading *Pandora’s Box* as much as we enjoyed editing it.

Tristan Pagliano and Alasdair McCallum  
Editors, *Pandora’s Box* 2014

**ABOUT PANDORA’S BOX**

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

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

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

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

Additional copies of the journal, including previous editions, are available. Please contact pandoraseditor@justiceandthelaw.org for more information.
ABOUT THE CONTRIBUTORS

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Rebecca Ananian-Welsh is a lecturer at the TC Beirne School of Law, University of Queensland. Prior to moving to Queensland, Dr Ananian-Welsh was an academic member of Professor George Williams AO's Laureate Fellowship Project 'Anti-Terror Laws and the Democratic Challenge', held research positions with the Gilbert + Tobin Centre of Public Law at the University of New South Wales and Professor Janet Chan's Australian Research Council Project 'Legal Culture, Work Stress and Professional Practice: A Study of Australian Lawyers'. Before commencing her academic career, Dr Ananian-Welsh held positions as a legal officer at the Federal Attorney-General's Department and as a litigation solicitor with DLA Piper Sydney.

Jo Bird has a PhD in law from the University of Melbourne. She has worked in the Michael Kirby Centre for Public Health and Human Rights at Monash University. Dr Bird is currently working with Professor Irene Watson on an ARC funded research project at Adelaide University. Dr Bird holds a manuscript sponsorship through the Writing Centre for Scholars and Researchers at the University of Melbourne to document her humanitarian work on the US/Mexico border.

Mark Burdon is a lecturer at the TC Beirne School of Law, University of Queensland. Dr Burdon graduated from London South Bank University with LLB(Hons) and completed his M.Sc.(Econ) Public Policy at the University of London's Queen Mary and Westfield College (now Queen Mary University). Dr Burdon’s primary research interests are privacy law and the regulation of information sharing technologies. Dr Burdon has researched on a diverse range of multi-disciplinary projects involving the reporting of data breaches, e-government information frameworks, consumer protection in e-commerce and information protection standards for e-courts. His current work regards the emerging Sensor Society and the use of data analytics in the workplace.
Peter Callaghan SC was admitted to the Queensland Bar in 1986 and was appointed Senior Council (Silk) in 2004. Mr Callaghan worked as a Crown Prosecutor for the Commonwealth, Australian Capital Territory and Queensland Department of Police Prosecutions until 1995, and has been in practice at the Bar since then. He has been involved in a number of high profile cases and was appointed as Counsel assisting Homes JA in her conduct of the Queensland Floods Commission of Inquiry. He is currently President of the Queensland Branch of the International Commission of Jurists and of the Law and Justice Institute (Qld) Inc.

Rebecca Chong & Mandy Lim are currently studying dual degrees at the University of Queensland in Bachelor of Laws and Bachelor of Economics (Ms Chong) and Bachelor of Psychology (Ms Lim). Ms Lim has previously volunteered at the Queensland Public Interest Law Clearing House, and was also a Summer Research Scholar with the Teaching and Educational Development Institute at the University of Queensland. Ms Chong and Ms Lim were involved in a research project for the Queensland Council of Civil Liberties under the supervision of Dr Mark Burdon, as part of the University of Queensland Pro Bono Centre initiative. The Pro Bono project for the Queensland Council of Civil Liberties sparked Ms Chong and Ms Lim's interest on the issue of metadata. Ms Chong and Ms Lim subsequently began researching on the topical issue of tower dumps and mass collection of metadata in Australia, again under the supportive guidance of Dr Mark Burdon, which led to the production of the paper published in this Journal.

Steven Freeland is a Professor of International Law at the University of Western Sydney where he teaches International Criminal Law, Commercial Aspects of Space Law, Public International Law, Human Rights Law and International Moot Court. Professor Freeland is Permanent Visiting Professor in International Law at the University of Copenhagen, Visiting Professor at the University of Vienna, ‘Marie Curie Visiting Professor’ of the iCourts Centre of Excellence for International Courts, Denmark, a Member of Faculty of the London Institute of Space Policy and Law, and an Expert Assessor of Research Proposals to the Australian Research Council, and the Netherlands Organisation for Scientific Research.

Jonathan Fulcher is one of Australia's leading native title and cultural heritage lawyers and a Partner at HopgoodGanim. Dr Fulcher was awarded Australia’s Leading Native Title Lawyer by ACQ Magazine in 2013 and was listed in Doyle's Guide to Australia's Leading Native Title Lawyers in 2010, 2012 and 2014. Dr Fulcher has extensive experience advising clients on mining, oil and gas transactions, infrastructure developments, joint venture arrangements, and asset and share sales and acquisitions across Australia and internationally.
Before entering the legal profession Dr Fulcher completed his PhD in History at the University of Cambridge and obtained a Juris Doctor at the University of Queensland.

Anna High is a visiting Assistant Professor at Marquette University Law School in Madison, Wisconsin. Dr High is a Rhodes Scholar and recipient of a Bachelor of Civil Law, Master of Philosophy and PhD in Law from Oxford University. While at Oxford, Dr High was also a Postdoctoral Research Fellow. Dr High's areas of expertise include human rights law, Chinese law and criminal law and she has recently published *China's Orphan Welfare System: Laws, Policies and Filled Gaps* in the University of Pennsylvania East Asia Law Review.

William Isdale studies a dual Bachelor of Arts and Law at the University of Queensland, where he is an Academic Excellence Scholar and TJ Ryan Medallist and Scholar. He is a past President of the Australian Legal Philosophy Students' Association and former Editor of Pandora's Box (2011 and 2012). In early 2012 and 2014 he was a visiting student at Oxford University's Uehiro Centre for Practical Ethics.

Joseph Lelliott is a final year dual Bachelor of Arts and Law student at the University of Queensland where he is a research assistant to Professor Andreas Schloenhardt, and recently concluded a research role for the United Nations Office on Drugs and Crime. Mr Lelliott also works as a law clerk, and is in the application process for a Master of Philosophy at the University of Queensland for 2015.

Dan Rogers has been a solicitor at Robertson O'Gorman since 2005. He holds a Bachelor of Laws (Honours) from the University of Queensland and a Master of Laws (Honours) from the University of Melbourne. Mr Rogers tutors criminal law at the University of Queensland, is secretary of the Management Committee at Caxton Street Legal Centre and has worked at the International Criminal Court in The Hague. Mr Rogers also writes extensively on the subjects of civil liberties and criminal justice.

Walter Sofronoff QC has had a long and distinguished career of service to the legal profession in Queensland. He was admitted to the Queensland Bar in 1977 and was appointed Queen’s Counsel (Silk) in 1988. Notably, Mr Sofronoff served as Solicitor General of Queensland for nine years, as an Adjunct Professor of Law at the University of Queensland and has been President of the Bar Association of Queensland. Mr Sofronoff has been published in a number of academic journals, and has made numerous appearances in the media.
An Interview with Peter Callaghan SC*

PB: Peter Callaghan, thank you for joining us. There have been a number of recent legislative developments in Queensland, namely the *Vicious Lawless Associates Disestablishment Act*, could you briefly outline the various effects of the VLAD act and your reservations to it?

PC: Not briefly, no. There are many aspects to the legislation that are offensive. Perhaps we could focus on one aspect of it and that is the concept of mandatory sentencing. The mandatory sentencing provisions in the VLAD and much other legislation introduced by the Newman/Blejie Government, are fundamentally obnoxious. All such provisions are an assault on judicial discretion and therefore represent an affront to the doctrine of separation of powers.

PB: Would you say that mandatory sentencing targets ethnic minorities?

PC: It certainly has the potential to target minorities, and not just ethnic minorities. We have also seen changes – they are not reforms, they are reactionary changes – to our system of youth justice. The mandatory provisions in those changes obviously have the potential to target another minority group (youth) and a disproportionately large number of indigenous youths are processed within the criminal justice system so yes, any punitive measure will have a disproportionate effect on them, and on other minority groups.

PB: Commissioner Bill Bratton of the NYPD has recently praised the VLAD legislation, likening it to the legislative scheme in the United States (federal RICO legislation) would you be able to outline the similarities or differences between Queensland's VLAD and the USA's RICO?

PC: I'm not familiar with these comments, but I am aware that, in terms of mandatory sentencing at least, the US attorney general Eric Holder has recently admitted to the complete failure of the mandatory sentencing regime applicable to drug offences in that country. He has acknowledged that increased reliance on incarceration is financially unsustainable and comes with human and moral costs that are impossible to calculate. I think any view expressed by Mr Bratton should be considered alongside those of the US Attorney himself.

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*Barrister-at-Law, Queensland Bar, BA LLB(Hons)(Qld). This interview was conducted by Tristan Pagliano and Alasdair McCallum in chambers on 13 March 2014.*
PB: I think he’s talking about the attempts to crack down on organised crime, like the Mafia.

PC: Yes, the Mafia stuff. But I would like to know whether he had what the US attorney certainly did have, which is empirical evidence about the effect of the legislation. You can see that it looks tough, as does the Qld legislation. But empirical evidence that legislation of this kind affects overall crime rates, I’m yet to see. Crime can just be shunted in a different direction. Maybe one branch of the Mafia is doing less business, but I’m yet to see evidence that legislation like this affects crime rates on the whole or reduces the amount of drugs in a community. Effective policing can do that, political posturing cannot.

PB: What about the *Criminal Law Disruption Act* and the effect it has on reversal of bail proceedings and solitary confinement? Could you identify any adverse effects this legislation could have?

PC: I cannot really comment on anything in terms of what’s happening in the prisons. As for the bail provisions, if nothing else, they are a powerful symbol of this government’s approach. There is a reversal of onus if the applicant for bail was a member of a certain type of organisation. In one of the first cases heard on that provision I argued successfully that had to mean “member” as at the date of bail application. But the law was then amended to apply to anyone who ‘is now or has ever been’ a member of a relevant organisation. Retrospectively applicable legislation is fundamentally obnoxious. An inquiry that asks something like ‘are you or have you ever been’ is expressed with the language of Joseph McCarthy, and it is sickening to think it is now part of the law of Queensland.

PB: In light of the Newman government’s huge majority and the quantity of legislation they’ve been passing through the Queensland parliament lately, do you think that our unicameral system is adequate or does it require the restoration of an upper house?

PC: That’s a good question and a topical one. As much as I could jump on the bandwagon and say we need an upper house, I really don’t think that’s the answer. Apart from anything else, I like to think that the contributions I make to the public debate are realistic. I just do not see the political or popular will that would make an upper house possible.
What should be realistic is a sincere effort from the lawyers in parliament. I am apolitical and unafraid to say that labor governments have done much that can be criticised. But that isn’t very topical at the moment. What should be topical is the death of conservatism in conservative politics. You make a good point about the sheer volume of legislation being passed at the moment. That’s not conservative. Conservatives should preserve what is good about our legal system and the lawyers in parliament are uniquely placed to point that out. They should know how carefully our laws have been developed. What’s involved in the creation of a law? It’s a distillation of the collective experience of humanity over centuries. You don’t just wipe it away with dozens of Acts pushed through parliament overnight without consultation. So the lawyers who should be taking a stand are the lawyers within the conservative party. They must be held responsible. They have been given a legal education and should use it to explain to others what the law is about. There has been a clear failure by lawyers within the conservative movement to do that. The AG is a lawyer and he’s failed to do this. The premier was entitled to rely upon those who are qualified and close to him to explain to him what his government is doing – I hope he understands that now.

PB: You discuss regulating the system within a one house government. Should there be more committee involvement?

PC: The performance of the legal affairs and community safety committee is a huge disappointment, and exemplifies what I was talking about in the previous answer. For example, some of the changes to youth justice laws were opposed unanimously by anyone who knew anything about the topic.

The dangers created by a unicameral system and a large majority can, realistically, only be addressed if politicians within that majority act with integrity. The majority controls the committee. The committee was faced with profound opposition to the legislation and they ignored it. Their process highlights the lack of evidence based reform. Lawyers should not act without evidence. Everything should come back to the evidence. Conservatives should understand this better than anyone. There is just no evidence to demonstrate any need for the radical agenda implemented in recent times. I think the ‘evidence’ that the politicians are acting on may be the perceived popularity of US politicians who have been spouting the same rhetoric. I don’t know how well the American experience translates to Australia. I like to think we are smarter than that.
PB: As someone who was involved with the inquest into the death of Doomadgee on Palm Island, it’s been 20 years since the royal commission on deaths in custody. Despite a lot of political rhetoric there has been no substantial decline in indigenous people dying in custody. What steps need to be taken to address this?

PC: That’s part of a much longer conversation; I can’t give a simple answer. I’ve got some pretty strong opinions on this. I’d prefer not to give an answer off the hip. A recommendation from a royal commission might be “accepted” but that doesn’t mean much if it is not implemented. This is an issue that tends to get discussed in soundbites and with a very superficial understanding of what’s involved. I don’t like the way these sorts of issues get debated. I get driven mad by shows like Q&A that reduce a complicated topic like this to a collection of sound bites and catch phrases.

PB: Commissions of inquiry are very much something you have been involved in. Especially in the wake of things like the flood inquiry, how can these be improved?

PC: I think with commissions of inquiry the time frame is all important. They’re always announced with a certain timeframe in mind, though this tends to be extended. For example, the inquiry into institutional response to sexual abuse of children. The period allowed for the inquiry has been extended quite a great deal and it’s still going. And that’s fair enough. Only once you analyse the task can you give a proper assessment of how long it’s going to take.

The flood inquiry by contrast met its deadline for an interim report, and then there was an extension of a couple of weeks for the final deadline. But it was all compressed by the fact it couldn’t go beyond the date of the election. If I had one recommendation for improvement in the establishment of commissions of inquiry, it would be that no deadlines are set until the commissioner can make an assessment of the scope of the task. The commission should then advise as to a realistic timeframe. That is the only sensible way of doing it, and it should never be affected by arbitrary considerations like an election date. That’s one suggestion – but no two inquiries will ever be the same.
PB: Campbell Newman recently labelled lawyers who defend members of a criminal organisation as ‘hired guns and part of the criminal machine’. As an ethics counsellor, what is your view of this statement? What is the correct role of the criminal barrister and how much should they do to get their client off?

PC: That was textbook argument ad hominem. It shed no light whatsoever on the real concerns. The media must challenge sound-bites like this. Newman’s comment was distressingly superficial again it may be due to a failure by the lawyers within his party to explain to him what the role of a lawyer is. The role of a criminal barrister is clearly circumscribed by a set of ethical guidelines and the Barrister’s Rules. Newman’s comment brings to mind the commonly asked question ‘how can you represent someone you know is guilty?’ Well only the arbiter of fact can make the determination of who is guilty – it’s not the barrister’s place. Barristers are functionaries. We are cogs in the machine.

The machine works well when every part works well. When the prosecutors are prosecuting effectively and the defenders are defending effectively and the judges are staying out of it and just applying the law effectively. Every defence lawyer should turn that cog as efficiently and effectively as they can and every prosecutor should do the same.

These attacks are unprecedented. I remember the Bjelke Petersen era and there was nothing like this.

The comment was typical of one made by people whose legal education has been obtained from bad American television. They should not believe much of what is seen on TV, defence barristers usually aren’t out there doing clever deals to get criminals off and even American television doesn’t really represent the American justice system.

PB: In light of all your experiences as a prosecutor and so on, could you tell us a bit about your journey to where you are today or any important life lessons you’ve learned?

PC: If there is one truth every lawyer should hold close, it is this: It’s not about the result, it’s all about the process. In the law you can never control the result, but you can manage a case within the confines of what you’re allowed to do. The justice system is a human system with
all the failings that will always be a part of such a system. There will be Pyrrhic victories and heroic failures. This means you shouldn’t own your victories – it may have had nothing to do with you. You can win your personal battle with the process, but you shouldn’t see any result as your triumph.

As to other advice, there’s a good book by Alan Dershowitz, called ‘Letters to a Young Lawyer’. Filter it for Americanisms and Dershowitz’s huge ego, but there are some good thoughts in it.

I remember he wrote a warning to beware of anyone who is telling you what you should do with your career, on the basis of what they did in theirs. Many will tell you a list of things you need to do to get where they are, to be what they are: be wary of that. And be wary of career advice given by those from a different generation. Some advice about ethics, techniques and principles might be timeless. But not all.

When I was doing the Bar practice course, a very learned Silk told me that there were things called computers that had their benefits, but would never replace a good law library I was told to start buying my law library then it would be the best superannuation investment I could ever make. Hardcopy libraries are a liability now and to my shame, I took his advice about computers and my computer skills still aren’t up to scratch.

Above all, make your own way. In law, as in life: One size does not fit all.

It follows that I am not to give advice that projects from my position. I do consider myself lucky to have been briefed in some of the cases that have come my way. But in each of the cases the brief has afforded proof of the proposition that luck is where hard work intersects with opportunity.

PB: Peter Callaghan, thank you for joining us.
On 4 October 1957, the world’s first artificial satellite was launched - a Soviet space object called Sputnik I. It subsequently orbited the Earth over 1,400 times during the following three month period. This heralded the dawn of the space age, the space race (initially between the USSR and the United States), and the legal regulation of the use and exploration of outer space. Since then, laws relating to activities in outer space have developed that significantly improve the standard of living for all humanity. The prospects for the future use of outer space offer both tremendous opportunities and challenges for humankind, and law will undoubtedly continue to play a crucial role in this regard.

The journey of Sputnik I immediately gave rise to difficult and controversial legal questions, involving previously undetermined concepts. Although the USSR had not sought the permission of other States to undertake the Sputnik mission, there were no significant protests that this artificial satellite had infringed on any country’s sovereignty as it circled the Earth. This international (in)action confirmed that this new frontier of human activity – outer space - did not possess the elements of sovereignty that had already been well established under the international law principles regulating land, sea and air space on earth.

The law of outer space has developed within the context of general public international law. Since the launch of Sputnik I, this process of evolution has been remarkably rapid, largely driven by the need to agree on rules to regulate activities in this new ‘frontier.’ There is now a substantial body of law dealing with many aspects of the use and exploration of outer space, mainly codified in and evidenced by Treaties, United Nations General Assembly resolutions, national legislation, decisions of national courts, bilateral arrangements, and determinations by Intergovernmental Organisations.

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Five important multilateral treaties have been finalised through the auspices of the United Nations Committee on the Peaceful Uses of Outer Space (UNCOPUOS), the principal multilateral body involved in the development of international space law. These are:

(i) 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies;¹
(ii) 1968 Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space;²
(iii) 1972 Convention on International Liability for Damage Caused by Space Objects;³
(iv) 1975 Convention on Registration of Objects Launched into Outer Space;⁴ and
(v) 1979 Agreement Governing the Activities of States on the Moon and other Celestial Bodies.⁵

These United Nations Space Treaties confirm inter alia that outer space is to be regarded as a ‘global common’ area and that the use and exploration of outer space is to be for ‘peaceful purposes’ (article II), although this principle has been highly controversial - arguments still persist as to whether this refers to ‘non-military’ or ‘non-aggressive’ activities.

The United Nations Space Treaties were formulated in an era when only a small number of countries had space-faring capability. The international law of outer space thus, at least partially, reflects the political pressures imposed by the superpowers at that time. Indeed, even the question of where air space ends and outer space begins has not been definitively determined from a legal viewpoint, although more recently a consensus as to a demarcation point (100 kilometres above mean sea level) has begun to emerge.⁶

¹ 610 UNTS 205 (Outer Space Treaty).
² 672 UNTS 119 (Rescue Agreement).
³ 961 UNTS 187 (Liability Convention).
⁴ 1023 UNTS 15 (Registration Agreement).
⁵ 1363 UNTS 3 (Moon Agreement).
The United Nations General Assembly has also adopted a number of space-related Principles, and guidelines, dealing with such important issues as the application of international law and promotion of international cooperation and understanding in space activities, the dissemination and exchange of information through transnational direct television broadcasting via satellites and remote satellite observations of earth, and general standards regulating the safe use of nuclear power sources necessary for the exploration and use of outer space and the problematic issue of space debris.

It is generally agreed that Resolutions of the General Assembly are non-binding, at least within the traditional analysis of the ‘sources’ of international law specified in article 38(1) of the Statute of the International Court of Justice. In the context of the regulation of the use and exploration of outer space, these principles and guidelines have therefore largely been considered as constituting ‘soft law’, although a number of specific provisions may now represent customary international law.

Yet, despite all of these developments, it is clear that the existing legal and regulatory regime has not kept pace with the remarkable technological and commercial progress of space activities since 1957. This represents a major challenge in relation to the ongoing development of effective legal principles, all the more in view of the strategic and military potential of outer space in an era of globalization.

As a consequence, there are many factors to consider when assessing the regulation of activities in outer space. Indeed, it is unlikely that there can be a ‘one size fits all’ model of regulation for this ever-changing environment. As is the case in many areas of scientific development, the technology that drives outer space activities has progressed far more rapidly than the specific law that regulates it, which to the outsider appears to be lagging far behind.

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7 1 U.N.T.S. 16 (ICJ Statute). Article 38(1) of the ICJ Statute provides as follows: ‘The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.’

It is clear that many of these new activities could not even have been within the contemplation of the drafters of the United Nations Space Treaties that underpin the main principles of outer space. That does not mean that the fundamental principles of space law do not apply to those activities; we cannot simply say that there is ‘no law’ that applies to such situations. Yet, even the fundamental space law principles that are set out in those treaties may not be enough, and we thus need to establish appropriate modes by which general international law principles can be utilised to fill these lacunae.

This is complicated further by the fact that outer space, once primarily the domain of States (and, even then, only a small number of them), is now ‘host’ to a vast array of actors, each with differing goals, capacities, agendas and expectations. The growing numbers of space-capable States are still crucial players – and will probably remain the principal space participants for the foreseeable future - but they are now complimented by a range of alternate entities, including intergovernmental organisations, public and private corporations, universities and scientists, and even individual space entrepreneurs.

Moreover, given the sometimes fluid nature of global and regional geopolitics, the future development of the regulation of space in a changing world undoubtedly will also be full of surprising twists and turns. This is no less true with respect to the regulation of the military uses of outer space to which this article now turns. This is an important and dynamic area of outer space activity, and one that has given rise to considerable debate and disagreement. Its significance arises from a number of reasons, and it is of crucial significance to the future of humankind.

A starting point for this exercise is the acknowledgement of a number of truisms: first, as noted above, the international regulation of outer space – past, present and future - is ‘embedded’ in international law. It is not an esoteric and separate paradigm. This is also a logical consequence of the wording of article III of the Outer Space Treaty, which requires that activities in the exploration and use of outer space are to be carried on ‘in accordance with international law, including the Charter of the United Nations’.

Secondly, international law is dynamic and evolving, as has been made clear by the International Court of Justice on a number of occasions. It has tremendous breadth and tremendous depth and extends to include non-traditional areas that are not ‘territorial’ in nature, therefore encompassing outer space. Likewise, the application of public international law principles to the regulation of outer space is equally dynamic and evolving.
So the general concept is relatively simple to state – general principles of international law apply to activities in outer space. What is far more difficult and unclear is to determine precisely how this may work for specific situations, and precisely which principles are (or might be) directly applicable to particular space activities. In the absence of specific provisions in the lex specialis of international space law, can we simply ‘transpose’ terrestrial international law regimes to outer space? This question seems directly pertinent in relation to two international regulatory regimes in particular – international environmental law and international humanitarian law (also known as the laws of war, or the jus in bello), to which I now turn.

The disastrous consequences of armed conflict upon civilians have led to an evolving international consensus developed over many years that international legal rules should be introduced and implemented in an effort to alleviate human suffering during times of hostilities. This has seen the emergence of a number of legal principles that limit the methods and means of warfare, and prescribe the rights and protections both of civilians and non-civilians in times of hostilities, a distinction that lies at the very heart of the law of armed conflict. These rules are regarded as among the most essential of all of the law of nations particularly given the impacts rendered by armed conflict on the international community as a whole.

