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Editor’s Foreword

Human rights occupy a particularly anxious territory in domestic and global contexts. Through history, the term ‘human’ has remained a site of contestation; let alone what ‘rights’ should be afforded to those we regard as ‘human’. When we talk about rights, we speak in abstract and often vague terms. So how do we conceive of human rights goals within domestic and international legal systems?

This journal addresses the complex and often paradoxical relationship between human rights, international policy and domestic struggles. Starting with a debate between leading politicians and academics on the value of a ‘Bill of Rights’ for Australia, the very notion of rights entrenchment is brought to the fore.

Complementing this domestic legal analysis, the essays and creative works contest the stability and effectuality of rights discourses in different legal and political contexts. Exploring the rights of those situated on the periphery of society, from refugees to intersex bodies, the articles gesture towards new ways of imagining what it means to cater for human rights in a globalising legal environment. Human rights are not simply distinct to individuals, but are linked more broadly to corporate bodies and animals. By inviting us to reconsider the liberal conception of human rights, the articles suggest, there is much greater potential to promote social justice policy which is specific to local circumstances and legal systems.

Human rights pose new challenges for lawyers, academics and citizens alike. In world that is becoming increasingly globalised, but still retaining distinct cultural values and ethics, we need to ask - what is the potential for legal human rights enforcement, protection and promotion?

Senthorun Raj
Editor-in-Chief
The definition of human rights in global treaties such as the International Covenant on Civil and Political Rights 1966 and the International Covenant on Economic Social Rights 1966 has been one of the defining achievements of the 20th century. It is, however, one thing for states to agree upon human rights standards in international agreements. It has proved to be quite another to give effect to these standards in national law and practice. Indeed, many of the most egregious breaches of human rights have been committed by States that have ratified all the major human rights instruments. It thus remains a challenge of the 21st century to ensure that human rights norms are effectively implemented under domestic laws and procedures.

Australia has been a leader in drafting international human rights. The work of Dr Clive Evatt on the UN Declaration of Human Rights in 1945 and that of the Australian negotiators of the 2002 Rome Statute of the International Criminal Court are testament to the commitment made by this state to human rights since 1945. It is paradoxical however that Australia has been cautious in giving full domestic effect to the many human rights treaties to which it is a party. While some treaties such as the Convention on the Elimination of all Forms of Racial Discrimination 1969 have been enacted directly as part of Australian law, more typically, Australia’s human rights treaties been appended to the Human Rights and Equal Opportunity Act as a ‘benchmark’ for the work of the Human Rights Commission. It is this gap between the aspirations of the human rights treaties and their enforceability in Australian law that informs the current debate on the enactment of a Bill of Rights.

One of the many reasons why Australia should legislate to implement international human rights is that it will enable Australia to consider the evolving jurisprudence of tribunals such as the European Court of Human Rights, the European Court of Justice, the UK’s House of Lords and the US’s Supreme Court. For these courts, almost all matters of law are viewed through the prism of a human rights act or convention. An Australian Bill of Rights, will in short, bring Australia in from the cold and end its intellectual isolation from global human rights.

Professor Gillian Triggs
Dean, Sydney Law School
A Human Rights Act For Australia: The Debate
   Sylvia Hale MLC 8
   John Hatzistergos MLC 11

Putting Rights Back Into the Human Rights Consultation – Ben Saul 15

Implementing Rights Protection – Wesley Lalich 19

Superman’s New Strategy (Visual Mash-Up) – Bryce Williams 22

Diasporic Visions – Senthorun Raj 23

Our Failure to Act – Mario Emmanuel and Samuel Thampapillai 27

Ending the Stalemate – Micaela Ahs 33

Bonded Labour – Myles Pulsford 35

Human Rights in South-East Asia – Chong Shao 41

The Optional Protocol to the ICESCR – Bryce Williams 45

Corporate Assault (Visual Mash-Up) – Bryce Williams 48

Dirty Money in Bloody Hands – Viv Jones 49

Justice For All? – Edwin Montoya 53

Precarious Protection (Visual Mash-Up) – Alice Mahoney and Bryce Williams 57

Human Rights and Complementary Protection – Alex Pavli 58

The ‘Indian Ocean Solution’ – Daniel Ghezelbash 61

Rohingya Refugees – Janina Richert 65

Animal Law with Teeth – Laura Costello and Fiona May Graney 71

Infantile Law (Visual Mash-Up) – Alice Mahoney and Bryce Williams 75

Intersexions – Antares Wells 76

Hope for Reform – James Johnston and Catherine Tayeh 80

Same-Sex Marriage – Donherra Walmsley 83

Lessons (Visual Mash-Up) – Alice Mahoney and Bryce Williams 85

Church, State and the School – Richard Murphy 86

The Right to Vote in Australia – Daria Orjekh 90

Law and Order (Visual Mash-Up) – Bryce Williams 94

Misplaced Trust? – Nicholas Olson 95

Prying Bosses – Phillip Boncardo 99

The Right to a Dignified Death – Emma Ede 102
Sylvia Hale MLC (NSW) puts her case for a bill of rights, demonstrating the many ways in which our current system fails to protect society’s most vulnerable.

The quality of a society may be judged by how well it protects its most vulnerable. Ensuring the rights of the majority is one thing, ensuring the rights of all requires another level of commitment altogether.

Human history is illuminated by the progress of human rights protections and of the transition from arbitrary rule by the most powerful to the rule of law and the enunciation and protection of universal rights. The time has come for Australia to join many other nations in that ongoing progression.

Australia should introduce a Human Rights Act because it is in the nation’s interest that the human rights of all of its citizens are properly protected. This proposition is neither radical nor novel. Many countries already have such protections including the USA, the UK, Canada, South Africa, Germany, France and New Zealand. In fact, Australia is one of the very few developed democracies that does not have specific legislative or constitutional protection for human rights.

Human rights have been defined in various laws, treaties, constitutions and other documents for centuries. The codification of laws relating to individual rights can be traced back as far as the Sumerian king Hammurabi about 4000 years ago. Since that time, in documents ranging from the British Magna Carta in 1215 to the French Declaration of the Rights of Man of 1789, the American Bill of Rights of 1789, the Geneva Convention of 1864, the Universal Declaration of Human Rights of 1948, the Canadian Human Rights Act of 1977, the South African Constitution of 1996 and the UK Human Rights Act of 1998, nations have been codifying and protecting the human rights of their citizens.

These documents are celebrated markers of the progress of human society. They demonstrate that the legislative protection of human rights has been developing over millennia. It is no fad, nor is it the preserve of either the ‘left’ or the ‘right’ of politics.

The rights contained in the Universal Declaration of Human Rights include that no one shall be held in slavery or servitude (Article 4); subjected to torture or to cruel, inhuman or degrading treatment or punishment (Article 5); subjected to arbitrary arrest, detention or exile (Article 9); and that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him (Article 10).

What makes such rights universal is that they have been developed over centuries, across the political spectrum and across many nations. They are a statement of the basic rights to which all human beings are entitled and which, therefore, should not be granted or withheld at the whim of governments, whether democratically elected or not.

Often the longer a government holds power the more its interest in the exercise of that power grows while its interest in protecting those over whom its power is exercised diminishes.

Is there a serious argument to be made that these rights should not be protected by specific legislation? Those who oppose an Australian Human Rights Act claim that Australia will suffer negative consequences if it enacts specific human rights laws. In my view, the evidence across many nations over many years does not sustain that contention.

It has been argued that human rights in Australia are adequately protected under the current arrangements. Some, but by no means all, of the international conventions to which Australia is a signatory have been incorporated into
out in the Human Rights Act. The UK court determines that a law does not meet the standards set down laws made by the parliament. Instead, it gives the courts in the UK, does not give power to judges or courts to strike prevails in the USA, a Human Rights statute, such as exists Unlike the constitutional protection of human rights that in protecting citizens from abuses of power by government. This argument reflects both a misrepresentation of the role of a Human Rights Act and the role of human rights laws in protecting citizens from abuses of power by government. Unlike the constitutional protection of human rights that prevails in the USA, a Human Rights statute, such as exists in the UK, does not give power to judges or courts to strike down laws made by the parliament. Instead, it gives the courts the ability to issue a 'declaration of incompatibility' where a court determines that a law does not meet the standards set out in the Human Rights Act. The UK Act specifies that a declaration of incompatibility 'does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given' and 'is not binding on the parties to the proceedings in which it is made'. A declaration of incompatibility does not invalidate a law but it does encourage public scrutiny and places pressure on a government to amend incompatible legislation. The UK Human Rights Act therefore ensures that the decisions of the courts remain subordinate to the laws passed by the parliament. Human rights laws are not only or even predominantly about high profile civil liberties cases involving prisoners, detainees, control orders and excluded persons. The main benefit a Human Rights Act can provide is to oversee how ordinary citizens are treated by the various arms of government and by corporations. The bulk of the matters raised under the UK Human Rights Act, for example, have not involved the courts, nor have they involved issues of detention and control. They have involved the way that citizens and the state interact and the way that services in health, education, welfare and aged care are delivered to citizens by government. The effect of a Human Rights Act is to provide some counter-balance to the overwhelming power of governments and corporations compared to individual citizens. As the Guardian newspaper in the UK editorialised: ...it is not just suspects but soldiers, victims and care recipients who are served by an act which is all about arming the individual against authority. And by forcing public bodies to factor rights into their thinking, it prevents even more abuses than it cures. Another argument put forward by those opposed to an Australian Human Rights Act is that it will clog up courts with trivial and mischievous cases of no merit. This has not proven to be the case in those many countries that have human rights legislation in place. An analysis of the implementation of the UK Act by British academic Aileen Kavanagh finds, for example, that: ...sections of the media made wild predictions that, post-HRA, the courts would be clogged with unmeritorious cases, that serious crime would go unpunished and that judges would accede to every impractical and implausible claim in the name of human rights. Needless to say, such dire predictions about the future impact of the HRA have not been borne out in practice. In Canada, only 58 of the 390 cases referred to the Human Rights Tribunal in the last four years have required final determination. The vast majority of cases have been settled by mediation. On average, less than 15 cases per year are subject to determination by a court. The arguments against a Human Rights Act for Australia appear to have little if any evidence to support them. Generally they are based on a small number of high-profile controversial cases that do not reflect the broad positive effects that flow from such legislation. This is what the Guardian describes as: ...reactionaries in parliament and the press, who have spun from thin air the fiction that it [the
Ultimately the best test of whether a Human Rights Act is likely to have a positive influence on Australian society is, rather than relying on anecdotal or atypical examples, to look at detailed evidence of what has happened in other countries where similar schemes have been implemented.

The UK Human Rights Act was introduced in 1998. There had been a great deal of resistance to the introduction of that Act, particularly from Ministers of the previous long-term government that had introduced laws that many perceived to be undermining important human rights protections. In my view, the similarity to the position in Australia, indeed in NSW, is not coincidental. Often the longer a government holds power the more its interest in the exercise of that power grows while its interest in protecting those over whom its power is exercised diminishes.

Many of the arguments now advanced against an Australian Human Rights Act were put forward with equal conviction against the introduction of the UK Act. So has the UK experience been positive or negative?

Last year the British Equality and Human Rights Commission undertook a comprehensive inquiry into the effectiveness of the UK Human Rights Act after ten years of operation.

Between April and December 2008 nearly 3000 people gave evidence to the inquiry. In addition, evidence was presented from the voluntary and community sector, from all levels of government, from the National Health Service and other public agencies, from the media, from regulators, ombudsmen and inspectorates. The inquiry also included a comprehensive literature review and extensive public polling.

So what does all of this evidence show? Here are some of the report's findings:

The Human Rights Act makes a positive difference to people's lives, and to the effective delivery of public services which focus on individual needs. Human Rights, by focusing on the needs of the individual, can help to restore the power balance between the State and individuals, and between service providers and service users, and can contribute to a fairer, equal and more inclusive society. The effect of adopting a human rights approach has been to improve the circumstances of the lives of many people and their families.

The fundamental principles set out in the Human Rights Act closely reflect our traditional values of fairness and justice, and the universal standards to which every democratic government is committed. Polling evidence shows that 84 percent of people actually want human rights enshrined in the law for themselves and their families.

UK Justice Minister Jack Straw summed up the evidence when launching the inquiry report:

The Human Rights Act has therefore decisively changed the culture of Government and public authorities by placing a positive obligation on the State to treat people with dignity, equality and respect.

The public support for legislative protection for human rights in the UK reflects the experience in Canada where public polling showed that after twenty years of operation, 74 percent of Canadians believe individual rights and freedoms are better protected due to their Charter of Rights.

The evidence from the UK and Canada is that Human Rights legislation has been both overwhelmingly positive and highly popular.

The public polling indicates that a large majority of the citizens of both Canada and the UK view the introduction of a Human Rights Act as having been a positive step for their nations. I am yet to find a nation that has been diminished by improving the protection of the human rights of its citizens.

Given the evidence Australia should take this positive step to join the international progression towards enhanced human rights and ensure that Australian citizens enjoy at least the same level of protection of our rights as the citizens of Canada and the UK.

References
1 Human Rights Act 1998 (UK).
5 ‘Birthday Blues’, above n2.
7 Id at 18.
8 Id at 17.
I agree that the protection of the vulnerable is fundamental to the quality of a society. But it is precisely because protecting the rights of the marginalised is so important that I am opposed to transferring responsibility for it from democratic parliaments to an unelected judiciary through a Human Rights Act or Charter.

Judges are appointed and are chosen because of their legal expertise, not as representatives of the people. If the electorate does not like the decisions of a government, they can vote them out, but they have no power to determine or even influence the decisions of a court. Why should we entrust the important function of protecting minority rights to a body that is not suited to it, that is beyond democratic control, and when judges themselves have said they do not want it?

The Australian political system has a proud history of advancing human rights across all sections of Australian society. We were, for example, one of the first nations to give women the right to vote by an act passed by the newly established Commonwealth of Australia in 1902.

Parliament has been the driver of progress in rights protections. This is reflected in the Commonwealth statute book, which records the history of legislative change to guarantee the rights of the vulnerable through the Racial Discrimination Act 1975 (Cth), the Sex Discrimination Act 1984 (Cth), the Disability Discrimination Act 1992 (Cth), and the Age Discrimination Act 2004 (Cth). The Australian Human Rights Commission Act 1986 (Cth) set up a statutory body to oversee human rights in Australia.

State legislatures have also passed complementary acts to outlaw discrimination and state criminal laws provide an important source of human rights protection. Safeguards such as the imposition of limits on the powers of police and accountability requirements, as well as guarantees of the rights of the accused are enshrined in state criminal statutes. The recent Crimes (Domestic and Personal Violence) Act 2008 (NSW) helps to protect the human rights of victims of domestic violence to personal security and freedom from violence by criminalising the behaviour of their assailants, making apprehended violence orders available to both the victims and their children and empowering police to take action against the offenders.

It is strange that a parliamentarian who has been around as long as Sylvia Hale should wish to reduce the democratic power of parliaments to effect progressive social change and transfer it to the courts. Parliaments are mechanisms to discuss, examine and resolve social conflicts, weighing up the different rights and interests of competing social groups and reaching practical and targeted resolutions. The legislative instruments discussed above are so effective at protecting human rights and receive such widespread support in the community precisely because they have come out of this parliamentary process. Ms Hale asks ‘is there a serious argument to be made that these rights should not be protected by specific legislation?’ In fact they are already protected by specific laws and it is the specificity of the legislation that ensures they function properly.

A charter, on the other hand, enumerating general principles, leaves it up to the courts to decide on how these are implemented and which rights and interests should be given greatest weight in the inevitable conflicts that will arise. Courts, equipped to deal with the adjudication of legal conflicts, not policy development or social controversy, should not be asked to perform this function.

Ms Hale cites a number of well-publicised cases where the Howard government failed its citizens. I agree that these examples are gross breaches on the part of the State of its duty to care for its most vulnerable, however I am unable to make the leap of faith required to believe that a human rights act would have stopped these events from occurring or provide more effective remedies. Indeed, the fact that these cases have come to light, been investigated and (to the extent possible) remedied is a testament to the existing structures of our parliamentary democracy.

A free press enabled investigation and publicity of the failures of government, special inquiries under the auspices of government and the Commonwealth Ombudsman were conducted and recommendations regarding public administration made. The Court system has ensured that compensation awards have been ordered. And, of course, in relation to immigration matters, the ultimate act of a parliamentary democracy has occurred – the government has changed. Detention policy has been reformed and now the Migration Amendment (Immigration Detention Reform) Bill 2009 (Cth) is before the Australian Parliament and the Senate Committee on Legal and Constitutional Affairs. The Bill reflects the newly elected government’s policy, one more in tune with the community’s attitudes, and proposes the establishment of a ‘fairer, more humane and effective system of immigration detention, which restores dignity and fairness to clients and rebuilds integrity and public confidence in Australia’s immigration system.

Other structures exist that protect our human rights. For instance, the Australian Human Rights Commission has a broad mandate to protect human rights in Australia through, for example, conducting annual visits to immigration detention centres and reporting on human rights issues identified during those visits and undertaking inquiries.
and making recommendations, including the payment of
compensation.

A closer look at the Australian Parliament’s Senate committee
structure also reveals its role as a human rights protector.
Anyone can make a submission to a Senate Committee
inquiry and there are open and flexible rules about how to
do so. A submission can be short, long, make one point or
many, be in any format, special arrangements can be made
for hearing and speech impaired people and it can be in
confidence or not. Such a scheme suggests to me that we
live in a country that, far from suppressing or limiting free
speech, encourages it.

**Decisions about where the balance lies when comparing the scope of human rights protections that we can afford against the need to protect ourselves from the real and constant threat of terrorist acts designed to destroy our secular democratic state must be left to elected representatives, not unelected judges.**

The inquiry into the Greens’ *Anti-Terrorism Laws Reform Bill 2009* (Cth) by the Senate’s Legal and Constitutional Affairs Committee is illustrative of an effective parliamentary democracy, where laws can be examined thoroughly by the Parliament with a view to determining whether they reflect current community standards, including human rights standards. Furthermore, the norms of free speech in our community mean that the media are free to report on the proposed legislation, as well as generate and participate in debate on the issues.

As noted in the evidence of the Clerk of the Senate, Harry Evans, to the National Human Rights Consultation:

> The committees have a considerable impact on the content of legislation. Their scrutiny discourages executive departments from attempting any major infringement of rights and liberties in the preparation of legislation. They also bring about the amendment of legislation after its introduction. It is difficult to numerically calculate the impact of the committees, because of their deterrent effect, and also because it is not always obvious when legislation has been amended as a result of the committees’ scrutiny. Primary legislation is often amended by governments, sometimes before it is received in the Senate, without explicitly acknowledging that the Scrutiny of Bills Committee is the cause of the amendments. The

Regulations and Ordinances Committee reports on amendments to delegated legislation as a result of ministerial undertakings, but its reports do not attract wide attention.

In practice, the committees seldom detect egregious infringements of personal rights and liberties in legislation. Such infringements are generally confined to “big ticket items” on the legislative agenda, such as anti-terrorism legislation.

The committees draw attention to possible infringements of rights and liberties in such legislation, and it is then left to the essentially political judgment of the Senate to determine where the balance should be struck between those rights and liberties and the achievement of the aims of the legislation.

Likewise the NSW Parliament’s Legislative Review Committee scrutinises all bills and many regulations introduced to NSW Parliament. I suggest that such parliamentary committee schemes fulfil in a more democratic way, the task expected of courts and judges in making declarations of incompatibility under a human rights act. The Senate Committee process gives easy access to the public, with individuals and organisations being free to make submissions on their own account. This must be preferable to requiring individuals to involve themselves in the costly and arcane business of lawyers and courtrooms in order to assert their views, as would most likely be necessary under a Human Rights Act involving declarations of incompatibility.

As I have made clear elsewhere, it is my contention that decisions about where the balance lies when comparing the scope of human rights protections that we can afford against the need to protect ourselves from the real and constant threat of terrorist acts designed to destroy our secular democratic state must be left to elected representatives, not unelected judges. As I noted in my submission to the National Human Rights Consultation:

> Abstract human rights principles give unelected judges an additional layer of subjectivity and discretion; their decisions become political and personal rather than legal. ‘The greater the degree of vagueness in the law, the greater the power of the judges in charge of it.” This encourages judicial activism.⁷ As stated by the NSW Solicitor General, Michael Sexton, ‘law cannot be a substitute for politics. To hand these questions over to courts does not make them legal rather than social or economic questions.’ Many rights ‘rest on controversial propositions, matters open to reasonable disagreement, issues that should properly be debated in the public arena’.⁸ These are ‘essentially political questions⁹ which courts should not be adjudicating upon."
Ms Hale suggests that the UK *Human Rights Act* is an appropriate model for consideration in Australia and that the experience of the UK has been a positive one. She emphasises the role of the Act in developing a rights culture in the UK and creating an ethical framework for the actions of public authorities. What this ignores is that the political, economic and legal environment in which the UK *Act* was enacted was very far removed from the Australian experience.

As I have said elsewhere, the object of the Bill enacting the UK *Human Rights Act* 1998 was unambiguously stated to be to retain power to interpret British laws in UK courts, stating: 

the time has come to enable people to enforce their Convention rights against the State in the British courts, rather than having to incur the delays and expense which are involved in taking a case to the European Human Rights Commission and Court in Strasbourg.

There is no comparable international court to which Australian laws are tied and therefore no need for a similar human rights instrument to keep Australian courts in control of our laws.

**a Charter or Bill of Rights is not a prerequisite for effective rights protection.**

Separation of powers and strong institutional governance are. The best human rights protections are to be delivered by our parliamentary democracy operating under the rule of law.

What was essentially a decision to elevate the European Convention on Human Rights into the domestic law has resulted in a shift in the way in which human rights were previously protected in the UK. No such imperative exists in the current Australian context.

Furthermore, as spelt out in Felicity McMahon’s article on the British Act, it appears that real damage is being done by its section 3(1) (which requires that legislation be read and given effect in a way which is compatible with the Convention rights) to the well established rules of statutory interpretation which enable courts to interpret legislation to give it its natural and ordinary meaning, in line with the intention of parliament. In particular, there have been a number of matters involving contentious areas of public policy, namely terrorism and crime, where the British courts, required as they are to interpret legislation so as to be compatible with the Convention, have made decisions that undermine Parliament’s ability to adequately protect the public from serious terrorist threats or remove convicted criminals from participation in civil society. As she notes:

The operation of the (UK Human Rights Act) has shown that it is a severe blow to the sovereignty of Parliament. The interpretation obligation, rather than the power to issue a declaration of incompatibility, results in parliamentary intention and purpose being undermined and the object of legislation perverted. This seriously contorts the power of Parliament to implement policy. 

The fact that the UK is now engaged in a serious debate about the adequacy of its human rights laws suggests to me that we should not be quick to emulate their existing law.

Ms Hale says she wants a charter to affect ‘the way that services in health, education, welfare and aged care are delivered to citizens by government’. These are important questions of resource allocation that should be in the hands of the democratically elected executive, who must make the often difficult political decisions of which needs and interests need to be prioritised. By locating them in a charter and giving the responsibility of deciding them to the courts, Ms Hale wants to thrust upon them a responsibility for which there is a serious democratic deficit and which they are ill-equipped and generally unwilling to carry out.

Finally, I would submit that the experiences Ms Hale cites as desirable outcomes of enacting human rights laws, such as restoring the power balance between the State and individuals and between service providers and service users, do not in themselves suggest the need for a stand alone ‘human rights’ statute. To the extent that this argument suggests that the UK law contains social and economic rights it is misleading.

Although economic, social and cultural rights are not currently incorporated directly into UK law through an equivalent of the *Human Rights Act*, a range of related entitlements are embedded in UK legislation and reflected in the institutions which oversee their implementation.

Likewise, it is unnecessary to import any such rights directly into an Australian human rights law. As I have advocated elsewhere, in NSW we have a raft of statutory bodies and laws that operate every day to protect peoples’ human rights. To name a few: discriminatory conduct is protected by our...
discrimination laws and overseen by the Anti-Discrimination Board, breaches of privacy are protected by our privacy laws and overseen by our Privacy Commissioner, many government decisions are reviewable in the Administrative Decisions Tribunal and our courts operate in a legislative framework that ensures the right to a fair hearing is delivered in every case. Similar protections can be found in comparable Commonwealth laws and bodies, some of which are discussed elsewhere in this paper.