These laws and customs of war had their origins in the customary practices of armies on the battlefield. These have existed in various forms almost since antiquity. Since then, the rules of custom have been significantly augmented and codified by a series of important treaty instruments, with the most significant probably being The Hague Conventions of 1899 and 1907, the four Geneva Conventions of 1949, and the Additional Protocols I and II to the Geneva Conventions of 1977. In (overly) simplistic terms given the space limitations of this chapter, the principal rules under the jus in bello can be described as follows:

1. Principle of distinction - deliberate attacks against civilians and non-combatants are prohibited. In addition, those engaged in armed conflict must not use weapons that are incapable of distinguishing between combatants and non-combatants. These represent

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9 For a discussion of the applicability (or otherwise) of the terrestrial international environmental law regime to the regulation of outer space, see, for example, Ulrike Bohlmann and Steven Freeland, ‘The Regulation of Space Activities and the Space Environment’ in Shawkat Alam, Md Jahid Hossain Bhuiyan, Tareq M.R. Chowdhury, and Erika J. Techera (eds), Routledge Handbook of International Environmental Law (2013) 375-391.

10 For a comprehensive discussion of the various jus in bello treaty instruments, see Adam Roberts and Richard Guelff (eds), Documents on the Laws of War (2005).
fundamental concepts in the conduct of military activities and illustrate the strong linkages between the scope of international humanitarian law and the development of formal legal principles for the human rights of the individual;

2. Principle of military objective – attacks not directed at a legitimate military target are prohibited. The important issue is the need to distinguish between civilian persons or objects and military objectives - comprising the elements of ‘effective contribution to military action’ and ‘definite military advantage’; and

3. Principle of proportionality – even when attacking a legitimate military objective, the extent of military force used and any injury and damage to civilians and civilian property should not be disproportionate to any expected military advantage. This demands an assessment of any potential “collateral damage” in the case of military action. However, it is often difficult to apply the proportionality principle in practice, given that different people ascribe differing relative ‘values’ to military advantage vis-à-vis civilian injury and damage. One only need recall the Advisory Opinion in the Legality of the Threat or Use of Nuclear Weapons, where the International Court of Justice (albeit based on a majority determined only by the Court President’s casting vote), could not say categorically that the threat or use of nuclear weapons would in every circumstance constitute a violation of international law.

In the past, it has been suggested that, with regard to these rules of international humanitarian law as applied to activities in outer space, the correct approach is to first try to apply the existing principles to armed conflict involving space technology, and only if we conclude thereafter that these are not adequate or sufficient, should we elaborate on new additional principles for application to outer space.

This seems also to be the general viewpoint of, for example, the International Committee of the Red Cross (ICRC). At a conference in Bruges in 2010, at which the ICRC kindly asked me to speak, I questioned whether the existing jus in bello would be adequate and sufficient to regulate all aspects of a space conflict. I suggested that, instead, we should aim towards a complete prohibition of all types of weapons and weapons-related systems involving outer space as an additional jus in bello specialis for outer space.\(^\text{11}\) However, the prevailing view at the time of many who attended that conference seemed to

\(^{11}\) See Steven Freeland, ‘Legal Regulation of the Military Use of Outer Space’ (2011) 41 Collegium – the Journal of the College of Europe 87-97.
be that the existing principles were adequate and that ‘new’ forms of armed conflict would somehow ‘fit into’ the existing fundamental rules.

I am not entirely in agreement on this point for a number of reasons. Traditionally, the principles of international humanitarian law have been regarded as being ‘one war too late’. This reflects the typically ‘reactive’ nature of international law, where, rather than seeking to establish rules beforehand, it develops new rules (or adapts existing international law rules) to respond to certain, perhaps unforeseen, situations that arise. Whilst it is true that certain fundamental customary law principles codified in the space law treaties – including those that were aimed at minimising the possibility of conflict and the risk of contamination – might be exceptions to this rule of thumb in that they were designed to prevent certain situations from arising, the reality is that much of the codification of international law, particularly, as noted above, in areas where technology moves forward very quickly, is (and can only be) responsive in approach. This certainly extends to areas where humans are engaged in conflict – as demonstrated in the area of international humanitarian law, as well as in international criminal law and international human rights law.

Indeed, with reference to space activities, the question arises as to whether, even if we wanted to, we are in a position to be proactive in relation to areas where we still do not fully understand the technology, and the risks and consequences associated with the utilisation of that technology, even where the activity may be ‘desirable’ and, in theory, ‘permissible’. One example is that of space ‘tourism’ – are we really able to create international legal standards at this point, before the fact? Isn’t there a risk that, if we attempt to do so, we may be setting standards that subsequent experience will show were not appropriate?

With regard to regulating the conduct of armed conflict – which, by contrast, involves the specification of ‘undesirable’ and ‘impermissible’ actions – I would suggest that a more proactive approach is warranted. Weapons-related technology, as well as the advent of different type of (non-State actor) participants in armed conflict has meant that the traditional mode of warfare no longer represents the absolute norm. More and more we will see the incorporation of sophisticated weapons related systems, involving cyber technology, remote controlled weapons systems (for example drones), robotics and, of course, satellites to help to fight wars. These present very significant challenges to the application of existing legal frameworks without further

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12 For a discussion of the legal challenges posed by the predicted advent of (large-scale) commercial space tourism, see, for example, Steven Freeland, ‘Fly Me to the Moon: How Will International Law Cope with Commercial Space Tourism?’ (2010) 11:1 Melbourne Journal of International Law 90-118.
adaptation and addition. One might argue that to continue to rely solely on existing rules that were developed in a previous technological era – as important as they are - is akin to applying 20th century rules to 21st century technology.

Indeed, the advent of this weapons-related technology offers both opportunities and challenges. One interesting opportunity that deserves further consideration is that, to the extent that it allows for greater target selectivity and accuracy, it might have the capacity to both minimise casualties during armed conflict and reduce the probability of collateral damage. Both of these consequences would, of course, be welcome and in keeping with the fundamental *jus in bello* principles; so much so that one might be tempted to argue that it therefore obligates a combatant to *use* this technology during the conduct of armed conflict.

On the other hand, there are real dangers inherent in this continued resort to ‘zero casualty’ warfare. Apart from the increased likelihood of error during the course of any long distance engagement, there is a real possibility that the physical detachment of the perpetrator from the injury/destruction may give rise to a greater moral and even ethical disengagement, and perhaps even lower the minimum threshold of adherence to standards of military conduct. Some commentators have spoken about a ‘play station mentality’, given that the operation of many of these systems is not dissimilar to using a computer keyboard. Whilst I am in no way qualified to comment on these suggestions in a meaningful way, history has repeatedly shown that the greater the sense of moral disengagement, the greater the likelihood that the *jus in bello* principles will be violated. This is clearly a cause for considerable concern and reflection.

As regards outer space, satellite technology now also plays an integral part in armed conflict. The first Gulf War in 1991 is often referred to as the first ‘space war’, in that its conduct was significantly dependent upon satellite capabilities. This trend has ratcheted up considerably in the two decades since that time, in parallel with a period of increasing commercialization of outer space. This has led to the growing reliance of States on continuous and reliable access to privately operated satellites, in order to protect their (real or perceived) national security interests.

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13 See, for example, an analysis of the various bombing errors giving rise to significant civilian casualties during the NATO bombing campaign in Serbia and Kosovo in 1999 (‘Operation Allied Force’) in Steven Freeland, ’The Bombing of Kosovo and the Milosevic Trial: Reflections on Some Legal Issues’ (2002) *Australian International Law Journal* 150-175.
A combination of factors - the increasing dependence by military and strategic forces within (the major) powers on the use of satellite technology; the inability of Governments to satisfy such demands for reasons associated either with costs or the lack of technological expertise (or both); and the advent of commercial satellite infrastructure and services that are responsive, technologically advanced, available and appropriate to meet these demands – means that military ‘customers’ are now regularly utilising commercial satellites to undertake military activities.

Thus, we have become familiar with the concept of ‘dual-use’ satellites. Indeed, the concept of a dual-use facility or resource - typically a commercial facility or resource that is also utilised by the military for military purposes - has become a common feature of contemporary technological society. It is also one that international law has had difficulties with.

This presents particular difficulties for those conducting armed conflict, since an asset that could prima facie be regarded as a legitimate military target on the basis of the jus in bello principles might also – even at the same time – be operating for civilian/commercial uses. It is sometimes very difficult, or indeed impossible, to ‘quarantine’ what is the civilian/commercial aspect of a facility from the military component. Given that such an increasingly important group of space assets used for military purposes are these dual-use satellites, one is also drawn to the question of whether, and in what circumstances, such a satellite can (ever) be regarded as a legitimate target of war. Certainly, it is possible that, taking into account at least the first two jus in bello principles described above (distinction and military objective), one could construct an argument that, in particular circumstances, a satellite would in fact constitute such a target.

This issue seemingly conflicts with the fundamental principles of article IV of the Outer Space Treaty. Moreover, the resolution of the question I have posed involves not only a consideration of the jus in bello, but also the jus ad bellum. Also relevant will be the scope of the inherent right to self-defence as articulated under article 51 of the United Nations Charter, and possibly as modified under customary international law (is there now a right of pre-emptive self-defence under customary international law?).

Moreover, very significant – perhaps insurmountable – difficulties would arise in attempting to apply the principle of proportionality in assessing the legality of a strike against a satellite. Once again, we simply do not fully understand the consequences of such an action, which makes an objective (in reality subjective) evaluation of that threshold requirement mere guesswork in most cases, particularly with respect to a dual-use satellite.
In these circumstances, therefore, my suggested proactive approach would ideally involve the conclusion of a binding treaty instrument that would comprehensively prohibit all weapons in outer space, as well as an acts designed to permanently damage or destroy an operative satellite. Naturally, the devil would be in the detail, and great care would be required to craft the most appropriate wording for such an instrument. This is not to say that the important *jus in bello* principles would not also be relevant; rather, this would add to and complement those principles to the extent that they apply the regulation of outer space activities. I am not naïve enough to suggest that agreeing the most appropriate regulatory framework would be an easy task, but, given the uncertainties of relying solely upon the existing principles, I firmly believe that it is a necessary one.

Of course, when one moves to such considerations, one is dealing with areas that are heavily influenced with political considerations. This translates into a willingness – or not, as the case may be – on the part of States to conclude, let alone adhere to, binding international law agreements in relation to the legal regulation of outer space. Discussions among international lawyers are, at times, predicated on an assumption that States actually want such binding rules. But do they really in every circumstance?

In this regard, the international diplomatic discussions on this issue have moved away from a path forward based on binding legal rules to one that is centred on that increasingly worn mode of ‘transparency and confidence building measures’ (TCBMs). For many complicated and mainly political reasons, it seems clear that the main space powers do not yet feel that there is sufficient mutual trust such as would ‘justify’ negotiations leading to a binding instrument addressing this issue. Indeed, given the difficulties that some see as far as verification is concerned, it is certainly not likely that such a treaty will be concluded in the foreseeable future.

Of course, reference to TCBMs is quite common in the various United Nations General Assembly resolutions that deal with various aspects of the use and exploration of outer space, so those involved in areas relating to space law are not unfamiliar with the concept. Indeed, it does make sense for the protagonists to develop cooperative and friendly relations in matters relating to space security, so as to increase the possibility that we might eventually see binding rules.

However, the concern as I see it is that non-binding TCBMs are, in fact, for all practical purposes considered as the ‘end game’ on this issue, so that the formalisation of binding obligations may never eventuate. This makes the application of general principles of international law more complicated with
respect to this very important area and, in any event, is not satisfactory given the added flexibility that such measures may give to States, who may feel at some point that they no longer wish to abide by whatever voluntary guidelines have been specified, irrespective of the political cost.

This highlights again the increasing reliance in the regulation of outer space on so-called ‘soft law’. Putting aside any objections to that title, there is much debate about the legal status of such instruments. Certainly, it appears that some non-binding space instruments have a higher legal ‘value’ than others. However, in (again overly) simplistic terms, at their core they are merely guidelines or recommendations that do not necessarily have the force of law, unless they are to be regarded as reflecting rules of customary international law. Given our increasing reliance on such measures in a whole range of space-related matters, do we run the risk that they will work only until they don’t? Shouldn’t they always be regarded only as interim measures, until traditional international law principles can be agreed and applied? And, indeed, is this approach feasible given the multitude of risks associated with the continued development of space related weapons technology?

These are difficult questions that require a much careful thought. They very much reflect the challenges of regulating outer space in a changing world. Law must play an integral role in addressing these issues. No doubt the terrestrial principles of the *jus in bello* are very important elements in a broader framework, but they are not necessarily sufficient to cover the challenges that lie ahead. Additional specific legal principles will be required. As we work towards that goal, it is important to recognise the fundamental sentiment of ‘humanity’ that underpins both space law and international humanitarian law, a consideration that will, hopefully, allow for an appropriate model of peaceful regulation to be implemented for the benefit of all of us.
The Aussie Constitution & Why It's Fair Dinkum

James Allan*

Although my main topic in this article will be the absence of any sort of national bill of rights in Australia, I think that topic is best approached circuitously, or at least from the side. Put more bluntly, readers may well need some background and context in order to understand why Australia lacks such an instrument and why, in my view, the absence of a bill of rights is a very good thing indeed.

To start, and this will be surprising to some, Australia is one the oldest democracies in the world and its written constitution is likewise one of the oldest continuous democratic written constitutions. Moreover, the biggest influence in drafting the Australian Constitution was the US Constitution. Back in the late nineteenth century the men who devised, argued over, debated about and eventually crafted Australia’s written Constitution were extremely well acquainted with the American model.

In fact, they copied key aspects of that US model, albeit in the context of the inherited British Westminster model — or if you prefer, in the context of a parliamentary model where you choose your Prime Minister and Cabinet from the elected legislature unlike in the US. Indeed on key issues the Australian drafters consistently preferred the US model to the Canadian one, both being in front of them.¹

You can see this immediately when you consider the sort of bicameralism chosen in Australia with its potent, elected Upper House Senate, something unknown then in Canada and still unknown in Canada, and the United Kingdom, and New Zealand. As in the US each Australian State, regardless of its population, is given the same number of Senators.² And again mimicking the American model, only a proportion of Senators contest each election as their terms run longer than those of legislators elected to the Lower House who contest every election.³

The American influence on the form of Australian bicameralism is plain for all to see.

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2 It is currently 12 for each of the six States.
3 There are 12 Australian Senators per State but only 6 contest each election on a rolling basis.
The same can be said for federalism. The Canadian model was rejected in favour of the American one. So the Australian drafters opted for a list of enumerated powers for the central government alone (the residue going to the states), rather than the Canadian style option of enumerating the powers of both the centre and the provinces.\(^4\)

Again, Australia left the choosing of the top State court judges to the States, as in the US, it did not give that power to the centre, as in Canada. Australia even copied the US in opting to create a national capital city from scratch.\(^5\)

I think one could make a powerful case that Australia’s written constitution is the closest copy of the US one in existence, the Philippines possibly excepted, and it is certainly the most successful one that owes much to the American predecessor. Indeed I would go so far as to generalise in this way: Australia took the US Constitution as a model, copied chunks of it, and then made it better while fitting the copied bits into a Westminster parliamentary framework.

Of course there are important features of Australia’s written Constitution that do not resemble their American counterparts. The Swiss inspired amending provision\(^6\) is perhaps the second most important of those non-US resembling features, and as will be seen below it is a provision that bears on our topic of the lack of a national bill of rights insofar as no constitutional bill of rights can come into existence without asking the voters. For these introductory purposes, though, I need only clarify what I said last paragraph.

The Australian Constitution is remarkably democratic.\(^7\) It took those aspects of the US Constitution that increased the input of representatives accountable to the voters (like an elected rather than an appointed or hereditary Upper House), blended them into an inherited Westminster system with parliamentary sovereignty at its core, and then, well aware of the US Constitution and after much debate,\(^8\) rejected the most obviously aristocratic

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\(^4\) The Australian aim was, as in the US, to have strong States. This has not eventuated however. See James Allan and Nicholas Aroney, ‘An Uncommon Court: How the High Court of Australia has undermined Australian Federalism’ (2008) 30 Sydney Law Review 245.


\(^6\) Section 128.

\(^7\) By ‘democratic’ I mean the term in its thin, procedural, ‘counting everyone as equal and letting the numbers count’ sense. On the competing ‘thin’ and ‘fat’ understandings of democracy see my ‘Thin Beats Fat – Conceptions of Democracy’ (2006) 25 Law & Philosophy 533.

\(^8\) See Australian Capital Television Pty Ltd v The Commonwealth (1992) 177 CLR 106 at 136: ‘[T]he prevailing sentiment of the framers [was] that there was no need to incorporate a comprehensive Bill of Rights in order to protect the rights and freedoms of citizens. That sentiment was one of the unexpressed assumptions on which the Constitution was drafted.’ per Mason CJ. See too
or counter-majoritarian or anti-democratic aspect of the US Constitution, namely its Bill of Rights.¹ This lack of a bill of rights is the most obvious way in which the Australian Constitution differs from the US Constitution.

Moreover, the omission was in no sense an oversight. The decision not to include a bill of rights was made after careful consideration, discussion and debate and on the assumption that the panoply of social policy, line-drawing decisions affected by a bill of rights – almost all of them being ones over which smart, well-informed, even nice people can and do disagree¹⁰ — was better left to elected, accountable-to-the-voters legislators (with bicameralism and federalism safeguards) rather than to a very small number of unelected top judges. Indeed, the consensus was that such line-drawing decisions were better left to the elected legislators even where the issues underlying these decisions had been translated into the language of rights.

Let me round off these prefatory remarks by noting that the highly democratic credentials of Australia’s Constitution were arguably even further buttressed when the Commonwealth Parliament legislated to move to compulsory voting in 1924 and, for Lower House of the Commonwealth Parliament elections, to preferential voting or ATV six years before that in 1918. This combination of voting systems is unique in the world.

From there, let us also recall that various attempts have been made to try to bring in a bill of right nationally in Australia since that initial decision to reject one at federation in 1901. In 1944 and again in 1988 Australians were asked in section 128 constitutional amendment referenda whether they wanted constitutionalised bills of rights. Both times the answer was an emphatic ‘no’.¹¹ Indeed, in the more recent of these held only 24 years ago there was not a single Australian State in which the majority of voters was in favour, with


¹ And its amending formula too.

¹⁰ This is the core basis, the fact of reasonable disagreement, for Jeremy Waldron’s critique of constitutionalized bill of rights. See, for example, Jeremy Waldron, Law and Disagreement (OUP, 1999) and “A Right-Based Critique of Constitutional Rights” (1993) 13 Oxford Journal of Legal Studies 18. Waldron there makes his case for a ‘right to participate’ as the ‘right of rights’.

no State recording more than 37 percent in favour of even the most popular of the four proposed new rights for entrenchment.

Against that backdrop and after those results, many Australian bill of rights proponents had something of a Damascene conversion. Entrenched, constitutionalised bills of rights were no longer for them. Instead, what was needed was a nice modest little statutory bill of rights, or so they tended to put it. The attraction of this alternative, of course, at least to those of a slightly cynical disposition, is that any statutory option could bypass the need to put the proposal to the Australian people in a referendum. The legislature could do this without asking, as it were. And during the 2007 Rudd government tenure this statutory option was mooted, given flesh, but ultimately could not command enough political support, even on the left, to be enacted.  

In the end, on April 21st, 2010, the then Attorney General called a press conference and announced that the government would not be proceeding with any sort of bill of rights, just as it would not be inserting any sort of reading down provision into other legislation.  For the foreseeable future the campaign to enact a statutory bill of rights in Australia, at the national level, looked to be dead or in forced hibernation. The same was probably true of any such campaigns in all the States that also lacked one, meaning all of them except Victoria – which is the only State jurisdiction to have enacted one.

Having briefly recounted why Australia does not have a national bill of rights let me now say why it is that I think the absence of one is a good thing.

Of course many of those pushing for some form or other of a bill of rights instrument like to point to the fact that Australia is one of the very few democracies – depending on how you look at the Basic Laws in Israel and the judiciary’s unwillingness to make much of what they have in Japan and a few other non-common law countries, perhaps the only one – without a national bill of rights. On its own, of course, such a ‘we differ from everyone else’ type

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12 For instance, former NSW Premier Bob Carr wrote many op-ed newspaper pieces against the proposed bill of rights. See, for example, “Bill of Rights is the Wrong Call”, The Australian, May 9th, 2009. And the Federal Cabinet was clearly divided on the issue. Other opponents’ writings included, for example, J. Leeser and R. Haddrick, Don’t Leave Us With the Bill: The Case Against an Australian Bill of Rights (Menzies Research Centre, 2009).

13 For a commentary on the Attorney General’s announcement, see James Allan, ‘All’s Well that Ends Well’, The Australian, April 23rd, 2010. See, also Bob Carr’s piece in the April 22nd edition of The Australian.

14 Parts of this section I have taken from my Invited Australian Senate Occasional Lecture Series Address (Canberra, April, 2008) and from ‘Statutory Bills of Rights: You Read Words In’ in (eds T. Campbell, K. Ewing and A. Tomkins) The Legal Protection of Human Rights: Sceptical Essays (OUP, 2011), 108-126.
of argument tells us nothing. The real question is not whether Australia should emulate others but whether a bill of rights is a good idea in its own right. Would having one deliver better outcomes than Australia achieves without one?

My answer is an emphatic and resounding ‘no’. Here is why. To start, notice that any sort of bill of rights enumerates a list of vague, amorphous – but emotively appealing – moral entitlements in the language of rights. It operates at a sufficiently high level of abstraction or indeterminacy that it is able to finesse most disagreement. Ask who is in favour of ‘freedom of expression’ or ‘freedom of religion’ or a ‘right to life’ and virtually everyone puts up his or her hand. And of course this is where bills of rights are sold, up in the Olympian heights of disagreement-disguising moral abstractions and generalities. Nevertheless, that is not where these instruments have real effect. People do not spend hundreds of thousands of dollars going to court to oppose ‘freedom of speech’ in the abstract.

Bills of rights have real, actual effect down in the quagmire of social-policy decision-making where there is no consensus or agreement across society at all about what these indeterminate entitlements mean. Rather, there are smart, reasonable, well-informed, even nice people who simply disagree about where to draw the line when it comes to campaign finance rules or hate speech provisions or defamation regimes or whether Muslim girls can or cannot wear veils to school or whether to sanction gay marriage and so much more. One could sit around in groups, holding hands, singing ‘Kumbaya’, and chanting ‘right to free speech’ or ‘right to freedom of religion’ for as long as one wanted and it would help not at all in drawing these contentious, debatable lines.

What a bill of rights does is to take contentious political issues – and I will deliberately say this again, issues over which there is reasonable disagreement between reasonable people – and it turns them into pseudo-legal issues which have to be treated as though there were eternal, timeless right answers. Even where the top judges break 5-4 or 4-3 on these issues, the judges’ majority view is treated as the view that is in accord with fundamental human rights.

The effect, as can easily be observed from glancing at the United States, Canada and now New Zealand and the United Kingdom, is to diminish politics and (over time) to politicize the judiciary. Meanwhile, the irony of the fact that judges resolve their disagreements in these cases by voting is generally missed. The decision-making rule in all top courts is simply that 5 votes beat 4, regardless of the moral depth or reasoning of the dissenting judgments, or that they made more frequent reference to J.S. Mill or Milton or the
International Covenant on Civil and Political Rights. Only the size of the franchise differs.

None of this deters bill of right proponents from talking repeatedly about how such an instrument ‘protects fundamental human rights’, as though these things were mysteriously or magically self-defining and self-enforcing. They are not. They simply transfer the power to define what counts as, say, a reasonable limit on free speech over to committees of ex-lawyers (who have no greater access to a pipeline to God on these moral and political issues than anyone else, but who are immune from being removed by the voters for the decisions they reach).

Nor are statutory bills of rights immune from this criticism. Of course on one level it is true that non-entrenched, non-constitutionalised, statutory bills of rights do not allow judges to invalidate or strike down legislation. Instead the transfer of power to the judiciary is done more indirectly.

The main tool for increasing the power of the judiciary under a statutory bill of rights is the reading down provision. No provision has more potential to transmogrify the powers available under statutory versions into something approaching those under constitutionalised versions. Indeed (and here is what proponents downplay in the time when they are pushing for the enactment of a statutory bill of rights), if judges take such reading down provisions to be Spike Lee-like licences ‘to do the right thing’, then these provisions leave open the possibility of affording judges scope to do what the disinterested observer would characterise as an out-and-out rewriting or redrafting of other statutes.

Consider the reading down provision in the UK’s Human Rights Act 1998 which reads to start:

So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights.\(^\text{15}\)

The danger with these sort of reading down provisions – these directions to give the words of other statutes a meaning that you, the point-of-application interpreter, happen to think is more moral and more in keeping with your own

\(^\text{15}\) Human Rights Act 1998 c 42, s. 3(1) (italics mine). The broadly similar reading down provision in the New Zealand Bill of Rights Act 1990 reads: “Whenever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meanings”, (s.6, italics mine). And the reading down provision in the Australian State of Victoria’s Charter of Rights reads: “So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights”. (s. 32(1), italics mine).
sense of the demands of fundamental human rights – is that just about any statutory language (however clear in wording and intent) might possibly be given some other meaning or reading.