To put it simply: a Charter or Bill of Rights is not a prerequisite for effective rights protection. Separation of powers and strong institutional governance are. The best human rights protections are to be delivered by our parliamentary democracy operating under the rule of law. A ‘stand-alone’ human rights act would add nothing to our democratic fabric and runs the unnecessary risk of removing from Parliament the scope to be responsive to threats that seek to undermine it.

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* Attorney General and Minister for Industrial Relations (NSW).
2 See for example; Mick Palmer AO APM, Department of Immigration and Multicultural Affairs, Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau (2000).
3 See for example; Commonwealth Ombudsman, Lessons for Public Administration - Ombudsman Investigation of Referred Immigration Cases (2007).
4 On March 7 2008 the Sydney Morning Herald reported that following proceedings in the NSW Supreme Court Cornelia Rau was to be paid $2.6 million in compensation by the Commonwealth government. See; ‘Rau wins $2.6m compo’, Sydney Morning Herald (7 Mar 2008) at <http://www.smh.com.au/news/national/rau-wins-26m-compo/2008/03/07/1204780046361.html> accessed 22 July 2009.
5 Commonwealth, Parliamentary Debates, Senate, 25 June 2009 (Penny Wong) at 4271.
12 Ibid.
17 Id at 284 – 285.
19 Ibid.
Dr Ben Saul* (BA (Hons) LLB (Hons) (Sydney) DPhil (Oxford)) investigates alternatives to the weak statutory dialogue model of a Human Rights Act and demonstrates that the judiciary is the arm of government best suited to the task of interpreting and enforcing our rights.

Since the Federal Government announced its national consultation on human rights protection last year, there has been a startling lack of ambition and boldness amongst those who support a bill of rights for Australia. The dominant model on the table appears to be the weak “dialogue” statute as found in Britain, Victoria and the ACT, under which there may be no new causes of action, no remedial rights to compensation, and no power of judges to declare legislation inoperative where it is inconsistent with a human right.

Most advocates of bills of rights in Australia appear to be satisfied with this model. Strategically, a statutory dialogue model is attractive because a small target is thought more likely to gain wider political support. It seeks to neuter a widespread concern about unelected judges usurping the role of a democratic parliament, instead of confronting such views head-on.

Yet, by failing to respond in a principled way to those criticisms, the supporters of a small target bill of rights lend dangerous legitimacy to the fallacies spouted by opponents of any bill of rights. Those who ought to be at the forefront of developing progressive human rights protections have regretfully fettered themselves by a super abundance of caution, which does not well serve the cause of the strongest possible human rights protection in Australia.

I make four arguments here in response to the disappointing debate which has ensued from the proposition of a bill of rights in Australia over the past year. First, both those who oppose bills of rights and those who advocate a dialogue model do not adequately understand the value of rights as rights, rather than as mere political privileges. Secondly, a dialogue model gives us little more than we already have and is scarcely worth the effort, although of course it would be better than nothing at all. Thirdly, the problem of human rights protection in Australia is that ‘unelected’ judges do not have enough power, and the ‘democratic’ parliament has too much. A justiciable bill of rights with enforceable remedies (whether constitutional or statutory) would not give unelected judges too much power. Fourthly, nor would such a bill require judges to apply vague or political standards which would politicise the judiciary. Far from it, empowering judges to better protect rights would enhance the legitimacy of the judiciary and increase public confidence in the justice system.

The Lack of Bold Vision of Rights Protection
There is a stark comparison between the political commitment to human rights by the Rudd Government in Australia and the Obama administration in the United States. In 2008, faced with the absence of a federal bill of rights for over a century since Federation, the Rudd Government announced a protracted inquiry into how to better protect rights, the recommendations of which will be considered by the Government towards the end of its first term, realistically consigning any implementation until after an election. No strong leadership there: just part of the usual blizzard of inquiries and consultations launched by this government on a range of issues, with human rights treated no more significantly than petrol or grocery prices.

Almost every other liberal democracy has had some form of bill of rights for decades, if not centuries. The legal issues are well known and not particularly difficult. There are a plethora of international treaties to guide the shape of a domestic bill. There have been numerous previous inquiries here and overseas about bills of rights and one wonders what yet another inquiry can add, other than polarising political positions for and against a bill of rights.

In contrast to the typically Australian lethargy on a bill of rights, contrast the commitment embodied in President Obama’s Inaugural Address in January 2009:

…we reject as false the choice between our safety
and our ideals. Our founding fathers, faced with perils that we can scarcely imagine, drafted a charter to assure the rule of law and the rights of man, a charter expanded by the blood of generations. Those ideals still light up the world, and we will not give them up for expediency’s sake.

On that view, rights matter. They are not up for negotiation, compromise or long-winded consultation, only to result in (if anything) a weak statutory dialogue. It is self-evident to the peoples of countries founded in ‘blood’ that human rights should enjoy the strongest possible constitutional protection; whether the US emerging from revolutionary violence, Germany rebuilding itself after Nazism, or South Africa overcoming systematic apartheid. The strong protection of rights is a key characteristic that signifies a break with the past and a shedding of the arbitrariness of the old order.

In contrast, those who have been most frequently victims of human rights abuses have never held the reins of power in Australia; whether Asian or Pacific labourers at Federation, indigenous Australians, asylum seekers, racial or religious minorities, the homeless, or now suspected terrorists.

How can we say to those victims of rights violations, often invisible, often voiceless, ‘oh well, we had a dialogue about your rights but we still decided to override them, sorry’

Instead, our approach to rights has often been driven by a majoritarian conception of the common good, in which democracy is primarily concerned to protect ‘mainstream’ interests: the battlers, middle Australia, families, and so forth. No wonder many of our politicians are against rights or indifferent to them, most politicians do not come from those minority groups. We just do not get it as those whose rights are systematically violated get it. How can we say to those victims of rights violations, often invisible, often voiceless, ‘oh well, we had a dialogue about your rights but we still decided to override them, sorry’.

Some argue that parliament and the common law already protect rights. In a recent speech,\(^3\) Liberal Senator George Brandis used the High Court’s Al-Kateb case to illustrate that where there is a gap in human rights protection in Australia, a bill of rights is still unnecessary because ‘political action and law reform’ fix it, as when detention laws were amended in response to that unsatisfactory decision.

But he evidently does not understand human rights well, or mischaracterises them. The government’s response to Al-Kateb did improve detention, but it remains arbitrary under human rights law, it was just made less arbitrary. Every person arriving without permission is still indiscriminately locked up, regardless of whether they are a flight, health or security risk. They are detained for up to 90 days, which is unnecessary to identify them. In other democracies, it takes a few days or a week.

Our parliament has decided that administrative convenience outweighs the right to liberty and freedom from arbitrary detention, which is precisely the kind of political interference which human rights law is designed to safeguard against. Similar judgments have been made by the parliament in the field of counter-terrorism law, anti-bikie legislation, and so on.

Of course, under a ‘dialogue’ bill of rights, little would change. Parliament could continue to override rights where it saw fit, particularly in a parliament which often does not appear to value liberty as highly as human rights law does. Democratic parliaments do not always get it right. Sometimes they transgress what ought to be regarded as ultimate moral limits on political authority, and one cannot be confident in their chivalric powers of self-restraint.

A Statutory Dialogue Model Does Not Give Us Much

The first feature of a dialogue model is that it may require statutes to be interpreted consistently with human rights as far as possible. That is largely already supposed to happen. There is good legal authority that ambiguous statutes should be interpreted consistently with international law (and the common law should also be developed consistently with international law where possible). So, little is gained through an express direction to that effect in a dialogue model, other than making human rights standards more familiar to those judges who are comfortable with statutes but suspicious or sceptical of, or untrained in, or unaware of, international law.

The second feature of a dialogue model is that it would enable courts to issue a declaration of incompatibility, where it is not possible to interpret the statute consistently with rights. Of course, most new legislation is already assessed in the arena of public debate according to human rights standards. A plethora of NGOs, academics and so on extensively analyse laws affecting rights in controversial areas according to such standards and parliamentary committees report on them and make recommendations. A declaration of incompatibility simply shifts the centre of gravity to the courts, in addition to whatever is going on in civil society and in parliament.

Now there is nothing wrong with an advisory opinion of that kind (and there are ways of ensuring they are constitutionally valid). A court’s declaration may send a powerful signal to the government that it has overstepped the mark. However, only procedural consequences follow (parliament must respond within a certain time period) and not any substantive obligation to change the law. Sometimes a declaration may convince the government to change the law, and sometimes not, it depends on the political wind on the day.
In a democracy in which parliamentarians have a heritage of framing legislative discussions around rights-based values, where there is a political culture that is sympathetic to rights, one might have confidence that judicial declarations of this kind might have the desired effect.

In Australia, one is not so sure that a charter of rights would civilize politics. There is such a deep rooted scepticism of or hostility towards international human rights amongst many politicians on both sides of the political spectrum and there is a prevailing attitude that parliament is democratic and that its views accordingly matter more than those of the courts, particularly because parliament can often overturn judicial decisions which it does not like.

I believe that parliament should never be entitled to torture a person, and I believe that a judge properly ought to have power to forbid it and to compensate victims.

The upshot is that the dialogue model is potentially, depending on its political reception, a fairly tepid or insipid way of protecting rights. It values them chiefly according to political preferences and priorities, rather than recognising their inherent importance above the fray of political bargaining, horse trading, negotiation and opinion polls. Rights become transformed into rebuttable presumptions, blown about in the political winds.

In enabling parliament to override human rights where it wishes, the dialogue model gives us little more than an expanded form of the Racial Discrimination Act 1975 (Cth). As we have seen in the Northern Territory intervention, rights are valuable only so long as they do not get in the way of politics.

Parliamentary Sovereignty Is Not Threatened

Senator Brandis asserted in March 2009 that a bill of rights ‘would inevitably result in a fundamental rebalancing of our constitution away from parliament towards the judiciary, with dangerous consequences for both’ and a ‘significant transfer of power from elected parliaments to unelected judges’.4

Yet, it has never been the case under the Australian Constitution that sovereignty is vested exclusively in the parliament. Doctrinally that is what sets Australian democracy apart from its British ancestor. With an unwritten constitution, the absolute sovereignty or supremacy of parliament was a defining characteristic of classic English constitutionalism. That was never the case in Australia, where the drafters of our Westminster constitution deliberately departed from that model by limiting the sovereignty of parliament in various ways. Not only by closely defining the powers, functions and authority of the parliament to legislate, but also by decentralising power in a separation of powers which was more rigid than its British counterpart, including by vesting certain powers exclusively in the judiciary.

The point of the separation of powers is the division or sharing of sovereignty. Majoritarian democracy only protects human beings so far. It is the constraints or limitations on power accepted by democracies that enable democracy to flourish and sustain itself over time, in a manner which is inclusive of all and not premised on the arbitrary exclusions or unequal treatment of groups that the majority does not like.

Further, as David Feldman argues, legitimacy can arise independently from democracy.5 Judicial decisions gain their own legitimacy from reference to relatively clear and predictable legal standards, the independence of courts from political processes, and constitutional role of courts in constraining the arbitrary or unlawful exercise of power.

Parliament can conversely be criticised for being an inappropriately forum for making certain policy decisions about human rights, for example, because political pressures render parliaments more susceptible to trading away individual rights to appease the majoritarian clamour, because legislators are susceptible to NGO or lobbyist pressure which distorts outcomes, or because party politicians are beholden to sectarian interests, whether big business or trade unions or green groups.

There is nothing innate about the respective roles of the legislature and the courts. The separation of powers is a dynamic doctrine which does and is capable of change according to the prevailing social needs of society. A democracy may properly elect to assign certain powers of restraint to the judiciary, including through a constitutional bill or a justiciable statutory model, because it is rightly sceptical of overly broad political power.

...both those who oppose bills of rights and those who advocate a dialogue model do not adequately understand the value of rights as rights, rather than as mere political privileges

Rights Are Not Too Vague or Political For Judges

It is often further asserted that human rights standards are wide, vague or ambiguous. As Senator Brandis puts it, they are ‘expressed at such a level of generality that often they amount to little more than political slogans’.6 Yet, rights are only general if one lacks a body of law that gives them content, which is obviously the case in a country which lacks a bill of rights. The obvious answer to this tedious objection is that Australia could readily draw upon the rich jurisprudence from those many democracies which directly apply human rights.
It is often further objected that bills of rights transfer to judges subjective control over what should be political choices, and that judges lack expertise in such policy-based decision making. Yet, this criticism equally applies to many other well-accepted legal concepts applied by the courts, such as tests of reasonableness, equity, fairness, justice and so forth, which mask broad discretionary power, yet which have long been accepted as judicial work.7 This objection is grounded in a misunderstanding of the judicial function, which in reality involves the exercise of discretions, balancing of interests, and policy judgments, rather than the automatic or technical application of finite legal rules.

Senator Brandis also objects that the making of wide policy choices would politicise the judiciary and undermine its neutrality. Yet conversely, the failure of the courts to remedy rights violations already exposes it to greater contempt: many Australians were deeply ashamed that our High Court was seemingly forced into accepting that indefinite detention without charge could arise under an Australian statute, and that our highest court was powerless to prevent it.

One problem in the framing of objections to bills of rights is that there is seldom specific attention to why codifying particular rights would be problematic. Once you drill down into specific rights, much of what is claimed to involve heated political contestation evaporates, precisely because so much of human rights law is about minimum, not maximum standards. For instance, I believe that parliament should never be entitled to torture a person, and I believe that a judge properly ought to have power to forbid it and to compensate victims.

I believe that an Australian court ought to be able to order the government to provide public housing for those who are living homeless and destitute on the streets. I cannot believe that this would impose undue interference in resource distribution priorities by the government, since avoidance of destitution is surely a minimum duty of any functioning government. If we can afford to spend many tens of billions of dollars on new defence procurements at a time of global financial crisis, we can surely afford to put a roof over the head of everyone who needs it: if we agree that rights areMinimum – and that is why the heart of human rights law reasoning) and which are not “inherently too vague for use in judicial decision-making”.

Likewise I believe that a court ought to be able to prevent the government from imposing punitive visa conditions on a person which deny them income and housing support, medical care, and work rights, thus leaving them destitute and treating them in an inhuman and degrading manner. Certainly the protection of some rights involves difficult resource allocation choices, in which governments are better experienced than courts. Yet, as the South African experience demonstrates, it is possible to balance these interests by giving courts powers in relation to rights while simultaneously ensuring that the courts only require governments to do what is reasonable within prevailing resource limits and policy constraints.

Conclusion
We have not yet achieved the optimal division of powers between politicians and judges in respect of the fundamental protection of human beings. The depth of hostility towards incorporating international human rights standards into Australian law is perplexing. Human rights are minimum standards only – a floor not a ceiling – and that is why suggestions that they interfere in democratic politics are so odious. Democracies should in most cases be performing far above the minimum standards. When they are not, something is going seriously wrong in those political communities.

I would caution against settling for a weak dialogue model of human rights protection. Its weaknesses cannot possibly satisfy those to whom human rights matter most, those who are victims of rights violations and who are seldom well positioned (unlike business, lobbyists, trade unions and so forth) to engage in the political process to extract concessions.

The litmus test of any government’s commitment to human rights is its preparedness to expend political capital, which may not necessarily appeal to majoritarian sentiment or to the usual cacophony of shock jocks and ideologues. The government has an unprecedented chance not only to put right what was so out of balance under the previous government, but to show real leadership in developing a progressive human rights agenda in Australia. It should not waste that opportunity by delaying on a bill of rights, or by settling for an insipid dialogue. The government might also be pleasantly surprised by how warmly a strong bill of rights would be received in the community.

References
* Director, Sydney Centre for International Law, Sydney Law School.
4 Ibid.
6 Ibid.
7 For instance, in the High Court’s anti-terrorism control orders case, Thomas v Mawbray [2007] 237 ALR 194 at 207 – 210 Gleseson CJ observed that the common law, constitutional law, contract, real property, and trade practices law commonly use concepts of reasonableness and proportionality (concepts which are incidentally at the heart of human rights law reasoning) and which are not “inherently too vague for use in judicial decision-making”.
8 See Grootboom v Oostenberg Municipality and Others 2000 11 BCLR 1169.
Wesley Lalich (Graduate Law II) looks at the history of rights protection in the UK and Canada and what Australia can learn from their experiences.

As Australia explores the possibility of a Bill of Rights, it is instructive to look at the situations that surrounded the development and implementation of statutory and constitutional rights protection in the UK and Canada. The circumstances, politics, personalities, interests and complexities, of a given political system are unique to the country and period in which the events take place. Nonetheless, the historical ties and comparable systems of governance between the three nations are conducive to comparative analysis. Similar to Australia's experience, the UK and Canadian governments' interest in enacting and entrenching rights protection has ebbed and flowed, with a number of abandoned efforts prior to the implementation of legislation. As with most aspects of high policy implementation in pluralistic societies, the realisation of a Bill of Rights is a laborious process of surmounting opposition and managing competing interests. If there is something to be learned from the British and Canadian experiences it is firstly that implementing domestic rights protection can be fraught with false starts, lack of momentum, and the final product will be a compromise between rights advocates and cynics. Australia has already experienced two failed attempts at a statutory Bill of Rights, one introduced by then Attorney-General Lionel Murphy in 1973, and another introduced by then Attorney-General Gareth Evans in 1984. Secondly, the effort will not be successful unless robust and resolute political leadership accompanies it. The political perils of navigating the rights debate and lack of immediate political benefits, allows for the project to be easily undermined when it is not supported with strong advocacy by the political leadership directly responsible for bringing it to fruition.

The UK

The UK has a long and distinguished history of articulating and safeguarding rights, stretching back to the Magna Carta of the Dark Ages. Political philosophers and jurists, such as Tom Paine, John Locke, Lord Coke and William Blackstone furthered rights development during the Enlightenment. The struggle between Parliament and the Monarchy in the 17th century also conceived The Petition of Right in 1628, the Habeas Corpus Act in 1679, and finally The Bill of Rights in 1688. However, the Bill of Rights of 1688 was primarily about establishing the supremacy of Parliament over a recalcitrant Monarch than protecting the rights of individuals. The era of modern rights dialogue began in the aftermath of World War II, with such seminal documents as the United Nation’s Universal Declaration of Human Rights, and the Council of Europe's European Convention on Human Rights (ECHR). The UK was a founding member of the Council of Europe and became the first country to ratify the ECHR. Despite the progress rights dialogue was making, it took a few more decades for it to gain further currency on the national level in the UK. Towards the end of the 1960s the prospect of a constitutional Bill of Rights was being discussed, and substantial interest was shown in the topic under the Labour governments of Harold Wilson and James Callaghan in the mid to late 1970s. In 1975 there was a general debate in the House of Commons on a UK Bill of Rights, and a discussion paper was produced by the Labour Party on the possibility of implementing the ECHR as an ordinary Act of Parliament. The Conservatives expressed support as well, committing to holding talks on a Bill of Rights in their 1979 general election manifesto, and Margaret Thatcher's first Lord Chancellor, Lord Hailsham, had expressed strong support for a constitutional overhaul and entrenchment of a Bill of Rights in the early 1970s. However, by the 1983 election, the Conservative manifesto contained no mention of a Bill of Rights, and subsequently Thatcher expressed clear opposition to the implementation of the ECHR or a Bill of Rights. Opposition to a Bill of Rights remained the Conservative line through John Major's years as Prime Minister.

In agreement with the Conservatives, throughout the 1980s, the Labour Party's official stance was opposition to a Bill of Rights. However, in the lead up to the 1992 election, the Labour Party's opinion on the matter changed, and they endorsed the idea that some broad statement of human rights was required, although the specifics were never enunciated. Following that election loss, Labour undertook a review of its constitutional reform programme. The then shadow Home Secretary, Tony Blair, headed the review that was carried out in 1992-3. Labour's proposed constitutional reform package that came out of the review included robust advocacy for the statutory incorporation of the ECHR as...
a first step in the development of a native Bill of Rights. Tony Blair subsequently became party leader in 1994. As time wound down on Major’s term, it looked increasingly likely that Labour’s extended stay in opposition was finally ending. Part of Blair’s electoral strategy, in order to convey Labour’s readiness for government and freshness after almost two decades of Conservative rule, was identifying key initiatives that were easily identifiable and achievable in a first Labour term. One of these initiatives was a White Paper the Labour Party released in December 1996, ‘Rights Brought Home,’ which was the genesis of the legislative process that produced the Human Rights Act 1998.12

Tony Blair led Labour to a landslide victory in 1997, and in 1998 the ECHR was incorporated into UK law as the Human Rights Act. It took more than two decades from when the idea was initially bandied about for the ECHR to be finally incorporated as an ordinary Act of Parliament. It would not have happened without the matter being treated as a priority, accompanied with strong commitment and leadership by Tony Blair and other senior members of the Labour Party.13 Incorporating the ECHR was itself a compromise, a stepping-stone in developing a UK Bill of Rights, although after more than a decade since the passage of the Human Rights Act there has been no progress on a native constitutional version. Nonetheless, it has been argued that the Human Rights Act is of sufficient significance to be considered part of the UK Constitution, along with documents such as the Magna Carta.14

**Australia has already experienced two failed attempts**

**Canada**

In the modern era, Canada’s experience with human rights protection began earlier than in the UK, and there was strong support from both the right and left at different points in its progression. Canada’s first Bill of Rights was enacted as an ordinary Act of Parliament in 1960. The impetus for the Bill came from the Conservative Party, championed by the Prime Minister of the day, John Diefenbaker.15 However, the Canadian Bill of Rights 1960 proved ineffectual, partly because of its limited legal force. Being an ordinary Act, Parliament was free to ignore its primacy provision, could amend it at anytime, and the Bill only applied to Federal issues and not to the provinces.16 The Bill of Rights never engendered the development of a rights dialogue as had been hoped. Thus, by the late 1960s, Diefenbaker’s successor, the Liberal Prime Minister Lester B. Pearson, and his Minister of Justice, Pierre Elliot Trudeau, were advocating for a constitutionally entrenched Charter of Human Rights.

Trudeau went on to replace Pearson as Prime Minister in 1968. As an academic and cabinet member prior to becoming Prime Minister, Trudeau had been a fervent and dedicated believer in entrenching human rights protection in the Canadian constitutional order. Despite his leadership and devotion to the issue, and longevity as Prime Minister, it was not until well into his last term, in 1982, that the Charter of Rights and Freedoms was finally entrenched.

Entrenching the Charter was part of a broader re-organization of the Canadian constitutional settlement that came to be known as ‘patriating’ the Constitution. When the provinces of British North America confederated in 1867 to form the new Dominion of Canada, written constitutions were a novelty in the English legal tradition. The British North America Acts, as the Imperial pieces of legislation that comprised the Canadian Constitution were known, lacked vital aspects, such as a domestic amending formula. By the 1960s, the Federal government was committed to severing all lingering constitutional links with Britain, and as part of this constitutional re-ordering, entrenching a Charter of Rights. Trudeau’s efforts in the late 1960s culminated in the 1971 Victoria Conference that produced a constitutional agreement that came to be known as the Victoria Charter, which included a Bill of Rights.17 This agreement soon collapsed due to discord amongst the provinces on the amending formula, and constitutional reform lay dormant for the rest of the decade.

Trudeau lost the 1979 election, but managed to regain the premiership nine months later when the Conservative minority government fell on a vote of confidence. Sensing it was his last term as Prime Minister, Trudeau pursued his constitutional priority of entrenching a Charter of Rights with vigor.18 After an initial attempt to corral the provinces into coming to an agreement, the Federal government decided they were unilaterally going to pursue patriation, with the inclusion of a Charter of Rights.19 It was termed the ‘people’s package,’ and the Federal Government launched a populist campaign to rally support for this exercise in Canadian nation building.20 As the Constitution lacked an amending formula, it was not clear if the Federal government could alter the constitutional order without the agreement of the provinces. The provinces thought not, and pursued the matter to the Supreme Court of Canada. The decision, known as the Patriation Reference, decided that as a matter of black-letter law the Federal government could unilaterally seek amendment of the Constitution from the UK Parliament, even though a non-justiciable constitutional convention existed of having substantial provincial consent. It was a peculiar piece of jurisprudence, giving the Federal government a legal triumph and the provinces political ammunition to assert that Trudeau was flouting constitutional norms. However, it did have the effect of concentrating the provincial premiers’ minds.21 Trudeau stated the Federal government’s intention was to press on with the patriation, but also indicated a willingness for further talks.22 The premiers convened in Ottawa in November 1981.