Here is how I framed the danger, the scope for abuse, of these provisions in an earlier article:

Put differently, reading down provisions such as these throw open the possibility of ‘Alice in Wonderland’ judicial interpretations; they confer an ‘interpretation on steroids’ power on the unelected judges. So although there is no power to invalidate or strike down legislation, the judges can potentially accomplish just as much by rewriting it, by saying that seen through the prism (that is, their own prism) of human rights, ‘near black’ means ‘near white’ or ‘interim order becomes a final order’ means ‘interim order does not become a final order’.16 They can make bill of rights sceptics half long for the honesty of judges (under constitutionalised bills of rights) who strike down legislation rather than gut it of the meaning everyone knows it was intended to have (rule of law values notwithstanding).17

Whether that characterization is alarmist or not, indeed how different the judicial approach to interpreting other statutes will be, is a question of fact. In the United Kingdom we have to look to see how the top judges in the House of Lords (now Supreme Court) – judges who a decade or two ago were widely considered to be the most interpretively conservative judges in the Anglo-American common law world – have used the section 3 reading down provision to alter their former approach to interpretation.

And so let us turn to the Ghaidan case, the leading UK case on the section 3 reading down provision. What is remarkable in that case is not what the judges did, but what they were prepared openly and explicitly to admit they believed they could now do with the section 3 reading down provision in place. When interpreting all other statutes they could “depart from the intention of … Parliament”.18 They could do so when “the meaning admits of no doubt”.19 They could “read in words which change the meaning of the

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16 See SI by his next friend CC v KS by his next friend IS (2005) 195 FLR 151 at 154 (Higgins CJ of the Australian Capital Territory using a similar provision in the ACT Human Rights Act 2004).
18 Ghaidan, para. [30], per Lord Nicholls. And could do so despite a total lack of ambiguity. Para [29]. For a similar New Zealand example of the relevant statute being blatantly read down, though without the judges explicitly referring to the section 6 reading down provision of the New Zealand Bill of Rights Act, see Simpson v Attorney-General [1994] 3 NZLR 667 (CA) [Baigent’s Case].
19 Ghaidan, para [29], per Lord Nicholls.
enacted legislation”. They could assert that “[t]he word ‘possible’ in s.31(1) is used in a different and much stronger sense”. They could imply that anything short of outright ‘judicial vandalism’ is now within their purview at the point-of-application. They could even use this new interpretive power to overrule one of their own House of Lords authorities – a case on the meaning of exactly the same statutory provision, an authority under four years old, and one that had held the meaning of that same statute to be clear.

I could go on. I could note again that this Ghaidan approach to using the reading down provision is no outlier and continues to be affirmed and reaffirmed in the UK and that the top judges there now see themselves operating under “a new legal order” – one in which their views on a host of political and moral line-drawing exercises are significantly more influential than before. Or I could explore the Rule of Law implications of this new Ghaidan approach to interpretation – how citizens’ knowledge of what any statute means becomes wholly and inextricably linked to judges’ views of the scope, range, content and reasonable limits on human rights, all or which are contentious and debatable and give rise to reasonable disagreement amongst smart, well-informed and even nice people. Put bluntly, this new Ghaidan approach to interpretation, whatever other sins it might have, most assuredly magnifies uncertainty from the citizen’s vantage and hence lessens the ability of all non-judges to know what the law demands of them and to be able to shape their conduct and expectations accordingly.

Or I could even note the other ways statutory bills of rights empower judges, most obviously by means of the Declarations of Incompatibility and Statements of Incompatibility powers. But the basic point is simply that these instruments, these statutory bills of rights, diminish democracy. Understood in those terms, and in the context of a country like Australia with superb democratic credentials, the push for a national bill of rights of any sort is one that I hope will continue to fail.

Australia does not need a bill of rights. Full stop.

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20 Ghaidan, para [32], per Lord Nicholls.
21 Ghaidan AC p. 573, per Lord Steyn.
22 Ghaidan, paras [111]-[112], per Lord Rodger.
23 Fitzpatrick v Sterling Housing Association [2001] AC 27.
24 Jackson v Attorney-General [2006] 1 AC 262 at para [102], per Lord Steyn.
25 For fuller arguments to that effect see my ‘Statutory Bills of Rights: You Read Words In’ chapter, op. cit., fn. 17, above.
That just leaves me to mention Australia’s so-called ‘implied rights’ jurisprudence, which for some can be thought of as an insipid, judicially created mini-bill of rights. There is no need to canvas this in detail. Suffice it to say that beginning in 1992, most notably in what is known as the ACTV case, the High Court of Australia arrived at the conclusion that the Australian Constitution—one that explicitly and deliberately left out any US-style bill of rights or First Amendment free speech entitlements and protections opting, after much debate and discussion amongst the Founders, to leave these social policy balancing exercises to the elected Parliament—nevertheless implicitly created an implied freedom of political communication. The first step in that reasoning, the only one that drew on the actual text of the Constitution itself, notes that the Australian Constitution provides that elected Members of Parliament are to be ‘directly chosen by the people’.

The practical effect of discovering this implied freedom of political communication was that the High Court of Australia justices could then strike down or invalidate part of the statute in that case. However, also notice that the justices were and are still clear that this implied freedom does not amount to a personal free speech type right vesting in the individual citizen.

Since then this implied rights jurisprudence has not expanded very widely, and indeed has only very rarely led to statutes being struck down or invalidated. It has, however, been used as the basis for what might be thought of as a limited implied right to vote jurisprudence.

Nevertheless, the effects of this implied rights case law on parliamentary sovereignty are considerably less than those of a UK-style statutory bill of rights, and less so again than those of a Canadian or US-style entrenched, constitutionalized bill of rights. So judicially made-up quasi-bills of rights (call them discovered ‘implied freedoms’ if you prefer) have such evident and

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27 Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106.

28 See sections 7 and 24.

29 See, for instance, the five step reasoning process of Mason CJ in ACTV at para. [138].

30 See the University of Queensland Law Journal special issue dedicated to the 20th anniversary of this jurisprudence in the volume 30, 2011 issue for considerable detail and analysis of these cases.

31 Ibid.

obvious legitimacy issues that they afford top judges nothing like the point-of-
application discretionary powers of an actual bill of rights, entrenched or
enacted.

So let us limit the democratic damage here in Australia as far as possible. Let
us hope we can avoid any sort of bill of rights, and as long as possible.

33 My book length plea in favour of as much democracy as possible came out earlier this year. It
is entitled Democracy in Decline (2014, McGill-Queen’s Press worldwide save for Australia where it
is published by Connor Court).
G20; Police Powers and Dissent

Dan Rogers*

I Introduction

No matter where a person stands on the scale that balances national security and the protection of civil liberties, there is no doubt that terrorism continues to pose a level of threat to Australians. Measures to protect the community are vital. However, public debate on Australia’s legislative response to terrorism is important in a democratic society, particularly where such laws change established legal rights and safeguards. The *G20 Safety and Security Act 2013* (Qld) (“G20 Act”) does exactly this.

Since 9/11, we have seen expansive amounts of legislation aimed at terrorism. Many of these laws have now been repealed; others remain on the books. For the G20 Act, and indeed any new laws, it is critical to ask:

1. Are the new laws necessary?
2. Are they proportionate to the perceived threat? And
3. Are they consistent? Consistent with the values underpinning our democracy, such as respect for the rule of law and protection of individual rights?

Conscious of these three important questions, this article will consider the right to protest and how it will be impacted by the special powers under the G20 Act. The protection of fundamental human rights is an obligation for all people who enjoy democratic freedom. However, for those people lucky enough to receive an education in law the responsibility to uphold the rule of law and protect human rights is even more paramount.

II The Right to Protest

The right to peaceful protest has a long and successful history. In the 1930’s, Ghandi marched almost 400 kilometres as a way of condemning the British salt monopoly in Colonial India. Recent protests in the Arab spring were a means of effecting fundamental regime change; after years of violence proved ineffective.

Closer to home, one of the most well-known anti-racism protests occurred during the Springbok tour in 1971. In 2003, approximately 100,000 people showed their disapproval of the Federal Government’s involvement in the Iraq

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war by marching from Roma Street to River Stage. In September of last year, thousands of protestors, union members and their families rallied against proposed job cuts to the State’s public sector.

Freedom of expression through peaceful protest is a legitimate, effective and non-violent means through which people can voice their concerns. It is utilised in Australia and elsewhere in the world. The European Court of Human Rights has declared that freedom of expression is one of the essential foundations of a democratic society and that it is applicable not only to information or ideas that are favourably received or regarded as inoffensive, but also to those that offend, shock or disturb the State or any section of the population.¹

The meeting of the 20 most powerful world leaders presents a unique opportunity for individuals to protest many issues including profoundly important economic issues. It is essential that the leaders of the world listen to the views of the population – peaceful protest is a great way to achieve this end.

So the critical question is to what extent will protest rights be respected and protected during a G20 event in Australia? Firstly, there is no national or State Bill of rights providing an entrenched right to protest. Secondly, the Queensland Peaceful Assembly Act, which confers certain rights upon protestors, has been overridden by the G20 Act. Thirdly, our common law confers no positive right to protest. There is clearly little protection.

It is even worse when you consider that the best we have in Australia are various international instruments to which Australia has signed including the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights. However, these instruments have not been implemented into Australian law. They have little force and are small comfort to an individual on the ground trying to assert their rights to a police constable.

III The use of discretionary police powers on the ground

In my experience as a practising criminal defence lawyer, I see firsthand the dangers to which police are exposed to in the execution of their duties. My contribution to this debate should not, in any way, be seen as an attack on police. However, assessing the practical operation of new laws, and identifying foreseeable problems, is an important part of public discourse.

¹ Muller v Switzerland (1988) 13 EHRR 212, [33].
The success of G20 will ultimately lie in police discretion. Discretion is the hallmark of modern policing. On the ground, police have an extensive range of decisions to make - do they investigate, do they search, do they use force, do they arrest, do they caution or do they charge. If so; what charge and in what court? It is clearly not an easy job.

But the manner in which police exercise discretion can have unprecedented and unexpected consequences for the community and its relationships with the police. During the G20 event in Toronto over 1,100 people were arrested. Of those, almost 800 were released without charge. Of the 300 charged, there were 44 findings of guilt. That represents a conviction success rate of 4% of those detained. If bookie Tom Waterhouse heard those odds, there’s no way that he would back the police!

It might not surprise you that in Toronto over 30 police were recommended to face disciplinary proceedings. A subsequent public inquiry found wide scale abuse of police powers on the ground. It’s easy to say ‘we’ll that’s Canada, things will be different here.’ To that suggestion, consider this; the powers given to Canadian police were very similar to the G20 Act and Canadian protestors were actually protected by that country’s Charter of Rights. We have no such protection.

That experience in Canada makes clear that police discretion is critical. G20 will of course see interactions between the police and the community on what will be, for Brisbane, a large and unprecedented scale. The concern is; what will happen on the ground?

A recent report by the Office of Police Integrity in Victoria found that the use of force by police most commonly arises during arrests and police stops on the street. They found that force is used on the streets twice as much as any other environment. Further, that allegations of excessive force rank highest on the list of public complaints made against officers. It is evidence like this which demands close scrutiny of public space laws and extended police powers.

IV G20 Act and some Concerning Provisions

Any consideration of the provisions in the G20 Act requires close consideration of the three questions that must be answered whenever a new law is proposed:

1. Is the law necessary?

2. Is the law proportionate to the threat?
3. Is the law consistent with our values and our rights?

The first problem with the Act is that it prevails, to the extent of any inconsistency, over the *Police Powers and Responsibilities Act.* Unlike most other States, Queensland has a codified system for police powers and responsibilities. It is important to question why we require new measures that may lack the ordinary safeguards necessary to protect against overuse or misuse of power by police.

**A Restricted Areas**

The Act provides for restricted areas within which protests can occur. Protest is meaningless if the target is unable to see or hear the protest groups. The imposition of restricted areas risks the exclusion of those exercising a right to protest. Conflicts at relevant boundary lines are inevitable. This risk will be greatly increased if police also use kettling tactics to control protestor’s movements and their direction of travel. This was done in Toronto.

**B Prohibited persons list**

Assistant Commissioner Carroll explained, in the parliamentary briefing on the G20 Bill, that the prohibited persons list will contain persons we, the police, suspect may cause a problem. This ‘black list’ is entirely unsatisfactory being overly subjective and lacking normal safeguards. There are no criteria for what will cause a person to be placed on the list such as any relevant criminal history. There is also no requirement to give notice to the concerned person or for the Commissioner to give reasons a person’s placement on the list. There is effectively no opportunity to be heard or to seek a review. This represents the complete removal of natural justice.

**C Presumption against bail**

In relation to bail, there is no demonstrable justification for a presumption against it. This provision appears to be an indirect way to remove unwanted persons from the city area during the entire event. The presumption in favour of bail stems from the presumption of innocence, which underpins our entire

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3 *G20 Safety and Security Act 2013,* s4(1).
4 Ibid, see Part 2, Division 1.
5 Ibid, see Part 5.
7 Ibid, s82.
criminal justice system. To restrict this principle for seemingly ulterior purposes is to undermine our system in an unprecedented fashion.

D Directions to Leave

During G20, if police suspect a person intends to, or may, disrupt any part of the meeting, they can be given a direction to leave a stated area. This is like a move on direction. Research shows that a direction for a person to leave an area usually results in arrests for either one or even more offences. One study showed that from 2,000 “move on” orders, 700 resulted in an arrest. This is a high proportion. It shows that conflicts are going to happen and that the stated purpose of the power, as a preventative tool, is a falsehood.

E Stop and search powers

The stop and search powers in the Act have limited requirements for any reasonable suspicion. Some of the stop and search powers enable an arbitrary deprivation of liberty. Individuals on the street will, for good reason, feel aggrieved by this invasion of privacy. Conflicts are inevitable especially if you keep in mind the recent Victorian report on the extent of police use of force on a street level. This power will be particularly dangerous for the more vulnerable groups who use public spaces more frequently; such as young, homeless or indigenous persons.

Strip searches are also allowed for the duration of G20. Deputy Commissioner Barnett, in the parliamentary public briefing on the Bill, asserted that this extreme power won’t be abused as there is a requirement for the officer to have a reasonable suspicion that the person is doing something wrong.

The High Court has held that reasonable suspicion is meant to be an objective standard. Given the police sensitivity concerning security at G20, police are more likely to exercise powers subjectively. A concern that a person may disrupt the event, because of their noise or behaviour, could form the basis of

8 Ibid, s48.
12 Ibid, s22.
14 George v Rockett (1990) 170 CLR 104.
a strip search. This is enough, under the Act, for police to exercise extreme powers and close physical interactions. In the context of a personal search, the potential for escalation is magnified many times.

**F Legal Observers**

One way to promote accountability of police discretionary powers is through legal observers on the ground. Legal observers are independent from any protest group. They watch and record interactions between police and protestors. They do not engage in conversation with police or provide advice to persons being arrested. Their presence is designed to deter the misuse of police powers. They are clearly identifiable by the wearing of distinctive clothing with clear text saying “legal observer”.

Caxton Community Legal Centre, located at South Brisbane, is co-ordinating a group of legal observers for next year’s G20 event. This was done in Toronto and in London. At the Brisbane G20, all legal observers will be volunteer practitioners. In Toronto, there were close to 100 legal observers who volunteered. Caxton needs help from practitioners in order to facilitate this important human rights protection. Queensland practitioners should volunteer by expressing their interest and contacting Caxton.¹⁵

**V Concluding Remarks**

It is clear that the right to protest at next year’s G20 is highly vulnerable to expanding police powers and to police discretion. When the Honourable Police Minister Jack Dempsey introduced the G20 Bill, he emphasised to the Queensland Parliament that at the G20 Forum Brisbane will be on display to the world.¹⁶ This is true. But more than our streets, our river and our business and industries are on display, our values will be on display as well. The positive promotion of Queensland is aligned with our due regard for human rights.

The world viewed Canada negatively in the wake of the G20 there. Russia hosted the G20 event in 2013. Russia’s strong crackdown on anti-government sentiments saw few protestors dare to take to the streets. To the world watching, this underscored Russia’s appalling human rights record. We are a country that prides itself on our democratic values and our protection of rights. However, there is a clear risk that our police and community will clash because of these laws. These negative interactions will be inconsistent with the way we view ourselves and the way we hope other nations view us.

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¹⁵ Contact Caxton Legal Centre at caxton@caxton.org.au.
An Interview with Dr Rebecca Ananian-Welsh*

PB: Dr Rebecca Ananian-Welsh, thank you for joining us. A member of Queensland's Hells Angels Chapter is preparing a constitutional challenge to the Queensland Government's "VLAD Act". In the absence of a Bill of Rights, what constitutional arguments are his lawyers going to run?

RA-W: Without a Bill of Rights as such there are a lot of arguments that his lawyers cannot run. But it doesn't stop them running rights-based arguments. In early media releases they mooted a freedom of association argument, which would have to be applied similarly to the implied freedom of political communication in our constitution. Their chances would have been uncertain though and they eventually abandoned this argument in the High Court proceedings. It is not alleged that the bikies are meeting for political purposes so it would take quite a leap of interpretation, I think, to come up with a freedom of association argument.

There are other aspects of those laws which are very troubling from a judicial independence perspective. For example, Mr Kuzcborski’s lawyers ran Chapter III arguments about mandatory and disproportionate sentencing. Mandatory sentencing is problematic because it constrains a judge's discretion, so, by the time a prosecution for ‘participants in a criminal organisation meeting in public’ gets to court there is not an awful lot the judge can do other than sentence the person to a mandatory six months in prison. Judges may also be obliged under the VLAD Act to increase sentences to a point where they are way out of proportion to the crime that has been committed. So I think there are weighty arguments from a judicial independence perspective.

What these laws really do is highlight the absence of protections in the constitution or in the states. The government really can take quite extreme measures, like criminalising three people coming together in a place for wearing the wrong clothes, or carrying for a particular card in their pocket. The government can also increase sentences to outrageous levels, adding 25 years of mandatory no parole imprisonment to sentences for innocuous kinds of offences without

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any recourse. It is really hitting home what little protection we do have when government finds it politically palatable to take-aim at one unpopular section of the population and. All we can really do is protest, but protesting on behalf of bikies, sex-offenders or suspected terrorists is never something that happens in a particularly widespread way.

PB: The way Chapter III jurisprudence has developed has very much emphasised the independence of the judiciary, yet people seem to be using it to try to defend individual rights. Is that effective or does it complicate what Chapter III is meant to be about?

RA-W: My first essay in my first law subject as an undergraduate law student was on the horrors of judicial activism. I argued that judges should not be trusted. I wondered how on earth these ‘old white men’ be making decisions about sentencing or seeing the law ‘on the ground’ - "They're so out of touch!" I've moved on from there and reached to a point similar to Professor Allen of saying that the last thing we need are constitutional rights, because look at what the courts have been able to do with the dry, skeletal constitution. I mean, our constitution is barely interesting, yet the High Court has out of it some amazing implications.

I think what we are seeing now though, or at least the way I see it, is that the court is coming up against the maximum it can possibly do with Chapter III. It has harnessed the institutional integrity principle out of Kable, but to say that's a right to fair process in the constitution is, I think, way off base. The Court can't get us to true fair process protections, they can't stop secret evidence, they can't stop mandatory sentencing, or reverse onuses of proof. I think litigants have an idea that Chapter III is a great protector of important constitutional values like fair process, and the High Court is saying back to them, "we actually can't do that, it's not written, we can only do so much". These observations are driving me to a point that is very different to Professor Allen, we might need constitutional change, something added to Chapter III so that it does what people want it to do, that is, so it effectively protects the integrity and fairness of court proceedings.

PB: You're probably going to hate this question, but what form would that take?
RA-W: I'm really not sure. I only started coming to terms with this notion in the last year. But I think basic fair process in courts is necessary as a factor to make the system work properly, so that you can know the case against you and answer it within the truly adversarial and open system of justice. I am keenly aware that due process clauses in the US and fair process rights in Europe have become much more onerous and unpredictable than they were ever intended to be. So what I think needs to happen is a directed study in how to draft a fair process clause that can work to protect our rights in court in line with community and legal expectations, but that doesn't end up having wildly unintended consequences, something very narrowly drafted perhaps.

PB: You don't want a second amendment style clause that takes on a life of its own, do you?

RA-W: No. The American Constitution is a very old constitution and there have been a lot of constitutions drafted since then that have improved upon that model. When the Australian constitution was drafted they didn't look too far beyond the US and Canadian constitutions, whereas now we have a much richer jurisprudence globally, including the Indian and South African constitutions and other documents we can certainly look to for guidance. But it needs a lot of very careful thinking and drafting.

PB: What is the best approach to implementing a constitutional amendment?

RA-W: The best approach, like with the referenda for local government recognition and indigenous recognition is to begin with wide consultation, community education and to be dedicated to keeping any amendments clear, simple and separate. If you wanted to introduce a fair process clause, one way to do it would be to take advantage of our federal system and begin with state constitutions. This is the beauty of the federal system. We can experiment in the states and then see how that goes. For example we have the ACT's Human Rights Act and the Victorian Charter of Human Rights, and in those jurisdictions you have the right to not have the onus of proof reversed against you, which is something that is happening now Queensland. We could begin by seeking changes in state constitutions, where you don't need to have a referendum. If a fair process clause gave rise to unintended consequences it could be fairly easy to backtrack in the states and amend the provision. I would definitely not be gung-ho about
enacting a fair process clause in the Commonwealth constitution. Though, in the meantime, I think that if people are looking to Chapter III to act as a fair process clause they may be bitterly disappointed.

PB: Do you have any concerns with use of control orders in anti-criminal and anti-terrorist legislative frameworks?

RA-W: Yes. I've written a recent paper with Professor George Williams for the Melbourne University Law Review on how control orders have moved from the federal sphere to be copied state legislation where they have expanded beyond terrorism to cover organised crime and bikie gangs. Now Queensland has taken the initiative of extending these state schemes beyond mere control orders, harnessing mandatory sentences and serious crimes of association. There are a number of reasons why that has happened. One of them is in fact the ineffectiveness of these orders. At the federal level, no preventative detention orders since 2005 until this September, and just two control orders have been issued in highly controversial and problematic scenarios. The first control order was issued against Jack Thomas, the second against David Hicks when he returned from Guantanamo Bay. These orders were justified on the basis that these men could have been contacted by terror cells seeking to utilise their knowledge of weapons including explosives. The control orders were issued despite the fact that these two men were infamous and couldn't walk down the street unnoticed. At any rate, David Hicks was highly traumatised from his experiences at Guantanamo and barely able to leave his house at the time.

The Australian Federal Police have never tried to get another control order. Nonetheless, the states copied these provisions in order to target bikies. For the states control orders presented a ready-made, constitutionally valid package enabling the police to avoid the criminal justice system burdens of proof but still impose onerous and prolonged restrictions and obligations on a person. Instead, control orders rest on a civil standard of proof, the balance of probabilities and focus on the prevention of future harm rather than proof of past acts. State governments have claimed that control orders might help fight serious crime, but there is no evidence as to their effectiveness at achieving this aim. When the Newman Government was elected they argued that control orders weren’t effective because didn’t go far enough. So, the Newman government went further, implementing mandatory sentencing, reversing the onus of proof and introducing new crimes in legislation targeting bikie gangs.
PB: It sounds like the real issue is that the current government has been changing the legal framework in Queensland - changing the rules of the game so to speak.

RA-W: That’s exactly what they're doing, and it highlights how few constitutional protections we have. We used to assume that state governments wouldn’t do anything so drastic as reversing the onus of proof in criminal cases or imposing disproportionate mandatory minimum sentences or criminalising public associations of three-or-more people. However, now the community is realizing how few limitations truly exist on governmental power, beyond holding them democratically accountable through protest and elections. However, like I said, bikies, sex offenders and terrorists are easy targets and aren’t going to attract a lot of public support. The laws themselves, however, have the capacity for a much broader impact. In Queensland, even the lawyers representing criminal organisations are being criticised as being part of the ‘criminal machine’.