The First Minister’s Conference commenced with Trudeau having an edge over his provincial counterparts. Not only
was he armed with the legal authority to continue regardless of their objections, but polls were also showing very strong popular support for the Charter,23 which may have been fostered by the massive advertising campaign the Federal government had been waging.24 The premiers, for a variety of reasons, had been concerned that a Charter of Rights would infringe on their powers, with the leaders of Manitoba and Saskatchewan adamantly maintaining that the Charter was ceding too much power to the Courts, and Quebec and Newfoundland worrying that it would impact their ability to control social policy.25 When the First Ministers initially gathered, eight of the ten premiers were firmly opposed, and a major concession was offered in order secure provincial agreement. What the premiers extracted is what became known as the ‘notwithstanding’ clause, whereby legislation is valid notwithstanding its violation of certain Charter rights, although it must be re-enacted every five years to maintain validity. This was a step-down from their original demands of having an opt-in formula, whereby a province could decide whether to be bound by the Charter at all.26 Trudeau did not directly partake in the negotiations that produced this settlement, and he had publicly dreaded the notion of a ‘checkboard quilt’ of human rights across Canada.27 Nevertheless, while politics invariably entails compromise, the broader goal of entrenching the Canadian Charter of Rights and Freedoms was achieved.

The current government’s tepid approach is inadequate.

Conclusion

So what lessons can Australia learn from the UK and Canadian experiences? If Australia is to have a Bill of Rights it is going to require much stronger leadership by the Prime Minister, Attorney-General and other members of cabinet than it is currently receiving. The current Labor government did not come to power advocating a Bill of Rights, but rather promising a consultation on the matter with the option of leaving rights protection in Australia as it is. Implementing a Bill of Rights is a complex and laborious procedure. It is not a matter that is easily advocated for in ‘sound bite’ politics, or likely to capture the popular imagination. One of the customary and tired arguments against a Bill of Rights is that it is illegitimately giving power to un-elected judges, which is a claim that loses much of its potency when rights protection is robustly embraced by the elected arm of government. Looking at the lengthy processes that Britain and Canada experienced prior to enacting and entrenching rights protection, coupled with Australia’s false starts on the issue in the 1970s and 1980s, the current government’s tepid approach is inadequate. The government is not championing a Bill of Rights as a pressing policy concern or directly engaging its critics, and the most likely outcome, if there is one at all, will be a weak form statutory one. If the initial objective is set with such little ambition, the final product, which is likely to be a diluted compromise, could be so ineffectual as to scarcely warrant the exertion. Nonetheless, even a feeble statutory model would be a positive step, and the requirement for this is persuasive and forceful advocacy from Prime Minister Rudd and Attorney-General McClelland.

References

1 Human Rights Bill 1973 (Cth); Australian Bill of Rights Bill 1984 (Cth).
4 Blackburn, above n3 at 17.
5 Hoffman & Rowe, above n2 at 23.
6 Id at 26.
7 Blackburn, above n3 at 6.
8 Ibid. 
9 Id at 9. 
10 Id at 10. 
11 Id at 11.
12 Hoffman & Rowe, above n2 at 29.
13 Blackburn, above n3 at 13.
14 Hoffman & Rowe, above n2 at 29.
16 Id at 10. 
19 Monahan, above n17 at 188.
20 Russell, above n18 at 111.
23 Russell, above n18 at 115.
24 Id at 113.
25 Id at 120.
26 McWhinney, above n21 at 95.
27 Id at 97.
Armed with his newfound legal knowledge, Superman sets off to Justice League HQ with a new strategy...
Senthorun Raj (Arts/Law III) explores the difficulties in allowing the marginalised subject to speak in both domestic and international law.

‘Human Rights’ as a global social, political, legal and historical discourse occupies a space of fierce tension, conflict and anxiety in differing cultural and national circumstances. In thinking about the ways in which rights are framed as ‘global goals’, it is important to deconstruct the tensions of universal human dignity with territorial sovereignty. Using a postcolonial theoretical position within the context of international law, the aim of this paper is to examine the ways in which romantic visions of ‘universal rights’ and international law are positioned in specific local contexts, often posing challenges to particular groups incapable of voicing their concerns. By extending the postcolonial critique this paper will then touch upon broader theoretical questions around the potential for a diasporic politics that promotes transnational legal dialogues rather than a territorial system which delineates the sovereignty of states. Using the civil conflict in Sri Lanka as an example, it is important to think of the development of human rights paradigms within both the local and global context to address issues of persecution, discrimination and disenfranchisement. This political scope is considered within the legal framework of the formation of custom and interventionist jurisprudence.

Theorising the Subaltern
In framing the theoretical basis of this essay, Gayatri Spivak poses a question as to whether the ‘subaltern can speak’? Spivak’s notion of ‘subaltern’ refers to the inability of particular classes of individuals to speak. It is the of lack social mobility that characterises the subaltern. They are unable to represent their position due to particular historical and capital conditions of oppression (such as colonialism). In making this assessment, she examines the structure of political representation which denies a particular voice (in her example it is the female colonised subject) the capacity to articulate in its own terms. In this essay, the subaltern will refer to the Tamil minority in Sri Lanka. It is either ‘spoken for’ by the ‘native’ patriarchal position (Sinhalese government) or represented by the ‘Western’ liberal (colonising) narrative. What such a conflict highlights within the context of international law is the voice of the marginalised continues to remain silent to the oppressive domestic system and the ‘liberating’ Western gaze.

Universal discourses on ‘human rights’ are problematic often because states can find such values compromising or untenable within its specific local context. However, whilst postcolonial critique offers insight into the limitations of hegemonic Western values, it also risks being conflated as culturally relativist, a position which marks ‘difference’ as something that should be absolutely respected. What is problematic about a culturally relativist argument is that it offers no strategic opportunities for individuals, communities and states to campaign against ‘human rights violations’ in the ‘Other’ state. Till Muller elaborates upon this legal proposition that customary international law is implicated within globalisation (increasing trade, diplomatic relations and cultural flows) and asserts that it is becoming increasingly ‘transnational’ in character. However, Spivak’s argument also queries how we can render the subaltern subject capable of speaking without the repressive apparatus of the domestic system or the colonising discourses of the liberal ‘West’. For Spivak, this question is answerable through the ‘unlearning of privilege’: a process that is largely unmapped by Spivak for a political and legal context. Instead, Spivak’s solution can be conceived of differently. That is, we can consider how privilege can be deployed in a self-reflexive mode that allows for critique and reformulating international legal frameworks.

Subalterns in Customary International Law
Customary international law as a legal system privileges a particularly liberal Western understanding of norms and ethics. Hilary Charlesworth notes the problematic assumption of customary international law as ‘general principles of law recognised by all civilised nations’. It is determined by widespread state practice and acceptance of this practice as law (opinio juris). What is central to this question as determined by North Sea Continental Shelf Cases (1969) is that for a custom to be recognised, it must be of ‘norm-creating character’. Such an argument is premised on assumptions of a universal ‘natural law’ that is recognised by all states. Yet, this claim fails to account for the problematic positionality of international law making actors.

For example, the formation of customary international law is bound in the structure of the United Nations and
its judicial bodies, which David Bederman describes as a ‘legal embodiment of communities’. Each state has its own legal personality, but there is a complex interplay of power relations. Whilst Bederman’s argument notes that the United Nations (UN) facilitates rather than creates customary international law, he fails to acknowledge the voices that are represented in this process. In the context of human rights facilitation, it is often the liberal democracies chastising other states for their behaviour or it is the allegedly oppressive state justifying or ignoring the position of the UN. Essentially, the voices of the disenfranchised minorities or those who lack political participation in the state are incapable of having their ‘interests’ facilitated.

...if the subaltern is incapable of speaking, how can we ‘hear’ their plight?

However, whilst we can then think to include the subaltern in this legal process, we are still left to ponder Spivak’s question: if the subaltern is incapable of speaking, how can we ‘hear’ their plight? Charlesworth’s critique offers a way of rendering the problem visible but not necessarily how to allow those without voices a means to articulate their political marginalisation. Charlesworth addresses ethnocentric conditions and terms under which something is said to be ‘norm-creating’. Conceptually, it is difficult to make a distinction between the substance of a legal injunction and the acts that identify its designation as a ‘norm’. States have varied perceptions as to what acts constitute a source of obligation for a particular legal injunction. It is important to note that ‘state practice’ is characterised by an uneasy distinction between formal and material sources of law. What ‘inspires’ the law is not necessarily the content which makes it obligatory. For example, the material quality of statute lies in the mechanism which enforces it, such as the various international human rights treaties (International Covenant on Civil and Political Rights or International Covenant on Economic, Social and Cultural Rights). That is, the statute itself may not be reducible to its domestic implementation. Such an argument questions the prevailing notions of what the international community ‘reads’ as state practice as an obligation may not be understood within the domestic field in precisely the same way.

Moreover, what is ‘norm-creating’ is bound in a debate between the domestic government and the liberal ‘Western’ international standards. Customary international law is codified by states only, who are seen as legal personalities within the international legal system. Both Charlesworth and Muller gesture to the ways in which non-state actors and scholars play a crucial role in informing domestic human rights policy as per Article 38(1)(d) of the Statute of the International Court of Justice. In essence, the dialectical nature of this process serves to highlight that the concept of ‘national sovereignty’ remains a legal fiction, in that no states have autonomous and independent voices in the formation of their domestic laws. Prior to the era of what is now termed ‘globalisation’ states were constantly being transformed by colonial politics, legacies that remain in many of the ‘post-colonial’ nations.

Even in the formation of treaty law, nations are increasingly subjected to signing instruments that are not implemented uniformly by states. The signature of the International Covenant on Civil and Political Rights (ICCPR) provides an example of this process in practice. In this sense, the notion of state authenticity or sovereignty is a fallacy, as Leela Gandhi notes, ‘the “post” is never separate from the “colonial”’. Therefore, what remains in terms of a legal system in postcolonial states such as Sri Lanka bears the scars of its colonial history. The Sinhalese-Tamil ethnic tension is bound in the legacy of British colonialism, which privileged Tamil minorities prior to decolonisation. Following the establishment of a republic, the Sinhalese majority implemented statewide policies to actively discriminate against Tamil populations in terms of political participation and employment. Attempts to argue the supremacy of either national sovereignty or international law fail to account for the affected subaltern individuals, who are ill protected by both systems.

Sri Lanka exhibits the tension between discriminatory domestic legislation and impotent international instruments that fail to address the victimisation of particular communities. During Sri Lanka’s three decade long civil war, the minority Tamil Eelam group sought to establish a separate state in the region. Such conflict has been marred with civilian and military casualties on both sides. In a report published by the International Crisis Group in June 30 2009, politicised court structures, which undermine the vested constitutional separation of powers, drew significant criticism. Moreover, the increasing statutory and executive infringement on judicial process has undermined the capacity of courts to enforce the law. Rather, the exercise of emergency powers, such as the Prevention of Terrorism Act 1979, is used to disproportionately target areas occupied by Tamil minorities. International legal processes of ‘habeas corpus’ are undermined within the practice of domestic litigation and courts have limited capacity to inquire into the validity of detention orders. In the final assaults on alleged Liberation Tamil Tigers Eelam (LTTE) groups, over 10,000 people were estimated to have been arbitrarily detained. Given that Sri Lanka has fairly consistent ‘state practice’ in this area, what are the possibilities of international custom providing a basis for justification, as this practice is ‘inconsistent’ with consensus by other states on habeas corpus?

However, the presumption that international law should prevail also fails to address the specific local ways in which courts and judicial advocates are positioned in tenuous circumstances. Issues of corruption and police protection are integral to the function of a judicial advocate; yet, failing to review the work of the law enforcement body can often lead to intimidation or other punitive measures. The judicial system is constrained in its capacity to limit
executive directions. Hence, international legal obligations prove ineffective, as there is no legitimate judicial mechanism to facilitate procedural fairness. The armed conflicts and ongoing security risks are viable concerns, yet no judicial system of balance exists capable of administering international obligations. Sri Lanka has limited financial resources, inadequate administrative review structures and differing cultural values, which make the local implementation of international law tenuous at best.

Towards Diaspora

Much of the theoretical scope for diaspora remains contested, especially when applied in a legal or political context. Diaspora, as Anita Manmur defines it, is understood as the dispersal and movement of populations from one national or geographic location to other disparate sites. In tracing the Tamil and Sinhalese diasporas, both have problematic and fraught relations to an unstable ‘homeland’. Within the context of Sri Lanka, as Asoka Badarage articulates, the Tamil diaspora has constructed a ‘Tamil homeland’ in danger of ‘genocide’. Conversely, Sinhalese communities have framed Tamils as ‘terrorists’ to political stability in the region. The political and legal constructions are difficult to reconcile. On one hand, such dichotomy can offer a means of mobilising vast communities of individuals; by the same token it has the potential to foster widespread violence and military aggression.

…the ‘post’ is never separate from the ‘colonial’.

Extending the concept of diaspora further, Stuart Hall notes that diasporic groups can move beyond the retrospective orientation towards the ‘homeland’ and can shape new ‘hybrid’ identities. Rey Chow reframes Spivak’s question as to whether the ‘subaltern can speak’ and suggests that whilst diasporic minority discourses are effective in protesting the cultural violence of hegemonic systems, the emphasis on ‘minority’ produces a binding conflict between the ‘home’ and ‘host’ nation. Therefore, these hybrid identities are often unstable and difficult elements to negotiate because they have competing political and ethnic dimensions. It is the complex positioning of the diasporic community that moves between positions of subaltern and privilege. Rather than suggest these groups are ‘legitimate’ in their speaking position, it is important to emphasise how this group offers a new mode of political and legal engagement with human rights discourse.

Tamil Diasporic groups occupy a position of some privilege and national concern. They are privileged with a fairly high socio-economic status and the capacity to travel whilst still being ‘tied’ to the ‘home’. It is in this space of the ‘in between’ that the competing national and international discourses are brought to the fore. It is important to note that the Tamil Diaspora is a fractured and diverse set of voices. However, it is this plurality which has the potential to undermine the dichotomous tensions between a claim for a self-determining ‘homeland’ or reinforcing the status quo. For example, it is necessary to query the political rhetoric of ‘home grown’ solutions advocated by the Sri Lankan government. According to Sri Lankan President Mahinda Rajapaksa, NGOs and diasporic communities have no role in the conflict: ‘these are the elite of Tamil society who had no clue about the hardship faced by the people in the LTTE-held northern Sri Lanka’. The Tamil Diasporas are not simply inauthentic, but elitist and misinformed threats to Sri Lankan national sovereignty.

The Sri Lankan government refusal to acknowledge diaspora exemplifies how ethnic differences and varied political beliefs structure the activism of diasporic groups. The Global Tamil Forum offers a diasporic voice to ‘alleviate the physical and emotional suffering of displaced and distressed Tamil people in the internment camps and to advocate for their freedom of movement and immediate rehabilitation in their homes’. Whilst one of Spivak’s solution to the problem of hearing the silent subaltern communities in conflict or internment is to ‘unlearn privilege’, her vision does not offer a strategic legal recourse for addressing the immediacy of suffering and abuses within the Sri Lankan context specifically. President Rajapaksa emphasises that the government is responsible for human rights abuses by emphasising the ‘political legitimacy’ of the Sinhalese government to legislate within its national territory. Moreover, his refusal to engage with ‘external solutions’ proves troubling as it seeks to advance a culturally relativist critique. That is, Western institutions have no conceptual understanding of the conflict and thus it should be solely the Sri Lankan government’s responsibility to find an adequate solution.

However, in seeking to produce innovative solutions to this challenging issue, it is fruitful to think about the possibilities of diasporic communities (as legal personalities) participating in the formation of customary international law. Such a position can partially offer a means of rendering those incapable of speaking a voice that is neither completely relativist (such as Rajapaksa) nor colonising (international NGOs and Western states). In Sri Lanka, hundreds of thousands of Tamil civilians are interned in government camps and unable to ‘speak’ and the diasporic Tamil community has sought to mobilise on their behalf. If the diasporic communities are offered greater participation and voices within the judicial decision-making processes, they can potentially challenge the assumptions of national sovereignty to deter intervention. However, Tamil Diasporic groups are concerned that much of this judicial decision making focuses on the conflict is between state governments alone and there is no space for engagement with the plight of the subaltern (Tamil) subject. Borrowing from Muller, there is potential for ‘transnational’ customary international law formed by diasporic communities engaging with the international law making bodies such as the UN and treaties between states.
This offers a mode of engaging with and enforcing human rights within particular regional contexts.

With hundreds of thousands of Tamil civilians forced into internment camps with limited healthcare, housing and education, there must be some international assistance. Yet, the denial of humanitarian agencies and investigative bodies into those areas facilitates a necessity to vocalise the problems of those positioned in such circumstances. However, there is a competing concern as to what groups or individuals have the ‘right’ to legitimately speak for a group. As Diana Fuss argues, the politics of ‘experience’ can empower those who experience oppression to speak; yet, it can disallow those who do not share experiences from intervening. Diaporic politics negotiates this problem, by empowering those with disenfranchised experience to dialogue with communities and bodies with such experience. Chow advocates a break into those areas facilitates a necessity to vocalise the problems of the ‘Third World’. Privilege must be acknowledged and deployed strategically; a position which differs with Spivak’s political goals of deconstructing or ‘unlearning’ social and economic privilege. In customary international law, this involves acknowledging the position and recommendations of varied diasporic communities in shaping treaties and policies.

Ultimately, these considerations culminate in asking what are the consequences of ‘using speech that appropriates the ‘raw materials’ (human rights violations) of minority subjects and enabling it through the ‘machinery’ (academic writings and decisions) of scholarly privilege?’ In attempting to engage the question it is important to note that within the context of international law there remains a tension between an existing right and its capacity for enforcement. On one hand, some critics note that since individuals are not directly considered legal personalities in international law, there are no direct rights. Whilst the enforcement may be impossible under the current framework, it does not negate the international obligations states have to not violate those rights, as Muller notes. In Sri Lanka, for example, what should be done when systemic targeting of Tamil civilians and the inability to offer humanitarian aid grossly offends our ethics as privileged observers? Is enforcing international law the answer or should state sovereignty assume primacy by respecting the political difference of each state to legislate and act accordingly within its domestic contexts?

Such questions highlight an urgency to avoid replicating either a colonising Western discourse of ‘human rights’, the ostensibly culturally relativist position or national sovereignty argument that undermines any foreign intervention by making ‘difference’ and autonomy the paramount considerations.

Chow’s warning against the ‘lures of diaspora’ is partially reconciled by the slippage into ‘hybridity’ where Chow notes that the intellectual should ‘straddle the elite and the subaltern’. For example, diasporic scholars working in the context of conflict resolution should think through their position of privilege whilst acknowledging the impossible position of the minorities whom they speak for. It is necessary to engage that which is unintelligible to avoid obscuring or ‘speaking for’ the disenfranchised.

Conclusion

This essay has merely touched upon the theoretical potential of diaporic politics to engage with domestic as well as international legal issues. Human rights discourses, as evident in the conflict in Sri Lanka, will continue to remain a debated and problematic territory within the context of political and social justice endeavours. However, within the context of postcolonial thought, the avenues towards diaspora can challenge the dialectical position between the global and local dimensions of international law. The promotion of diaporic analysis can make voices of ‘silent’ individuals and communities heard against the violent conflicts between domestic political agendas and colonising (Western) agendas of liberal human rights.

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4 Spivak, above n 2 at 31.
8 Id at 376.
9 Charlesworth, above n 5 at 2.
10 Statute of the International Court of Justice 1945 (United Nations) at Article 38(1)(d).
14 International Crisis Group, above n 13 at 17-18.
15 Id at 25.
16 Id at 20.
18 Bandarage, above n 12 at 7.
19 Gopinath, above n 17 at 9.
21 Gopinath, above n 17 at 7.
Mario Emmanuel (Commerce/Law III); Samuel Thampapillai (Economics/Law IV) discuss humanitarian intervention in the context of the Sri Lankan conflict.

No place does the tension between state sovereignty and promoting respect for human rights manifest itself more clearly than in the notion of humanitarian intervention. The most recent conception of humanitarian intervention is the Responsibility to Protect (R2P) doctrine which obligates UN member-states to intervene if ‘national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.’

R2P was recently lobbied for in the last stages of the 30-year war in Sri Lanka between the Sri Lankan Armed Forces and the Liberation Tigers of Tamil Eelam (LTTE), who took up an armed struggle for a Tamil homeland in the face of widespread marginalisation at the hands of the country's Sinhalese majority. The Sri Lankan army's final assault on the rebel LTTE, who at one stage ran a de-facto administration in one third of Sri Lanka's territory, all but wiped out the militants, but at a monumental cost to the Tamil civilian population. Several hundred thousand civilians were left trapped on a two-mile-wide sliver of land, blocked from leaving by rebel fighters, who used them as shields, whilst facing an aerial barrage by government forces who shelled hospitals, shelters, refugee camps and designated safe zones with apparent impunity. Hospitals in the no-fire zone were teeming with victims. Despite claims to be protecting civilians, the Sri Lankan government blocked the delivery of humanitarian aid to the combat zone by the International Committee of the Red Cross. Government doctors from the conflict zone reported that in May, on average one thousand civilians were dying per day, although some later recanted their testimony after two months of government 'interrogation.' Independent media were prevented from entering the conflict zone, with the only non-government accounts coming from the aforementioned doctors and other civilian sources. Government reports on the situation grossly understated the volume of civilian casualties, and by using the politick of the UN and controlling the information flow out of the conflict zone, the Sri Lankan government managed to avoid having a United Nations Human Rights Council (UNHRC) investigation into potential war crimes committed during the crisis.

Despite Barack Obama calling it an 'imminent catastrophe,' the UN terming it a 'bloodbath,' and repeated warnings from several international organisations of impending mass civilians killings, the international community did little more than issue strong statements, urging the principal actors to take steps to avert the bloodshed. Yet mass deaths still occurred. More than 20,000 civilians are reported to have been killed in the first four months of 2009 as a result of the fighting. Investigations run by The Times of London and Le Monde have suggested that most of these civilian deaths were the result of government shelling. If the atrocities of the conflict were not severe enough, now in the post-conflict period, three hundred thousand civilians who managed to escape the war zone are being forcibly interned in government camps run by the military.

This tragedy in Sri Lanka, where both the state and a non-state armed group acted without regard for civilian welfare, is prima facie a scenario that should attract international concern and intervention. Yet it did not occur. This paper attempts to explore the efficacy of current mechanisms for humanitarian intervention in light of recent events in Sri Lanka. The first section of the paper will explore the development of humanitarian intervention as a principle in International Law culminating in the doctrine of R2P. The second section will examine R2P with respect to the Sri Lankan situation with view to establishing the legal, geopolitical and political impediments to its fair exercise. Particular emphasis will be placed on modern interpretations of genocide, the strategic interests of foreign powers and the role of the media in establishing the case for intervention.

The Evolution of Humanitarian Intervention

The international community has always been cautious in approaching intervention, even in severe humanitarian situations, for fear of undermining the integrity of sovereign states. While there is a theoretical understanding amongst the international community that the need for intervention in situations where there have been grave breaches of international law supersedes considerations of state sovereignty, the application of this concept has proved troublesome.
Difficulty articulating precisely when intervention is justified, and legitimising it without explicit UN Security Council (UNSC) approval, has meant that historically states have chosen to avoid asserting humanitarian grounds as the basis of intervention, choosing instead to rely on the principle of self-defence. The refusal of states to legally base intervention on humanitarian grounds means that there is little evidence of state practice or opinio juris upon which to assert that humanitarian intervention is part of customary international law.

This legal void means that until recently there were no principles articulating when ‘legitimate’ intervention can or should be made. This void poses significant legal, economic and political costs for potential intervening states. These costs coupled with the inherently self-interested nature of geopolitics have meant that without significant strategic motivation, humanitarian intervention has been nonexistent. Rwanda and Sudan are prime examples of such non-intervention.

Words like ‘never again’ are little more than rhetoric

The Responsibility to Protect

The ‘responsibility to protect’ (R2P) doctrine attempts to provide a workable reconciliation of the concepts of state sovereignty and the need for humanitarian intervention, and clearly articulates when intervention can and should take place. Developed by the International Commission on Intervention and State Sovereignty (The Commission) in 2001, the doctrine formed part of a unanimously supported resolution of the World Summit Outcome in 2005. At the time R2P was hailed as Secretary-General Kofi Annan’s ‘greatest achievement’ and provided hope that the UN may finally have the mechanisms in place to do what it had not been able to do in Rwanda and deliver on the post-Holocaust promise of ‘never again.’

R2P shifts the focus of sovereignty by defining sovereignty in terms of responsibility rather than rights. Essentially R2P dictates that, ‘sovereign states have a responsibility to protect their own citizens from avoidable catastrophe…but when they are unable or unwilling to do so that responsibility must be borne by the broader community of states.’ This implicitly recognises that human sanctity is a principle to which sovereignty must cede.

R2P’s distinctive feature is its articulation of when military intervention can be justified. It does this by first establishing a ‘just cause’ threshold for any military intervention. ‘Just cause’ arises in two situations; first when there is actual or anticipated large-scale loss of life, and the second is actual or anticipated ‘ethnic cleansing,’ which can include inter alia killing and forced expulsion. Once ‘just cause’ has been established, R2P outlines four ‘precautionary principles,’ which aim to ensure that the intervention undertaken is reasonable and justly motivated. These principles are:

- **Right intention:** Intervening states must prove that their primary intention is to remedy the humanitarian situation
- **Last resort:** All other alternate responses must have been explored, if not attempted.
- **Proportional means:** Intervention must only be enough to remedy the wrong
- **Reasonable Prospects:** The intervention must have reasonable prospects of halting or averting the wrong without the risk of inflaming greater conflict, essentially precluding any intervention in powerful states.

R2P then goes on to identify the **right authority,** recognising the UNSC as the primary source of authority and allowing recourse to a special meeting of the UN General Assembly (UNGA) if the UNSC is unable or unwilling to make such authorisation. Finally when both these avenues fail the Commission suggests that action by regional organisations (NATO etc.) with ex post facto UNSC approval may also be legitimate. In articulating these six principles, just cause, right intention, last resort, proportional means, reasonable prospects and the right authority, R2P seeks to provide enough safe guards to prevent ad hoc intervention while still enabling the international community to mobilise efficiently and effectively in the face of humanitarian crisis.

We argue however that the high hopes built around R2P were misplaced. Whilst the codification of principles around humanitarian intervention is itself a small victory, the Sri Lankan case demonstrates the pragmatic reality of intervention has not changed.

Why R2P Failed to Deliver in Sri Lanka

1. **Defining ‘Just Cause’**

R2P is premised on the notion of state abuse of sovereignty. Intervention cannot occur unless the state has failed to fulfil its responsibility. However the Sri Lankan conflict gives rise to competing narratives, both involving large scale loss of life but ascribing markedly different levels of responsibility to the state. Several commentators referred to the situation facing Sri Lanka’s Tamils in the latter stage of the war in 2009 as genocide. The long history of Sinhalese nationalist oppression against the Tamil community, since Sri Lanka’s independence in 1948, is well documented. However the persistent armed struggle of the LTTE against the state turned a history of oppression and resistance into one of brutal insurgency and counterinsurgency.

Hence the Sri Lankan conflict is often referred to as a ‘civil war’ in the media and framed by the Sri Lankan state as an internal battle against terrorism. However, as Martin Shaw, a contemporary sociologist of genocide writes, these narratives need not be mutually exclusive. Civil war is one of the most common contexts of genocidal violence where armed resistance by an oppressed minority leads the
dominant power to collectively punish the civil population of that minority group in the name of quelling the insurgency.\textsuperscript{43}

The claim that Sri Lanka’s conflict was ‘only’ a civil war, in which civilians unfortunately got in the way, has been the prime notion\textsuperscript{44} that the Sri Lankan state, like many regimes before it, has used to obfuscate accusations of genocide. For Shaw, indiscriminate allegations of a long-running Sri Lankan genocide and the competing claims of counter-terrorism paradoxically blunt the real questions which are what kind of violence did the Sri Lankan state commit against its Tamil civilian population in the concluding stages of the war, on what scale and with what intentions? By steering the issue away from broader political narratives, those questions hole in on the bedrock issue of R2P, the material role of the state. Those questions cannot be deflected by pointing to the culpability of non-state actors such as the LTTE whose obligations under international law are markedly different to sovereign states.\textsuperscript{45} For example in the recent fighting, the Sri Lankan state attempted to evade its ultimate responsibility for the loss of life by accusing the LTTE of using civilians as human shields.\textsuperscript{46} This however misses the point. Associate Professor Jake Lynch from Sydney University’s Centre for Peace and Conflict Studies stated of the Sri Lankan government:

It accused a non-state armed group of using civilians as human shields - then went ahead and attacked them anyway. This is explicitly ruled out by a norm of humanitarian protection. The 1977 Additional Protocols to the Geneva Conventions specify that the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.\textsuperscript{47}

As Professor John Neelsen\textsuperscript{48} put it, ‘the plight of the Tamils is not due to a natural disaster but the result of the conscious policy of a government that had no qualms of bombarding people that it claims as its own citizens with heavy artillery.’

On this basis, the actions of the state towards the Tamil civilian population appeared to more than satisfy the just cause threshold for R2P. However the state’s ability to direct, define and distribute its own narrative, particularly in light of Western sensitivities towards terrorism\textsuperscript{49} post 9-11, distorted the international community’s understanding\textsuperscript{50} of the situation to the extent that no clear ‘just cause’ was identified.

2. A Controlled Media and Establishing Just Cause

Fundamental to satisfying the ‘just cause’ threshold in any conflict is the ability of the international community to accurately identify the situation on the ground. Yet Sri Lanka’s war was fought without witnesses because the government refused independent media access to the conflict zone.\textsuperscript{51} As British Foreign Secretary David Miliband observed, ‘the fog of war makes it difficult to be certain of the facts of the present situation.’\textsuperscript{52} Leaving aside foreign journalists, Sri Lanka’s local media record is poor, ranked 9\textsuperscript{th} last in the world for press freedom by Reporters Without Borders,\textsuperscript{53} with state censorship and widespread killings, abductions and threats made against journalists with apparent impunity.\textsuperscript{54} The absence of independent media allowed the state to ‘stage-manage’ the flow of information. The narrative started as one of a fight against terrorism and later changed to one of a ‘rescue-operation’,\textsuperscript{55} which characterised the LTTE as the aggressor with the Government making the fantastical claim that ‘not a single drop of civilian blood was shed’\textsuperscript{56} during the saga. US satellite imagery released post-conflict appeared to validate non-government claims of civilians being targeted,\textsuperscript{57} and footage released in August 2009 by dissident journalists showed what appear to be Sri Lankan army soldiers summarily executing naked and blindfolded Tamils during the conflict.\textsuperscript{58}

The media in many ways defines public opinion and indirectly the politico-cultural canvas on which Western governments operate. To that extent the absence of free media in many conflict situations allows the public narrative to be shaped by holders of military power\textsuperscript{59} and avoids the creation of a ‘conscience shocking event’ around military behaviour. This in one sense imposes an obligation on the media to not be silent on such issues or release an equivocal narrative. But most importantly the meaningful exercise of R2P requires the international community to refuse to allow limited or murky information mute its stance on evolving humanitarian disasters.

3. A Lack of Political Will: The Geopolitical Maze

States it is said ‘have no permanent friends only permanent interests.’\textsuperscript{50} Thus, despite the aforementioned facts, the primary driver of intervention is the geopolitical interest of international actors.\textsuperscript{61} Sri Lanka’s location in the Indian Ocean and the presence of strategic natural harbours such as Trincomalee,\textsuperscript{62} in a region claimed by Tamil militants, have meant that a variety of actors have a stake in Sri Lanka’s politics. Most of the permanent members of the UNSC have conflicting interests in Sri Lanka, a fact that brings into question the efficacy of the mechanisms through which R2P should operate.

India, China, and the West

India as the regional superpower has a particular interest in asserting its pre-eminence on Sri Lankan issues. Moreover its own 55 million strong population of Tamils in South India has meant that the central government has traditionally been sympathetic to the Sri Lankan Tamil cause. Indeed, India equipped the nascent Tamil militants in the 1980’s.\textsuperscript{63} However, the LTTE’s assassination\textsuperscript{64} of former Indian Prime Minister Rajiv Gandhi, due to an ill-fated Indian intervention in Sri Lanka in 1987, had the effect of muting India’s engagement in Sri Lankan domestic issues.

China on the other hand only recently emerged as a player in Sri Lanka, pledging over $1bn for large infrastructure projects in 2007. The most significant of these is a port in
Hambantota, providing China security for vital shipping routes. The Sri Lankan government also found some unlikely allies in Iran and Libya who have both poured money into Sri Lanka. The West on the other hand, with no primary interest in Sri Lanka has traditionally only been interested to the extent that it wished to prevent the rise of either China or India as a regional hegemonic power. However, given China’s new dominance and the emergence of Iranian and Libyan interests, it would seem that the West, in particular the US, is now focused on turning India into a close ally by developing India’s influence in the region.

In the face of these conflicting geopolitical interests the Sri Lankan government effectively sided with China and other non-western aligned states, receiving significant military hardware and arms financing. China’s growing influence has had the effect of rousing India out of its ambivalent stance, and it has recently attempted to outdo China in support of the Sri Lankan military.

Sri Lanka’s anti-western stance also had an electoral dimension that allowed the government to embody an aggressive Sinhalese nationalism, with Western governments, NGOs, foreign media and the UN all painted as LTTE conspirators. In a series of anti-West manoeuvres the Sri Lankan government removed Norway from its role as peace facilitator, rejected a US offer to evacuate trapped civilians using its naval vessels, and rejected US and EU calls for amnesty to the LTTE leadership and their surrender to a third party. Similarly UN calls for unhindered access to the camps and the war zone were consistently rebuffed with some foreign MPs and journalists belligerently deported.

In this context the doctrine of R2P proved to be a lame duck. China’s interests and veto power prevented any real discussion or action on Sri Lanka at the UNSC. Furthermore, the global recession and the wars in Iraq and Afghanistan, meant that most of the West’s ‘altruistic capital’ has been spent, with domestic issues occupying the short-term agenda. Importantly, the need to court India as a bulwark against China means the West is reluctant to take a stance that undermines India’s position vis-à-vis China. In effect the West was reduced to making humanitarian pleas to a third party. Similarly UN calls for unhindered access to the camps and the war zone were consistently rebuffed with some foreign MPs and journalists belligerently deported.

As a postscript to the war, with the support of China, Iran, India and Israel, a motion moved by several EU nations to investigate war crimes by both parties, was blocked at the UNHRC. The UNHRC instead chose to issue a resolution ‘congratulating’ Sri Lanka for its ‘victory’ over terrorism. Moreover, with the support of China, Sri Lanka is well placed to implement its stated agenda of military expansion, leading to fears of colonisation and permanent military occupation of traditional Tamil areas. By failing to take a principled stance on Sri Lanka, the US and UK to some extent have lost not only moral stature as champions of human rights, but also perpetuated their own marginalisation in the face of China’s increasing influence in the region.

Conclusion

The doctrine of R2P represented a paradigm shift for its formal acknowledgment and codification of the legitimacy of humanitarian intervention. Yet this is ultimately a theoretical abstraction unless the international community has the political will to act in the face of human tragedies as witnessed in Sri Lanka. Here a failure to acknowledge the genocidal characteristics present in the civil war, albeit shrouded by the nomenclature of terrorism, and the acquiescence to unacceptable media practices, allowed a human disaster to be ambiguously framed. The geopolitical interests of various states, and a lethargy on the part of the West allowed this disaster to escalate with no real threat conveyed to the Sri Lankan state that such a catastrophe would lead to action.

During his campaign, President Obama stated ‘when ethnic cleansing is happening somewhere around the world and we stand idly by, that diminishes us.’ This endorsed the idea that the West has an obligation to intervene to protect civilians from war even when no vital national interests were at stake. It was precisely the idleness Obama referred to that led the international community to say ‘never again’ after the Holocaust in 1945 and Rwanda in 1994. The plight of Sri Lanka’s Tamils in 2009 should serve as a reminder to the international community that without true commitment to act when human sanctity is threatened, words like ‘never again’ are little more than rhetoric from a West that perennially promises more than it delivers, providing little hope to war’s luckless victims and undermining its own claim as the upholder of human rights.

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39 Philippe Balny, ‘Terrorism and the year “rolling” genocide’ in which Sinhalese governments have sought “to annihilate the Tamils and to steal their lands and natural resources, what Hitler and the Nazis called Lebensraum – “living space” for the Sinhala at the expense of the Tamils.” This history includes linguistic and religious marginalisation, discrimination in education and employment, colonisation of Tamil lands and state orchestrated pogroms. Francis Boyle, Stopping Sri Lanka’s genocide at ICJ, UN (12 March 2009) <http://www.repor...> accessed 1 August 2009.


43 International Law academic Francis Boyle sees a sixty-year “rolling” genocide in which Sinhalese governments have sought “to annihilate the Tamils and to steal their lands and natural resources, what Hitler and the Nazis called Lebensraum – “living space” for the Sinhala at the expense of the Tamils.” This history includes linguistic and religious marginalisation, discrimination in education and employment, colonisation of Tamil lands and state orchestrated pogroms. Francis Boyle, Stopping Sri Lanka’s genocide at ICJ, UN (12 March 2009) <http://www.repor...> accessed 1 August 2009.

44 Genocide as framed in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide has to provide the answers to when and in what form a group is killed, so the group is destroyed; “in part, on account of race, nationality, ethnicity, religion, political opinion, or in part, a national, ethnical, racial or religious group.” This intention component is very hard to prove in civil wars contexts where the civilian casualties can be framed as “collateral damage.” Related to this is that Western conceptions of genocide are largely of the Holocaust and similar “vocalic” violence in places like Rwanda as opposed to the “slow genocide” that occurs in places like Sri Lanka.  Jake Lynch, Up close and spineless: Australia’s Department of Foreign Affairs (June 18 2009) Online Opinion <http://www.onlineopinion.com.au/view/article/20905925034.html> accessed 6 August 2009.

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30 UN Charter Article 2(4).
China means Sri Lanka can Take a Pass on Human Rights — perhaps a quiet chat, but not wagging the finger.' Somini Sengupta, ‘Aid From around teaching each other how to behave. There are ways we deal with each other

Palitha Kohona, reflected the anti-western sentiment when he said ‘Asians don’t go

Sri Lanka’s Foreign Secretary, an Australian citizen and former DFAT official, 82 Sri Lanka's Foreign Secretary, an Australian citizen and former DFAT official, 2009.


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58 Ratnesar, above n6.

Micaela Ahs draws on her recent trip to Israel to personally reflect on what happens when competing human rights clash within the Israel-Palestine context.

The focus of human rights is flawed. By focusing on the bestowal of rights upon individuals without question, the duties and responsibilities inherent within them become peripheral and can result in paralysis where competing rights interact. This became apparent to me after living and studying in the West Bank and Jerusalem for six months last year. The Israeli occupation of the West Bank has persisted for over forty years and each year settlements are expanded making Israel and the Palestinian Territories ('the Territories') more intractable and the 'two state solution' further out of reach. The occupation violates many of the Palestinians’ fundamental human rights, particularly their right to human dignity and freedom of movement. For the Israelis the issue is fundamentally different. Their greatest preoccupation is their national sovereignty and security: their 'right to exist.' The Israelis justify the occupation of the Territories by claiming that it is necessary to secure these rights. It seems to be against reason that one right can be used to justify the violation of another. However, currently there is no framework that sets out what to do when rights are in competition. The West Bank Israeli settlements are an example of this.

Despite violating international law, Israel continues to expand these settlements, which range from large thriving Israeli 'suburbs' built in East Jerusalem to small settlement 'outposts' where people live in caravan-style homes. The security these settlements require results in a greater presence of the Israeli Defence Forces ('IDF') and strengthens Israel's hold over the Territories. They also put undue weight on the natural resources of the area and impinge upon the rights of the Palestinian people, particularly their freedom of movement, which places immense psychological pressure on the population. Further, the settlers often inflict violence on their Palestinian neighbours without fear of prosecution under the law.

My friend's village, where I stayed for nine days, is on the Israeli side of the security barrier and the Palestinian side of the Green Line. The people are Palestinian but are under the control of Israel. With settlements on either side, the drive from Ramallah to the village can take up to three hours, though it used to take about twenty minutes, and includes travelling on a rough dirt road and a small stretch of an Israeli settler highway. While most Palestinians are barred from this highway, those who have the village listed on their I.D. as their place of origin have special permission, which is strictly regulated by a checkpoint. When a person marries someone from outside the village, their spouse cannot move in with them and they must leave. The reasoning behind this Israeli policy seems to be a belief that the number of villagers 'on the wrong side' of the security barrier will eventually diminish. The official reason is 'security' – the security of settlements and highways – the same reason Israel uses to justify most of their policies relating to Palestine.

The settlers often harass and wreak violence upon nearby Palestinians. I experienced this first-hand when I stayed for an evening in a Palestinian home in a village outside Nablus, which has a settlement on its outskirts. A number of the village's young men were in gaol (including the brother-in-law of my hosts) and two had been killed in confrontations with this settlement. Many of those in gaol are held under 'administrative detention,' which means that Israel can detain them without charge for three month periods, extendable by a judge. This is in violation of Article 9 of the International Covenant on Civil and Political Rights guaranteeing freedom from arbitrary arrest and detention.

On many nights, explosions and lights flash above the village, set off by the Israeli military. My hosts tell me how it terrifies their children who cannot sleep. Many of the villagers struggle to pick their olives due to the harassment they receive from both the settlers and the military protecting them. I experienced first-hand their violence when helping a village harvest their olives. This caused me to question the motivations of the settlers: what drives them to occupy this place where their presence has such an adverse effect on other people?

The motivations can range from ideological and religious to simple economic considerations, with the Israeli government subsidising settlements, making them a less expensive alternative for settlers looking to secure for themselves a good standard of living. I met one man at his home in a small
settlement just north of Hebron (or Al-Khalil in Arabic) and considered him to be quite sensible until I read his article on a ‘solution’ to the conflict where he suggested that the Palestinians be sent to Iraq where they could help rebuild the country. However, while taking a short course in Israeli law at the Hebrew University I met an Australian Orthodox woman who challenged my ideas of settlers. She was migrating to Israel and looking for a ‘quiet rural area’ in which to live: the West Bank settlements. While she acknowledged that the settlements are illegal under international law, this did not deter her. She loved the landscape and rural environment and claimed that Orthodox communities outside of the cities were hard to find elsewhere. Why should she not live where she wanted to when it was available to her? Her decision to relocate to the West Bank was motivated by personal rather than political considerations.

This woman perceived the dismantling of Israelis settlements in Gaza in 2005 as a violation of the settlers’ rights, as they were being forcibly removed from their homes. Many of the people in Israel I encountered shared a similar view. Even those who originally supported the 2005 withdrawal from Gaza pointed to the election of Hamas and the chaos that now puruses as evidence that Israel must not do the same in the West Bank: the army and settlements are a ‘necessary evil’ that must be tolerated for the sake of national security. This security craved by Israel along with the dignity craved by Palestinians appears to be irreconcilable: it is impossible to argue which right is more important or which party is more entitled to these rights. With each side unwilling to compromise and stand down from what they see as being rightfully theirs, a deadlock ensures. Such intractability is perpetuating the conflict.

Despite the lack of progress, human rights organisations litter the West Bank. Their presence represents the hollowness of the human rights discourse and the reality of selective protection of victims and policing of human rights perpetrators.

This phenomenon of selective law enforcement and ineffective NGO intervention was made plain when a Palestinian friend was beaten by Palestinian police and held in a cell for a night without lawful cause. As soon as he was released he approached a prominent human rights organisation in Ramallah to complain about his treatment. He was told that there was nothing they could do because the abuse had been perpetrated by Palestinian, not Israeli officials. How, then, can a human rights organisation claim legitimacy if they only concern themselves with human rights abuses committed by certain people and not others?

The stalemate between Israel and the Palestinians will continue so long as each side continues to focus on the rights owed to them, without consideration of the responsibilities they owe each other in return. Nowhere is this more evident than in the question of the settlements. Such settlements destabilise Palestinian households who are forcefully removed or are cut off from food, water and sanitation; however, their dismantling would result in equal suffering for the settlers. A focus on duties and obligations can end the paralysis and offer a clear way forward. In order to move beyond the deadlock, I believe it is necessary for Israel to honour its International obligations and remove the settlements. The resultant suffering of the settlers is lamentable but necessary if a solution to the conflict is ever to be reached.

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**Right to security v. right to dignity?**

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Myles Pulsford (Economics and Social Sciences/Law III) explores the legal issues around indentured labour in India.

The law undoubtedly has a major role in the pursuit of global human rights goals. There is however a distinct need for formal legal structures to be enforced to contribute to the realisation of these goals. This gap and its effect on the realisation of human rights goals are evident in the continued existence of bonded labour in India. In order to explore this issue, this essay will begin by defining what bonded labour is. It will then move on to examine the formal legal prohibitions against bonded labour and contrast this with the stark reality that exists in India. The essay will conclude by examining the possible reasons why there is such a disjuncture between the law and its enforcement.

Defining Bonded Labour
The characteristic that defines bonded labour is the exploitation of a debtor by the debtee. Bonded labour, often referred to by the more specific name 'debt bondage', has been defined as:

the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.

To contextualise this formal definition, bonded labour in India emerges from the nexus between poverty and financial need. Individuals living at, or below subsistence wages are confronted by situations that require additional financial expenditure such as the failure of crops or wedding ceremonies. These low level of wages mean that individuals do not have savings upon which to draw. The only option for these individuals is then to borrow. As these individuals are poor and often live in rural areas, there are limited credit facilities they can access. Alternately, they do not have collateral with which to secure such a loan. It is in this situation that they turn to individual contractors who will provide the required finance on the condition that they bond themselves to the contractor, committing to work for the contractor until the initial loan is repaid.

The conditions of bondage are exploitative and thereby fulfil the second requirement of the above definition of bonded labour. The bonded labourers work is not reasonably valued because he or she is being paid a wage below the Indian minimum wage or the length and type of the work that the worker has to provide to repay the loan is uncertain. This exploitation is often maintained by violence and intimidation. India’s National Human Rights Commission reports a case in 2003/4 in which an individual was bonded for the sum of 12,000 rupees (approximately $300 Australian dollars). Following working for one and half years in which the labourer believed the loan had been paid off, the contractor demanded a further 24,000 rupees alleging the worker had only been paying off the interest component of the loan.

The genealogy of bonded labour links it with forced labour and contemporary slavery. The International Labour Organisation (hereafter ILO) views the institution of bonded labour as one of the ‘numerous forms’ of forced labour. Forced labour is the situation in which ‘all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily’. According to the ILO, bonded labour fits this definition as the labour service provided by bonded labourers is often coerced under the threat of, or the execution of, violence and penalties.

Bonded labour is also seen as one of the forms of ‘new slavery’. Forms of new slavery like debt bondage and chattel slavery are distinguished from old slavery because enslavement is based on the ‘complete control’ rather than the ‘[legal] ownership’ of another human being. It is estimated that globally over 27 million people are victims of new slavery. This figure surpasses the number of ‘people stolen from Africa in the time of the transatlantic slave trade’, the largest proportion of this global number coming from people enslaved in debt bondage in South Asia. It must be noted however that even though bonded labour is included within the term new slavery, it has a history in India over 1500 years old.

Bonded Labour and the Law
The prohibition of bonded labour and the pursuit of the law to achieve this global human rights goal is evident in international law and in India’s municipal legal system.

BONDED LABOUR in India
International Law

The position of bonded labour as a wrong at the level of international law and India's obligation to prohibit it can be seen in conventions dealing with slavery, forced labour, bonded labour specifically and more general human rights instruments.