PB: Similarly, the Tasmanian Government has proposed anti-protest law to target environmental protestors. Surely this has the potential to give rise to a constitutional challenge on the basis of breaching the implied freedom of political communication found in the ACTV case?

RA-W: I think it will attract a constitutional challenge, because protest against government action is pure political communication. The reason we didn’t write rights into the constitution is because we believed that the political machine would work well without them, and protest is a crucial part of that picture. The question raised by the Tasmanian legislation is whether limits on protest can ever be ‘reasonable’. This constitutional question, about whether there can be ‘reasonable constraints’ on political communication, has been revitalized recently. For example, it would be appropriate for the government to limit violent protest, and perhaps implement a law to prevent protestors interfering with business. The drafters of such legislation would defend it on the basis that it imposed a reasonable limit on political communication.

PB: The government has produced new laws regarding retention of metadata. The new legislation is extremely vague and gives us virtually no idea of the kind of data they want to retain. What can we learn from experiences of other countries?
RA-W: The issue of data sharing has attracted considerable controversy around the globe, for instance across the European Union. As for legislation on metadata in Australia, there are of course going to be privacy concerns. Mandatory retention of metadata is a significant step away from the usual intelligence gathering process. It looks more like 'fishing' than targeted investigation and may entail searching through a great deal of data. This raises issues of effectiveness because there is so much data, and it is hard for anyone to know what is relevant. This also raises particular issues in Australia because of the unique breadth of our national security offences. Here, preparing to commit a terrorist attack is a crime, but in a highly unusual step conspiracy to prepare to commit a terrorist act is also a crime punishable by the most severe prison sentences. This means that if we simply talked about buying fertilizer that may be used to create a bomb for an undefined terrorist activity it would be criminal. In one Australian case, a man was convicted for calling his religious mentor in Ethiopia and asking whether committing a terrorist attack would be condoned by the Koran. His mentor replied that such an attack would be against Koranic principles. Based on that interchange the man was charged, found guilty, and sentenced to an extensive period of imprisonment in a maximum security prison. All you need is conspiracy to commit a terrorist act to potentially get life imprisonment, so if you have everyone’s metadata, there is every chance that personal information may be used not only for, quite valid, intelligence and crime prevention purposes, but also as evidence in criminal prosecutions.

PB: It seems perverse that the government defends the retention of metadata by saying there’s so much data that they can’t possibly process it all and that this will protect people’s private data. This seems to me to be an argumentative against the effectiveness of collecting metadata.

RA-W: Another argument that was raised in evidence before the Parliamentary Joint Committee on Intelligence and Security is that private companies, like Facebook and Google, are retaining metadata anyway, so why not let the government do so as well? True, there is nothing stopping these companies from retaining their own data, and a lot of people know that they have already sacrificed many of their privacy rights - but shouldn’t this be making us more concerned about privacy and data retention, not less? Another crucial distinction is that Facebook and Google can’t use the data to prosecute you and sentence you to onerous terms of imprisonment based on your communications.
PB: In criminal law, judges think they can fix everything with jury directions. Psychological studies tend to discredit this argument, and indicate that jury directions don’t actually change that much. Do you think, as lawyers, we pay enough attention to the behavioural and psychological sciences?

RA-W: It’s an interesting area and there is a lot of overlap. The overlap is part of what got me interested in fair process, secret evidence and judicial decision-making.

This is certainly an issue that underscores the importance of interdisciplinary research. For me, this raises particular questions about the impact of secret evidence on trial processes. Judges are human, if a judge has heard tested evidence from one side and untested evidence from the other side, will be difficult for him or her to rationalize their way through the inherently biased proceedings and arrive at a truly fair outcome. Behavioural science and psychology can bring a lot to law through, for example, demonstrating how these concerns really play out in the courtroom, providing a scientific or realist perspective rather than the complex doctrinal analysis of the law. In Australia, legal academics are only just starting to look towards truly interdisciplinary research. America, for example, is far more developed in this respect. In America, the jury system is more widespread, particularly in civil cases, so there is an increased impetus for psychological studies of juror behaviour and judicial directions to juries.

As I said, judges are human. There are interesting studies indicating that during bail applications are more likely to be granted right after lunch or morning tea. When lawyers discuss judicial independence – a vital aspect of constitutional law – these considerations ought to be acknowledged.

Perhaps even more importantly, psychology and behavioural sciences have a lot to contribute to the health of the legal profession. Law students and lawyers have unbelievable rates of anxiety, depression and other mental illnesses that can lead to debilitating consequences or even suicide. This may be unsurprising when you bring people together with perfectionist, competitive mind-sets. Many law students and lawyers have limited experiences of ‘failure’ and may take criticism, a bad grade, or a mistake at work very seriously, allowing these perceived failures to overshadow successes and achievements.
Even on good days, perfectionists tend to suffer from ‘imposter syndrome’, expecting those around them to discover at any moment, perhaps with just one less-than-perfect slip-up that they really aren’t up to the job or as brilliant as people may think. Perfectionism in this way and others can facilitate anxiety and depressive disorders that prevent bright and outstanding individuals from enjoying their gifts or the fruits of their labour. This can lead to disastrous consequences. Burnout levels in the legal profession are incredibly high. There are more graduates than jobs at the moment, but it seems that after only four or five years firms are desperate for suitably experienced lawyers still in practice. Resilience – taking bad days and perceived failures in stride and maintaining a healthy and well-balanced outlook and lifestyle – is an invaluable professional skill that employers have learnt to be attuned to.

There is a lot that law firms need to do in terms of mental health and keeping their staff. I was involved in an Australia-wide study on mental health and legal professional culture and it can be difficult to get lawyers to talk about these issues. Mind you, once the conversation begins it becomes quickly apparent that almost all lawyers and law students have close or personal encounters with serious mental health concerns. I can say that not only from a professional perspective, but from my personal experience and observations as a lawyer in public, private and academic practice. The tendency for lawyers to evidence mental health concerns begins as early as first year university. Both law students and medical students are perfectionists, but law students’ mental health declines during their university years, while medical students’ mental health does not follow this trend to a similar degree. Unfortunately, first year law students don’t want to talk about resilience training and looking after their mental health. Sadly, I get the impression that many students think that marks alone are the secret to a successful career – an approach that might have worked in High School but only presents a small part of the picture as you head into your professional life. You can be a fulfilled, happy, passionate, moral person and a lawyer, even though legal decision-making involves making dispassionate interpretations of real-life situations.

PB: Do you have any issue with businesses having two votes in council elections, as implemented in Melbourne and as currently being debated in Sydney City Council?

RA-W: This is interesting. Constitutionalism really comes down to power and values. Democracy and the rule of law are two of these core values
and if this means equal participation then these initiatives seem to fly in the face of those fundamental notions. Of course, a lot depends on your view of democracy and parliamentary sovereignty. Speaking for myself, this idea of two votes for businesses makes me quite uncomfortable. Some businesses already have well-funded and influential lobby groups to represent them and give them a more direct impact on government. Giving businesses an extra vote doesn’t align with my understanding of what government is all about.

PB: I believe the rationale is that businesses pay more rates and therefore should be entitled to more votes. It would seem there is only a small leap to say that if you pay more taxes, you should be entitled to more votes.

RA-W: I agree. People in eastern suburbs of Sydney, for example, pay exorbitant property rates. Should people in large houses in nice suburbs get more than one vote? Translating anything into unequal democratic participating is problematic. In some respects these kinds of initiatives relate to the Roach case, which concerned withholding voting rights from prisoners. When the government tried to extend this to all prisoners, it was ruled unconstitutional. The case demonstrates the potential for constitutional values of democracy and representative government to be enforceable in some situations. Parliaments have considerable, but not unlimited, powers in this area.

PB: In February, a poll indicated that support for the republic is at a 20 year low. Do you think Australia will ever be a republic?

RA-W: There are studies that indicate that a referendum is unlikely to succeed when government is unpopular or unstable. We would need to await a period of general prosperity and stability before considering another attempt at becoming a republic. I think Australia might become a republic but I have no idea what that might look like. To some extent I fall into that oh-so-Australian view of ‘if it ain’t broke don’t fix it’. That said, I think there is a lot happening right now that suggests the system isn’t working particularly well – the rise of micro-parties in the Senate, the difficulties this government experienced in passing the budget, and the widespread circumvention of personal rights for example. If becoming a republic would give more powers to government at the expense of accountability or democratic deliberation, I don’t think I’d support it. I don’t think that now is the time for Australia to make the big change to finalise our independence from the UK. I think there are higher constitutional priorities right
now, like recognising aboriginal people and removing racist provisions from the constitution. Ideally, this should happen through referenda and citizen engagement instead of the High Court creating new broad rights.

PB: Dr Rebecca Ananian-Welsh thank you for joining us.

RA-W: Thank you for the chat.
Combating Domestic Violence in China – Problems, Progress and Prospects

Anna J. High*

“You can pick up the law or you can pick up a fruit knife. But it’s still easier for people to pick up the knife than the law, and that’s what’s happening.” Kim Lee, 2013

When the People’s Republic of China was founded in 1949, the women of China were promised liberation from the bonds of “backwards”, “feudal” Confucian patriarchy and related exploitative practices. Since then, Chairman Mao’s infamous declaration calling for gender equality – “women hold up half the sky”¹ – has been transposed into various laws, regulations and policies aimed at elevating the status of women as part of China’s march to modernity.²

As the notions of gender equality and women’s rights have taken root in modern China, one important social problem gaining increased recognition and response from the Party-State and civil society alike is domestic violence.³ Where in 2000, the official line was that violence against women was not a “serious social problem in China,”⁴ in recent years Beijing has begun to acknowledge that domestic violence is by no means an infrequent occurrence, particularly in rural areas.⁵

¹ “妇女能顶半边天” (funü neng ding banbiantian).
² See, eg, «中华人民共和国妇女权益保障法» [Law of the People’s Republic of China on the Protection of Rights and Interests of Women] (People’s Republic of China) National People’s Congress, 3 April 1992, art 2 (“Women shall enjoy equal rights with men in all aspects of political, economic, cultural, social and family life.”) See, further, Shen Guoqin, ‘The Development of Women’s NGOs in China’ in Li Yuwen (ed), NGOs in China and Europe (Ashgate, 2011), on the relatively warm reception of women’s NGOs in modern China, the goal of gender equality pursued by such NGOs coinciding with government policies on women’s liberation and social development.
³ It is not my intention to suggest that children and men are not also victims of domestic violence; however, the focus of this article is domestic violence as an important aspect of women’s rights.
⁵ For example, in its February 2014 press release, the Supreme People’s Court reported that domestic violence is a serious social problem that occurs in almost one quarter of Chinese families (reported by Susan Finder, Supreme People’s Court Focuses on Domestic Violence (16 March 2014) Supreme People’s Court Monitor http://supremepeoplescourtmonitor.com/category/domestic-violence/).
To date, however, this shift in central rhetoric has not always resulted in meaningful protection for victims. While general, aspirational and vague references to the importance of preventing domestic violence have been inserted into various central statutes, strong and specific national measures to prevent such abuse and provide adequate remedies for its victims are lacking.

To give just a few examples: China’s *Marriage Law* was amended in 2001 to provide that “family violence [家庭暴力 jiating baoli] is prohibited”, without defining the term or stipulating possible sanctions for abusers. The *Criminal Law* is only slightly more concrete, criminalizing “mistreatment of family members” (undefined); however such mistreatment is only a crime if the case is “serious” (also undefined). Moreover, unless the mistreatment results in death or serious bodily injury, the *Criminal Law* only permits prosecution for family-member mistreatment if requested by the victim. This provision potentially stymies domestic violence prosecution, as victims are frequently unable or unwilling to pursue criminal charges against their abuser.

Even where a victim is able and willing to pursue prosecution, the question of whether mistreatment is sufficiently serious so as to result in criminal liability is left to the discretion of judges. This can be problematic given that many Chinese judges lack basic training in the gravity and complexities of domestic violence. Accordingly, judicial responses to abuse cases frequently reflect traditional cultural beliefs about the heaven-sent rights of men over their wives, and that the violent exercise of that authority is morally legitimate. It is reportedly common for courts to treat offenders leniently or to dismiss alleged spousal abuse as justifiable or “not serious”. Similar attitudes persist among law enforcement officers and the procuracy, with domestic violence commonly

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9 Zhao (ibid 226) provides an illustrative case study – a county court accepted proof of ten instances of violent battering of a wife by her husband, supported by hospital records, resulting in broken ribs, impaired eye-sight and concussion. The court refused to convict, finding that “ten instances of battering over a period of twenty years cannot be characterized as occurring with high frequency, an essential element of the crime” and that, moreover, this was not a case of mistreatment because the violence “occurred with good cause” (wife refusing to obey her husband regarding family matters).
viewed as a private family issue, best resolved without official involvement, rather than a general societal harm.\(^{10}\)

The approach to domestic violence in the context of family law is, unsurprisingly, also piecemeal and problematic. As yet, Chinese divorce law has not formulated an appropriate response to divorce cases involving allegations of spousal abuse. The starting point is promising – the *Marriage Law* provides for contested divorce on a number of grounds, including “breakdown of mutual affection” and “family violence”.\(^{11}\) Moreover, a victim of family violence is entitled to damages in divorce proceedings.\(^{12}\) However, domestic violence victims face a number of challenges when it comes to divorce proceedings. First, a victim must provide “strong evidence” – such as police reports – to corroborate claims of domestic abuse.\(^{13}\) This is difficult in a society that often fails to take claims of domestic abuse seriously – despite progress, Chinese domestic abuse victims continue to report being told by family, friends and even police officers to settle their “family quarrels” within the family, rather than filing a formal complaint.\(^{14}\)

Secondly, where a party seeks a contested divorce, the *Marriage Law* requires the court to carry out compulsory mediation before adjudicating either divorce or denial.\(^{15}\) Judicial mediation is a defining feature of civil procedure in contemporary China, and is congruent with prevailing social/cultural norms that emphasize social harmony and reconciliation. In the past, in line with conservative views on divorce, the mediation requirement has been applied aggressively and coercively, with divorce petitions frequently denied in favour of so-called “mediated reconciliation”.\(^{16}\) More recently, Professor He’s research suggests that rather than mediated reconciliation, adjudicated denial is the new baseline for first-time contested divorce petitions, even when it is manifestly apparent that the marriage is not salvageable and the couple will not


\(^{11}\) *Marriage Law* art 32.

\(^{12}\) Ibid art 46.

\(^{13}\) Xin He and Kwai Hang Ng, ‘In the Name of Harmony: The Erasure of Domestic Violence in China’s Judicial Mediation’ (2013) 27 *International Journal of Law, Policy and Family* 97.

\(^{14}\) See, generally, Zhao, above n 8; He and Ng, ibid.

\(^{15}\) *Marriage Law* art 32.

\(^{16}\) Philip Huang, ‘Divorce Law Practices and the Origins, Myths, and Realities of Judicial “Mediation” in China’ (2005) 31 *Modern China* 151, 155. English readers will understand “mediation” to denote a voluntary process; whereas courtroom mediation in China, as Huang describes, frequently “employed distinctive methods and a variety of subtle and not-so-subtle pressures [eg. ideological education and moral suasion], as well as material inducements, in ways that would be astonishing in an American courtroom” (156).
reconcile.\textsuperscript{17} These practices are alarming, as they give rise to the possibility of abused women, having worked up the courage and fortitude to seek divorce despite threats to their safety, being denied judicial relief and forced back into a dangerous home situation.\textsuperscript{18} In all, conservative attitudes to contested divorce persist in many Chinese courtrooms – combined with a lack of training about the gravity and wrongfulness of domestic violence, it is clear that protection of domestic violence victims is easily compromised in divorce proceedings.

Finally, in cases where divorce is granted, He and Ng report that even if domestic violence has been established during the hearing, references to past abuse are often suppressed or underplayed during judge-led mediation on questions of property division and child custody.\textsuperscript{19} Blame is excluded from the discourse, for the sake of facilitating agreement, but at the risk of compromising the victim’s right to receive compensation for domestic abuse.

Those are just some of the problems when it comes to taking domestic violence in China seriously. But there has also been progress. In recent years, a number of high-profile cases have brought much-needed attention to the issue. Most notably, in February 2013, a Beijing court granted a divorce to Kim Lee, the American wife of Chinese B-list celebrity Li Yang. A few years earlier, Kim Lee went public on social media websites, including with graphic photographs, with allegations that her husband was abusive. She faced grave obstacles along the way, including unsympathetic and uncooperative police officers, but eventually her battle for due legal protection and recognition of her plight culminated in the Beijing decision. The court granted her a divorce, and issued a three-month protection order against Li Yang – the first time such an order had been granted in Beijing. In addition to acknowledging the domestic violence, the court ordered Li Yang to pay $9000 in compensation, and a further $2.1 million as part of the divorce.

\textsuperscript{17} Xin He, ‘Routinization of Divorce Law Practice in China: Institutional Constraints’ Influence on Judicial Behaviour’ (2009) 23 \textit{International Journal of Law, Policy and the Family} 83, 87. He also finds that adjudication for divorce is readily granted when a plaintiff reinstates the same divorce petition a second time, concluding that “adjudication against divorce for first-time petitions and adjudication for divorce for second-time petitions all serve the same function: to increase the judges’ performance and to reduce their risk of being adversely affected under the current incentive structures” (101).

\textsuperscript{18} See, for example, the case described in He (ibid) at 102, in which an abused wife, after adjudicated denial of her divorce petition, continued to suffer grave physical violence at the hands of her husband, and became almost paralyzed – “Had divorce been granted last time, none of [this] would have taken place … all I want now is a divorce”.

\textsuperscript{19} He and Ng, above n 13.
Kim Lee quickly became a symbolic hero for domestic violence victims in China, and her case ignited interest and debate about their plight. In particular, Kim Lee’s persistence in seeking (Chinese) legal remedies and vindication is an important example to other victims of abuse in a society and legal system which too often denies the gravity of the problem and the need for legal reform and protection, meaning untold women (and, presumably, men, although the majority of victims are women) are left to either put up with abuse, leave without support or protection, or take matters into their own hands. As Kim Lee put it, “You can pick up the law or you can pick up a fruit knife. But it’s still easier for people to pick up the knife than the law, and that’s what’s happening”.20

To give an example, at the same time as Kim Lee’s case was being decided in Beijing, the Sichuan High Court rejected an appeal against the conviction of Li Yan, a woman who was sentenced to death in August 2011 for killing her husband. Li Yan struck her husband with the butt of a rifle in the course of a fight; her lawyer said that her husband had been threatening to shoot her with the rifle. Numerous witness statements speaking to her long-term abuse at the hands of her husband were submitted to the court. However, in the absence of official reports – authorities had declined to investigate Li Yan’s case – these were not considered sufficient to prove domestic violence and accordingly the abuse was not taken into account in her conviction and sentencing.21

Clearly reform, and urgent reform at that, is needed to provide safeguards. National domestic violence-specific legislation should be enacted to address various gaps in domestic violence prevention and victim protection. Domestic violence should be capable of public prosecution, rather than dependent on the victim’s initiative. In criminal and family law cases alike, courts need clear guidance on the definition of domestic violence; how to deal with cases, such as that of Li Yan, involving “battered-women” syndrome”; 22 special procedural/evidentiary rules that take into account the complexity of domestic violence and attendant power/control dynamics; and the power to make emergency and final protective orders. In divorce proceedings, domestic violence victims should be entitled to obtain exemption from mediation, given

22 In one provincial study, it was found that over 50% of female criminal delinquency cases resulted from domestic violence (Zhao, above n 8, 222).
the power imbalance and emotional distress involved in confronting and negotiating with one’s abuser. Police officers, prosecutors and judges need training on appropriate responses to domestic violence cases, and clearly defined duties of reporting and intervention.

For all that remains to be done, there are signs that the authorities are increasingly taking the problem seriously. In the past decade, dozens of provinces have enacted local legislation and policies against domestic violence. In 2011, a pilot program saw courts in ten provinces authorized to issue protection orders at the request of domestic violence victims. Although progress on a central, specialized domestic violence law has been slow, the law is expected to pass sometime before 2018. In the meantime, Shenzhen, a Special Economic Zone that often functions as testing ground for planned national initiatives, will adopt domestic violence regulations by the end of the year, and the Supreme People’s Court has announced it will issue a judicial interpretation on domestic violence before 2014 is out, to provide more specific guidelines for courts on the definition, classification and criminal punishment of domestic violence. And in a further sign of the government’s commitment to tackling domestic violence, in June the Court overturned Li Yan’s conviction.

The Li Yan turnaround is particularly encouraging, as the move was largely in response to a groundswell of criticism of the judiciary’s mishandling of a case

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23 He and Ng, above n 13, 26; Zhao, above n 8, 237.
24 Zhao, above n 8, 244.
25 Yang, above n 10, 253.
29 司法解释 (sifa jieshi) – quasi-legislative instruments issued by the Supreme People’s Court to provide guidance to lower courts on the interpretation and application of central legislation.
30 Finder, above n 28.
involving heinous domestic abuse. This indicates that advocacy groups are making progress in raising public awareness of the issue. Further national law reform that signals clearly the Party-State’s commitment to the prevention of domestic violence could assist in further shifting cultural/societal norms. For too long, Chinese society has been at best uneducated about the issue of domestic violence, and at worst seen it as unproblematic. Male superiority is deeply ingrained in traditional Chinese culture. Confucianism, the ruling doctrine for most of China’s imperial era, presumes that humanity is inherently unequal, and that social harmony is attained when everybody “knows his place.” For the virtuous woman, this required heeding the “three obediences” – obeying her father before marriage, her husband during marriage, and her sons in widowhood. In some Chinese households, particularly in rural areas, similar beliefs about the proper authority of men over women persist today. Kim Lee’s husband’s lawyer, for example, defended his client’s actions, arguing that “domestic violence is when a man hits and injures his wife frequently over a long time but has no reason, but my client did that because he had conflicts with his wife”. Li Yang himself responded to his wife’s allegations with something far short of contrition: “Our problem involves character and cultural differences…I hit her sometimes but I never thought she would make it public since it’s not Chinese tradition to expose family conflicts to outsiders”.

Perhaps not, but perhaps the example of Kim Lee, a tenacious American who brought her expectations about finding justice and vindication in the law with her to China, and successfully found some measure of both in the Chinese system, will challenge those Chinese traditions, at least in some homes.

China’s social landscape has changed dramatically since the reform and opening era began in the 1980s. For better or for worse, the traditional view that “it is better to save a marriage than to build ten bridges” is being questioned, there is less social pressure on unhappy couples to reconcile and divorce rates are on the rise. What is needed is a concomitant increase in social pressure against domestic violence and in favour of women’s protection.

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32 三从四德 — San Cong Si De (Three Obediences and Four Virtues).
Tower Dumps, Information Privacy and Warrant Access
Mandy Lim, Rebecca Chong and Mark Burdon*

Abstract

Under the Telecommunications Interception Act 1979 (Cth), telecommunications data does not equate to private communications. Telecommunications data is viewed as the address on the envelope rather than the contents of a letter. As such, law enforcement and a range of Commonwealth, State and Territory government agencies can request and access such data from telecommunications and internet service providers without a warrant. However, recent media articles have revealed that the collection of telecommunications data by such agencies, in which authorisation for the disclosure of specified information is first required, has now progressed to a much larger scale through the technique of ‘tower dumps’. This technique allows agencies to collect metadata generated from mobile phones on a mass scale by requesting telecommunication providers to provide all data collected at a particular mobile phone tower over a period of time a period of time. This article explores the issue of metadata collection from tower dumps to identify the warrant access requirements to such data and thus re-examines the complex balance between governmental law enforcement requirements and information privacy protections for individuals.

I Introduction

The use of telecommunications and internet metadata for law enforcement purposes is currently a highly contested and complex issue, as exemplified by Attorney-General George Brandis’s repeated failed attempts to explain the concept of metadata in a recent Sky News interview.1 Metadata, in the simplest of terms, can be described as ‘data about data’.2 In telecommunication terms, metadata refers to data that is generated during phone calls such as the duration of a phone call, the location the call was made, the phone number called etc. Metadata therefore does not include the actual content of the phone conversation or an email message. Accordingly, legislative requirements regarding access to telecommunications data, such as that from phone calls or

* The genesis of this article lies in a research project for the Queensland Council of Civil Liberties as part the University of Queensland Pro Bono Centre initiative.


emails, have historically distinguished metadata from personal content.\(^3\) Whilst police and government agencies are required to obtain a warrant in order to lawfully gain access to personal content, no such requirement is necessary to access metadata.