The genealogy of bonded labour as a type of slavery means that one of the earliest prohibitions against bonded labour is found in the International Convention to Suppress the Slave Trade and Slavery 1926. The 1926 Convention promoted the "complete abolition of slavery in all its forms." As a form of slavery, it can be argued that bonded labour is prohibited by this convention. The Convention, however, defines slavery specifically, as the 'status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'. It has been argued that this definition does not "apply equally well" to bonded labour. Regardless of whether bonded labour is included in this prohibition on slavery, India would not be bound to implement the Convention as it signed, but not ratified, the Convention in 1954.

The genealogy of bonded labour links it with forced labour and contemporary slavery.

As bonded labour is a form of forced labour, the prohibition of bonded labour in international law may also be found in conventions dealing with forced labour. The 1926 Convention did make note of forced labour as it outlawed compulsory or forced labour for all but public purposes. Following the limited provisions in the 1926 Convention, forced labour was dealt with in more depth by the ILO's Convention Concerning Forced or Compulsory Labour 1930. The 1930 Convention reiterated the commitment to suppress all forms of forced or compulsory labour. In the same vein as the 1926 Convention, forced labour is authorised for public purposes within a "transitional period" - although the 1930 Convention does place stringent conditions for such actions. This pledge to end forced labour is supplemented by the ILO's Convention Concerning the Abolition of Forced Labour 1957. The convention reiterated the commitment of member states to immediately and completely abolish forced or compulsory labour. However, it only requires the abolition of forced labour in five specific cases outlined in by the Convention. Although India is not bound by the 1926 Convention, it is bound in international law by the 1930 Convention and the 1957 Convention as it ratified them in 1954 and 2000 respectively.

Despite these general prohibitions against slavery and forced labour, the international community went further and specifically made bonded labour illegal. The 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, which India ratified in 1960, calls upon the member states to abolish or abandon specific institutions and practices like slavery such as debt bondage. In addition, the 1956 Convention holds that in member states the act of bonding labour is an illegal and punishable offence.

The status of bonded labour in international law is further confirmed in more general international human rights instruments. The Universal Declaration of Human Rights can be seen to generically outlaw bonded labour as it holds that "no one shall be held in slavery or servitude." Furthermore, the practice of bonded labour violates other articles of these human rights instruments, such as the right to 'free choice of employment' which is completely antithetical to the bondage of an individual to a specific employer.

India's Domestic Law

Indian domestic law accords with international law on bonded labour. In 1807, Great Britain abolished slavery internally and in 1833, it legislated for the abolition of slavery throughout Britain's colonies. In the Indian Penal Code of 1860, slavery was prohibited, a provision which Tripathy argues banned bonded labour and criminalised the bonding of labour.

India's achievement of Independence in 1947 saw the prohibition against bonded labour significantly strengthened. Following Indian Independence India adopted its constitution in 1949. Article 23 of India's Constitution holds that one of the fundamental rights of Indian citizens is freedom from forced labour and prohibited acts perpetuating forced labour. In relation to the link between bonded and forced labour, the Indian Supreme Court has held that 'it is clear bonded labour is a form of forced labour.'

Following the continued existence of the bonded labour system after Independence, the eradication of bonded labour was included in Indira Gandhi's 'Twenty Point Program' in 1975. This commitment was translated into the Bonded Labour System (Abolition) Ordinance on 24 October 1975. This ordinance was repealed in 1976 and replaced by the Bonded Labour System (Abolition) Act 1976 (hereafter the Act). The Act was a statute of India's Central Government that, applying to the 'whole of India', abolished the bonded labour system and freed all bonded labourers. In addition, the Act extinguished the obligation of the bonded labourers to repay the bonded labour debt.

There are three primary mechanisms through which the Act is intended to be enforced. The first mechanism of the Act provides the governments of the 28 States and the 7 Union Territories of India with the authorisation to endow District Magistrates or their delegates with powers and duties necessary to ensure the Act is carried out properly. Further, the Act places them under the specific obligation to inquire into the existence of bonded labour and to eradicate it as well as placing them under the duty to promote the welfare
of freed bonded labourers so that they do not ‘contract any further bonded debt’.50

The second mechanism for enforcing the Act also requires the District Magistrates or their delegates to serve as Chairpersons on Vigilance Committees.51 Each state and territory is obliged under the Act to constitute Vigilance Committees in each district and each subdivision as thought fit.52 Vigilance Committees comprise key stakeholders like social workers.53 The functions of the Vigilance Committees range from providing for the rehabilitation of freed bonded labourers54 through to defending freed bonded labourers in any suit for the recovery of the bonded labour debt.55

The abolition of bonded labour is also supported by the criminalisation of practices which support the bonded labour system, such as the enforcement of bonded labour56 and the advance of a bonded labour debt.57 The maximum punishment for these offences, as well as their abetment58, is three years imprisonment and a fine of 2,000 rupees (approximately $50 AUD).59

Despite delegating the responsibility for enforcing the Act to the states, India’s central government remains part of the processes created to end the bonded labour system. Since 1978, India’s central government has been sponsoring the rehabilitation program for bonded labourers, contributing half of the 20,000 rupees (approximately $500 AUD) that is provided for their rehabilitation as well as providing funds for the identification of bonded labour.60 This rehabilitation package that the States are supposed to provide to the freed bonded labourers includes assistance to acquire land for housing and agriculture, as well as services like education and training.61

The Continued Existence of Bonded Labour
Although the bonded labour system in India is clearly prohibited by international and national law, the gap between what these legal structures provide for and what occurs in reality is stark. The bonded labour system continues to exist in India. Its existence can be examined through the extent of the problem and its distribution across the divisions of gender, age and caste.

Extent
The extent of the bonded labour system in India has long been a controversial question. One of the most in-depth reports into the extent of bonded labour was the 1978-1979 Joint Survey of the Gandhi Peace Foundation and the National Labour Institute. This survey found that there were 2,617,000 bonded labourers in the 10 states surveyed.62 There was however, as the ILO has highlighted, a significant incongruity between this survey’s finding and official government statistics with the estimates of state governments as to the extent of bonded labour in the surveyed states like Bihar less than 15% of the Joint Survey.63 Despite the fact that the National Labour Institute is part of the Ministry of Labour and Employment, this discrepancy has been defended by India’s central government which has argued that the Joint Survey’s methodology was ‘not scientific’.64

Contemporary suggestions as to the size of bonded labour are similarly diverse. The Bonded Labour Liberation Front (hereafter BLLF) believes that there are 300 million Indian’s ‘living a life of bondage and contemporary forms of slavery’.65 Although the scientific and methodological basis for such an assertion is unclear, the estimations of other NGO’s range from Human Rights Watch’s 20-65 million66 to Anti-Slavery International’s 20 million.67 Ascertaining the true extent of bonded labour in the face of such conflicting reports is compounded by the Indian Central Government’s decision to only provide statistics on the number of bonded labourers that have been identified, released and rehabilitated since 1976, rather than provide national estimates of the problem. The most recent figures provided by the Central Government state that 288,098 bonded labourers have been identified and released, with 286,136 of these labourers rehabilitated.68 This approach to the problem of bonded labour has led to criticism of the Indian Government by human rights organisations like Anti-Slavery International for ‘grossly [underestimating] the scale of the problem’.69

One of the main explanations for the continued existence of bonded labour in India is that the prohibitions and the provisions of the laws dealing with bonded labour in India remain impotent…

Gender
In terms of the demographic of those enslaved in bonded labour, there appears to be a link between bonded labour and gender. Reports into bonded labour to suggest it is primarily males who are responsible for entering into bonded labour contracts.70 Throughout the duration of their bondage, however, it is suggested that sometimes the wives and children of these individuals, who are often employed in waged work, also become bonded because of factors like the increasing size of the debt due to compound interest.71 A recent report by the ILO noted a study in the Indian state of Andhra Pradesh which found women ‘may be increasingly affected by bonded labour’.72 The study found that India's economic development was creating the opportunity for male bonded labourers to escape their contracts of bondage.73 Unfortunately this tendency correlates with increasing levels of bondage among their wives.74

Children
There is significant evidence suggesting children are also victims of bonded labour. Numerous reports have found the existence of child bonded labourers in India, particularly in silk and beedie (local cigarette) making industries.75 The BLLF and Human Rights Watch believe that there are 65 million76...
Child bonded labourers may find themselves in the position of bondage because they have inherited the debt from their parents. Alternately, the child is bonded by their parents so as to have their labour repay the loan or as security for the loan. In the latter instance, the value of their work is not used to reduce the debt owing – rather it is considered as a mere payment of interest on the loan. In a horrific example, Upadhyaya reports that in the state of Tamil Nadu two child bonded labourers aged 9 and 10 were found ‘bound with iron chains’ after trying to escape their contracts of bondage. The children were bonded over debts of 2,000 and 4,000 rupees respectively by their parents ($50 and $100 AUD respectively). When the children were found, they claimed they had been working for 8 months. The contractor responsible claimed they had not even paid off the interest on the debt.

**Caste**

Bonded labour in India is also significantly related to the caste system. Academics writing on contemporary forms of slavery, like Kevin Bales, have argued that the ‘criterioria of enslavement today do[es] not concern colour, tribe, or religion, they focus on weakness, gullibility, and deprivation’. In India however it is estimated that over 80% of bonded labourers are Dalits (once known as the untouchables) or indigenous tribal Indians. Although Bales’ argument could be reconciled with such statistics by the conflation of the Dalit and Indigenous people of India with poverty, there is evidence to suggest their over-representation is linked to caste-based discrimination. For example, Upadhyaya has argued for this over-representation of the Dalits is due to the co-incidence of the type of industries in which bonded labour is employed and cultural attitudes towards the Dalits. The bonded labour system is prevalent in industries like quarrying in which the work is ‘simple, non-technological, and traditional’. As Upadhyaya explains, according to India’s caste system, only the Dalits that are ‘considered fit for such work’. This link between caste and debt bondage is made stronger by the fact that the individuals bonding these labourers come from higher castes.

**Enforcing the Law?**

One of the main explanations for the continued existence of bonded labour in India is that the prohibitions and the provisions of the laws dealing with bonded labour in India remain impotent as there are significant issues with the implementation and enforcement of the law itself. These issues are evident in the attitudes of India’s governments, the breakdown of the mechanisms for implementing the law, and the negative culture of enforcement.

A primary issue with the enforcement of the law on bonded labour in India is the ignorance of the States and Union Territories as well as the Central Government of India in regards to the problem itself. Despite the figures provided by credible studies outlined earlier identifying the number of bonded labourers in India in the millions, State and Central governments deny either the existence or extent of the problem. In an illustrative case, Upadaya reports that the State governments of Karnataka and Punjab denied the existence of bonded labour in their states until 2000 ‘when five bonded labourers were found in iron chains’. It has been argued this attitude of denial is a ‘fundamental barrier’ to the eradication of the bonded labour system. Further it seems that the diffusion of authority and responsibility between the different levels of India’s federal system provide the Indian governments with the ability to avoid accountability through blame-shifting.

The disjuncture between what the Bonded Labour System (Abolition) Act provides for and its practical application is also evident in the failure of the Vigilance Committees. The Vigilance Committees, as the ILO explains, are a ‘potent mechanism for eradicating bonded labour’. The issue lies however, in either their non-existence or their ineffectiveness to combat bonded labour. Human Rights Watch’s belief that Vigilance Committees were non-existent in many districts across India was confirmed by India’s National Human Rights Commission which found ‘in almost all the States’ that they were ‘non-functional’. Even where the Vigilance Committees have been found to be functioning, it has been reported that they are defective for their purpose as they have failed to ensure the enforcement of the law and comply with their responsibilities under the Act such as failing to prevent freed bonded labourers from repaying debts abolished by the Act.

The failure to enforce the Act is also seen in the failure to prosecute under the provisions of the act. The ILO reports that a study by the National Commission on Rural Labour in 1991 found that only 733 individuals had been arrested for bonding labour at a time when 240,000 bonded labourers had been identified officially. It has been argued by Jaswal that this failure to punish those who breach the Act means that the Act’s provisions ‘remain only as paper tigers without any teeth or claws’. The failure of the law on bonded labour to be implemented in India has also been explained by the negative culture of enforcement. One of the primary explanations for the failed enforcement of the law has been the effect of ‘vested interests’. It has been argued that contractors using bonded labour have bribed officials to ensure the law is not implemented. Even where the notion of bribery has not been invoked to explain impunity, the negative influence on the implementation of the Act by these vested interests is evident in the ‘pro-employer’ stance that Vigilance Committees have been accused of. Contractors have also been accused of using violence and intimidation to ensure humanitarian organisations and bonded labourers themselves.
do not seek to have the law enforced. Further, not only has the notion of discrimination been used to explain the over representation of Dalit and Indigenous people in bonded labour, it has also been used to explain the "weak enforcement" of the law. Anti-Slavery International has argued that 'impunity is the norm' in the enforcement of the laws on bonded labour because the victims of bonded labour are 'treated as people who are "polluted", "low caste" or outside the caste system.'

Conclusion
Bonded labour in India is a pernicious institution. Formally the law has evolved to deal with this problem. The continued existence of bonded labour in India, however, highlights the need for these formal legal structures to be matched with effective enforcement if humanity's global goals are to be achieved at the local level.

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Chong Shao (Arts/Law III) explores the issues surrounding human rights in South East Asia through a fictional dialogue.

Sydney, July 20, 2009. Daniel Taylor, a law student with an interest in human rights sits in the office of Bo Xiao Ning, an associate at the Centre for Asian Rights Studies. Using the recent development of ASEAN as a starting point, Daniel hopes to discuss regional conceptions of human rights in Southeast Asia and more broadly the global challenge of advancing rights in Asia in the future.

DANIEL: So what do you think of the ASEAN Inter-governmental Commission on Human Rights announced today?
BO: I'm cautiously optimistic. The body will only be focusing on the promotion of human rights, not monitoring or enforcing them which is disappointing. But it is a significant first step, and it has been a long time coming.

DANIEL: It’ll be the first of its kind in Asia. Each of the other major areas in the world – Europe, Americas and Africa – all have their own regional human rights machinery,1 with more developed functions. Why do you think it is important to have these kinds of systems?
BO: I think firstly regionalism reflects the view that a group of states with shared geography or history is more likely to share an understanding and appreciation of human rights. So in terms of policy it is easier to develop awareness and engage in dialogue between states. Furthermore they are a lot more accessible, compared to participating with the UN in Geneva.

DANIEL (pause): Hmm, clearly diversity is a monumental hurdle. But even at the sub-regional level, co-operation seems to be only at an economic level and like you said, the ASEAN body doesn't look very authoritative. There has to be other reasons why regional mechanisms have languished in this part of the world.
BO: Of course. Let's turn our attention just to Southeast Asia for the time being. Over the last two decades a lot has been made of ‘Asian values’ and the peculiarities of the region, and how this has impacted on human rights.

DANIEL: You mean the old excuse of economic development and how those countries should get a free pass?
BO (Smiles): Yes, that and other defences such as sovereignty, security and stability. Essentially it boils down to the conflict when the universalism espoused by the UN clashes with the cultural, economic and political systems of the region.

DANIEL: I’m not sure how this excuses the violations that states commit against their citizens.
BO: For sure, it doesn't excuse them. But try to keep an open mind in this discussion. Human rights issues are never purely academic or philosophical, but also political, reflecting power relations within and between states.2 I think you’ll find a common theme is the use and abuse of that power. Many of the justifications used are rebuttable, but nevertheless they are thought-provoking, such as the suspicion that human rights are merely a disguise for Western neo-imperialism.

UNIVERSALITY OF HUMAN RIGHTS
DANIEL: That’s ridiculous! Human rights are universal. They are rights we have solely by the virtue of being human.
BO: Ah, but we must distinguish between conceptual universality and whether empirically there are such rights. Not all rights in the West have the same resonance in Asia.

DANIEL: Surely it’s all there in the Universal Declaration of Human Rights (UDHR) and the two international covenants?3
BO: But it is no coincidence that four of the ten ASEAN states have not ratified the ICCPR, which embodies civil and political rights synonymous with liberal Western thought. It is also no coincidence that the UDHR contains predominantly civil and political rights, since membership of the drafting committee and the UN as a whole in 1948 was predominantly Western.

DANIEL: What are you saying? That the UDHR is not actually universal?
BO: I’m merely putting things into perspective. The Declaration is not a worldwide consensus, and it wasn’t until the 1950s that decolonisation led to the formation of new African and Asian states. I do not doubt it contains universal human rights, but some of the provisions are questionable.
For example, Article 21(3) stipulates periodic elections – it is ethnocentric to assume that Western electoral procedures are universally favoured.

DANIEL: But countries in which human rights were most protected and respected are characterised by such electoral methods.4

BO: There is a quote that is pertinent here: “it is self-defeating for the human-rights movement to impose its political system and say, force private property upon Russia or China, or abolish arranged marriages in India, or force general elections in Saudi Arabia, and then – and there is the greatest danger of all – retire in the smug delusion that having done that, justice has thereby been achieved for the individual.”5

DANIEL: There is no doubt that the current human rights doctrine has Western historical origins. Still, I wonder if they’re taking the easy way out by using Western imperialism as a bogeyman.

BO: Good point. Instead of focusing on the cultural ‘Western-ness’, we should re-formulate human rights ideas and practices as arising out of the transformations of modernity.6 In the West, the struggle for civil and political rights arose in response to the modernising state – think the French revolution and the American Civil War, while economic and social rights arose in response to the challenges of industrial capitalism, particularly in Europe.

DANIEL: It seems like the human rights doctrine, because of its Western origins and status in foreign policy, has suffered from guilt by association with imperialism.7

BO: Indeed. Human rights should have relevance wherever transformation into modernity is occurring.

ASIAN VALUES AND CULTURAL RELATIVISM

DANIEL: That makes sense, especially given the rapid rise of Asia at the moment. But what of Asian values then? Even if we do accept the universality of rights, they seem to be contradicted by Asian values.

BO: The claim arose in the early 1990s, in part as a defensive reaction against mounting pressure for political liberalisation and conformity with international rights.8 It was a conscious attempt by two Southeast Asian leaders in particular – Singapore’s Lee Kuan Yew and Malaysia’s Mahathir Mohamad – to draw elements from diverse cultural strands into a coherent alternative concept of politics and society.

DANIEL: When I hear Asian values I think of the respect for family and tradition, as well as authority.

BO (nods): They also advocate the primacy of community over individual rights. In 1993 Asian governments met before the World Conference on Human Rights and signed the Bangkok Declaration, which recognised at paragraph 8 that while “human rights are universal in nature, they must be considered… bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.”

DANIEL: That seems like a cop-out. When considered in light of culture or whatever, who knows how they’ll twist things!

BO: Yes and no. There is the strong relativist position, exemplified by the Chinese representative to the World Conference when he said: “different historical development stages have different human rights requirements… Thus one should not and cannot think the human rights standards and model of certain countries as the only proper ones.”9 This view explicitly challenges universality and I think may be too strong.

DANIEL: But you do think relativism is legitimate?

BO: To a degree. Consider child labour, for example.10

DANIEL: What about it? Child labour is abhorrent. No country should ever allow it to happen!

BO (Shakes head): See, that’s a deeply Western view. Despite the presumption that child labour is entirely wrong, it can be a matter of economic necessity, particularly in Asia. In many societies it is an accepted part of life that children will contribute to the family income.

DANIEL: So you’re saying child labour is OK.

BO: By no means do I advocate turning a blind eye. I’m merely saying the concept of childhood and ideas about work varies across cultures. Taking an absolutist approach can not only be ineffective, but counterproductive.11

DANIEL: You have a point. But then how can we distinguish between the substance and rhetoric in the Asian values debate?

BO: I hate to generalise, but Asian societies do embrace a different set of morals and values.12 For example, Asians do not value personal autonomy as highly as Western liberals, placing importance on the preservation of a common religion or social stability. They generally have a more conservative attitude towards sexual morality. This inevitably leads to a balancing act between the rights of the individual and society as a whole.

For many of these societies, the greatest oppression is not necessarily political but economic or social

DANIEL: That’s all well and good but what about blatant human rights violations? You cannot tell me that ethnic cleansing and human trafficking are justified by Asian values.

BO: You’re right of course. Unfortunately the debate has been heavily politicised by some Asian governments. The East versus West mentality has played directly into the hands of the oppressors since relativism tacitly supports the status quo.13 Some of the fiercest critics of Asian values have come from within Southeast Asia – minorities, intellectuals, journalists, opposition parties and NGOs – because it represents a dubious justification for government actions.

DANIEL: I’m still sceptical as to whether there is such a thing as a common Asian culture. Even still, I think they’re wrong to reject universalism simply because cultural systems are different and therefore there can be no convergence.

BO: Not only that, but culture is also constantly changing. Languages, laws and religions are not homogenous but are continually changing because of new ideas and institutions adopted by its members.
DANIEL: That's right. If you think about it, for most of history Western religious and philosophical doctrines have either rejected or ignored human rights, until now.

BO: Remember that cultural discourses legitimate or challenge authority and justify relations of power. Anwar Ibrahim, then Deputy Prime Minister of Malaysia, put it nicely: “It is altogether shameful, if ingenuous, to cite Asian values as an excuse for authoritarian practices and denial of basic rights and civil liberties... it is certainly wrong to regard society as a kind of false god upon [the] altar [which] the individual must constantly be sacrificed.”

**ECONOMIC DEVELOPMENT AND STABILITY**

DANIEL: The Asian values excuse isn’t very convincing. I don’t expect the economic reasons to be any better. For example, when the Malaysian government deprives indigenous populations of access to forests and waters, or when China denies its labour force the right to protest. They’re unjustifiable violations of human rights.

BO: It’s not as simple as just telling them to improve their human rights, regardless of the circumstances. Just as Western governments make tradeoffs to justify maintaining the social order, governments in Southeast Asia frequently appeal to imperatives of economic development.

DANIEL: So it’s a choice between starvation and oppression then? Freedom in exchange for food?

**Human rights issues are never purely academic or philosophical, but also political**

BO: I wouldn’t put it in such stark terms, but something like that. The majority of the world’s poorest reside in Asia. East Asia has achieved remarkable GDP growth for the past two decades while reducing the proportion of those living below $1.25 a day from 55% of the population in 1990 to 17% in 2005. And yes, many of the governments used interventionist means and they feel justified in doing so. For many of those societies, the greatest oppression is not necessarily political but economic or social.

DANIEL: (Pause): What are we to do about human rights problems then?

BO: First we must understand their circumstances. The dispute isn’t actually about the ideal of human rights or fundamentally incompatible cultural outlooks; rather it’s recognition that Asian governments often find themselves in the unenviable position of curtailing some rights to secure others. I know there will be instances of abuse. But I challenge you to show me a society of vibrant human rights practices where more than half the inhabitants live on less than $2.50 a day.

DANIEL: That’s true. On the topic of curtailing rights, I suppose it also occurs in the name of national stability or security.

BO: Keep in mind though that some Southeast Asian states are, or were, quite unstable. This is why we must be vigilant in determining what’s acceptable and what isn’t. For example, the Internal Security Acts of Malaysia and Singapore allow for arbitrary arrest and detention without trial. Its uses include heading off racial riots, which is not unreasonable, to arresting leaders of interest groups and political parties. What seems like ‘necessity’ can quickly turn into repression.

DANIEL: And Thailand as well – I know we should respect their reverence for the monarchy but they take censorship to the extreme.

BO: This isn’t just an Asian phenomenon by the way. Just look at what happened to the United States and Australia after 9/11. If there’s anything universal, it would seem to be disregard for rights wherever there are real or perceived threats to stability or order.

DANIEL: (Right): It really is a depressing thought. The state is the central institution available for advancing human rights efforts and is simultaneously the biggest offender. And it seems like once again appeals to stability are simply a power ploy.

BO: This is why I place great emphasis on understanding. It seems besides the point to counter violations of human rights with the argument that human rights are sacred and should not be violated. If there is a case to be made for human rights, it will be made through internally relevant moral and political arguments.

**RELATIVE UNIVERSALITY**

DANIEL: And what might those arguments be?

BO: That’s a tough one. I can tell you what they’re not. Nothing constructive will come out of pointing the finger and lecturing Asian countries about how bad their human rights records are.

DANIEL: (Smiles): America immediately pops into mind.

BO: We can’t kid ourselves. The local circumstances – including cultural beliefs and traditions, the level of development and the level of political and legal institutions – are clearly relevant with respect to the implementation of human rights.