This distinction was previously justified because the extent, scope and availability of metadata did not reveal identity or provide an insight into personal and private communications. Today, however, that is not necessarily the case. Technological capacities and the availability of an increasingly greater number of metadata sources\(^4\) now means that law enforcement agencies and other bodies can use metadata to identify intricate details of an individual’s life without having to access personal content. So much so, that some commentators consider metadata to be ‘the electronic equivalent of DNA, ballistics and fingerprint evidence, with a comparable power to exonerate and incriminate’.\(^5\)

To complicate matters further, a series of media articles has recently cast light on a new law enforcement practice involving metadata generated from mobile phones and devices, called ‘tower dumps’. This technique allows agencies to collect information from mobile phones on a mass scale by requesting telecommunication providers to provide all data collected by a particular mobile phone tower over a period of time. Data collected from such operations includes the identity, location and activity of the mobile phone devices,\(^6\) even when a call is not being made.\(^7\)

While phone carriers have stressed that it is only metadata that is being collected and not the actual conversations and text messages, the sheer number of persons whose data is collected from a tower dump merits consideration. It has been reported that over ninety nine per cent of individuals whose mobile

\(^3\) For example, in the *Telecommunications (Interception and Access) Act 1971*, Part 4-1 sets out the circumstances in which access to telecommunications data is permitted, but distinguishes in s \(172\) that this does not include the contents or substance of a communication.


phone data was collected through tower dumps were not targets for law enforcement or national security considerations. This in itself is a sufficient justification to re-consider the relevant warrant access regime and wider privacy considerations. Despite the obvious comparisons to a ‘fishing exercise’, law enforcement agencies nevertheless argue that tower dumps are a powerful tool that assists law enforcement activities.

This article outlines the practice of tower dumps before setting out the current legal framework in the *Telecommunications Interception Act 1979 (Cth)* (hereafter ‘TIA’) which distinguishes metadata from other types of communications data and provides different warrant access regimes for different types of data. Our analysis of the law reveals that the practice of tower dumps sits uncomfortably within the current access regime and this raises several complex questions about the nature of metadata and those agencies that can access tower dump data. For example, the statistics regarding the significant number of agencies potentially engaging in tower dump practices are surprising and it is possible that tower dumps are being used for purposes that go beyond traditional and recognised law enforcement purposes. If that is the case, then the debate about the complex balance between warrantless access to metadata for law enforcement requirements and the concomitant effect on individual privacy protections may need to be revisited.

II Mobile Phones and Tower Dumps

The telecommunications infrastructure that is readily accepted today as part of our everyday existence is significantly different to the ‘landline’ infrastructures of the relatively recent yesteryear. Our insatiable demand for mobile technologies, and mobile phones in particular, has required the development of a new technological infrastructure. Mobile phone usage is made possible by the use of radio communications that link an individual’s mobile phone to their respective carrier network. The carrier network is constructed around a large number of radio base stations that facilitate phone to network radio

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9 Francis, above n 7.
11 Grubb and Partridge, above n 6.
communications over geographical areas.\textsuperscript{13} The base stations are generally located on mobile phone towers and the number of phone towers required for a given geographical area depends on the configuration of topological surrounds and population concentration.\textsuperscript{14} Furthermore, as an individual transits from one location to another, the individual’s mobile phone will periodically identify itself to the nearest mobile phone tower in order to maintain constant radio communication and thus ensure the phone continues to operate whilst on the move.\textsuperscript{15} Each phone tower has a fixed capacity on the number of phone calls that be taken or data downloaded by individual phone users. Consequently, in urban areas with high density populations, a greater number of towers are required in order to manage and compensate for heavy, local network use, which in turn means, that such towers have the capacity to record and store details of a greater number of individual phone users.\textsuperscript{16}

This new infrastructure has in turn given rise to new law enforcement investigation and data collection practices, as exemplified by the US experience.\textsuperscript{17} Law enforcement agencies there have used a range of different investigation techniques. For example, the New York Police Department used mobile phone tower data to track protestors and intercept tweets posted as part of the Occupy Wall Street demonstration.\textsuperscript{18} Cell tower data has also been used in successful police investigations for bank robberies and murders\textsuperscript{19} and even car thefts and break-ins.\textsuperscript{20}

Tower dumps are one of the most prominent new techniques\textsuperscript{21} being employed by law enforcement agencies that take advantage of mobile phone infrastructures. A tower dump ‘allows police to request the phone numbers of all phones that connected to a specific tower within a given period of time.’\textsuperscript{22} The use of this practice in the US has been evident for several years. The American Civil Liberties Union (ACLU) undertook a national research project

\begin{itemize}
\item \textsuperscript{13} Ibid.
\item \textsuperscript{14} Michael Kalis, ‘Ill Suited to the Digital Age: Fourth Amendment Exceptions and Cell Site Location Information Surveillance’ (2013) 13 Journal of Technology Law & Policy 1, 3.
\item \textsuperscript{15} Pell and Soghoian, above n 12, 126.
\item \textsuperscript{16} Ibid, 127.
\item \textsuperscript{17} See e.g. Andrew Crocker, ‘Trackers that Make Phone Calls: Considering First Amendment P
\item \textsuperscript{18} Crocker, above n 17, 621.
\item \textsuperscript{19} Pell and Soghoian, above n 12, 120.
\item \textsuperscript{21} Ibid. See also discussion on stingrays etc.
\item \textsuperscript{22} Jeffrey Brown, What Type of Process is Required for a Cell Tower Dump? (16 May 2012) Cybercrime Review http://www.cybercrimereview.com/2012/05/what-type-of-process-is-required-for.html.
\end{itemize}
to identify the extent of tower dump activity in the US. The ACLU received over 5,500 pages of publicly accessible documents for over 200 law enforcement agencies. A USA Today investigation found that more than 125 police departments in 33 states have used the practice approximating to one in four US law-enforcement agencies. Moreover, Massachusetts senator Ed Markey’s inquiries to major US telecommunications companies such as US Cellular, Verizon and AT&T also revealed that there were approximately 9,000 reported cell tower dumps in 2012 alone. In 2011, service providers jointly reported a total of 1.3 million requests for access to subscriber data. Some of the major service providers fielded up to 700 to 1,500 law enforcement requests per day.

The use of tower dumps in Australia has only lately come to light. Recent articles published by Fairfax Media indicate law enforcement, and other government agencies have engaged in the practice of tower dumps in Australia. Details about how exactly law enforcement agencies are using the tower dump technique remain minimal, but journalists from the Sydney Morning Herald were able to obtain a statement from a Vodafone spokeswoman who revealed that ‘[o]n occasion mobile network operators receive requests from Australian law-enforcement agencies to provide communications information from a specific tower’. The spokeswoman also stated that the only data provided to law enforcement agencies was telecommunications metadata. This would denote that no actual content of phone conversations and text messages was disclosed. It also suggests that law enforcement and other government agencies believe they are not required to obtain a warrant to access tower dump data. The next section will consequently review the warrant access regime in relation to telecommunication data.

24 Kelly, above n 20.
26 Kalis, above n 14, 6.
27 Ibid.
28 Grubb and Partridge, above n 6.
III The TIA’s Access Regime

The TIA distinguishes between three types of data: communications, stored communications and telecommunications data. Each category of data has a different access regime and warrant requirement.

A Communications

‘Communications’ is defined under the TIA as ‘including a conversation and a message, and any part of a conversation or message, whether in the form of: speech, music or other sounds; data; text; visual images’. 29 Under Part 2, s 7(1) of the TIA states that a person cannot intercept, 30 authorise, suffer or permit another person to intercept or do anything that will enable any persons to intercept communication passing over a telecommunications system. However, s 7(2) gives a list of exceptions including employees of carriers carrying out work to set up or maintain telecommunication system, if it was for the purpose of tracing any person suspected of committing a criminal offence, or if the interception of communication was warranted or authorised. 31

Access to communications is governed under Part 2 TIA and it is limited to ASIO and other specified agencies under Part 2-5 TIA. 32 In order for ASIO to intercept communications, the Director-General of Security will have to request for an interception warrant from the Attorney-General. 33 The Attorney-General will issue a warrant if he/she is satisfied that the interception will likely assist ASIO in carrying out its functions of obtaining intelligence relating to security. 34 The request by the Director-General of Security will have to include a description of the telecommunications service including the name, address, and occupation of the subscriber and the number allotted to the service by a carrier and also specify the facts and other grounds which is considered necessary that the warrant should be issued. 35

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29 Telecommunications (Interception and Access) Act 1979 (Cth) s 5.
30 Ibid s 7(1)(a).
31 Ibid s 7(2).
32 ‘Agency’ in Chapter 2 means an ‘interception agency’, which is a Commonwealth agency or eligible authority of a State which the Minister declares as an agency upon the request of the Premier of that State under s 34 TIA Act (s 5 TIA Act). Such eligible authorities include state police forces, crime and misconduct commission (s 5 TIA Act). These include the Australian Federal Police, the Crime and Misconduct Commission, state police forces, and public bodies such as city councils and Australia Post, which are involved in imposing pecuniary penalty and collection of public revenue.
33 Telecommunications (Interception and Access) Act 1979 (Cth) s 9(1).
34 Ibid s 9(1)(b).
35 Ibid s 9(2).
Section 7(3) of the *TIA* also states that the Attorney-General must not issue a warrant unless he/she is satisfied that ASIO has exhausted all other practicable methods of identifying the telecommunications services used. If a named person warrant\(^{36}\) is requested, the Attorney-General will have to be satisfied that the interception is likely to assist ASIO in carrying out its functions and that a telecommunications service warrant is ineffective. If that is the case, the name, sufficient details of the telecommunications services and grounds that the Director thinks are necessary are required for the warrants to be issued. The Attorney-General must not issue a warrant unless there are no other practicable methods available to identify the telecommunications services used.

The warrants will authorise entry on premises specified for the purpose of installing, maintaining, using or recovering any equipment used to intercept such communications. The warrants may be in force for a period of time up to 45 or 90 days.\(^{37}\) The Director-General of Security can also request for warrants for collection of foreign intelligence under s 11A and s 11B of the *TIA* if the relevant considerations and requirements are satisfied. The Director-General of Security will have to write a report to the Attorney-General within 3 months after the expiration or revocation of each Part 2-2 warrant about the extent to which the interception of communications under the warrant has assisted the carrying out of ASIO’s functions.\(^{38}\)

Emergency requests to intercept contents can be made by a member of a police force if he/she honestly believes that another person is or is likely to die or be seriously injured and the interception can assist in dealing with the emergency.\(^{39}\) Other agencies which may apply for a warrant to intercept communications are listed under s 39(2) and include agencies involved in law enforcement investigation such as the Australian Federal Police, the ACC, the Crime Commission and the Crime and Misconduct Commission. All of the qualified agencies will have to apply in writing\(^{40}\) or over the telephone\(^{41}\) to an eligible judge or nominated AAT member for a warrant to intercept contents.

In the written application, the agencies must provide specific details in an affidavit including the facts and other grounds on which the application is

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\(^{36}\) A named person warrant is a warrant which allows the interception of a specifically named person’s communications made to and from any telecommunications service or made by means of any telecommunications devices, and may include the interception of any stored communications, see *Telecommunications (Interception and Access) Act 1979* (Cth) ss 5, 9A, 11B, 46A.

\(^{37}\) *Telecommunications (Interception and Access) Act 1979* (Cth) s 49.

\(^{38}\) Ibid s 17.

\(^{39}\) Ibid s 30.

\(^{40}\) Ibid s 40(1).

\(^{41}\) Ibid ss 40(2), 43.
based.\textsuperscript{42} In the telephone application, the member of the agency will have to explain the urgent circumstances and also the same information that is required in a written application.\textsuperscript{43} The nominated judge or AAT members will have to consider issues such as the extent of privacy being interfered with, the gravity of the offence being investigated, and also the necessity of the interception for the investigation of the offence.\textsuperscript{44} The judge or nominated AAT member must not issue a warrant unless they are satisfied that the agencies have no other methods to identify the telecommunications services used.\textsuperscript{45} Telecommunications interception warrants may be issued for the investigation of serious offences\textsuperscript{46} with a maximum penalty of at least seven years imprisonment.\textsuperscript{47} The agencies may also apply for a named person warrant under s 46A \textit{TIA}. The warrants obtained by the qualified agencies under Part 2-5 will be valid for up to 45 or 90 days.\textsuperscript{48}

\textbf{B Stored Communications}

Stored communications is defined as ‘communication that does not pass over a telecommunications system, and is held on the equipment that is possessed and operated by a carrier but cannot be accessed on that equipment by non-parties to the communication without the assistance of an employee of the carrier’.\textsuperscript{49} The \textit{TIA} makes it an offence with a 2 years imprisonment and/or 120 penalty units if a person other than the intended recipient accesses stored communications.\textsuperscript{50} However, access to stored communication is allowed if the act is reasonably necessary for the employee to perform its duties,\textsuperscript{51} which include the identifying of any person who has or is suspected to have contravened telecommunications offences under Part 10.6 of the Criminal Code,\textsuperscript{52} or if the access was sanctioned by a warrant.\textsuperscript{53}

The agencies that may apply for a warrant to access stored communications data are the same as those who can apply for a communications interception

\begin{itemize}
\item \textsuperscript{42}Ibid s 42(2).
\item \textsuperscript{43}Ibid s 43.
\item \textsuperscript{44}Ibid s 46(2).
\item \textsuperscript{45}Ibid s 46(3).
\item \textsuperscript{46}Ibid s 46(1)(d).
\item \textsuperscript{47}Ibid s 5D(2).
\item \textsuperscript{48}Ibid s 49.
\item \textsuperscript{50}\textit{Telecommunications (Interception and Access) Act 1979} (Cth) s 108.
\item \textsuperscript{51}Ibid s 108(2)(d).
\item \textsuperscript{52}\textit{Criminal Code Act 1995} (Cth).
\item \textsuperscript{53}\textit{Telecommunications (Interception and Access) Act 1979} (Cth) s 108(2)(f).
\end{itemize}
warrant and is listed under s 39 TIA. The applications will be made to a judge or a nominated AAT member and the application procedure and requirements under Part 3-3 of TIA are similar to that of an interception warrant under Part 2-5. However, stored communications warrants may be issued for the investigation of serious contraventions of at least three years’ imprisonment as a maximum penalty, which is a significantly lower threshold compared to the requirements for ‘communications warrants’. The duration of a stored communications warrant will be in force until it is executed or 5 days after the warrant is issued.

C Telecommunications Data

The type of regime most likely to be applicable to tower dump data is that which governs telecommunications data. There is currently no clear definition of ‘metadata’ or telecommunications data under the Australian legal framework. However, there is a general presumption that telecommunications data and metadata is essentially the same thing. Telecommunications data is regulated under Chapter 4 TIA, but is not defined in the Act. Nevertheless, as Chapter 4 TIA authorises access to ‘information or a document’, it implies that telecommunications data would either be information or a document. The Explanatory Memorandum for the TIA Amendment Bill 2007 (Cth) also provides that that telecommunications data is information about the process of communication and is distinct from the content of communications and stored communications data. More importantly, for the purposes of this article, telecommunications data is subject to less rigorous access regimes compared to communications or stored communications data.

54 Ibid s 39.
55 Ibid s 5E.
56 Ibid s 116(1)(d)(i).
57 Ibid s 119(1)(a).
58 Ibid s 119(1)(b).
59 Media reports suggest that the government has defined metadata following the Attorney-General’s disastrous interview with Sky News. The definition has not been made public See e.g. Christopher Joye, ‘Making sense of the government’s metadata mess’, The Australian Financial Review (online), 12 August 2014 http://www.afr.com/p/technology/making_sense_of_the_government_metadata_O201HVdB DxF7FQ66eIB7pI.
60 Australian Law Reform Commission, above n 49, 2484 [73.26].
63 Ibid 8.
There is currently no warrant regime for telecommunications data in Australia. Under Part 4, the holder of telecommunications data can voluntarily disclose the data to ASIO if it is in connection with ASIOs performance of its functions. The Director and Deputy Director of General of Security and a qualified member of ASIO may authorise the disclosure and access to existing and prospective telecommunications data. The holder of the data may also voluntarily disclose to an enforcement agency if the disclosure is reasonably necessary for the enforcement of criminal law or law imposing a pecuniary penalty or for the protection of public revenue. The disclosure of existing telecommunications data may also be authorised by an authorised officer of an enforcement agency for the purpose of criminal law enforcement, locating missing persons or of law imposing a pecuniary penalty or protection of the public revenue if the data is not voluntarily disclosed. An authorised officer of a law enforcement agency may also authorise the disclosure of prospective data if it is reasonably necessary for the investigation of a serious offence or an offence against a law of Commonwealth or a State or a Territory that is punishable by imprisonment for at least 3 years. Authorisation for access to prospective data can also be made if it is necessary for the enforcement of the criminal law of a foreign country.

D General Assistance Obligation – s313 Telecommunications Act 1997 (Cth)

Another method in which agencies can access all forms of the three types of communications data is through the general assistance obligation section under s 313 of Telecommunications Act 1997 (Cth) (‘TA’). Section 313(1) makes no restrictions as to who may make disclosure of information and is therefore a provision that is much broader and available to a wider range of agencies than the TIA. Carriers and carriage service providers may provide communications data to various agencies to prevent telecommunication

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64 Telecommunications (Interception and Access) Act 1979 (Cth) s 174(1).
65 Ibid s 175.
66 Ibid s 176.
67 Ibid s 177(1).
68 Ibid s 177(2).
69 Ibid s 178.
70 Ibid s 178A.
71 Ibid s 179.
72 Ibid s 180(4)(a).
73 Ibid s 180(4)(b).
74 Ibid s 180B.
75 Telecommunications Act 1997 (Cth).
76 Australian Privacy Foundation, above n 63, 4.
networks and facilities for crime prevention or prospective future offences and law enforcement. The section also provides that the carriers and carriage service providers have immunity from liability of any collateral damage if the disclosure was made *bona fide*. As these disclosures are made informally, it would be difficult to be detected by the public and there are no accountability mechanisms in place to ensure that the disclosure is not used inappropriately. Despite the lack of accountability and transparency measures that would be expected, a recent report by the Australian Privacy Foundation has suggested that some agencies have been relying on this provision to access different forms of communication data in recent years.

**IV Discussion**

Having set out the practice of tower dumps and the applicable law, we now discuss some of the key considerations of tower dump use in Australia. In particular, we consider two different issues. The first is whether telecommunications data can legitimately be classed as metadata. This issue is particularly important given that a wide range of government agencies could potentially have access to tower dump data and the implications this may have in relation to compliance with the *Privacy Act 1988* (Cth). The second issue is whether the practice of tower dumps requires warrant access by law enforcement and government agencies.

**A Is Tower Dump Data Really Just Metadata?**

As highlighted above, telecommunications data is currently not defined under the *TIA*. The government has argued that the current legal framework is more likely to develop flexibly alongside expected technological changes involving telecommunications infrastructures by not defining telecommunications data. However, it seems clear that telecommunications data is intended to refer to metadata, as detailed in the Explanatory Memorandum of the *Telecommunications (Interception and Access) Amendment Bill 2007* (Cth). The Memorandum states that telecommunications data is ‘information or documents about the process [emphasis added] of the communication passing through the communications

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77 *Telecommunications Act 1997* (Cth) ss 313(1)-(2).
78 Ibid s 313(3).
79 Ibid ss 313(5)-(6).
80 Australian Privacy Foundation, above n 63, 5-6.
81 Ibid 4.
Information about telecommunications process fits squarely within the classic notion of metadata. In other words, data about processes is the address on the envelope. However, as highlighted above, and as presaged by the intentional avoidance of a clear definition of telecommunications data in the TIA, the amount of metadata collected has evolved to the extent that the difference between metadata and content is now much murkier. Current technological infrastructures are potentially a source of mass personal information collection and surveillance due to wide-scale developments, such as the vast extent of mobile phone tower networks, which now generate and record different types of metadata. It is the combination of amount, extent and context that is creating a situation in which the clear distinctions between metadata and content are now being blurred particularly in relation to location-based metadata collection. It is therefore becoming possible to identify individuals and their behavioural patterns from metadata.

For example, metadata generated by mobile telecommunication infrastructures may provide a range of different types of metadata that can be used in respect of an identified individual. For example, the addresses or phone numbers of communications to and from that individual, information as to the time of the communication and limited information as to its nature (for example, the duration of a voice call or the size of an email) can now be used to identify individuals. Researchers from Stanford University have recently demonstrated that metadata generated from mobile phone usage can be used to reveal details of the phone owner’s ‘familial, political, professional, religious, and sexual associations’, as well as ‘potential drug use, medical conditions, political associations and after hours activities with strip clubs’. The Stanford study involved the use of a specifically designed Android app that recorded metadata details of phone use. The simple act of phoning a certain organisation was sufficient to enable the researchers to infer sensitive aspects of an individual’s life. Moreover, calling patterns were also highly indicative of activities of a sensitive or personal nature, as indicated by this example:

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87 Ibid. For example, participants called such organisations as Alcoholics Anonymous, gun stores and sexually transmitted disease clinics.
Participant E had a long, early morning call with her sister. Two days later, she placed a series of calls to the local Planned Parenthood location. She placed brief additional calls two weeks later, and made a final call a month after.\textsuperscript{88}

These examples appear to demonstrate that highly sensitive and personal information can be revealed through mobile phone metadata analysis. Should metadata from mobile phone towers be regarded as personal information and therefore fall under the auspices of the \textit{Privacy Act 1988} (Cth)? If so, would it make any difference?

The issue of whether mobile phone metadata is personal information is a complex question. Personal information under the \textit{Privacy Act} is information or an opinion about an identified individual or an individual who is reasonably identifiable.\textsuperscript{89} Without a clearer understanding of what metadata is collected by mobile phone towers, it is impossible to determine whether the information is sufficient to identify an individual. However, the \textit{Privacy Act} recognises that information can be combined with other information and that process of aggregation can lead to a situation in which an individual is reasonably identifiable. The metadata collected by mobile phone towers is important here because if phone unique identifiers, such as a mobile phone number or other identifier hard-built into the phone are collected, then this type of data collection will make a reasonable identification more likely.\textsuperscript{90} That is certainly the policy position put forward by the European Union’s Article 29 Working Party, which is the EU’s policy body for data protection development. This argument is also strengthened by the recent decision by the Court of Justice of the European Union where the court declared that the EU’s 2006 Data Retention Directive, which requires telecommunications providers to collect and retain communications data, interferes with the European citizens’ fundamental rights to privacy.\textsuperscript{91} The basis for the decision was that the

\textsuperscript{88} Ibid. It should also be noted that the researchers, to their credit, did not try to seek confirmation from the participant regarding their findings due to the highly sensitive and personal nature of their interference.

\textsuperscript{89} \textit{Privacy Act 1988} (Cth) s 6 (1).


\textsuperscript{91} Case C-293/12 (Digital Rights Ireland Ltd v The Minister for Communications, Marine and Natural Resources, The Minister for Justice, Equality and Law Reform, The Commissioner of the Garda Síochána, Ireland and The Attorney General) (Request for a preliminary ruling from the High Court of Ireland) and Case C-594/12 (Karnter Landesregierung and Michael Seitlinger v Christof Tschohl, Albert Steinhauser, Jana Herwig, Sigrid Maurer, Erich Schweighofer, Hannes Tretter, Scheucher Rechtsanwalt GmbH, Maria Wittmann-Tiwald, Philipp Schmuck, Stefan Prochaska and Others) (Request for a preliminary ruling from the Verfassungsgerichtshof (Austria)) [2013] ECR [34]-[35].
retained telecommunication data ‘may allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained’. However, the situation in Australia is not so clear and it therefore remains uncertain whether mobile phone metadata would be classed as personal information or not.

Even if such data was deemed to be personal information, the limited privacy protections accorded by the Privacy Act may not actually be sufficient to provide meaningful sources of accountability for aggrieved individuals, such as the many thousands of persons whose mobile phone data is collected through tower dumps. For example, ASIO is exempt from the Privacy Act and its acts are instead regulated by the A-G under the Australian Security Intelligence Organisation Act 1979 (Cth). ASIO can therefore conduct tower dump authorisations without any consideration of the Privacy Act. Moreover, the Privacy Act also has a number of wide ranging exemptions that allow large-scale disclosures of information if that information is required or authorised by or under an Australian law. Given the breadth of the current access regime, which is discussed below, this exemption means that it would be relatively easy for a requesting organisation to contend that the tower dump is authorised by law. This is an important point considering the many different types of organisation that have been accessing telecommunications data that presumably include tower dumps. For example, the 2012-13 TIA Annual Report produced by the Attorney-General’s Department reveals that in addition to law enforcement agencies (e.g. the Australian Federal Police, State and Territory police, Crime Commissions, Commonwealth enforcement agencies (e.g. Australia Post) and State and Territory enforcement agencies, (e.g. local councils and even the RSPCA), were all authorised access to telecommunications data.

Given the potential for mobile phone metadata to reveal highly sensitive and intrusive information about an individual, it could be argued that such data should be recognised as personal information. If that is the case, it may be necessary to revisit the current access regime and question whether warrants should be required for access to telecommunications data generated by tower dumps. This question is especially important considering the breadth of agencies in Australia that currently access this data without warrant. At present, it is unclear which of these agencies engage in tower dumping practices, but as no further requirements on top of authorisation to access metadata are

92 Ibid [27].
93 Burdon and McKillop, above n 91, 734.
94 Privacy Act 1988 (Cth) sch 1.
necessary for a tower dump, it seems that these agencies would be able to engage in this practice if they wanted to.

On its face, it would seem to be arguable that the data collected from tower dumps is mobile phone related metadata and should therefore be classed as telecommunications data under the TIA. The mobile phone data in question does not involve interception of communications or stored communications and the data accessible by law enforcement agencies is presumably the type that is generally envisaged to be transactional data that is a by-product of automated infrastructural and technological processes. As a consequence, it could be argued that tower dump data is the equivalent of telecommunications data and therefore warrant access is not required by law enforcement and other agencies. However, the application of the TIA to tower dump data may not be so clear-cut.

Part 4 of the TIA regards the collection of telecommunications data and it would seem that a certain type of collection is envisaged. For example, the TIA allows authorisations for access to telecommunications data that encompasses pre-existing or prospective ‘specified’ information or ‘specified’ documents. This specificity requirement is potentially important in the context of tower dumps. Part 4 of the TIA appears to be directed towards allowing the disclosure and collection of specified documents or information and thus may not cover processes of mass data collection such as tower dumps. Again, the use of tower dumps is important in this regard because the practice quite often has an element of predictive investigation. In other words, agencies use tower dumps to identify patterns of behaviour that indicate the potential for criminality. Law enforcement agencies’ engagement in this type of educated guess work is why their requests for tower dump data often involves a number of mobile phone towers. The inclusion of multiple towers,
however, further distances agencies from the requirement in the *TIA* for specificity, indicating the generality of this approach. Such approaches are more likely to give rise to fishing expeditions and are less likely to be covered by the *TIA*.

It is also important to consider the voluntary disclosure provisions that arise from s 174 *TIA*. As highlighted above, a telecommunications service provider may voluntarily disclose telecommunications data to ASIO if the disclosure is in connection to ASIO’s functions, and an enforcement agency if the disclosure is reasonably necessary for the enforcement of criminal law or a law imposing a pecuniary penalty or for the protection of public revenue. The absence of ‘specified’ in s 174 and s 177 is important here as it suggests that a telecommunications service provider may be able to disclose telecommunications data on a more generalised basis. Accordingly, while authorisations for telecommunications data in relation to tower dumps are questionable due to the specificity requirement of Part 4, it would seem that such data could be disclosed under s 174 as long as the purpose of the disclosure meets the requirements of s 177. However, it should also be noted that s 174(2) and s 177(3) state that the voluntary disclosure sections do not apply if information or document has already been requested by an agency.

It is therefore unclear whether, and to what extent, the *TIA* would authorise the practice of tower dumps by Australian law enforcement and other government agencies. It is certainly arguable that tower dump data is telecommunications data but the collection of that data is potentially problematic given the generalised nature of collection processes. If that is the case, agencies can rely on s 313 *Telecommunications Act* (*TA*) for tower dumping practices.

As highlighted above, s 313(3) *TA* obliges carriers, providers or telecommunications networks or facilities and carriage service providers to give officers and authorities of governmental agencies help as is reasonably necessary for a range of purposes including: enforcing the criminal law and laws imposing pecuniary penalties; protecting the public revenue and safeguarding national security. Section 314 outlines the conditions on which

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The first and had also registered with two of the towers. the FBI was then able to go back to the judge and obtain more specific court orders which enabled them to identify the subscriber names of the phones and eventually led to catching the robber. (Nate Anderson, *How “cell tower dumps” caught the High Country Bandits — and why it matters* (29 August 2013) arstechnica, http://arstechnica.com/tech-policy/2013/08/how-cell-tower-dumps-caught-the-high-country-bandits-and-why-it-matters.

*99* *Telecommunications (Interception and Access) Act 1979* (Cth) s 177(1).

*100* Ibid s 177(2).
help is to be provided to enforcement agencies under s 313(3), and there is nothing in s 314 that suggests that the practice of tower dumps is intended to be prohibited. As such, if the use of tower dump data is considered reasonably necessary for the purposes highlighted above, a provider will be required to disclose tower dump data. If tower dump data is not telecommunications data and is in fact content or substance of communications, s 276 TA would prohibit the disclosure of that data. It should also be noted that Part 4-1, divisions 3, 4, 4A TIA set out circumstances when s 276 TA does not apply. Sections 171 and 172 TIA reiterate that these divisions do not allow disclosure of contents or substance of communications. However, s 276 TA does not prohibit disclosure of metadata per se. Accordingly, although ss 175, 178, 178A, 179 TIA state that disclosure of information under s 276 is not prohibited if it is covered by authorisation, it seems that there is no prohibition against disclosing telecommunications data.

The issue of warrantless access for the disclosure of tower dump data under the TIA is not clear cut. Whilst there are no clear prohibitions of such practices in the TIA, it is equally unclear to what extent the specificity requirement under s 174 applies to tower dumps. Furthermore, the broad obligations on telecommunications to provide telecommunications data under s 313 could easily be interpreted as allowing agencies to collect tower dump data, as long as the providers supply the data in ‘good faith’ to aid in the agencies’ enforcement purposes. In fact, under the current legal framework, all forms of communications data can be voluntarily disclosed by communication service providers under s 313 TA. In practice, this allows various agencies to bypass the warrant regime by directly requesting for any communications data from the communication services providers if it can be justified as a means of crime prevention of prospective future offences and law enforcement. In that sense, s 313 would allow the disclosure of tower dump data regardless of whether it is telecommunications or communications data.

Should access to tower dump data therefore require a warrant? In the 2012-13 year, there were 319,874 authorisations made for the access to telecommunications data in existing information or documents for the enforcement of a criminal law and an additional 10,766 for the enforcement of a law imposing a pecuniary penalty or the protection of public revenue.

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101 Conditions provided in s 314 include that the person giving help does not profit nor bear the costs of giving the help and that the person giving help complies with the requirement on the terms and conditions agreed by the parties or the arbiter appointed by the parties.

102 Telecommunications Act 1997 (Cth) ss 313(1)-(2).

103 Ibid s 313.

104 Attorney General’s Department, above n 96, 49 (Table 29).

105 Ibid 52 (Table 33).
is unclear, however, to what extent and whether these figures include tower dumps. Moreover, it is unclear whether only one authorisation is required for a tower dump or whether the number of authorisations is required for each mobile phone tower accessed.

A difficult balance needs to be struck here. The introduction of a warrant access regime for tower dump data may, in principle, appear to be an appropriate response to protect individuals' privacy rights from being compromised. However, it presents a number of practical and process challenges. Introducing a warrant regime that may involve tens or potentially hundreds of thousands of requests will put a considerable burden on the 90 eligible judges or AAT members who can issue warrants for the access of communications data under the current legal framework. A significant increase in the issuing authorities to deal with extra applications of warrants to access tower dump data requests would therefore be required.

V Conclusion

The current legal frameworks in Australia and in other jurisdictions discern between three different types of telecommunications data. Access to these different types of data is dependent on formal and less formal access structures. Those structures are themselves predicated on the type of data sought. For example, more stringent and formal procedures are required for access to ‘contents’ data that clearly involve personal communications. However, the requirements for access to telecommunications data are considerably less and may even be accessed in a relatively informal manner. The reason for this distinction is that telecommunications data does not confer the same type of personal insight by reason of third party access to it.

This article casts doubt on that proposition particularly in relation to tower dumps. Mobile phone metadata accords more opportunities for identifying the personal aspects of an individual’s life than has previously been the case. However, the current Australian law has been slow to recognise this change in technological capacity, and indeed, the widespread availability of all kinds of metadata. This indicates a pressing need for more significant public and political debate regarding the role of metadata, law enforcement and privacy in the political arena. This will help raise public awareness regarding the way in which metadata, such as telecommunications data, or any form of communications data is being collected and analysed by a wide range of government agencies.

As highlighted in the article, the limited protections arising from the Privacy Act may not provide any meaningful recourse for innocent individuals who are
caught up in the wide net of tower dump collection. It is therefore important to have increased accountability and transparency regarding the use of tower dumps as an investigatory mechanism. At the very least, the frequency with which towers dumps are conducted and which agencies conduct such requests should be noted. Without greater knowledge it is difficult to determine whether warrant access should be required for tower dumps. However, it is clear that informed and public discussions on access to tower dump data are required in order to fully understand the complexities that arise. Only then will it be possible to have a forthright and considered dialogue about the difficult balance between law enforcement and privacy that tower dumps entail.
There and Back Again: A Human Rights Perspective on the Apprehension and Return of Unaccompanied Minors from Central America

Joseph Lelliott*

I Introduction

For more than a decade migrant smuggling has been an important and divisive issue in Australia. Both the scope of the problem, and how best to address it, have been the topic of heated political debate. Looking across the Pacific however, we find that whatever problems we have with migrant smuggling pale in comparison to the predicament that has recently been facing the United States. A surge in migrant smuggling over the border with Mexico has seen over 50,000 unaccompanied minors from Central America brought into the United States since October 2013. The phenomenon has become intensely political in the United States, with the result that both sides of politics have publicly considered methods of quickly and cost-effectively repatriating the minors. In particular, both the Obama Administration and House Republicans have mooted a change to the Trafficking Victims Protection Reauthorization Act 2008 (‘TVPRA’),\(^1\) which currently prevents unaccompanied minors who do not originate from contiguous countries from being returned immediately to their country of origin.\(^2\) Revoking these protections would allow US immigration officials to deal with unaccompanied children in the same way they deal with children from Mexico - via an inadequate and poorly implemented initial screening process.

The development of international human rights law has brought with it a series of protections and best practice guidelines that are relevant both to the treatment of refugees and asylum seekers generally, and to the treatment of children in the migration process specifically. Notably, a UNHCR report recently found that, following interviews with unaccompanied minors from Central America, the vast majority were owed international protection.\(^3\) There has also been recognition that unaccompanied children are ‘particularly

* Final year LLB/BA (Qld).
\(^3\) UN High Commissioner for Refugees, ‘Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection’ (Report, United Nations High Commissioner for Refugees Regional Office for the United States and the Caribbean, 2014) 6.
vulnerable to human rights violations and abuses at all stages of the migration process'. With this in mind, and in light of the political responses to the arrivals; the purpose of this essay is to examine whether current and proposed US immigration processes align with international human rights standards. To this end, this essay will provide an overview of some of the international law relevant to unaccompanied minors (Part II); an examination of US immigration processes (Part III); and a brief comparative analysis of the two (Part IV).

It should be noted that the scope of this essay is necessarily restricted, and as such a holistic appraisal of international law, or an in-depth analysis of US legal protections and processes, are beyond its remit. It should be properly viewed as an overview of the relevant issues in these contexts, and as a starting point to further and more thorough analysis.

II International Protections for Unaccompanied Minors in the Refugee Process

No single instrument deals specifically and holistically with the rights of unaccompanied minors in international law, despite the existence of the aptly titled, and admittedly central, Convention on the Rights of the Child (the ‘CRC’). Due to this state of affairs, the general international law relating to unaccompanied minors must be located within an amalgam of various treaties, international humanitarian law, customary international law, and the practices of both states and international agencies. Internationally, the law relating to children represents a series of ‘well-developed and accepted human rights standards’ that have, through the increasing strength of human rights law and institutions, effectively become international norms. As Goodwin-Gill argues, ‘[t]he international law of the child must be understood in context,… [as] a standard by which to measure performance’. This essay will examine the 1951 Convention Relating to the Status of Refugees, its attendant 1967 Protocol Relating to the Status of Refugees (hereafter jointly referred to as the ‘Refugee Convention’), the CRC, and accompanying guidelines and comments, with the aim of elucidating

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8 Opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).
their contribution to the human rights of unaccompanied minors in the immigration process.

A *The 1951 Refugee Convention and the 1967 Protocol*

The Refugee Convention is the primary source of refugee rights in international law. A refugee under the Refugee Convention is a person who satisfies Article 1A(2), and who is not otherwise excluded under Article 1. The Convention guarantees a number of rights that attach to all refugees within the Refugee Convention’s definition, including, importantly, a prohibition on refoulement and guaranteed access to court systems.

In the context of this essay, the principle of non-refoulement is integral. Article 33(1) of the Refugee Convention provides that

> No contracting state shall expel or return (“refoule”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

It should be noted that the Article does not impose a positive obligation on states to grant refugee or asylum seeker status to anyone who falls under the definition of the convention and arrives within a contracting state’s borders.\(^\text{10}\) It only acts to restrain states from returning such persons to a place where their ‘life or freedom would be threatened’.\(^\text{11}\)

1 *Procedural Requirements for Refugee Status determination*

Of course, the prohibition on refoulement requires a state party to procedurally determine whether or not a person is a refugee under the Refugee Convention, so refoulement of a valid refugee does not occur. The Refugee Convention itself doesn’t specify any particular procedures in this regard, though the definition of a refugee itself influences general state practice.\(^\text{12}\)

Additional procedural requirements are nevertheless stated in other documents. The *Conclusions Adopted by the Executive Committee on the International*
Protection of Refugees outlines ‘certain essential guarantees’ required by the UNHCR Executive Committee.\textsuperscript{13} Importantly, the Conclusions requires that an applicant be given a ‘complete personal interview by a fully qualified official and, whenever possible, by an official of the authority competent to determine refugee status’, in addition to further basic requirements outlined under Conclusion No. 8.\textsuperscript{14} Similar requirements are also stipulated in the Handbook on Procedures and Criteria for Determining Refugee Status under paragraph 192(i)-(vii).\textsuperscript{15} For example, an applicant should ‘receive all necessary guidance as to the procedure to be followed’,\textsuperscript{16} and ‘should be given the necessary facilities, including the services of a competent interpreter, for submitting his case to the authorities concerned’.\textsuperscript{17}

Further procedural guidelines have been recommended specifically in the assessment of claims made by child applicants. In particular, the UNHCR has recognised the difficulties children may face in articulating their circumstances, and any relevant emotions and fears, that may need to be considered during asylum procedures.\textsuperscript{18} It has also been noted that, whereas in interviews between an adult and an examiner where the burden of proof is shared, an asylum examiner may need to take on a greater burden when dealing with an unaccompanied minor.\textsuperscript{19}

\begin{itemize}
\item \textsuperscript{13} UN High Commissioner for Refugees, Conclusions Adopted by the Executive Committee on the International Protection of Refugees, Conclusions no. 1-109, ExComm, 26-60th Sessions (December 2009); UN High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/1P/4/ENG/REV.3 (December 2011) para 192 (the ‘Handbook on Procedures and Criteria for Determining Refugee Status’).
\item \textsuperscript{14} UN High Commissioner for Refugees, The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum, Conclusion no. 30, ExComm, 34th sess (1983) para (e)(i).
\item \textsuperscript{15} Handbook on Procedures and Criteria for Determining Refugee Status, HCR/1P/4/ENG/REV.3 (December 2011) para 192(ii)(vii).
\item \textsuperscript{16} Handbook on Procedures and Cross Criteria for Determining Refugee Status, HCR/1P/4/ENG/REV.3 (December 2011) para 192(ii).
\item \textsuperscript{17} Handbook on Procedures and Criteria for Determining Refugee Status, HCR/1P/4/ENG/REV.3 (December 2011) para 192(iv).
\item \textsuperscript{18} UN High Commissioner for Refugees, ‘Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection’ (Report, United Nations High Commissioner for Refugees Regional Office for the United States and the Caribbean, 2014) 88.
\item \textsuperscript{19} UN High Commissioner for Refugees, The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum, Conclusion no. 107, ExComm, 58th sess (2007) para (g)(viii); UN High Commissioner for Refugees, ‘Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection’ (Report, United Nations High Commissioner for Refugees Regional Office for the United States and the Caribbean, 2014) 89.
\end{itemize}
However, despite UNHCR recognition in recent years of the special requirements of children, the Refugee Convention itself does not contain any specific provisions relating to children as refugees. At the time the Refugee Convention was drafted, the inclusion of categories of refugees was debated, but ultimately rejected.  

B Convention on the Rights of the Child

Adopted in 1989, the CRC articulates a set rights owed to children. Although these rights do not specifically address either the definition of a refugee child, or any special procedures for assessing the claims of refugee children, Article 22(1) of the CRC does give some guidance, mandating that

State parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

It is worth noting that, interpreted in line with the Refugee Convention, the CRC has been taken at both domestic and international levels to have a bearing on the meaning of ‘persecution’ for the purpose of child refugee status determination. The UNHCR has stated that the rights granted under the CRC should be factored into a child-sensitive interpretation of persecution that explicitly recognises child specific rights; a position also supported by academics. Domestically, the Canadian Federal Court in Kim v Canada (Minister for Citizenship and Immigration) has also found that the CRC adds ‘nuances’ to the definition of persecution under the Refugee Convention that must be taken into account. Some tacit admissions by the courts in the United

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20 Interestingly, the United States proposed the inclusion of four categories of refugees, one of which was to be ‘unaccompanied minors’; See Jason Pobjoy, ‘A Child Rights Framework for Assessing the Status of Refugee Children’ in Research Handbook on International Law and Migration (2014, Edward Elgar) 101.
22 UN High Commissioner for Refugees, Guidelines on International Protection: Child Asylum Claims under Article 1A(2) and 1(F) of the 1951 Convention and/ or 1967 Protocol relating to the Status of Refugees, HCR/GIP/09/08 (22 December 2009) paras 1 and 5.
24 2010 FC 149; [2011] 2 FCR 448.
States have also suggested that the **CRC** implicates child specific rights into the definition of persecution.\(^{25}\)

Additionally, Article 12 of the **CRC** has been interpreted as a procedural guarantee in the assessment of child refugee status determinations.\(^{26}\) The Article provides that:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The **UNCRC** in its General Comment no. 12 has stated that Article 12 means that children must be given the opportunity to freely express their views without any ‘undue influence or pressure’.\(^{27}\) State parties must also create an environment where a child feels secure and respected, and must inform the child of all ‘matters, options and possible decisions to be taken and their consequences’.\(^{28}\) In order to achieve these conditions, the **UNCRC** stipulates that core obligations of state parties include adequately training professionals working with children on the procedural requirements of Article 12.\(^{29}\) This would include persons engaged in refugee status determinations.

Finally, Article 3 of the **CRC** states that the best interests of the child must be the primary consideration in all actions taken regarding the child. This Article arguably raises complementary protections for children who may otherwise not fall under the definition of persecution in the **Refugee Convention**.\(^{30}\) The **UNCRC** in its General Comment no. 6 has stated that any refoulement of a child must

\(^{25}\) See, eg, *Mansur v Ashcroft* 390 F.3d 667 (9th Cir. 2004).


\(^{27}\) UN Committee on the Rights of the Child, *General Comment No 12: The Right of the Child to be Heard*, 51st sess, CRC/C/GC/12 (1 July 2009) para 22.

\(^{28}\) Ibid para 25.

\(^{29}\) Ibid para 49.

be in the child's best interests.\textsuperscript{31} Importantly, if returned to their country of origin, children must have 'secure and concrete' arrangements for care and custodial responsibilities.\textsuperscript{32} Additionally, the UNCRC stated that 'Non rights-based arguments such as those relating to general migration control, cannot override best interests considerations'. \textsuperscript{33} The complementary protection granted under Article 3 puts in place a significantly high threshold for the return of children to their country of origin, and suggests that status determinations may have to consider claims that would normally fall outside the normal definition of persecution. Indeed, viewed holistically and in combination with the \	extit{Refugee Convention}, the \	extit{CRC} arguably obligates states to weight any claims of asylum towards the side of the child, and contemplates return only when it is clear that the child would suffer no detriment above what they would experience in the destination state.

\textbf{1 A Right to Legal Representation?}

The UNCRC in its General Comment no. 10 has stated that the \	extit{CRC} requires that a child in the justice system be provided with 'appropriate assistance in the presentation and preparation of his / her defence'.\textsuperscript{34} Where at all possible this must be adequately trained legal or paralegal assistance. Furthermore, the child and the assistant must have adequate time to prepare a defence.\textsuperscript{35} Drawing on General Comment 6 of the UNCRC, the UN Special Rapporteur on the Human Rights of Migrants has further stated that countries must comply with age appropriate due processes of law including access to 'free legal aid'.\textsuperscript{36} Relevantly, many countries have taken steps to provide free legal advice to unaccompanied minors. Countries such as Sweden and Norway provide lawyers for all unaccompanied minors, while the United Kingdom and Australia provide the right to free legal representation.\textsuperscript{37}

\textsuperscript{31} UN Committee on the Rights of the Child, \textit{General Comment No 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin}, 39\textsuperscript{th} sess, CRC/GC/2005/6 (1 September 2005) para 84.
\textsuperscript{32} Ibid para 85.
\textsuperscript{33} Ibid para 86.
\textsuperscript{34} UN Committee on the Rights of the Child, \textit{General Comment No 10:Children’s Rights in Juvenile Justice}, 44\textsuperscript{th} sess, CRC/C/GC/10 (25 April 2007) para 49.
\textsuperscript{35} Ibid para 50.
III Legal Protections and Realities for Unaccompanied Minors in the United States

In the United States, the primary governing law for unaccompanied minors entering the United States is the TVPRA. It should be noted that the Act treats children differently dependent on whether they are from contiguous or non-contiguous countries. Children from Mexico are granted far fewer legal protections under the TVPRA than children from other Central American countries.

If a child is deemed to originate from a non-contiguous country, the child must be transferred into the custody of the United States Department of Health and Human Services’ Office of Refugee Resettlement Division of Unaccompanied Children’s Services (the ‘ORR’) within 72 hours of apprehension. The TVPRA then requires, if the government wants to expel a child, that the child is placed in removal proceedings before an immigration judge, which must constitute a full and fair hearing. These proceedings, however, are adversarial and complex, and there is no domestic legal requirement for a judge to consider the best interests of the child. Furthermore, although the child is afforded the right to be represented by an attorney, there is no right to be provided with free legal representation. This means that more than half of unaccompanied minors in removal proceedings are unrepresented. These statistics are even worse for minors who face removal proceedings while held in detention. All respondents held in Eloy detention centre in Arizona in 2011, including minors, received representation in only 15 per cent of cases. These statistics are damning when it is considered that the inability of minors to participate in legal proceedings in a meaningful way ‘will most often lead to removal or deportation to their home countries’.

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The situation for children from contiguous countries is even worse. Presently, unaccompanied minors from Mexico enter a truncated and streamlined process that allows for immediate repatriation following apprehension by the Customs and Border Patrol (the ‘CBP’). If a child is independently willing to return voluntarily, is not a victim of trafficking, and has not expressed a fear of return, then the child can be removed immediately from the United States. Unfortunately, it appears that even these limited legal safeguards have been poorly and inadequately implemented. A comprehensive report in 2011 found that the CBP facilities were inappropriate for conducting interviews, that CBP officers had no specialised training, and that the forms used to determine if a child had been trafficked, or was in fear of persecution, were inadequate. Evidence has also indicated that the forms are used inconsistently, and that the child often believes the only realistic option available is to return to Mexico.

A separate report from 2009 further found that in 2007, of 90,000 children apprehended on the Mexico border, nearly all of them were repatriated immediately due to a lack of effective screening mechanisms by the CBP. In this context, a UNHCR Report in 2014 specifically recommended, among other things, that capacity be enhanced for identifying children with international protection needs, and to this end that more effective tools and training procedures be implemented.