DANIEL: And Thailand as well – I know we should respect what seems like ‘necessity’ can quickly turn into repression. More crudely, it allows for the prioritisation of rights due to varying circumstances and cultures. For example, China’s one child policy or Singapore’s compulsory urine test for public drunks may be seen as unacceptable invasions of privacy in the West on the one hand, and on the other may be legitimate tradeoffs for public welfare and maintaining a good standard of living, both also mentioned in the UDHR.

DANIEL: I can see different degrees of interpretation too. Our example of censorship in Thailand would be near one end of the spectrum while on the opposite end is America, where free speech is immensely protected.

BO: Yes, as long as it’s within the bounds of reason – the
key considerations should be good faith in interpretation and proportionality in implementation.21

DANIEL: So what Asian countries said in the Bangkok Declaration about national and regional particularity, it doesn’t have to undermine the human rights movement.

BO: Not at all. If we are to meet the global goal of advancing human rights in the Asian region/sub-regions, we need to not only call governments out for their abuse, but also be open-minded and understand their situation.

CONCLUSION

DANIEL: What do you think are the prospects for further regional developments in Asia?

BO: Realistically, I wouldn’t be expecting any more regional frameworks for the time being. I do wish ASEAN well, and hopefully as it develops more expertise, its roles can expand to monitoring as well as enforcement.22 For the moment, I think we need a reconceptualisation of what human rights protection in the region means.

DANIEL: I’m guessing less talk and more action?

BO: Absolutely! While enlightening, debates about what’s relative or what’s binding can go on forever. Right now, in addition to promoting regional dialogue, the best thing we can do is work on projects with local people that incrementally build awareness of rights in basic, non-confrontational ways.23 For example, experience with women’s rights groups in Malaysia and Indonesia confirms that the implementation of human rights is easier and more effective when supported by local traditions.24

DANIEL: One thing’s for sure, the issue is not going away. I remember when ASEAN was exclusively about regional security and economic development. Now it has a promotional system for human rights as well.

BO: And so in addition to understanding I’d advocate patience. Human rights are a constant challenge to vested interests and authority in societies with enormous disparities of wealth and power.25 I believe its transformative potential will only strengthen as Asia leads the rest of the world into the 21st century.

References

1 They are, respectively, the Council of Europe, the Inter-American Commission on Human Rights and the African Commission on Human and Peoples’ Rights.


3 The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Together with the Universal Declaration of Human Rights they are referred to collectively as the International Bill of Rights.


11 For example, consider the Harlan Bill introduced in the US Congress in 1992 with the laudable aim of prohibiting the import of products made by children under 15. This panicked the garment industry of Bangladesh, who summarily dismissed their child workers, mostly girls. A later study found some girls to be working in more hazardous situations for less pay, or in prostitution. See Carol Bellamy, The State of the World’s Children 1997 (1997) at 23.

12 Chan, above n2 at 35.


14 Anwar Ibrahim, ‘Media and Society in Asia’ (Keynote speech at the Asian Press Forum, Hong Kong, 2 December 1994).

15 The World Bank Development Research Group (Shaohua Chen & Martin Ravallion), The Developing World is Poorer Than We Thought, But No Less Successful in the Fight against Poverty (2008) at 33.


18 Bell, above n16 at 39.


20 Donnelly, above n6 at 299.

21 Chan, above n2 at 33.


24 Shelton, above n19.

On the 24th of September 2009, the first Optional Protocol ("OP") to the International Covenant on Economic, Social and Cultural Rights ("ICESCR") was opened for signature. The OP is a long overdue step on the path to the realisation of the human rights of the world's population. Nevertheless, the true impact of the OP will only become evident after many years of observation and reflection. It remains to be seen whether it can be the silver bullet to catalyse the development of strong policy responses to economic, social and cultural issues or whether it will become another nail in the coffin of an over-politicised institution that struggles to remain relevant as the twenty-first century moves into its second decade.

Background
The Optional Protocol to the ICESCR is the latest instrument in the development of international human rights principles and jurisprudence. It gives the Committee on Economic, Social and Cultural Rights (the ‘Committee’) the competence to hear complaints from individuals and groups that have had their rights under the covenant violated.1 The protocol thus operates like similar instruments attached to the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of Discrimination Against Women (CEDAW) and the Convention on the Rights of Persons with Disabilities (CRPD), as well as Articles 14 and 22 in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and Convention Against Torture (CAT).

The Committee only has the competence to examine communications which express a violation of the rights enshrined in the ICESCR by a state that is a party to the OP.2 Thus the expression of the rights in the original Covenant, which was opened for signature in 1966 and entered into force in January 1976, become highly relevant.3 The ICESCR, like its sister covenant, the ICCPR, covers the right to self-determination in Article 1.4 Other rights in the ICESCR include the right to work, the right to an education and the right to an adequate standard of living.5

The OP to the ICESCR is the product of a long struggle for many academics, policymakers and activists. The ICCPR, its sister covenant in the International Bill of Rights, was given an optional protocol at its inception. A committee to oversee the implementation of civil and political rights and to hear individual complaints was established at the time of its entry into force (March 1976). The Committee for Economic, Social and Cultural Rights, on the other hand, was established some ten years later and will only now be able to comment on specific disputes, after the idea for an optional protocol was first recommended by the Committee in 1990.6 The delay relating to the establishment of institutions dealing with economic, social and cultural rights reflects the complex discursive and jurisprudential battle over the relative worth and justiciability of these rights and a perverse outcome for the indivisibility of human rights.7

Jurisprudential Debates
Debates over the justiciability of economic, social and cultural rights centre on the ability and appropriateness of the Committee (or any other judicial body) to resolve disputes regarding the violation of economic, social and cultural rights and the allocation of governmental resources. At the international level, these debates involve questioning the boundaries of state sovereignty and the competence of the Committee. In domestic debates, the ‘issue’ of the separation of powers becomes the principal concern.8 Underlying both debates is a rigid dichotomy of human rights as either negative or positive.9 So-called ‘negative’ rights, traditionally civil and political rights, only require the government to refrain from infringing on the rights of their constituent individuals. ‘Positive’ rights, like social, economic and cultural rights require active governmental intervention to be fulfilled. A deeper analysis, however, confirms the inadequacy of the dichotomy. While the expenditures to ensure the maintenance of civil and political rights like the right to the security of one’s person and the right to a fair trial may be less apparent than the expenditures to ensure health and education, they both involve the reallocation of governmental resources.10 The Committee on Economic, Social and Cultural Rights has expressed a preference for a triumvirate of governmental obligations for all human rights – to respect (or to refrain), to protect and to fulfil.11 It remains
to be seen whether now, with the optional protocol in place, the debate can move forward from these academic concerns to the real and practical implementation of economic, social and cultural rights.

At the heart of debates about implementation are the standards to be applied by the Committee in judging individual complaints, including the definition of the ‘progressive realisation’ of rights. While the Limburg Principles and Maastricht Guidelines are of some assistance, there is still considerable contention as to the most appropriate standard to judge the compliance of the state party. The Committee, in issuing its general comments and concluding observations of state reports, has exhibited some preference for the ‘minimum core obligations’ standard, where there is a minimum level of education and health services, for example. This standard will be inapposite for individual communications and is arguably inappropriate in judging state reports in that it neglects the particularities of both the state and alleged victim’s circumstances. The thorough consideration of individual circumstances in response to communications via the Optional Protocol will hopefully remedy this glaring omission in the Committee’s jurisprudence and case law. National jurisdictions have developed their own tests, most notably South Africa’s constitutional court, which moved from an examination of the ‘rationality and good faith’ of governmental decision-making to an evaluation of the ‘reasonableness’ of the policy in its circumstances. While the ‘reasonableness’ test may be better than the ‘minimum core obligations’ test, it has been criticised for its undue emphasis on the policies of the state and not the outcome for the individual whose rights and dignity have been violated.

Implications

The real implications of the Optional Protocol’s entry into force remain speculative. Undoubtedly an important symbolic step, the OP will empower the Committee to make decisions about specific violations, and hopefully convince the relevant State parties to change their attitudes and policies toward social, economic and cultural rights. Ultimately, however, the Committee’s power is constrained by the requirement that to bring a claim against a state, it must be a party to the Optional Protocol. Reflecting on the experience with the OP to the ICCPR and other complaint mechanisms, it seems likely that the OP will only get support from the international community if it is relatively weak. Those states who see the Committee as too critical or as judicial activists (a claim put forward after the Committee developed the right to water from the right to an adequate standard of living in General Comment No.15 (2002)) will simply not sign the protocol. Alternatively, they will sign with reservations that effectively nullify their obligations under the protocol. Denouncement is another possible option, as Jamaica has proven with respect to the OP to the ICCPR, denouncing the optional protocol after being heavily criticised for its continued use of the death penalty (Jamaica has the highest number of complaints raised against it in the history of the OP to the ICCPR).

The effectiveness of the Optional Protocol in promoting these rights is further affected by the accessibility of the Committee to the victims of human rights abuses.

The effectiveness of the Optional Protocol in promoting these rights is further affected by the accessibility of the Committee to the victims of human rights abuses. One of the requirements of the individual complaint procedure is that the individuals exhaust all domestic legal avenues. Exhausting these avenues and then lodging a complaint to the Committee requires significant legal assistance and resources. In addition, victims may or may not know of their rights and capacity to seek legal remedies. A survey of the individual complaints dealt with under the ICCPR paints an unfortunate picture – as of 2009, the countries with the highest number of complaints (not including Jamaica) were Canada, Korea, Spain, Australia and the Netherlands. Countries like the Democratic Republic of the Congo and Libya were much further down the list.

The issue of accountability is an even more pertinent issue that the Committee will have to deal with. The violators of economic, social and cultural rights are often multinational corporations which exploit lax regulations in host countries. While these regulations are a violation of the state’s obligation to protect the rights of its inhabitants, the Committee is powerless to deal with the arguably more culpable entity. The lack of accountability of international financial institutions, like the International Monetary Fund, for the socio-economic outcomes of its policy requirements (like privatisation of public health services) is equally troubling.

For Australia, the implications of the Optional Protocol are still not capable of determination. Despite Australia’s important role in the formulation of the international human rights instruments, its support over the past few decades has waxed and waned. The Howard era (1996-2007) was marked by its general disregard of individual complaint mechanisms and the general impunity with which it dealt with both the decisions arising from the OP to the ICCPR and the concluding observations of the Committee on Economic, Social and Cultural Rights. Nevertheless, there is some hope
that the Rudd government will ratify the Optional Protocol to the ICESCR, as it has done with the OP to CEDAW and has committed to do with the CAT’s individual complaint mechanism. The fact that the ICESCR is one of the few prominent international human rights instruments that is not scheduled to the Human Rights and Equal Opportunity Commission Act is of some concern. It will be of interest to see the impact it has (if ratification occurs) on governmental policy toward Indigenous health and education, two areas which are a high priority on the agendas of many of Australia’s academics and non-governmental organisations.

Conclusion

The development of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights over the past two decades demonstrates the significant progress of the international human rights community. Reflecting on a conversation I had with Justice Yvonne Mokgoro, of the South African Constitutional Court, the development of the protocol indeed evinces the exciting time we are in for the advancement of human rights. Nevertheless, in recognising the significant symbolic and academic achievement that is the Optional Protocol, we must not lose sight of the ultimate purpose of these instruments – that is, to have a real impact on people’s livelihoods around the world.

References

2 Optional Protocol, above n 1, art 1(2).
4 The Committee on Economic, Social and Cultural Rights, Fact Sheet 16 (First Revision) (1996) at 7.
5 Id at 12, 17, 19.
7 Id at 514.
17 Optional Protocol, above n1, art 1(2).
23 Hilary Charlesworth, Human Rights: Australia versus the UN (Discussion paper presented for the Democratic Audit of Australia, Canberra, 22 August 2006).
Viv Jones (Graduate Law I) explores the issues of corporate accountability and corruption in an international and domestic context.

One of these things is not like the others
The following are real examples of corporate corruption1 I investigated over six years before I enrolled at the Sydney University Law School2 but one of them is not like the others. Which?

1. A pharmaceuticals company bids to supply the Republic of A’s Ministry of Health with a vaccine. It is suggested that the company subscribes to an industry newsletter at USD30,000 per issue. Each issue consists of a few photocopied newspaper articles. It quickly emerges that the newsletter is published by the Health Minister’s husband and is a conduit for bribes to the Minister. Pharmaceutical companies that do not subscribe do not get government contracts in Republic of A. Reluctantly, the pharmaceuticals company Sales Director subscribes.

2. A professional services company renovates its office and seeks a Safety Certificate from B City Council. The inspector tells an employee he will not issue a certificate because “everything is wrong”. The employee replies that, “our fire engineer’s report said everything was fine”. The inspector retorts, “shut up – just give me 1000 [USD] and you get your certificate. Otherwise – nothing”. The employee pays.

3. A manufacturer of power generating equipment discovers its Sales Director in the Republic of C has been secretly selling its products to intermediary companies who sell on at a 50% markup. These intermediaries are owned by the Sales Director and employees of the end users (many of which are State-Owned Enterprises). He splits the markup with them in exchange for them directing purchases through the intermediary.

The answer is 2); the reason why is explained below in “The Irrelevant Defence?” But how is corporate corruption relevant to this Dissent issue on human rights? Well, corporations, not governments, are the primary links between developed and developing markets: Australia’s outward FDI was AUD21bn in 2008 while its aid budget was AUD3.7bn. Corporate corruption isn’t rare: about USD1 trillion3 is spent on bribes annually and Australian companies encounter (and sometimes create) scenarios like those above every day: 55% of extractives companies believe they have lost business in the last five years because a competitor had paid a bribe.4 And corporate corruption can sustain human rights abuses:

In 2002-2004, Fiat subsidiaries bribed Iraqi public officials to buy vehicles under the Oil for Food programme. These and other kickbacks were used to sustain the oppressive behaviour of the military and security services5. “Billions of dollars were lost, all of which was directly translatable into food, medicine and other humanitarian goods that were supposed to reach the Iraqi people. The resulting damage in human suffering caused to...the people of Iraq is virtually incalculable.”6

In 2003-2005, engineering firm Willbros Group paid over USD6m in bribes to Nigerian politicians, a political party and the state-owned oil enterprise NNPC. Human Rights Watch has stated that “there is a direct relationship between corruption and political violence [in Nigeria]-many public officials use stolen public revenues to pay for political violence in support of their ambitions.”7

In 2004, Siemens paid bribes to ex-Telecoms Minister of Bangladesh, Aminul Haque. Haque funded the Jama’atul Mujahideen Bangladesh, a terrorist group that has assassinated judges and threatened journalists and women’s groups.8

Corporate corruption can also precipitate human rights abuses as well as just sustain abusive regimes: after Malaysian and Dutch businesspeople partnered with Liberian President Charles Taylor to form the Oriental Timber Company, the company was accused of “hiring and arming a private militia...harassing and intimidating local people, [and] destroying private farms during road construction... [in 2000, two men] were illegally arrested by armed OTC militiamen...and jailed in the OTC private prison at the company’s headquarters. No charges were brought against them.”9

Lockheed Saves the World: the FCPA
It probably seems strange to thank one of the most egregious practitioners of corporate corruption for its contribution
to fighting bribery. But if it weren’t for Lockheed Aircraft Corp’s spectacular scandals in Germany, Holland\(^{10}\), the UK, Italy\(^{11}\) and Japan\(^{12}\) (where its agent turned out to be an organised criminal, CIA agent and accused war criminal\(^{13}\)), the seminal Foreign Corrupt Practices Act (FCPA) might never have been signed into law by US President Jimmy Carter in 1977.\(^{14}\) The FCPAs passing was courageous and carried out in the face of bitter opposition from business interests: arms manufacturers told Jimmy Carter “they couldn’t sell in competition with the French and the British and the others overseas if they didn’t bribe officials” while others could.\(^{15}\)

In essence, the FCPA prohibits US concerns from making corrupt payments to foreign officials to win or retain business and requires US companies to keep accurate books and records (reflecting concern about slush funds e.g. Exxon’s USD27m donations to Italian rightist political parties\(^{16}\) in the 1970s). The Department of Justice (DoJ) and Securities & Exchange Commission (SEC) may bring an action under either civil or criminal law.\(^{17}\) Corporations are liable to fines of up to USD2m or twice the commercial benefit the bribe was meant to obtain: in December 2008, Siemens “got off lightly” by agreeing to pay a USD800m penalty to settle FCPA indictments when it could potentially have been fined USD2.7bn. Individuals can fined USD100,000 or twice the commercial benefit and imprisoned for up to five years.

The FCPA’s scope is drawn wide: in addition to regulating US corporations and their subsidiaries, individual US citizens, foreign issuers of US securities and their agents also fall under the jurisdiction of the FCPA, whether or not they were in the US at the time of the corrupt act. In 1988, this was extended to foreign citizens and companies where any step (even a single correspondent bank transaction or phone call) in the corrupt process has taken place in the US. Consequently, the DoJ has the ability to prosecute non-US defendants for corruption of non-US officials taking place outside the US: Fiat (Iraq) and Siemens (China, Indonesia, Hungary, Israel...everywhere, really) were both prosecuted on this basis.

The DoJ and SEC encourage corporations to self-report FCPA violations, in return for reduced penalties and avoidance of prosecution. This is no easy way out for corporations: in my experience, they often end up spending millions of dollars on external US and foreign counsel, investigators and auditors trying to identify past corrupt practices and establishing costly compliance regimes processes to prevent them recurring. This enables the DoJ/SEC to punch above their weight: the corporation’s consultants do what the DoJ and SEC don’t have the resources to do. Self-reporting now is preferable to incurring the wrath of the DoJ and SEC later.

**Widening the net: OECD and Australian response**

Despite US and NGO lobbying, it took twenty years before significant multilateral progress was made in fighting corporate corruption: in 1997, the members of the Organisation for Economic Co-Operation and Development (OECD) adopted the *Convention on Combating Bribery of Foreign Public Officials*. The *Convention* obliges its signatories (inc. Australia) to prohibit bribery of foreign officials and require companies to maintain accurate accounts and records. It also recommends that bribes are not tax-deductible.\(^{18}\)

The Howard government ratified the *Convention* and amended the *Criminal Code Act* 1995 (Cth)\(^{19}\) in 1999. In a nutshell, s70.2 of the *Act* makes it illegal for Australian companies, citizens or residents to provide a benefit to someone for the purpose of influencing a foreign public official to obtain or retain business, or to obtain or retain a business advantage. The maximum penalty is ten years’ imprisonment or $66,000. Investigation is the responsibility of the Australian Federal Police while the Criminal Justice Division of the Commonwealth Attorney-General’s Department is responsible for policy development. ASIC may also pursue civil enforcement against bribe-payers using *Corporations Act* 2001 (Cth) powers relating to breach of fiduciary duty.

**It probably seems strange to thank one of the most egregious practitioners of corporate corruption for its contribution to fighting bribery. But if it weren’t for Lockheed Aircraft Corp’s spectacular scandals...the seminal Foreign Corrupt Practices Act (FCPA) might never have been signed into law by US President Jimmy Carter in 1977.**

**The Irrelevant Defence?**

In the examples above, the bribe paid to the fire safety inspector in City B was the exception because the FCPA and s70.4 both provide an affirmative defence for “facilitation payments”. These are essentially small bribes paid to public officials to “expedite or secure performance of a routine government action of a minor nature.”\(^{20}\)

But the facilitation payment defence may be of purely theoretical interest: lawyers who are able to overcome their legal training and can think like businesspeople will understand why. Clients typically have only two questions about anti-bribery laws: “how do we comply with it?” and “did someone break it?”\(^{21}\) The distinction between a “real bribe” and a facilitation payment may be unhelpful in answering the first question for four reasons:

1. It is confusing for overworked employees trying to build a business. I remember a bewildered client in Kyiv asking, “last month, the lawyer told us that little bribes were OK, but now you’re saying we shouldn’t pay them – which is it?”;
2. In 100% of the cases I have worked on, “real” corporate corruption was preceded by facilitation payments and accompanied by other fraud. Failing to react appropriately to facilitation payments encourages the development of the other two problems. It also sends a message to the market that the company is a “soft touch” with poor internal controls and encourages further corrupt demands; 26

3. 70.4 requires an accurate accounting record to be made of the payment in order for the defence to be pled. Maintaining records of corruption rightly makes everyone nervous and few actually comply; and

4. Even if Australian law doesn't criminalise a facilitation payment, it's still likely to be illegal in the country in which it was made.

Recent US decisions also make the distinction less useful for answering the “did someone break it?” question: in US v Kay, the DoJ prosecuted executives at American Rice for bribing Haitian customs officials to expedite clearance and skip inspections. American Rice argued that these were properly recorded facilitation payments and were outside the FCPA. 25 However, the court construed the statute widely and found the bribes were “intended to produce an effect that would assist in obtaining or retaining business” because they resulted in reduced transit time and underpayment of duties. The two defendants were ultimately sentenced to 3 years and 5 years imprisonment respectively.

Enforcement in practice

Essentially, OECD members’ enforcement of anti-bribery law falls into three categories: pretty good, passable and pretty poor. 24

The “pretty good” category has only one member: the USA. The FCPA received increased attention and funding after 9/11 due to its interlinkage with money laundering, conflict resources, arms trafficking and terrorism issues. DoJ and SEC enforcement actions have risen from 2-4 a year between 1977 and 2006 to 30+ in 2007 and 2008. 25 In early 2009, the lead DoJ prosecutor in FCPA issues said “enforcement is at an all-time high and is likely to remain there under the Obama administration. There are c.100 ongoing investigations.” 26

In the “passable” category is Germany: in 2008, a major enforcement action against Siemens succeeded and there were seven other convictions. There are reportedly c.150 ongoing investigations. 27 France might also qualify: the Brigade Centrale de Lutte contre la Corruption exists as a specialist unit in the Interior Ministry and a large number of investigations have been initiated, although there have been few convictions or settlement agreements.

Unfortunately, Australia and most other OECD states remain in the “pretty poor” category. The Commonwealth Director of Public Prosecutions has yet to bring a single prosecution under s70.2 and ASIC has so far not succeeded in punishing overseas corporate corruption under civil powers. 28 It is unclear whether the AFP has begun investigating the credibility of allegations that Stern Hu and Rio Tinto bribed public officials in China 29 or that Australian businessmen paid bribes in connection with a state property development project in Dubai, even though s70.5(1)(b) establishes jurisdiction over Australian citizens and companies worldwide.

Same Scam, Different Outcomes: Fiat v AWB

Fiat (Italy) and AWB (Australia) both paid kickbacks to Iraqi public officials administering the UN Oil for Food programme in similar circumstances: the different treatment they received is illustrative of the differences between US and Australian enforcement.

Fiat paid USD4.4m of bribes in 2000-2002. In December 2008, Fiat agreed to pay USD17.8m in penalties and disgorged profits. It also agreed to “enhanced compliance policies and procedures” and co-operation with ongoing investigations to settle DoJ criminal charges and SEC civil enforcement.

AWB paid USD224m of bribes in 1999-2003. In November 2006, the Cole Report identified two AWB companies and twelve AWB employees who may have breached criminal and/or civil law. 31 In December 2007, ASIC commenced civil penalty proceedings in the Supreme Court of Victoria against six ex-employees under s180-181 of the Corporations Act 2001 (Cth). In November 2008, proceedings against five of them were stayed until criminal charges were filed. The civil proceeding against the sixth employee was scheduled for July 2009 but ASIC sought to run that case with the others to avoid undue expense. A decade on from the first bribes, the criminal investigations continue and the civil cases are unresolved.

If the AWB case has not (yet?) been a great prosecutorial success, it has at least avoided the embarrassment faced by the UK’s Serious Fraud Office. After pressure from the Saudi royal family and arms manufacturer BAE, in December 2006 Tony Blair terminated an investigation into accusations BAE had paid USD2bn in bribes to Saudi public officials since the 1980s. Humiliatingly, the issue was taken up for investigation by the DoJ and Swiss prosecutors six months later 32 and Blair’s intervention was declared unlawful by the High Court in April 2008. 33

Implications for Dissent readers

Corporate corruption is an important issue for Australian businesses and legal institutions and this is unlikely to change in the near future: Australia’s fastest-growing export markets and FDI targets in Asia often pose significant corruption and human rights challenges. Australian businesses need support and guidance to avoid the pitfalls of corruption and thrive in the international marketplace; Australian institutions need the funding and resources to enforce and advise on the law. Meanwhile, as the Rudd government works to
position Sydney as an Asian financial hub, more international companies will fall under Australian jurisdiction.