IV Observations and Conclusions

As mentioned above, the United States has recently considered reducing the protections for unaccompanied minors from Central American countries in line with the current legal requirements for minors from contiguous countries. The process for dealing with non-contiguous minors is already inadequate; the protections that would be afforded under legislation similar to those dealing with contiguous minors would be further insufficient, especially considering even the more basic requirements of International Refugee Law.

50 UN High Commissioner for Refugees, ‘Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection’ (Report, United Nations High Commissioner for Refugees Regional Office for the United States and the Caribbean, 2014) 54.
Considering that the UNHCR has indicated that the majority of unaccompanied minors arriving from Central America to be deserving of international protection, any ‘en masse’ return of the minors by the United States may potentially be a breach of Article 33(1) of the Refugee Convention. Furthermore, the current processes for determining the status of minors from contiguous countries departs significantly from the guidelines of the UNHCR Executive Committee.\textsuperscript{51} Available evidence suggests that status determinations are undertaken with inadequate resources, in inadequate locations, and with poorly trained officials.

A continuation or reduction in the rights afforded to unaccompanied refugee minors from Central American countries may also depart from Article 22(1) of the CRC. As well as not considering specialised child-sensitive definitions of ‘persecution’ for children, immigration processes fail to place children in an environment without any ‘undue influence or pressure’, or to provide adequately trained officials to make judgements, as per Article 12. Additionally, there is no requirement to consider the best interests of the child, either by CBP officials or by judges. This departs from the requirements of Article 3 of the CRC, insofar as it seems clear that any refoulement of Central American unaccompanied minors is unlikely, in most cases, to be in their best interests. In addition, and as noted in Part III, unaccompanied minors are rarely provided with legal assistance when facing judicial proceedings. The UNHCR has observed that persons who are not provided with legal representation are unlikely to able to adequately defend themselves in legal proceedings.\textsuperscript{52} In line with these comments, the weight of international best practice and state practice falls behind the provision of free legal advice to unaccompanied minors, and the United States should attempt to do likewise.

It should be noted that these observations are neither comprehensive, nor do they take into account all the rights and complementary protections that may be afforded to unaccompanied minors under international and domestic law. Nevertheless, the conclusions of this essay should serve to indicate that the influx of unaccompanied minors into the United States raises a number of important human rights related questions – especially concerning the protections that should be given to those children that are genuine refugees deserving of assistance and non-refoulement.

\textsuperscript{51} UN High Commissioner for Refugees, \textit{Conclusions Adopted by the Executive Committee on the International Protection of Refugees}, Conclusions no. 1-109, ExComm, 26-60th Sessions (December 2009).

\textsuperscript{52} UN Human Rights Committee, \textit{General Comment No 32: Article 14: Right to Equality before courts and tribunals and to a fair trial}, 90th sess, CCPR/C/GC/32 (23 August 2007) para 10.
An Interview with Dr Jonat
han Fulcher*

PB: Dr Jonathan Fulcher, thank you for joining us. What is native title?

JF: In the *Mabo* decision the High Court found that the common law recognised that native title exists in Australia. The concept of "native title" in *Mabo* is now legislated for in s 223 of the *Native Title Act* which provides essentially that native title comes from the traditional laws and customs of the people who are claiming native title and holding it. That gives rise to a whole series of processes and procedures that need to be followed in order not to extinguish those rights further or adversely deal with them without there being proper compensation or giving proper rights to negotiate about the impact of the things proposed to do on the rights of the native title interest. So all of the agreement making that has come out of the Act, all of the future act processes (a future act is just a grant or other crown action that is going to affect native title in some way) goes some way to treating the native title holder as a freeholder and allowing people to do dealings over those interests without offending them too much. The negotiation process and the Act in general is designed to facilitate society's capacity to develop economically while recognising and protecting *sui generis* (or unique) relationships to land.

PB: What originally drew you to practice Native Title?

JF: I wrote quite a long paper for a government department on the history of Moreton Bay in 1993, the Mabo verdict had just been handed down in 1992. As a research tool more than anything else I had asked myself the question, "who owns Moreton Bay?" and obviously there were three different answers, the Commonwealth, the State or the Moreton Bay native title holders, so I became very interested in the whole thing. I'd been away from Australia since 1992 doing my doctorate so I hadn't really caught up with anything about the case until I got home and the judgement in Mabo seemed to be fixing a historic wrong so there were a lot of politics, but also the way the judgements had been reasoned out seemed very intriguing so I subsequently did research in the judgement that Brennan J cited such as Marshall CJ's decisions in

* Partner HopgoodGanim, PhD (Cantab) JD (Qld) BA (Hons) (Qld). This interview was conducted by Tristan Pagliano, Alasdair McCallum and Samuel Walpole on 24 March 2014 at the University of Queensland whilst Dr Fulcher was taking part in the TC Beirne School of Law’s Practitioner-in-Residence Program. We would like to thank Professor Sarah Derrington and Mrs Helen Braavedt for facilitating a time for our interview during Dr Fulcher’s residency.
the early 20's and the history of native title and the approach of the colonial government to native title in Australia and I was the state's historical consultant in the Wik case leading up to 1996 and as a result got this interest in Native Title law (I was a historian then, I wasn't a lawyer).

At the same time I was working in the Co-ordinator General's department within the Queensland Government negotiating some of the first native title agreements, something that had began happening for projects following Mabo. The first one was a big gas pipeline that went from Ballera, in the Cooper Basin to Wallumbilla, which is near Roma (almost 800km). We did the first ever full cultural heritage assessment of a pipeline in Queensland as a result of the changes to the law with regards to native title and cultural heritage. Then I started to negotiate native title agreements commercially, I went to Minter Ellison in 1997, worked there for eleven years and while I was there I got my law degree. So that’s how I came to work in native title law and as you can see it was a fairly circuitous way in.

PB: Would you say that your previous experience in academia has prepared you for your career in legal practice?

JF: In more ways than you would imagine. My PhD was on early 19th century British Radicalism and there were interesting similarities between radical movements where they were often led by leaders who had no money, but were very charismatic and the organisations themselves often had very little money, but they often fought for something that they believed in which was the extension of the vote to people who didn't at that time have it. Can you see the parallels to the movements pushing for something that wasn’t recognised and became recognised? So I also learnt a lot about organisation of political movements to effect change so when it came to understanding native title groups I sort of had an inside advantage because I had studied this in some depth.

Now you might say, 'how can there be parallels?' Well, to an extent, if you take the race element out of it, most people aren't able to do that, but you really should take the race element out of it, because Aboriginal people have rights in property to land just like everyone else does, how can they give full effect to those rights so I have always approached it that way, I know race is an element to it, but if you are properly equitable about it you should be considering it as just another property interest that the law recognises and protects.
PB: Given that your PhD focused on 19th century British radicalism, you would have read *The Making of the English Working Class* by Edward Thompson. In it, he states his goal is to save working class people from 'the enormous condescension of posterity'. Would you say there is a similar goal in modern efforts to right the historical wrongs to Aborigines?

JF: The only difference is that you're really saving aboriginal people from condescension; it's not just the condescension of posterity. It's happening now, people still see this interest as ephemeral and not very important and somehow secondary to standard real property interests.

PB: Does that view that may exist in the community give you difficulties in practice?

JF: Not difficulties, but it makes it very interesting. When I teach native title negotiation at university, I say to my students that before you go anywhere near any aboriginal person you need to think about your own categories of belief about who they are and what they represent. You've got really to confront whether or not the structured racism that the country has embedded in its psyche is inside you. You really have to deal with that, and you have to be very honest about it. I think if you're not, Aboriginal people are great at reading people, it's a very political culture, they understand nuances, and they watch body language and they pay attention to those kind of things and your sense of superiority even though you think you are disguising it, can come out in the way you sit, the way you behave, how you look at people, what you say, you have to be extremely careful and considerate about your attitude to these things before you go out.

Most of us don't think we're racist, which really is the root of the point I'm trying to make. Unfortunately, a lot of racism is entirely unconscious, we're not actually aware that you don't know any aboriginal people and you don't ever think about why that might be. There are places, such as Doomadgee in far north Queensland, which used to be an Aboriginal Reserve where people were dragged, forcibly, and forced to live with multiple native title groups in the same place. Up until the 1960s people had to have permits to leave, the protector or mission manager, or whoever it was, was in charge of the money they earned and sometimes bank accounts or money disappeared.
This is very similar to what happened in South Africa, Canada and other places, but Australians are just less aware of it because we've been cleverer about hiding it. Doomadgee is a place that we're all responsible for, it's not something you can say, 'it's not my problem' and most people don't even know where it is and there are a number of these communities around the country.

PB: So the schemes we are talking about were State administered schemes back in the 19th and early 20th centuries?

JF: All of the state governments took charge of Aboriginal affairs on the transfer of responsible government in each place. Effectively the British Imperial Government washed its hands of the issue when they delegated control to the various colonies within the Australian continent. Almost all of those colonies enacted legislation in the 1880s and 1890s to basically police and regulate aboriginal people in a very draconian way. The language of the acts are very racist, it talks about 'half-castes' and the like. It really was quite brutal and it was all in force up until the 1960s and then people realised it was dreadful.

PB: Do you think of the government's approach to indigenous issues strikes the balance between serious issues of child safety or child abuse and being interventionist and neo-colonialist paternalism?

JF: Yeah, these are really thorny questions. I'm not going to hazard an answer, but I'll just say this, the intervention caused a lot of angst largely because of the way it was done. There wasn't a lot of consultation with individual communities before it was carried out. Now some communities have asked to be dry and where there is a community 'buy-in' we should be working with the community to deliver those sorts of outcomes, but where things are imposed, you're replicating a system that has failed for decades. So, I don't think there is enough proper consultation, I think there is consultation, but I think a lot of it is lip service paid, (ie, 'well we talked to the community and we didn't really listen'). But often the people who are in charge often aren't the best human beings in the world, but there is not a lot of compassion about how they got to that point either. There is a delicate balancing act to tread, a sort of process to go through, I think that all of these sorts of things are in the background when you're doing native title particularly in remote parts of the country. If you're not alive to them, if you're not sensitive to them and you're not aware of the internal politics of the communities you're dealing with, things will be difficult.
PB: Would you say there's a problem with the current scheme (legislative) or is it a cultural awareness problem why it may take quite a long time to establish and negotiate native title dealings?

JF: I'm not like Senator Gareth Evans who believed there was no problem that couldn't be solved by really good legislative drafting. I think, in this area particularly, that's a mistake to think that you can legislate to fix these problems. Some of the things that aboriginal leaders are proposing now, like Warren Mundine's treaty idea, they are more than symbols, they are treating people with respect and they are saying 'yes you didn't cede anything to us, there wasn't any succession that went on here', there was a process of accommodation or forcible taking and anything that can help heal that wound is important. That's why the national apology is really important; it's not just window dressing.

I don't know whether we'll ever get as sophisticated as Canada has with section 35 of the Canadian Constitution which basically entrenches indigenous land rights into the constitution and protects them. I can't imagine that we've got the political will to do that, which I think is a shame in itself, I'm not saying Canada's perfect, it's not, but we've got other models we could be pursuing but are not for reasons I think that are historical and cultural.

PB: Recently the Government has been discussing the possibility of a referendum on indigenous recognition in the preamble to the Constitution?

JF: I think all of that should happen, but I don't think it's any one initiative that will work here. We have got to educate and change minds, legislating in those kind of ways is really important, but we have a Racial Discrimination Act which has been interpreted by the High Court and our National Parliament as allowing the Native Title Act that has a provision in it that says I can put a gas pipeline across indigenous land without acquiring the interest and just by offering procedural rights to those people. Now in the case of a Gas pipeline those procedural rights are effectively just notice. Why is Native Title in that circumstance different to a freehold interest? Where you couldn't just put a pipeline, ultimately the minister might acquire your interest as a freeholder and it is possible under the Petroleum and Gas Act, but why should that provision treat aboriginal people differently for public infrastructure, it doesn't make sense. Even though we've got
the Act, one of the professed aims of which is to recognise and protect
native title from further loss.

I'm acting for a native title group in the North-West of Western
Australia at the moment and Main Roads issued a notice to the group
that said they were going to clear the land and put in bitumen over 11
hectares of the Aboriginal reserve that doesn't extinguish native title,
but the essence of this is that they are taking the native title away
under s 24KA of the Native Title Act that deals with facilities for the
service of the public, and given the holders absolutely zero
compensation at the time. As far as the native title group's rights are
concerned, they will have to make a native title claim, get a
determination of native title and then get compensated once it's clear
that there interests have been taken by the bitumening. Now that
doesn't seem to me to be fundamentally very fair, but it seems we all
tacitly accept that it's okay.

PB: As you're probably aware, the West Australian government drafted the
very first legislative settlement, the Noongar Recognition Act, do you
think legislative settlements are a cheaper and easier way to resolve
native title claims?

JF: It set a good precedent, whether it will be followed by other state
governments is another matter. Victoria has a very good model it's a
different model, it's effectively Victoria's response to the Yorta Yorta
decision, but by and large Victoria has implemented a scheme where
claimants can get benefits now. So there are various ways of redressing
some of the injustices of the past, I don't think we should say, 'That's
the right way to do it', or 'that's the wrong way to do it', I think this is
one of these things where we think 'wow, aren't we great! We just paid
$650 million' and we're thinking as white people. What we should be
doing is saying, well if there's an interest that's being affected here
what do those people think? Why don't we ask them first? It's that
sense of 'hey, we could ask before we did stuff', now I'm not
suggesting that the WA government didn't ask the Noongar, I'm sure
they did, but in other places we tend to do things without asking first.
I don't mean faux-consultation, I don't mean yeah we went to the
community once and talked to them about it and then left again,
you're not going to get more than 55% for or against, but why not
have a proper debate about things.
PB: The objection raised with the Noongar Recognition Act was the condition that they have to renounce all future claims to native title in the area. Could this essentially lead to "hush money" scenarios?

JF: Look it's not "hush money" if people agree to it. Look, there are going to be a range of views in any community about what should happen politically. It's not like white people have unanimous support for stuff, so it depends on the way the group itself makes the decision. The Noongar are going to go through, I imagine, quite a strong consultation process internally to decide whether or not to accept this proposition. The reality is that this is the best deal I've ever seen in Australia, and that's a good thing. But it's not really our call to decide if it should be accepted or not, it's the group's call and how that group makes that decision will matter as to whether or not they accept it. I think we tend to think of these things in a very linear way, I don't think we spend enough time paying attention to what other people have to say.

PB: What's your opinion on the Native Title Act, does it strike the right balance with the rights of aboriginal people?

JF: I have two diametrically opposed answers to this question. First, as a citizen I was asked about 10 years ago if I could change one thing about the NTA and I said I would make it so we wouldn't have a statute at all. I think there has been a ridiculous amount of hysteria about Aboriginal people taking people's land and I've never seen any evidence of that, I know Aboriginal people in Canada protected their land and I would imagine Aboriginal people here would like to protect their rights. So my first answer is that we probably shouldn't have legislated, and that would have allowed for more things to happen. But because the development industry at the time decided it was going to be the worst thing for certainty ever, which you'll notice they tend to do about everything that has changed in a regulatory sense. I work for a lot of mining companies and some of the regulations brought in are not good, so I'm not coming from a position of radical views here. I do however think there was a very hysterical reaction at the time to Mabo. To a certain extent the legislation helped calm that down and created a sense of certainty about backyards, which isn't a bad thing, but there should never have been a sense of threat and I think the hysteria was whipped up by some people.

My other answer is more along those lines. The NTA provided the platform to build proper relationships across the community divide.
But the Act itself has also created a lot of division within Aboriginal communities as well. Those in the community who have managed to get in on the ground floor and get in charge of claims have tended to make a better fist of it than those who've not. That division is as much the responsibility as all of us as it is the parties concerned. A lot of Aboriginal people don't have the skill set necessarily to get themselves out of disputes they're in and I don't think our profession has done a great deal of service to it either. There has not been a lot of mediation, there have been attempts to have mediation, but whenever anyone gets a lawyer it tends to become more divisive rather than less and I think that's a shame.

PB: The NTA makes it a pre-condition to mediate between parties, do you still think there is too much adversarialism in the mediation process?

JF: I don't think the quality of the advice has been very good as opposed to the advocacy being decisive. As a result there has not been a great deal of judicious advice that has been given in some cases. The people who get really good advice tend to get really good outcomes. It's not a sufficient condition, but I do think it's a necessary condition and I'd like to see more Aboriginal people get higher quality advice than they currently get and that often is a factor of money. As Aboriginal people get native title determined and earn some money from the owning of the land in whatever ways we can free it up a bit they have a better chance of obtaining advice of the same quality as mining companies. We need to help Aboriginal people to become mainstream economic actors like everybody else, on one level that means jobs and training, on another it means education and on another it means helping them to use their compensation by them making informed decisions. If there isn't disinterested good advice, there might not be as informed a decision as there would have been had there been better quality legal advice.

PB: Would you say the decisions flowing from Mabo and the NTA "trap" aboriginal people in the past making it harder for them to get economic equality and become "mainstream actors"?

JF: That is probably the biggest problem with the bundle of rights argument that has come out of Western Australia v Ward which has construed native title simply as a bundle of things that can be individually picked off rather than it being an Aboriginal title as they have, say, in Canada, where you have to extinguish the native title holding, you can't extinguish part of a right. The difference is how the
common law has developed native title in Australia in that we have this unfortunate sense that native title is even less fungible than we thought at the start.

PB: Do you have any experience working in other jurisdictions?

JF: No, if you've done work in native title you have had a look at comparative native title law. For instance in *Western Australia v Ward*, Lee J, was persuaded by the Canadian cases and tried to create a holistic sense of native title. But the Full Federal Court and the High Court disagreed.

PB: Canada has been more pro-active about indigenous self-determination and has a long history of treaties on indigenous land, hunting and fishing rights; do you think there is much we can learn from Canada?

JF: It's interesting that indigenous community statistics are almost identical though. It's an attitude of mind that is delivering these results. It's not any one piece of policy or legislation or a particular set of rules. It's because those rules are interpreted and applied in a particular way, Indian bands and first nation peoples now have their own accountants and lawyers and fight their own corner and hopefully that will happen here. But that's an attitude more than a societal thing or a legal or policy thing.

PB: Native title claimants currently bear the burden of establishing continuity and other aspects of their native title claim. Should the presumption lie with the claimants or on the Government or party contesting the existence of a land right?

JF: I don't think it would hurt if we placed the onus on the government to prove that native title didn't exist because by-and-large that is what we do at the commercial level. We write advices about where native title is and isn't from a statutory perspective and then we give advice to say because we can't find evidence of an act of extinguishment or crown activity which renders the native title extinguished you have to assume it exists. So from a commercial perspective that is how we carry on now. I don't think it would make much difference at all, for the purposes we are engaging in a right to negotiate procedure for a mining lease and if we can't prove extinguishment we assume the existence and so does the state when it issues these notices to start the negotiations. I've done many indigenous land use agreement negotiations on the basis of what we call the "as if" principle, which is
that despite the existence of a number of freehold grants in one area of a pipeline, you treat the entire pipeline as if it would affect native title interests. The advantage of operating on this principle is that you can come up with a formula for an objective standard of value for what the loss of the interest is even though native title over some parts of the pipeline have been extinguished by other grants.

PB: Is that practice better for commercial clients because they have certainty?

JF: Well they know exactly what the objective standard (ie a dollar rate per km) regardless of whether native title is extinguished there or not. You might get into the situation where you have a 200km pipeline and only 10km is affected by native title, in some cases it might be as low as 1.3km where native title actually still exists. Commercially it is nonsense to say we're only going to pay you for that 1.3km. People have done it, but the problem with it is that it ends up making the value of that 1.3km a lot more than what you would negotiate from a commercial viewpoint. So instead you would forget about if it exists or not, let's just do a deal on the basis that native title does exist to prevent an inflated sense of what native title is worth in the commercial sense. It's also a great way to get the community on side and start a discussion, to forget about something that has happened in the past which might extinguish the native title right and see if we can do a deal on the basis that the group does have an interest there.

PB: Do you think native title processes in Australia are too drawn out?

JF: No, I think the timeframes for native title have been extraordinarily fast from a historical perspective. For instance, New Zealand had the Treaty of Waitangi in the 1840s, it had the Maori Wars in the 1860s about what the Treaty of Waitangi was actually about, and they have only just started talking about the fiscal envelope in the last 20 years and what it's worth to get the interest addressed.

So really we are doing staggeringly well, right now we've got a lot of groups and individuals across the country in the process of claiming large native title interests. It really is quite extra-ordinary, I think it's unbelievably quick compared to other jurisdictions. The treaties in Canada have been around for as long as 300 years, and there are still some claimants in Canada in difficulty.

PB: Do you think there is a reason why the treaties have taken so long in those countries?
JF: They're fighting over land. Put aside race for a moment, you want to use the same land as someone else, it is a bit difficult to resolve this issue unless everyone acts reasonably. Why would you act reasonably if you think the land is yours? Crimea at the moment is a classic example.

PB: In New Zealand they have the Treaty of Waitangi Tribunal, do you think a body like that could be a way forward in Australia?

JF: To be honest, I think that given the speed in which things are happening and the way the Federal Court is handling things at a very high level I think it is going fine. The Tribunal still has a role to play in mediation, the Federal Court is active in case managing these matters now, and they're focused on getting outcomes. The only thing I am a bit concerned with is that in pushing for consensus in native title determinations. If one party has a genuine concern another party shouldn't be able to use a consensus push to circumvent it just because the court or tribunal primary concern is with securing agreement.

It would be a minor injustice compared to the multiple deep injustices that have happened over the past 200 years, but I don't think that a couple of wrongs make a right. So I think we've got to be careful about the way in which the practice and procedure of some native title claims is carried out. But as a concept, while it may be expensive, compared to the injustice over the past 300 years it is incredibly cheap what we are paying at the moment.

PB: Dr Jonathan Fulcher thank you for joining us.
Human Rights on the US/Mexico Border

Jo Bird

I The Academic Setting

As a student at the University of Melbourne writing a dissertation, my work space was a quiet corral, an open plan office space shared with other PhD students, the only sound the gentle clicking of letters into a computer keyboard on the other side of my office partition. An international exchange student from Harvard moved into the office space next to me and we debated US foreign policy, but there were complaints about the noise so our conversations stopped. My office was filled with books and messy stacks of paper and a potted cactus. I wrote my thesis on human rights, reading Foucault and Derrida and other ‘postmodern’ philosophers.

In the first year of study as a law student, the law was largely about legal principles and judgments. We were introduced to the reasonable man of law. This man, described as ‘the man on the Clapham omnibus’ did not let his feelings interfere with his rational decision-making. In law, the body and human emotions are often absent in the quest for impartiality. However, the Honorable Michael Kirby has said that human rights begin with human love. My interest in human rights led me to Mexico where my humanitarian work revealed the connection between bodies, emotions and human rights.

Taking my supervisor’s advice to ‘broaden my horizons’ I deliver a paper at an international human rights conference in New York. The participants come from all over the world. Michele Goodwin talks about the harvesting of body parts such as corneas from African American and Mexican bodies which are implanted into wealthy and usually white recipients. The bodies are mostly young men, some of whom have been shot dead by the police; in return the families get the funeral expenses paid. This may happen without the family’s knowledge or consent, although the state assists in funeral costs in return for possession of the body.¹ This story and others like it are heartbreaking. Like law texts, conferences are full of paper, but in these pockets of ideas there are blood and trauma.


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The conference lunch table is groaning with more varieties of cheeses than I’ve ever tasted in my life. It is snowing outside. There is a baby grand in the corner, and someone is playing Debussy’s Clair de Lune. A European delegate jokes that the worst violation of human rights that most of us in this room will suffer is to be served a corked glass of red. At his words I glimpse the chasm between United Nations documents and the lived reality of many people. I experience a desire to work at a grassroots level to advance human rights.

II Field work

When the conference comes to an end I fly home via Los Angeles. It is only three hours to the Mexican border by train so I take a day trip to Tijuana. It is not the first time that I have been to Mexico. I was eleven years old when I first crossed the border with my family. The image of a small girl selling single roses to day trippers, her mother breast feeding in the background, lingers in my mind. By day’s end I have decided to change my flight home and spend time in Mexico.

A lot of visitors don’t like the border culture, because they don’t see it as ‘the real Mexico.’ They travel further south looking for an ‘authentic’ Mexican experience. Tijuana is perceived to be trashy and tarnished by the goods and services it provides to its North American guests. However, it is this city that awoke me to human rights in a concrete way and where I have spent most of my time in Mexico.

The majority of Mexicans cannot get a visa to make a day trip to neighbouring San Diego – its Spanish name a reminder that until recently the city formed a part of the territory of Mexico. The North American Free Trade Agreement means that corporations are free to establish their factories in border cities to exploit cheap labour and poor working conditions, yet the average Mexican does not have the freedom to go to the US and sell the only thing they have to trade: their bodies. Travellers from the US side of the border cross each day in their tens of thousands. Tijuana is the busiest border in the world and home to the world’s largest red light district outside of Amsterdam. During the prohibition era, North Americans headed south looking for sex, alcohol and casinos. In more recent times added to that list are drugs, both illegal and pharmaceutical. There is a booming medical tourism industry for those unable to afford health care and dentistry in the United States. Low wage earners, no longer able to

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2 Hernan Cortez invaded the Yucatan Peninsula in 1519 and Mexico became a colony of Spain. Mexico then fought for and won independence from Spain in 1821. During the years 1846-48 the US waged a war against Mexico, claiming around half of the territory of Mexico including the states of California, Texas and Arizona.
afford housing in the US – rent rooms in cheap hotels in Mexico and commute between the two countries.

III Border crossing

There are two metal turnstiles in Tijuana where pedestrians walk through from the United States. At those gates, I watch a Mexican family clasp hands through the metal grating. A woman’s tears cross the border as her face is pressed against the coldness of the metal bars. Here was a family, carved up by the necessity of living on either side of the line. One half of them have ‘made it’ to the United States. If the others in the family decide to cross the border to reunite with relatives, they must make a journey that could end in death. These immigration laws mean that people are more likely to stay in the US indefinitely, rather than to visit relatives and work for a few months or a year and then return.

At that instant, as a stranger watching a very private moment, I become aware of the pain of separation caused by the wall. As I push my way through the turnstile, I am also aware of the ease with which I, the white faced outsider, can cross the border. Without this freedom of movement, what do human rights mean for most Mexicans? What does it mean to be ‘born equal’ in this situation? There are fine aspirations expressed in human rights declarations and conventions; I realize the complexity of bringing those aspirations to fruition. I resolve to listen and respond to the voices of those who I had not heard during my academic studies. Costas Douzinas inspires me with these words: ‘The appeal of the other is direct, concrete and personal; it is addressed to me and I am the only one who can answer it…the demand does not depend on absolute reason or universal law, but on the concrete…encounter with the other.’

In Tijuana, having made a decision to stay, I feel at home and quickly make friends. I help lots of people who have been suddenly deported to Mexico from the United States. I buy them a meal, let them use my phone to make a call to a loved one in the South of Mexico, purchase bandages, new shoes and insoles for a woman whose feet have been torn up by three days of walking in rough terrain, provide medical attention for a man who broke his leg after falling from the border fence trying to reunite with this wife and two young children after being deported.

There are two groups of deported Mexicans, those who have lived in the United States for an extended time, in some cases most of their lives. After a

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minor infraction or a car accident, they are taken into custody and deported to Mexico if unable to show citizenship papers to the authorities. The second group of people are deported when they are caught crossing the border into the United States from Mexico.

IV No More Deaths

I am certain that there is an organization that assists people in these kinds of situations. Sitting in an internet café in Tijuana, I discover No More Deaths (No Mas Muertes). No More Deaths is an organization based in Tucson, Arizona that assists immigrants in a number of ways. The mission of No More Deaths ‘is to end death and suffering in the Mexico–US borderlands...working openly and in community to uphold fundamental human rights.’ The organization ‘focuses on providing humanitarian assistance, witnessing and responding (to human rights abuses) and encouraging humane immigration policy.’

As an activist NGO, No More Deaths run treks into the desert every day of the year where volunteers carry two and five gallon bottles of water in backpacks to leave on the immigrant trails. They work to identify bodies and to make contact with the relatives of those who they find dead, perished from the lack of water and harsh desert conditions. US patrol agents or vigilantes use their machetes to slash any water bottles that they come across, resulting in deaths from dehydration. No More Deaths lobby for law reform on immigration and have been involved in battles to challenge the legality of deportations. No More Deaths also run the ‘Nogales project’ a program that assists immigrants who have recently been deported from the United States to Nogales, Mexico. They document abuses by interviewing people who seek humanitarian aid about their experiences with the border patrol and the military. No More Deaths also provide assistance to deportees in the form of giving food and first aid treatment and making phone calls to relatives back home. It was the Nogales project that I applied for and I was selected to join the team on the basis of my legal education, my Spanish language skills and experience living in Mexico.

The training takes place at a local church. The instructors teach us a very condensed border history and how to avoid conflict with the officials, such as the police and the border patrol. We sleep in the church on fold away stretchers and sleeping bags. The next day is a course in basic first aid. We practice bandaging each other’s feet and arms. We catch rides in shared cars to Nogales. There, the majority of the group, more than 100 people, head into

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4 No More Death (No Mas Muertes) website http://forms.nomoredeaths.org/about-no-more-deaths/.
the desert with supplies of water. Six volunteers, plus two organizers stay in the two bedroom apartment in Nogales to render assistance and document human rights abuses. My room-mates are both refugees. There is Marta – she was 16 years old when her family fled the conflict in Guatemala. During the civil war that ended in 1996 more than 200,000 were killed and 50,000 went missing, presumed kidnapped and tortured. And there is Michelle – she is from the Hmong and she was just a baby when her family fled Vietnam, and too young to remember life during the Vietnam War. Every time she hears about the deportations of Mexicans, she thinks about her own family and their struggle to build a life in the United States. The six of us are women.

I walk into the garden and have a look at the view of the city of Nogales over the back fence of our apartment on the Arizona side. The city is literally cut in two. A wall carves its way through the centre of the city and speaks of ‘insider’ and ‘outsider’ a moat protecting the privilege and property of whiteness. The wall runs over the natural features of the landscape. I almost expect to see it slicing through a building. I am sure that a significant number of homes and businesses would have been demolished at the time that the wall was constructed. Up and down the hills and the canyons, the wall threads its way over the horizon towards Texas in the East and San Diego to the West. The wall divides the South from North America (los Estados Unidos), the most powerful military industrial complex in the world. The borderlands are patrolled by helicopters scanning a barren desert in which hundreds of immigrants die each year attempting to cross. This is the place where, as Gloria Andaluzia wrote, ‘the Third world grates against the first and bleeds.’

Ofelia Rivas, a First Nations woman from the O’odham nation says ‘We don’t agree with this wall. It’s like a knife in our mother (earth). These metal things are going into our mother and we can’t pull them out’. The wall creates an artificial barrier that also radically disturbs the environment – animals and plants as well as humans.

V El Comedor

Our team crosses the border on foot and we catch a local bus up to El Comedor (the food hall). My first impression of Nogales is to see the old buses belching smoke, the packs of hungry looking dogs, the children begging,
the taco stands with their rainbow of condiments, the border fence. The wall is painted with murals, by well-known artists Alberto Morakis and Guadalupe Serrano. The art depicts the difficult lives and the journeys of immigrants passing between lands and cultures. Messages of hope, peace, justice and freedom are painted in Spanish across a wall that is constructed of recycled metals used by the US army to land aircraft in Iraq during the gulf war. One of the messages painted across the ex-wartime materials reads, ‘No Guerra’ (no war).

At El Comedor there are over a hundred people queued up by 8.30am when we arrive each morning. Many have spent three, four or five days walking in the desert. Some of the people standing in this line have likely witnessed friends or relatives die, or feared for their own lives as they ran out of food and water. Once apprehended by border patrol agents, I hear many accounts of beatings and sexual assaults and other breaches of human rights.

Perhaps a third of the people waiting in line for a meal have suffered some kind of injury. I attend to injured feet. The top layers of skin have completely come away through continuous rubbing. The wounds then become badly infected making it exacerbatingly painful, and eventually impossible, to walk. Some of those whose injuries I treat have been unable to afford even the basics of first-aid, a bandage and over the counter pain killers. Their injuries are caused by walking for three, four or five days and nights in the desert.

Eduardo was provided with crutches after he was taken into custody. However, before he was deported, the crutches were taken from him, and he was told that he could not keep them because ‘you are illegal and they are the property of the United States government.’ Eduardo said despairingly ‘Nosotros los trabajadores de el pais and mira como nos tratan’ (we are the workers of the country and look at how they treat us). Another man in his early 20s told me about how he lost his finger in a workplace accident. If he was a citizen of the United States, he would be entitled to sick leave and compensation and in theory some protection under the International Covenant on Economic and Social Rights. Instead he was immediately deported, no longer of use to his employer.

Detainees are often forced to stand for hours on end without rest. Maria was told that she could not lie down in her cell for 24 hours or the officer would take her blanket which she needed to keep warm. Adela was given a blanket containing biting insects that she thought were probably fleas. The blanket may also have been infested with ticks. Loud music is frequently played in cells for hours on end to prevent sleep. I heard an account of a young child, about four or five years old being beaten while in the custody of the border
patrol. The child was physically abused when he did not respond to orders in English which he clearly did not understand as he only spoke Spanish. The boy’s screams distressed the witnesses we spoke to.\textsuperscript{8}

I only came into contact a few times myself with the border patrol, and they were brief encounters. The first time was on the Greyhound bus from San Diego to Tucson. The bus stopped twice in the night and every person on board was asked to prove their identity – I dug through my belongings and showed my Australian passport. A border patrol agent told me that it was his job to keep the ‘terrorists and the gangbangers’ out of the country. ‘You should see the kind of people that are coming into the homeland.’ I tell him that all of the immigrants I have met have simply come to work. He sees the look on my face and he stops. ‘If you want to know any more, you will need to talk to public relations.’

Human rights abuses occur with the dehumanization of deportees. A group of girls in their teens and women in their early 20s take refuge in a shelter in Nogales after having been deported. They tell stories of having been sexually assaulted by border patrol agents who touched their breasts and genitals. One girl was searched by two men. These are common experiences. War has historically been used to dehumanize those who are deemed to be ‘the enemy.’ The idea of war creates a different set of ethical standards, where the suspension of human rights occurs.\textsuperscript{9} War has been used to justify horrific abuses including torture of detainees. The United States was last at war with Mexico in 1848, and yet this idea of war is prevalent in the abuses at the border and I believe that it is used as a justification for abuse. One border patrol officer aimed a weapon at a migrant and shouted ‘I can shoot you with this (gun) for crossing. It’s a declaration of war.’

With two Mexican nuns named Juana and Lupe, I help to cook and serve breakfast each morning. We feed approximately 200 people with huge vats of rice, beans and tortillas until the food runs out and we have to send people away. Each person is given a ticket which allows them to eat at El Comedor for three days post deportation. If they come from Central or South America, then they can eat here for a week, breakfasts and dinner. The Central and South Americans are recognized as being a particularly vulnerable group as many are refugees and they are not officially allowed to stay in Mexico. However, it is to this town in Mexico that they are deported by the United

\textsuperscript{8} No More Deaths, \textit{A Culture of Cruelty: Abuse and Impunity in Short-Term U.S Border Patrol Custody}, September 2011.

\textsuperscript{9} See Giorgio Agamben, \textit{The State of Exception} (The University of Chicago Press, 2005). Agamben writes about the suspension of civil liberties that occurred in the United States following 9/11.
States. After the week, they are on their own. It is a terrible feeling to tell someone in despair and asking for help that there is nothing that you can do for them. Our small team at No More Deaths simply does not have enough resources to feed and assist the number of deportees arriving day and night in Nogales.

At home in Australia I document my work for No More Deaths. The organization produces the reports *A Culture of Cruelty* and *Post-Deportation Health: A Humanitarian Assessment* and continues to lobby Congress for immigration reform. The University of Melbourne awards me a manuscript sponsorship to write a book about human rights issues on the Mexican/US border.
Book Review: ‘Democracy in Decline’ by Professor James Allan

William Isdale*

I  Introduction

‘Democracy’, Churchill once quipped, ‘is the worst form of government except all those other forms that have been tried from time to time.’ For all its flaws, democracy has proven itself the system of government most likely to deliver laws and policies that are in our interests, because decision-makers are rewarded when they take account of what people want (by election, or re-election) and are reprimanded and disempowered when they don’t (by being voted out).

In Democracy in Decline,1 Professor James Allan argues that the say of average citizens in how societies are governed is on the decline. Not everywhere, but, in particular, in the five oldest and most-established democracies: the United Kingdom, United States, New Zealand, Canada and Australia. These are countries Allan is knowledgeable of, having lived in each one. After many centuries of democratic triumph – including incremental wins like the expansion of the franchise and diminution of the powers of monarchs – we’re now witnessing, he argues, the emasculation of democratic institutions and a concomitant increase in the influence of unrepresentative ones.

II  What democracy is

But what is democracy? As a concept it’s been so shrouded in positive connotations that many distinct political features have come to be regarded as necessary components. For instance, some would argue that the rule of law and respect for civil liberties are essential to a democracy. Such a view is certainly not without philosophical exponents, such as Ronald Dworkin, who argues that ‘democracy is not the same thing as majority rule, and that in a real democracy liberty and minorities have legal protection.’2 For Allan, however, this ‘fat’ conception of democracy is in desperate need of liposuction; it is conceptually clearer, he suggests, if we think of democracy as ‘being focused on process, on how decisions are made.’3 Because ‘smart, nice, well-informed

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1 James Allan, Democracy in Decline: Steps in the Wrong Direction (Mc-Gill-Queen’s University Press, 2014). James Allan is the Garrick Professor of Law at the University of Queensland.
2 Ronald Dworkin, A Bill of Rights for Britain (Chatto & Windus, 1990) 43.
3 Allan, above n 1, viii.
people will and do regularly disagree on moral questions – such as what respecting minorities actually requires – building moral criteria into a conception of democracy always leaves the question of whether a decision is ‘democratic’ or not open to question.

On Allan’s view, democracy is equivalent to majority rule, and while there’s no guarantee that the best decisions will be reached in any particular instance, it is the system most likely to lead to the best outcomes in the long run. In this sense, Allan does not champion democracy for its own sake – he is a consequentialist who believes that democracy is valuable because of the real-world outcomes it tends to achieve.

Allan identifies four main causes of democratic decline: judges, international law, supranational organisations, and undemocratic elites. The bulk of the book addresses each of these headings in turn, taking examples from the five jurisdictions he considers. Of these jurisdictions, he concludes that the United Kingdom has seen the greatest democratic decline over recent decades, with the trend being least apparent in Australia.

III Judges

For anyone familiar with Allan’s work, it’s unsurprising that he takes judges to be one cause of democratic decline. Firstly, Allan argues that from about the 1950s and 60s onwards, ‘we see judges become more adventurous or unconstrained by previous interpretive orthodoxies.’ He makes a powerful case for an originalist approach to interpretation, particularly when it comes to interpreting constitutional texts. Whilst any text that limits parliamentary decision-making power is undemocratic in one sense, he convincingly argues that it is better that this restriction be the result of decisions made by our constitutional framers, or those who amend the constitution, rather than the perceptions of today’s judges. The former approach, he suggests, makes a smaller inroad into democratic decision-making. He is excoriating of the Australian High Court’s ‘implied rights’ cases, such as Australian Capital Television, in which the judges, he argues, turned interpretation into a ‘gazing at tea leaves in tea cups exercise’ that allowed for the illegitimate imposition of their own preferences.

4 Ibid ix.
5 Ibid 137-8.
6 Ibid 9.
7 Ibid 44.
8 (1992) 177 CLR 106.
9 Allan, above n 1, 36.
A second cause of democratic decline has been the increased adoption of bills of rights.\textsuperscript{10} Allan points out that at the end of World War Two, only two countries in the world – the US and France – had bills of rights. Today, every democracy in the world, save for Australia, has one. Because they’re usually expressed at such a high level of abstraction (e.g. a ‘right to free speech’), what content will be given to these rights in practice is far from clear. Even on rule of law grounds this might be concerning – citizens become governed by rules expressed in such an indeterminate manner that they cannot know in advance what the law actually requires of them. The idea of couching the criminal law in terms of ‘don’t do bad things’ would be repugnant for that reason, and yet bills of rights can impugn conduct or legislation on similarly amorphous grounds. The question is really one of who does a better job at making complex social policy. Whilst courts undoubtedly have advantages (e.g. of seeing an injustice in a particular case), parliamentary decisions usually enjoy the benefits of committee scrutiny and departmental advice. Crucially, parliament’s decisions can also be easily undone, since they do not have to wait for the issue to be brought before them, and there is no political equivalent to stare decisis. Additionally, governments or MPs who make bad decisions – but rarely judges – can be removed. Although parliaments are far from perfect, Allan makes a compelling case that, in the long run, better outcomes are reached if we leave the ultimate power to make law with our elected representatives, rather than with judges.

IV International law and supranational institutions

Two further causes of democratic decline that Allan identifies are the rise of international law and supranational institutions. In a world of global pandemics and nuclear weapons, the need for bodies like the United Nations, and for some laws of more than domestic reach, is indisputable. Allan doesn’t reject the idea of these wholesale, but points to a number of current deficits. The clearest example of a democratically deficient supranational institution is the European Union (EU). While the EU does have a parliament, it cannot initiate legislation, which is instead done by the European Commission (composed of appointed civil servants).\textsuperscript{11} There are a number of other similar structural deficits, but the key democratic downside is that it takes decision-making power further away from citizens. Some EU-wide measures are undoubtedly beneficial (e.g. the common market). But many other EU directives and decisions dilute the influence of citizens with comparatively smaller gains (if any). For instance, in 2011 the European Court of Justice ruled that cheaper car insurance for young women than for young men was discriminatory, and

\textsuperscript{10} Ibid 63-72.

\textsuperscript{11} Ibid 110.
so unlawful, despite being based on solid statistical evidence as to risk.\textsuperscript{12} Allan quotes one commentator who wrote that, ‘the judges are so bewitched by the idea of discrimination that they can’t tell the difference between actuaries and Nazis.’\textsuperscript{13} Arguably, whether conduct such as this should be prohibited would be more appropriately decided at the domestic level.

Allan also has his sights on the expanding scope of international law. International law was once exclusively concerned with the ‘law of nations’ – that is, disputes between countries – but has more recently asserted its authority over traditionally domestic matters. For example, the 1989 Convention on the Rights of the Child (CRC) provides that states should take all appropriate measures to ‘protect the child from all forms of physical or mental violence’.\textsuperscript{14} This has been interpreted by the CRC committee to preclude corporal punishment of children.\textsuperscript{15} This leads to the rather ‘grandiose’ conclusion, as Allan describes it, that countries are in breach of international law if they don’t take steps to stop parents smacking their children for disciplinary purposes.\textsuperscript{16} If small groups of international decision-makers reach conclusions on matters of domestic significance such as this, and their views are privileged over those of citizens and more likely to be implemented accordingly, that is undoubtedly less democratic.

An important caveat is that international law rarely trumps domestic law and is regularly breached without consequence. In Australia, international law can only be domestically implemented through the regular passage of legislation.\textsuperscript{17} So although international law is less democratic, it’s not clear that we need to be concerned. Allan does suggest a few ways in which international law ends up diminishing the say of average citizens – for instance, he notes that judges sometimes cite international law in their decisions and use it to reach conclusions on domestic law.\textsuperscript{18} Famously, in the case of \textit{Roper v Simmons},\textsuperscript{19} some justices of the US Supreme Court had recourse to international law in deciding that the juvenile death penalty was unconstitutional. Allan also points to the UN Human Rights Council’s practice of ‘Universal Periodic Review’, in which the human rights compliance of member states is assessed. He writes: ‘every time a democratic country’s judges or executive branch alters what

\textsuperscript{12} \textit{Association Belge des Consommateurs Test-Achats ASBC and Others} (C-236/09) [2011] ECR 1-773.
\textsuperscript{13} Allan, above n 1, 161.
\textsuperscript{14} Article 19.
\textsuperscript{15} Office of the UN High Commissioner for Human Rights, Committee on the Rights of the Child, General Comment No. 8, 42\textsuperscript{nd} sess, UN Doc CRC/C/GC/8 (2\textsuperscript{nd} March, 2007).
\textsuperscript{16} Allan, above n 1, 87.
\textsuperscript{18} Allan, above n 1, 90-4.
\textsuperscript{19} \textit{Roper v Simmons}, 543 U.S. 551 (2005).
would otherwise be its position due solely or largely to assertions made in one of these Periodic Reviews, democratic decision-making has been diminished.\textsuperscript{20} This is true, but it’s arguably no more undemocratic than the executive giving undue weight to the views of any particular journalist, think-tank, or other source besides the majority view of its citizenry. When it comes to judges citing international law, it would undoubtedly be a mistake if it were treated as binding – but if it is simply treated as an intellectual resource that can be drawn upon for insight, it is no more undemocratic than any textbook or scholarly article on which weight may be placed. Since citizens never have any democratic input into judicial decisions anyhow, it’s not clear how their voice is diminished, unless international law is used to trump the clear words of democratically enacted legislation. That would be concerning, but is already contrary to the ordinary rules of statutory interpretation, and there’s no reason to think that international law has increased the likelihood of outcome-oriented judicial reasoning.

V Undemocratic elites & concluding thoughts

The final cause of decline Allan addresses is under the heading ‘undemocratic elites’. These elites include anyone who is prepared ‘to impose his or her preference … on the country without bothering first to convince a majority of us that this preference … is the best one (or least-bad one) in the circumstances.’\textsuperscript{21} This is a broad category, but Allan seems to primarily have in mind those who ‘ask the unelected judges to second-guess and invalidate’ democratically enacted laws. In Australia specifically, he also points to the ability of the federal executive to sign up to international treaties without parliamentary approval, allowing them to ‘get their way in federalism disputes with the states or lock in future governments from the other side of politics.’\textsuperscript{22} Doing this, rather than persuading the parliament, makes them undemocratic elites.

The final section of \textit{Democracy in Decline} concerns a number of possible objections to the key thesis that democracy is in decline and that this is a bad thing. Most of these objections are well addressed and ultimately fail. But perhaps the strongest counter-argument to some of what Allan says can be found in what he describes as ‘Ploy #4: Say, under your breath, “Other things sometimes matter more to me than democracy”’.\textsuperscript{23} As mentioned earlier, Allan is a consequentialist. That is, he believes that what matters morally is ultimately

\textsuperscript{20} Allan, above n 1, 116.
\textsuperscript{21} Ibid 121.
\textsuperscript{22} Ibid 126.
\textsuperscript{23} Ibid 137.
just ‘good’ outcomes. Sometimes ‘good’ outcomes are understood as those that achieve the greatest balance of pleasure over pain (as Bentham argued), or satisfy the greatest number of preferences (as Peter Singer argues). On this view, other things do matter more than democracy; democracy is really just the (supposed) best means to an end. And Allan could be wrong that democracy is the best means. He counters that, ‘Personally, I would not agree with anyone who made such an open, honest assertion. I think they’re wrong on the consequential benefits of democracy’. But democracy is not an all-or-nothing affair as this seems to suggest. It might make good sense for citizens to have a say over a large number of issues, but not on others. Allan seems to agree: in one section he offers a brief digression on proportional representation electoral systems (PR) and suggests that whether they are more majoritarian can be put to one side for our purposes here. Arguably PR systems are more majoritarian because parliamentary composition under such systems more accurately reflects the views of voters. Nonetheless, Allan rejects such systems on the basis that they ‘make it harder to get things done in the legislature’. Similarly, while it would be more democratic if all political decisions were voted on directly as the ancient Athenians did, it would likely take so much time and lead to decisions of such poor quality that it wouldn’t be worthwhile. Accordingly, it is possible to argue – contrary to Allan – that judges might make better (consequential) decisions on some human rights issues, or that a good deal of decision-making power should be handed over to supranational organisations on consequentialist grounds (for instance, if it were necessary to stop climate change), even though democratic input would thereby be lessened. This would be a largely empirical debate, and it’s not obvious that democracy would always win.

Overall, Democracy in Decline is a highly enjoyable work of popular non-fiction. It covers a broad range of topical issues and is written in clear and engaging style. Besides the issues already discussed, it includes excursions into such questions as whether compulsory voting is a good thing, whether judges should be elected, and what the appropriate limits to free speech are. It is sure to challenge readers and will be enjoyed by anyone with an interest in law and politics.

24 Ibid 138.
26 Ibid.