These factors, combined with the uniquely multi-jurisdictional nature of corporate corruption, have significant implications for Dissent readers as current and future:

Policy Makers: need to appreciate the articulation between corporate corruption and human rights, and realise that foreign corruption prosecutions in Australia would support human rights protection abroad; need to integrate anti-corruption work into DFAT’s OECD/sanctions/terrorism assets/human rights portfolio; need to align federal civil and criminal law on foreign corruption (possibly by amending the Corporations Act) to avoid the timing/sequencing dilemma faced by AWB’s investigations; need to provide the funding (carrot) and the pressure (stick) to make foreign corruption a priority for the AFP and ODPP. The A-G’s Department has published some anti-bribery advice on its website but in my experience it’s prosecutions — painful, high-profile prosecutions — that really focus that minds of senior executives.

Practitioners: need to understand the implications of Division 70 for local clients doing business abroad and foreign clients subject to its jurisdiction; need to understand the FCPA for the numerous Australian clients that are “US issuers” e.g. Amcor, BHP Billiton, Rio Tinto, NAB and Boart Longyear; need to consider the presence of corrupt transactions and arrangements as liabilities in pre-transactional due diligence and structure M&A to avoid them; need to be aware of the outside resources that are available to understand the issue and to support clients’ business decisions with practical solutions; need to remember their ethical obligations.

In-house Counsel: need to roll out anti-bribery regimes within their organisations that mesh with anti-fraud and mainstream compliance programmes. To avoid being perceived as the “Business Prevention Department”34, in-house counsel must ensure that legal advice is always combined with practical support for “front line” executives and a strong message from the Board that the company will walk away from business if the only way to do it is corruptly.

Academics and students: the most urgent need is for research into corporate corruption best practice that focuses on practical responses to extortionate demands (which can be used to help Australian businesses comply with the law) and enforcement best practice that focuses on co-operation with overseas agencies (which can be used to help the AFP and ODPP gain traction in enforcing the law).

References
1 I use “corporate corruption” here and throughout to mean bribery of public officials (including employees of state-owned enterprises) by companies or their agents for business reasons, not private citizens’ bribery of public officials or business fraud/kickbacks/ embezzlement that doesn’t involve the state.
2 I was employed by a major business risk consultancy. Although the company did many things, my role was to investigate people and companies to identify and mitigate integrity, reputation, money laundering, organized crime, corruption and political risks. Like everyone in the industry, I signed a confidentiality agreement so the examples are anonymised. I do not disclose confidential information in this article.
5 In retrospect, the Oil for Food regime may unfortunately have been worse for Iraq’s HR than the emergent corruption was.
6 Taken from the complaint filed by Iraq against Fiat, AWB and other alleged Oil for Food bribe payers in June 2008 in US Federal Court.
7 Human Rights Watch, Criminal Politics (2007) at 35.
10 “From beyond the grave, Prince finally admits taking $1m bribe”, The Times, 4 December 2004.
14 Lockheed performed further public service in keeping corporate corruption on the agenda by being convicted of FCPA violations in 1994. In 2003, showing it had learned its lesson, it terminated its acquisition of Titan after due diligence showed Titan had bribed President Kéréou of Benin. See Alexandra Wrage, Bribery and Extortion (2007) at 61.
17 In practice, the SEC focuses on civil prosecution of US-listed or US-traded corporations.
18 Ireland, Mexico and Israel still do not formally prohibit bribes being written off against tax liability.
19 Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999 (Cth). Other statutes were amended but the core anti-bribery prohibition is in the Criminal Code. 20 s70.4(1)(b) of the Criminal Code – Act 1995 (Cth).
20 Sometimes the “someone” is “us” (so we can self-report), “our competitor” (so we can report them) or “our acquisition target” (so we can pay less or withdraw from the deal). Sometimes the question ends with the word “again”, or in especially troubled clients, the words “yet again” followed by the sound of a whisky bottle opening.
21 According to industry gossip, Wal-Mart in China has a reputation for never paying bribes, which in turn creates a “halo effect” that discourages officials from soliciting bribes in the future.
22 American Rice also argued that the FCPA was excessively vague and that “obtaining and retaining” business was not the same as “sustaining” its existing business. These arguments were rejected.
23 Transparency International prefers the categories “active enforcement”, “moderate enforcement” and “little or no enforcement” and lists Germany, Switzerland and Norway alongside the US in the premier tier for 2008 alone.
24 In practice, the SEC focuses on civil prosecution of US-listed or US-traded corporations.
26 Ibid.
28 Ibid at 18 (as of June 2009) and not contradicted by my own research. Corrections or updates are welcome.
30 I do not assume the accusations are credible: prosecutorial agencies in China and the UAE are subject to political influence and the industries concerned are politicized.
31 Attorney-General’s Department, Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme, Chapter 1. Usually referred to as the Cole Report after its Commissioner (and Sydney Uni Law School alum) Terence Cole QC.
32 “Payload: Taking Aim at Corporate Bribery”, New York Times, 25 November 2007. Jurisdiction appears to have been founded on the claim that payments were made via Riggs Bank in Washington, DC. Riggs Bank had previously been prosecuted for laundering money for public officials in Chicago, Equatorial Guinea and Saudi Arabia.
34 This is how the Legal Dept was described by the Sales division of an engineering client: counsel was seen as being excessively cautious and ignoring the need to keep the business growing.
A new office is like borrowed robes. As I sit on my softly padded chair and find my name and title engraved on a small plaque as “James Dufrey- Victim Accounts Editor”, I look around to see what aspects of the room reflect my own attitudes and background.

On a stand on the wall opposite me is a bronze statue of Themis, its symbolism curiously altered, probably left there by the previous editor. On one side of the scale of Themis are a dozen or so miniature figures, their mouths gaping open in horror as the ground tilts towards a grave dug at the foot of the statue. On the other side lie a UN logo and a gavel. I hope the meaning of this will become clearer as the day goes on.

I turn to my computer and plug in a flash drive, then open the folder where my Secretary has stored two typed up letters for the work of my first morning. One is labelled “Tutsi survivor”, the other “Peruvian widow”. I open the first and begin.

‘I wake up every morning with the parting shouts of my family as I left them at the church echoing beneath the blankets. For a long period I lie there, fully covered in sheets and with the curtains asphyxiating the light. Since the genocide I have only trusted the darkness, for in the marshes sundown would mark the period when we could wipe the sweat off our brows, the Hutus having returned to their towns after another day of slaughter.

It is with a newfound sobriety that I write these words. It is also with great secrecy, for what I have learnt in my divided community is that one man’s promise of reparation is another’s threat of incarceration.

The other day, our town saw its first killing in half a decade. It occurred after what became our most controversial Gacaca trial in memory, the final decision being that the accused man, a former teacher, would be taken to a higher authority. All the time, both sides had been composed, nodding their heads whenever required. The magistrate had gotten the responses which he wanted from them. A few hours later, the wife of the witness was heard screaming that the accused and a friend, whom I was aware had been given amnesty the previous week, had murdered him with kitchen knives. The fear in her eyes reflected the hunger in the eyes of the men. This is not any killing. It is a pathology rising to the surface.’

And I think to myself, this is what we call “never again”. Where was the protection? If there were police officers, or mental health experts at hand, why couldn’t they coordinate some kind of custody to safeguard the community?

Yet these courts probably serve their purpose. I have read that in actual custody there are both those likely to die of old age before being convicted and those too young to have been perpetrators of genocide.

‘I kneel before our local church and feel thankful even before the cross of a God whose presence and existence has gradually become a myth in my mind. Funny then, that it should be a source of strife in an African village. There are those, many Christians among them, who would have it torn down as a symbol of our vulnerability and blind trust, for, its walls having borne witness to dozens of deaths, it reminds them of running from the church in Nyamata where frenzied Hutus had proven that even the walls of God were not impenetrable. Then there are those who wish for the church to remain as an enduring symbol of our commitment to the Faith, as if our struggle for survival was motivated by a desire to serve the Lord. Such great contradictions, and yet a few months ago a group of Methodists belonging to an organization called Reconciliation Evangelists decided to build a chapel of their own just down the road. These influences confuse us, and make us forget that it is we who must ultimately cure the wounds in our society.

But I’ll make it clear that no institution has distributed its efforts better to help our community in the most urgent and meaningful ways. A multipurpose room in front of the church has become a parish office and community hall where both peasant woman and councillor can cater for their own needs.

The other day, an acolyte attended a Gacaca trial of great
severity, who later told me he had been sent by our local priest to unofficially partake in the proceedings. The case concerned a man who had been forced to watch as acts too dreadful for these pages had been dealt upon his three sisters. The following weekend, the priest himself led a herd of a dozen or so cattle to the man's house, revealing that they had been purchased with funds donated by an NGO for the purposes of “collective healing”. It had been long since we Tutsis had seen such beautiful cattle, and we had in fact mourned their slaughter at the hands of Hutus and missed their company. The man talked to the priest for a few hours and left the house weeping on his shoulder, but afterwards headed to the cabaret to exchange, over a few Primuses, such a riveting survival story as few of us had ever heard.

I am inevitably reminded of an often narrowly interpreted principle established by Theo van Boven, Special Rapporteur during the early 1990s,

“Restitution shall be provided to re-establish, to the extent possible, the situation that existed for the victim prior to the violations of human rights. Restitution requires, inter alia, restoration of liberty, citizenship or residence, employment or property.”

‘These days, there is much talk about the newfound redemption of our leader, Paul Kagame. I have occasionally read in the newspapers that he has made laws to preserve a more permanent stability for our country and defends them against those overseas who criticize him. He has often called upon this principle of national sovereignty, and only recently have I grasped its meaning. What puzzled me from the start was that this seemed to be an idea which only made sense when applied to individuals, for we are each carriers of our separate stories which we may or may not choose to share with one another. Our trust and our insecurities define the limits of our lives. To attempt to combine them all into a national chronicle defined by the government's unity, as he does in his rhetoric, which nobody can interfere with, as an abstract concept that exclusively binds our nation, seems delusional. I know too that the foremost politicians of nearby countries like the Sudan have caught on to the sentiment of our leader's catchcry in order to defend their own causes, of their stories, and not a single one lacks the feeling that he or she has somehow been chosen. Though I am not one of them, I relate to their feeling. Not for the nimbleness of my limbs, but for the most essential and beautiful scraps of humanity that I witnessed within my own surviving group. I have, however, learnt to be equally sceptical of the foreign authorities that try our perpetrators. You arrive at the ruins and tell us what genocide is, that the causes are a madness that possesses the mind, or a historical divide existing since the departure of the colonial power. And with this basis you judge those who were personally responsible. You then go on to try to empathize with the survivors by telling us that the machetes are just as vivid from the television screens. While it may be true that your words are accurate in a political dialogue, they fail to have any relevance with our memories. You find the vernacular equivalent of the word genocide and learn to pronounce it accordingly; we live the word genocide in our own homes. You come into our villages and speak as if you had experience things comparable to our suffering. To this I object.’

They know more about us, we who waited, observed then deliberated, than we know about them in their suffering. We owe it to them to listen and apprehend the horror of each new case, rather than giving ourselves a pat on the back for building this legal monument we call the charge of genocide, a so far imperfect and not so divine manifestation of natural law.

‘There are now five mental health consultants in a town of 50,000, thanks to unofficial reparation funds donated by NGOs. Many of us, both Hutu and Tutsi, mostly those who were adolescents at the time of the genocide, are indeed grateful to be given the opportunity to openly and profoundly discuss their memories and persistent conditions in an environment untainted and without prejudice. This would be progress if there weren’t only half as many general practitioners in our town, if there were a few who could spare their time to teach our most afflicted young to take the medicine to halt their degeneration.’

My secretary has left a factsheet on my desk with the relevant figures, and I only have to do the calculations to encounter a few horrible realities. From around 20,000 cases in which women who had been raped gave birth to children that are still alive today, around 70% had been infected with HIV/AIDS by their attackers, doubtless as a weapon of war in most cases. That is around 14,000 children living the same story, unwanted, AIDS-affected, their mothers having no living relatives, themselves being orphaned as AIDS killed yet another generation. And this is the tip of the iceberg.

‘We are few compared to what we were before. Amongst the six thousand who congregated in Kayumba to face the machetes together, only twenty remain. I know every one of their stories, and not a single one lacks the feeling that he or she has somehow been chosen. Though I am not one of them, I relate to their feeling. Not for the nimbleness of my limbs, but for the most essential and beautiful scraps of humanity that I witnessed within my own surviving group. We who now have the privilege of choosing how to pass on knowledge to our successors, to teach them to take the best with the worst, or whether we will give birth to and rear our own children. Whether the Westerners come with their grand projects and build schools or not, we will make them the gardeners of a new society.

Yet there is nothing like the family you grew up with, and I myself have felt a loneliness which grows when it is not shared. So I hope you will gain as much reading this as I did writing it.

Jean-Baptiste Kayitesi’
Privileged is what I feel to be reading Jean-Baptiste’s account, yet at the same time I regret the fact that both his story or my position have to exist at all. Setting these thoughts aside, I turn to the next letter.

‘As I write this letter I realize it may be the sole of my attempts to uncover and spread the truth of my husband’s murder that does not derogate from my dignity as a citizen. I have been humiliated on the door of the barracks, I have followed Congressmen on the street in vain, and I have been called retrograde by a local newspaper.

As indifferent as society may be, none are less human than my husband’s murderers. A group of them drank beer and shared a birthday cake soon after committing a series of killings. I will not forget this action, nor will I forgive these men.

Our proud President Fujimori would always preach to us the virtues of eternal vigilance, yet only in these past few years have I discovered the true meaning of that phrase. It is looking over your own shoulder as much as your neighbours’. It is being vigilant of every memory or trigger that may be just around the corner.

There is a poster of Vladimiro Montesinos, left over from the early 1990s, hanging upon the north side of the bell tower. Nobody has yet bothered to take it down, if not for its precarious position then for fear of the radical sentiments that such an action would inevitably stir. Every time I walk past it, however, I feel a storm arise deep within me and am seized by the mad conviction that our country’s, in fact our world’s, virtue and piety should be judged according to the weight of justice that is dealt upon this man. For many years I endured a regime that was nepotist not only in its promotions but also in its deliberations on our very right to justice, passing amnesty after amnesty before those suspected could be fully investigated.

In the 90s we had the “faceless” tribunals where the judges and prosecutors would be hidden by screens. These permanently disconnected our community from the judiciary we had placed our faith on. I knew that Fujimori was behind all of it, hidden even deeper within the curtains. I couldn’t bear to see so many known innocents jailed within these courts while Fujimori’s public actions would be to praise the efforts of the abusive counter-terrorism wings of the military.

I wish he could read this letter. I wish he could hear the bullets, or feel the footsteps. For so many years I endured watching extradition trials knowing that he was laughing at the fact that his own people had allowed him to escape.

The Truth and Reconciliation Commission has done a lot of great work yet its failures have also been felt greatly. It has, fortunately, changed the legal status of all the “disappeared” to “absent due to disappearance”, and thus enfranchised their relatives to resolve the clouded issues of succession and property. I have a friend who was in what we call a “crossfire family”. Her older brother was taken away by Sendero and her younger brother by the military. She has been able to overcome such legal difficulties. These omissions are inevitably perceived as signs of neglect coming from the higher executives, and thus garner neither support nor nobility for the government’s ideal of change.

More than anything we need one that cares about more than fighting for every dollar, every political dollar as some would say, it can wean off our right-wing government and giving to a select few whose cases have been well publicized. The Commission figures say that the extended range of people affected by assassinations and enforced disappearance ranged in the thousands, yet so far the government has only delivered full pardons or reparations to a few dozen people. If they truly want to extend a hand to as many people as possible, then they should rigorously trace every detail of the stories, from the moment Grupo Colina came around asking questions, such that a society can reflect and heal its fractures. For truth helps not only the judges but also the judged, it allows perpetrator and victim to set every detail of their ordeals in stone and thus understand the terms with which they build their new lives.

Indeed, without discovering the truth about perpetrators it is impossible to discover the truth about victims. Impunity yields to indifference and justice is forever delayed. The Commission should take a strong stance on impunity, and if it is resources and international cooperation that are lacking, then the international courts should assist us in whatever way they can.

In fact, my frustration grew to the point that I was in email correspondence with an ambassador of the worldwide Trust Fund for Victims and travelled to Lima to speak to him when he visited our country. The final verdict was that the Fund was a young organization slowly adapting to new cases, and that even if its parent court, the International Criminal Court, would recognize the decisions of Chilean and Peruvian Supreme Courts during the extradition period, however politicized they were, it could not assist in the creation of a Peruvian trust fund because of the perception that it would be anything but trustworthy. But this made me ask, is Peru in such a bad state of governance or so uncooperative that various other countries can utilize the Fund’s capabilities, while we cannot? And should Peruvian victims be so greatly disadvantaged to those, say, in Africa? Our cries, so far, remain unheard.’

At that point I realized that governments could be just as unable and unwilling to respect the victims as they could be in protecting them to begin with. Legal continuity and state responsibility to amend the actions of previous regimes are legitimate claims which governments rarely acknowledge. The international community, as donor and soft enforcer, could do much to extend the power of international law.
‘My contact delivered this news with dread and that air which I have come to identify as the guilt of a noble man, handing me a bunch of four o’clock flowers, those which grow in the northern regions of Peru.

I planted these flowers in my garden in defiant memorial. With thousands of people in this town urgent to face what they perceive as a prosperous future, there is little space for the memories of the few betrayed innocent who perished with similar dreams. There is little space for memorials amidst the gleaning plazas and the smells that make you feel like a tourist in your own town. Our Junin has become like any other place in South America. Yet the suffering which has gone on here must never be forgotten.

I write this letter because I hope that a just-minded person out there will care and that this may be a pebble in breaking down the wall between their intent and our victimization. Of all my past attempts, none have succeeded.

Aurelia Hernandez’

And thus, taking on their pleas, my working day continues.
Complementary Protection
Alex Pavli (BA (Hons)) explores the current limitations of complementary protection and the necessity of amendments both in Australia and internationally.

Complementary protection is a form of international protection granted by states to asylum seekers who are in need of protection, but who do not meet the criteria set out in the 1951 Refugee Convention. This includes people who are stateless, who come from a country in the midst of civil war, or who have been subject to gross violations of their human rights that are not covered by the Convention. Australia is currently one of the only Western States without a complementary protection system. As a result, asylum seekers who do not meet the definition of a refugee, but who could still face torture or inhumane treatment, may be sent back to their home country. In November 2008, the Rudd Government unveiled a provisional model for the introduction of complementary protection into Australia's immigration law. While it is an improvement on the previous system, the proposed model still falls short of adequately protecting some of the world's most vulnerable people. This article will critique the Government's provisional model, arguing that if the model is not amended, Australian law will fail to provide adequate protection for people fleeing civil war.

**Current Practice**

Current practice in Australia is not consistent with the international trend towards complementary protection. A person seeking protection in Australia for non-Convention reasons must go through several stages of the refugee determination process before their claims are considered. The applicant must be rejected at each stage of the determination process, after which they may write to the Minister for Immigration and Citizenship to request that he exercise his personal discretion to issue a protection visa under section 417 of the Migration Act 1958 (Cth). Although a person seeking protection for non-Convention reasons may be granted protection at this stage, the Minister is not required to consider the claim. For example, a person who fears torture for non-Convention reasons has no legislative basis for claiming protection in Australia.

It is evident that this system is problematic on many accounts.

Firstly, it is a lengthy and inefficient process: the Department of Immigration and Citizenship and the Refugee Review Tribunal must spend valuable time and resources dealing with applicants whose claims fall outside the Convention, but who would otherwise have bona fide claims. Secondly, it is expensive to delay the grant of protection to a person entitled to it, especially if that person is in detention. Finally, the process lacks transparency and accountability. The Minister has non-compellable, non-reviewable powers to grant a visa to any failed applicant, and no reason is given for the decision. People in need of complementary protection are left in uncertainty as the assessment of their claims is delayed, sometimes for extended periods.

**The Draft Complementary Protection Model**

Refugee advocates have been lobbying to implement a complementary protection system for several years. In November 2008, the Department of Immigration and Citizenship released a draft complementary protection model, one of many significant changes to the immigration system since the Rudd Government was elected in 2007. Complementary protection does not have a settled meaning in international law. At its broadest, complementary protection can include protection for people to whom states have a non-refoulement obligation (the obligation not to return a person to a place where they may face certain kinds of harm) under international treaties other than the Refugee Convention, as well as stateless people, and people fleeing civil war. In this model, the Department proposes to limit the complementary protection system to Australia's non-refoulement obligations under international human rights treaties, including the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child. To preserve the primacy of obligations under the Refugee Convention, decision makers would first assess applicants' claims against the Refugee Convention, after which complementary claims would be assessed. The model grants access to merits and judicial review and importantly, the recipients of complementary protection will be granted the same benefits and entitlements as refugees.

**The Major Inadequacy of the Proposed Model**

The proposed draft complementary protection model is inadequate because it does not consider the international
international protection. The proposed Australian model demonstrates an expedient disregard for the views of the international community regarding the protection of people fleeing armed conflict.

Conclusion
Despite the welcomed upcoming introduction of complementary protection in Australia’s domestic legislation, the proposed draft model does not consider the international protection needs of people fleeing civil war. Consequently, people who face grave violations to their human rights in conflict situations may be sent back to their home countries. The omission of this category of people from Australia’s complementary protection draft model was criticised by the UNHCR. People fleeing civil war fall within the mandate of the UNHCR, and the UN agency considers that serious and indiscriminate threats to life resulting from generalised violence are valid reasons for international protection.

Australia’s failure to protect people fleeing civil war conflicts with the objectives of the international protection regime.

UNHCR’s Position on People Fleeing Armed Conflict
Australia’s failure to protect people fleeing civil war conflicts with the objectives of the international protection regime. The United Nations High Commissioner for Refugees (UNHCR) commented on the Australian complementary protection draft model with reference to persons fleeing generalised violence, stating that it would welcome the explicit inclusion of such persons in Australia’s codified complementary protection regime. On many occasions, UN member states have affirmed their support for the UNHCR, and its efforts to protect people fleeing the indiscriminate effects of violence associated with armed conflict. The General Assembly has extended the UNHCR’s mandate to a variety of situations of forced displacement resulting from indiscriminate violence and public disorder. Accordingly, UNHCR considers that serious, and indiscriminate threats to life resulting from generalised violence are valid reasons for international protection. The proposed Australian model demonstrates an expedient disregard for the views of the international community regarding the protection of people fleeing armed conflict.

How Other States Address the Protection Needs of People Fleeing Armed Conflict
In contrast to Australia, people fleeing civil war are offered international protection in many other parts of the world. States have generally dealt with the issue in one of two ways: by expanding the definition of a refugee to encompass other groups in need of international protection, or through a complementary protection system. In Africa, States have broadened the refugee definition to encompass people threatened by indiscriminate violence. The Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa covers not only persons fleeing persecution for the reasons set out in the 1951 Convention, but also:

Every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

Similarly, in Latin America, the 1984 Cartagena Declaration on Refugees recommended inclusion of ‘persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence’. While this definition is not binding, it serves as the basis for recognition of refugee status in a number of Latin American States. Europe, however, addresses the claims of people fleeing generalised violence through a variation of complementary protection called ‘subsidiary protection’. In 2004, the European Union adopted the Qualification Directive that sought to harmonise refugee legislation across Europe. This Directive provides a legal status similar, but not identical to, Convention refugee status for people who fear an individual threat due to indiscriminate violence in situations of international or internal armed conflict. In sum, people fleeing armed conflict are offered protection in many parts of the world, but there is no equivalent legislative framework for offering such people protection in Australia.
Moreover, there is considerable state practice offering protection to people fleeing generalised violence. In contrast to Australia, regional systems in Africa, Latin America and Europe have frameworks in place to consider such claims. The Department of Immigration and Citizenship's proposed model must be amended to consider the protection of people fleeing armed conflict. The current model is in direct conflict with the recommendations of UNHCR and international trends. Ultimately, however, the proposed model will compromise the lives of people in need of Australia's protection.

For students interested in refugee issues and human rights, Amnesty International Australia offers internships and volunteer positions within its Refugee Casework Team. Please email refugee_team@amnesty.org.au for more details.

References
1. 1951 Convention relating to the Status of Refugees. Article 1 of the Convention provides the definition of a refugee: 'A person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.'


4. The model also omits the Convention relating to the Status of Stateless Persons (1954) and the Convention on the Reduction of Statelessness (1961). Debate surrounding the inclusion of the Stateless Conventions in Australia’s complementary system is beyond the scope of this article. The omission of people fleeing armed conflict and stateless persons from the draft complementary protection visa model was noted in United Nations High Commissioner for Refugees Regional Office for Australia, New Zealand, Papua New Guinea and the South Pacific, Draft Complementary Protection Visa Model: Australia, UNHCR Comments (January 2009) at 1-10.


11. Ibid.


Daniel Ghezelbash (Law IV) explores the development of a new ‘Indian Ocean Solution’ and assesses whether it conforms to Australia’s obligations to refugees under international law.

In February 2008, the newly elected Rudd Government triumphantly announced the resettlement in Australia of the final group of asylum seekers detained on Nauru. This marked the end of the Howard government’s ‘Pacific Solution’, which had seen the transfer of asylum seekers who arrived in Australia without permission to processing centres on Nauru and Manus Province. Shortly after, Chris Evans, the Rudd Government’s Minister for Immigration and Citizenship triumphantly announced a new direction in the processing of unauthorised arrivals to Australian shores. While introducing some welcome changes, the Rudd Government’s ‘new direction’ maintained the architecture of excision of off-shore islands and a regime of non-statutory processing of people that arrive unauthorised at an excised place. As these unauthorised arrivals were being transferred to processing on the detention facility at Christmas Island, the new regime has become known as the ‘Indian Ocean Solution’. This paper will explore the details of the new regime and assess with reference to Australia’s international obligations.

Background: The ‘Pacific Solution’
The architecture of the Rudd Government’s current policy towards the processing of unauthorised arrivals has its roots in the Howard Government’s response to the Tampa incident and the establishment of the ‘Pacific Solution’. In late 2001, the Norwegian registered container ship MV Tampa rescued 433 asylum seekers on the verge of sinking in ocean 75 nautical miles north of Christmas Island. The federal government prevented the MV Tampa from entering Australian territorial waters by boarding the ship with SAS troops and signing hasty agreements with Australia’s Pacific neighbours to host the asylum seekers. This heralded the beginning of the Pacific Solution. The aim of the Pacific Solution was to ensure that certain asylum seekers were not processed in Australia. Three main strategies were employed to meet this aim. First, a Minister could declare that certain Australian territories were ‘excised offshore place’ and hence no longer part of Australia’s migration zone. Initially, only Christmas Island, Ashmore Reef, Cartier Island and Cocos Islands were excised. Later regulations extended the excision zone to include almost all but mainland Australia. Second, a new category of ‘offshore entry person’ was created to catch all asylum seekers who land without a valid visa or authority on an excised territory. Finally, provisions were made to enable the transfer of ‘offshore entry persons’ to a ‘declared country’.

The ‘Indian Ocean Solution’
The Rudd Government has not altered the legislative framework that underlay the ‘Pacific Solution’, but has adopted a policy of transferring off-shore entry persons to Christmas Island, rather than foreign countries. This means that the two-tiered system of processing unlawful arrivals that discriminates between those that enter Australia’s migration zone and those that do not, remains in place. Those that enter the zone are entitled to apply for a Protection Visa under s 36 of the Migration Act and in the cases where such an application is unsuccessful, such individuals have access to an independent merits review before the Refugee Review Tribunal (RRT), as well as judicial review in domestic courts and a right of application for ministerial discretion. Such rights are not afforded to ‘off-shore entry persons’, which the government defines as unlawful arrivals at an excised offshore place. Off-shore entry persons are not entitled to apply for a Protection Visa unless the Minister exercises his/her discretion under s46A(2) of the Migration Act.

In effect, this requires that such asylum seekers go through a three step process before being granted protection:

1. They must complete a ‘Refugee Status Assessment’ (RSA) application; and
2. If a delegate of the Minister decides the person satisfies the definition of a refugee, (s)he will prepare a submission to the Minster requesting his intervention under s 46A(2); and
3. If the Minister lifts the bar, the person can then lodge an application for a Subclass 866 Protection Visa, which will be assessed according to criteria which is the same as an application made by an asylum seeker within the migration zone.

Unlike those refugees that make it to within Australia’s migration zone, off-shore entry persons cannot obtain
merits review of an unfavourable RSA decision in the RRT. Under the ‘Pacific Solution’, off-shore entry applicants were not afforded any opportunity for merits review of unfavourable determinations of refugee status. The Rudd Government, however, has created a new non-statutory advisory body called the ‘Refugee Status Assessment Review Panel’ (RSARP) to conduct independent merits review of claimants who have received negative departmental RSA outcomes. The operation and procedures of this review board remain unclear as it is yet to hear any applications for review. Further, it should be noted that the board’s decisions are purely advisory, and that the Minister is under no obligation to act on its recommendations. This is in contrast to the RRT, which has the power to grant Protection Visas in its own right.

Judicial Review
It appears unlikely that an off-shore entry person has a right to judicial review of adverse RSA outcomes and a failure of the Minister to exercise his/her discretion under s 46A(2) to allow them to apply for a Protection Visa. Section 494AA(1) of the Migration Act provides for a comprehensive bar against proceedings against the Commonwealth relating to an offshore entry by an offshore entry person. However, a minimum right to judicial review of decisions by Commonwealth officers is protected under s 75(v) of the Australian Constitution, which confers original jurisdiction on the High Court in all matters where a writ of mandamus, prohibition or injunction is sought against an officer of the Commonwealth. Section 494AA(3) expressly recognises that the bar in that section does not affect the High Court’s jurisdiction under s 75. While the Minister, the delegate conducting the RSA assessment and the RSARP members would likely all satisfy the requirement of being officers of the Commonwealth, it is not clear if the constitutional writs provided for in s 75(v) could be awarded to remedy their decisions. To seek review under s 75(v) an applicant must apply for one of the remedies specified in the section. These remedies are mandamus, prohibition and injunction. The remedy of certiorari is also available as ancillary remedies where it is necessary for the exercise of one of the named writs. Further, the remedy a declaration is also available, based on the High Courts wide discretion to grant all remedies necessary to ensure the complete and final determination of all matters in controversy between the parties.

Before discussing the applicability to the remedies mentioned above, it is necessary to elucidate the precise nature of the power of which review is being sought. The refusal to allow an off-shore entry person from applying for a Protection Visa occurs as a result of the Minister refusing to exercise his/her discretion under s 46A(2) to give leave for such a visa application to be made. The Minister has no legal obligation to exercise this discretion. This power is framed in a similar fashion to the Minister’s power under s 417 of the Migration Act to substitute a decision of the Refugee tribunal with one that is more favourable to an applicant. Both powers are discretionary and only apply where the Minister thinks it is in the public interest to exercise them. Further, they can only be exercised by the Minister personally and are non-compellable as the Minister has no duty to exercise his/her discretion. This non-compellability would raise problems for the issuing of constitutional remedies as Australian courts can only order a government officer to do what the law demands of him or her.

The two-tiered nature of Australia’s processing system for on-shore Protection Visa applicants is discriminatory, inefficient and in breach of Australia’s international legal obligations.

Going back to the individual writs that may be available, the writ of mandamus would be the most desirable from the point of view of an off-shore entry person denied the opportunity to apply for Protection Visa. A writ of mandamus can be issued to enforce the performance of a public duty where there has been an actual or constructive failure to perform the duty to exercise a jurisdiction. However, in Re Minister for Immigration and Multicultural and Indigenous Affairs: Ex parte S134-2000, the majority of the High Court in examining the s 417 discretion, ruled that where the Minister is under no duty to exercise a discretion, a decision not to exercise the discretion cannot be the subject to of a writ of mandamus. Therefore, it is likely that the High Court cannot issue a writ of mandamus to order the Minister to consider exercising his or her discretion under 46A(2) to permit an asylum seeker to apply for a visa, given that s 46A(7) clearly states the minister has no duty to even consider whether to exercise this discretion. The writ of certiorari will not be of much use, as the challenged Ministerial action does not involve an operative decision made by an inferior court or tribunal that can be removed into the court and quashed. Similarly, a writ of prohibition would be of little utility as there is no impending decision being made.

The applicability of the constitutional writs to the review of decisions made by decision-makers delegated to conduct RSA assessments and the members of the RSARP would face similar impediments to those that preclude the applicability of these writs to decisions of the Minister. The RSA delegate and the RSARP are only advisory bodies and do not derive their status from legislation, but rather exercise the delegated executive authority of the Minister. As such, any application for judicial review would face the same problem as an application for review of the Minister’s decision—namely that there exist no legal obligation, statutory or otherwise, to make a determination of an applicant’s refugee status that a court could enforce.

It may be possible for the court to grant a declaration that the off-shore entry person is a valid refugee. While such a
declaration would not place a legally binding effect on the Minister to exercise his discretion under s 46A(2), it would be an effective means of placing political pressure on the Minister to do so.\textsuperscript{20} This declaration may also be accompanied by an injunction to prevent the removal of the applicant. The success of such an application is unlikely, given the High Court’s decision in \textit{Minister for Immigration and Ethnic Affairs v Guo},\textsuperscript{21} where it was held that a declaration issued by the Full Federal Court that the applicants were refugees was invalid as it trespassed on the forbidden area of review of merits.

\textbf{Criticism of the ‘Indian Ocean Solution’}

Australia’s two-tiered processing system is undesirable in that it that it creates an incongruous distinction between asylum seekers processed offshore and asylum seekers processed onshore, resulting in unequal access to the Protection Visa application process and review of adverse refugee determinations.\textsuperscript{22} The result is a refugee processing system for off-shore entry persons that is both unfair and in violation of Australia’s international obligations. The dependency of off-shore entry persons’ ability to apply for a Protection Visa on the exercise of ministerial discretion and the failure to provide off-shore entry persons access to judicial review violates Australia’s commitment under international law to provide off-shore entry persons access to judicial review of the asylum process strengthens compliance with the \textit{Refugee Convention} by establishing, through considered interpretation of the Convention’s terms, the parameters of [a state’s] international obligations and that procedural safeguards elaborated by the courts enhance and help ensure the fairness of asylum processes.\textsuperscript{23}

The importance of judicial review in the refugee determination process is evidenced in the statistics for its utilisation by on-shore applicants. In 2006-2007, there were a total of 2202 cases in which the RRT affirmed the decision of the original decision-maker to reject an application for asylum.\textsuperscript{24} Of these rejected applicants, 2032 made applications for judicial review and 546 succeeded in having their case remitted back to the DIAC for re-determination.\textsuperscript{25} This means that more than 92% of applicants who obtained an unfavourable outcome at the RRT sought judicial review of the decision, with just over 18% having their case remitted for re-determination. This indicates a significant degree of legal error in the merits review process by the RRT. As a new, untested non-statutory body, the RSARP is likely to have at least a comparable, if not higher error rate. By depriving off-shore entry persons access to judicial review of the RSARP decision, these legal errors will go unchecked and the chance of \textit{refoulement} of genuine refugees is increased.

The two-tiered system of processing has also resulted in the denial of the applicability of hard fought reforms to domestic refugee processing procedures to off-shore entry applicants. Most notably, despite a clear undertaking made by the Minister, Chris Evans, that children would no longer be held in immigration detention,\textsuperscript{26} more than 80 unaccompanied and accompanied minors are currently being held in community detention facilities on Christmas Island.\textsuperscript{27} Further, the remoteness of Christmas Island has raised some serious problems in the processing of off-shore entry refugee applicants. This remoteness creates barriers for contact with legal representatives\textsuperscript{28} with reports of new arrivals at Christmas Island regularly waiting for up to 50 days before being able to access any legal advice.\textsuperscript{29} This remoteness also resulted in high operating costs. Aside from the $396 million it cost to build the new detention centre,\textsuperscript{30} the government faces exuberant costs in flying in food and personnel such doctors, psychiatrists and government funded lawyers. The remoteness of Christmas Island also raises concerns in that it removes the refugee processing system from the public eye and media scrutiny.

\textbf{Conclusion: A Fairer way Forward}

The two-tiered nature of Australia’s processing system for on-shore Protection Visa applicants is discriminatory, inefficient and in breach of Australia’s international legal obligations. The Rudd government has made some welcome policy changes in the area refugee processing such as the
abolishment of Temporary Protection Visas and refugee processing on foreign soil. However, the Rudd government needs to go further and introduce legislative reform that abolishes the concept of off-shore entry persons. This could be achieved by repealing the provisions that excise Australian territories from the migration zone and preclude off-shore entry persons from applying for Protection Visa. A uniform procedure for processing asylum seekers would allow all persons that enter Australian soil to make applications for Protection Visas and afford the same rights to merits and judicial review to all applicants. These reforms would result in a fairer, more efficient refugee processing system that conforms to Australia’s international obligations.

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Janina Richert (Arts (Languages)) explores the resettlement opportunities for Rohingyan refugees from Burma.

The Rohingya have been persecuted in Burma for many years by the military junta. Many are forced into unpaid labour, are tortured and imprisoned arbitrarily, women are raped, and all are denied citizenship. Those who flee the country do not face a much brighter future in refugee camps where food is scarce, housing and security inadequate, and corruption is ripe. The debate about a durable solution for the Rohingya refugees is ongoing and involves many governments and international organisations. The question and dilemma is this: when the host government’s patience for refugees runs out, and abuses are continuing in the country from which the refugees fled, what choices are available? This is a worldwide phenomenon that is not only affecting the Rohingya, but other refugee groups in other countries. The situation of the Rohingya represents one case of how complex the refugee situation is throughout the world and how such situations require solutions on local and international levels.

According to the Centre for Refugee Research, the Rohingya’s statelessness, their desire for citizenship and respect for their own rights often makes moving to a third country the only apparent solution for many refugees.1 Countries like Canada and Australia are currently opening their doors to Rohingya refugees from camps in Bangladesh. This paper will look at resettlement in a third country critically to examine both the advantages and challenges ahead for the Rohingya community, governments and international organisations.

To understand the complexity of the situation, which Rohingya refugees find themselves in, a historical perspective needs to be examined. As a Bengali-speaking, Muslim ethnic minority group, the Rohingya have lived in western Burma for centuries. Yet there is a long history of their repression by Burma authorities.2

The Rohingya are predominantly concentrated in the northern part of Rakhine State (Arakan) and number about 1.4 million, almost half the state’s total population. The Arakanese had their first contact with Islam in the 9th Century, when Arab merchants docked at an Arakan port on their way to China. The Rohingyas claim to be descendents of this group, racially mixing over time with Muslims from Afghanistan, Persia, Turkey, the Arab peninsula and Bengal. The merging of these races arguably constitutes an ethnically distinct group with its own dialect.3

Of more recent history, shortly after Myanmar’s independence in 1948, some Muslims carried out an armed rebellion demanding an independent Muslim state within the Union of Burma. A backlash ensued that echoes today – Muslims were removed and barred from civil posts, restrictions on movement were imposed, and property and land were confiscated. Although Rohingyas were close to having their ethnicity and autonomy recognised in the 1950s under the democratic government of U Nu, plans were spoilt by the military coup of General Ne Win in 1962.4

Later, the 1974 Emergency Immigration Act stripped the Rohingyas of their nationality, rendering them foreigners in their own land. This, say Médecins Sans Frontières (MSF), makes them uniquely subjected to institutional discrimination and other abuses, including limitations on access to education, employment and public services, and restrictions on their freedom of movement.5 Moreover, the Burmese constitutional protection of religious freedom has not existed since 1988, after the armed forces brutally suppressed massive pro-democracy demonstrations and abrogated the Constitution. According to the US Department of State, in 1990 pro-democracy parties won a majority of seats in a free and fair election, but the military junta refused to recognise the results and has ruled the country by decree and without a legislature ever since.6 This has allowed the persecution of the Rohingya to continue.

The Rohingya now have difficulty obtaining birth certificates. Muslims have also reported that authorities forbid them from constructing new mosques and that it was difficult to obtain permission to repair or expand existing structures. In some parts of Rakhine State, authorities cordoned off mosques and forbade Muslims to worship in them.7 Torture and ill-treatment are commonplace and although forced labour is illegal under Burmese law, it continues to be enforced by the army.8
In May 2008 the Government announced that its draft constitution had been approved after a nationwide referendum. Many diplomatic observers and human rights organisations, however, criticised the fairness and transparency of the referendum and questioned the validity of the results. Although the draft recognises Islam as a religion ‘existing’ in Burma and prohibits discrimination on the basis of religion, the US Department of State believes the Government still imposes restrictions on certain religious activities and frequently abuses the right to religious freedom. In fact, an independent researcher who interviewed more than 40 undocumented Rohingyas in 2001 has found that a lack of food triggered the departure from Burma of approximately 80% of the respondents. The lack of food stemmed mainly from forced labour, land confiscation, and unemployment. Furthermore, restrictions on their movement precluded them from searching for employment elsewhere in Rakhine. Consultations conducted in March 2007 in Bangladesh demonstrated that for some, memories of abuse completely define their attitude toward Burma, and repatriation is out of the question regardless of what transpires politically in the future. Others could see some advantage in returning to Burma, but only if there were long-term political changes which made a return safe. Some older refugees said that they might find returning to a traditional rural life less daunting than resettling in a new country. Others have extended families still living in Burma and little familial support in Bangladesh, and did not rule out repatriation when political conditions improved. For these cases, the durable solution is not necessarily resettlement in a third country, but acknowledgement of their needs and drastic changes to the running of the refugee camps in Bangladesh.

The UNHCR established its presence in Bangladesh in 1992 upon invitation of the Government of Bangladesh to assist in the repatriation of over 250,000 Rohingya refugees who fled to Bangladesh in 1991-1992. Today, some 26,317 refugees remain in two camps of the original twenty that were established. These are called Nayapara and Kutupalong. Meanwhile, females are the subject of particular dangers, relating to their gender, in Burma and in the refugee camps. They may, therefore, be less likely than men and boys to exercise their rights. Indeed, rape and sexual violence by the Burma military was a major cause of the 1991-92 exodus, claim MSF. Now, in the camps, women and girls are still at risk of sexual violence, abduction, and trafficking. In MSF’s survey of mid-January 2002, many respondents stated that they fear for the safety of their female relatives. Some explained the distance and placement of the latrines, bath houses, and water sources undermined their privacy and security, and poorly lit camps made their movement in the evening dangerous.

In Bangladesh, both women and men described a system of camp control run by the camp administration, police and refugee block leaders (Mahjees) which is sustained by false accusations, mistrust, bribery, corruption, fear and violence and the ultimate threat of ending up in prison. Women reported that at night villagers, police and guards in plain clothes would go to the sheds to target young women. They said the men would rape the girls and threaten their fathers and brothers with beatings and false allegations which would result in imprisonment if the rapes were reported. Incidents of sexual abuse against boys have also been reported. Furthermore, the education system stops at grade 5 and only includes Burmese, Mathematics and English. Many young people were beaten if they went to private schools in the camps to receive better education. Also, refugees repeatedly described how the already insufficient food rations were reduced further due to corruption and the seizure of rations as a form of punishment. Also, family values are seriously undermined and family unity eroded by forced separation, imprisonment of husbands, confined space and violence. Refugees highlighted the need to strengthen family unity to provide a protective environment.

A complete overhaul of the camp administration and justice systems is urgently required, says the Centre for Refugee Research. The Rohingya have asked for an effective committee system to reduce the violence and to work with law enforcement agencies. They have also called for a neutral police force and a change from the Mahjee system with elections. Changes are being introduced to eliminate corruption, false accusations and to reduce the power of the Mahjees. These changes however are not being introduced fast enough.

The Government of Bangladesh contends that the ‘new arrivals’ are economic migrants and therefore cannot claim they were the subject of persecution by the Burmese government. As a result, the Government of Bangladesh claims they are not eligible for refugee status. MSF claim that the UNHCR has not challenged this contention. However, MSF emphasises that an analysis of the humanitarian condition would reveal a correlation between poverty and persecution. Thus, it can be argued that the economic reasons for coming to Bangladesh have political roots. The Bangladeshi government regards the costs of maintaining and supporting the refugees as being difficult for an already overstretched economy. This is no excuse however to treat them inhumanely and disregard international treaties such as the Universal Declaration of Human Rights, to which Bangladesh is a signatory. International conventions aim to represent a consensus of opinion among different sovereign states as to minimum standards of behaviour for any State regardless of their economic development, national laws, cultural norms or social mores.

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reported that some girls were having unsafe abortions and some had died. Moreover, women stated that young girls were being married early in order to secure protection for them.27

The male refugees described, during consultations, how helpless they felt in being unable to protect the women. This was seen as an assault on their role as protectors: extreme hardship in Burma, and then years of camp life have depleted many men of their identities as fathers, husbands, sons and leaders.28

What is more, young women who become pregnant as a result of rape will have a marriage arranged and the women explained there is no alternative but to become the second or third wife, due to religious beliefs. Others said that when women are raped, their husbands do not want them as wives anymore.29 This situation needs to be resolved at either a local level or through resettlement to reduce the risk of sexual violence. For those women at risk, resettlement in a third country should be seriously considered and if appropriate, acted upon promptly.

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At the local level, the UNHCR believes that the protection of females is primarily the responsibility of States, whose full and effective cooperation, action and political resolve are required to enable the UNHCR to fulfil its mandated functions. Moreover, all action on behalf of women and girls must be guided by obligations under relevant international law, including, as applicable, international refugee law, international human rights law and international humanitarian law.30 More specifically, UNHCR proposes a holistic approach to the situation in Bangladesh that combines preventive strategies and individual responses and solutions, which involves collaboration between, and the involvement of, all relevant actors, including men and boys, to enhance understanding and promote respect for women’s rights.31

The agency also suggests mobilising women, men, girls and boys of all ages and diverse backgrounds as equal partners with relevant actors in participatory assessments to ensure their protection concerns, priorities, capacities and proposed solutions are understood and incorporated.32 These are long-term strategies, which may prove to be effective, but in the meantime many women and girls are still at risk of being abused. Similar situations exist for refugee groups settled in camps throughout the world such as those in Darfur, Iran or Malaysia. Prompt action must be included in UNHCR’s solutions for a worldwide response, which still addresses locally specific issues.

The Centre for Refugee Research observes that everything for the Rohingya from marriage, divorce, registration, food

...
parents were born in Burma, have resided there, and have family there - all factors that establish a genuine and effective link to the country.\textsuperscript{45}

The dilemma in the situation is that much of what the UNHCR can do depends on the Burmese, Malaysian, Thai and Bangladeshi governments' cooperation and their recognition of the international norms on preventing statelessness.\textsuperscript{46} However, this global goal has many local challenges. Burma does not have the political will to change its views. Furthermore, Malaysia and Thailand have no asylum system and under the countries' general immigration law, refugees are not distinguished from other undocumented workers, and are considered illegal immigrants. In Malaysia, without permission to live there legally or any way to get such permission, Rohingya are at constant risk of detention and deportation. Local police and immigration officials generally ignore UNHCR documents and arrest their bearers.\textsuperscript{47} Human Rights Watch emphasises that although Malaysia does not repatriate Rohingya to Burma, it continues to deport them to Thailand, including some identified as refugees by UNHCR. This is despite the fact that they are without meaningful protection in Thailand, which also has not ratified the \textit{Refugee Convention and Protocol}.\textsuperscript{48}

Human Rights Watch claims that even if a state believes a person has entered a country illegally, this does not affect his or her basic rights to life, security, equality before the law, or other basic civil and political rights.\textsuperscript{49} The Rohingya refugees need a new beginning. This can be done in large part by restructuring the entire refugee camp system in Bangladesh, changing the registration process by the UNHCR in Malaysia and Thailand and through resettlement in a third country. Durable solutions need to be found at all three levels.

One major privilege that citizenship offers in today's state-run society, and which the Rohingya are deprived of, is health care. In the Bangladeshi refugee camps tuberculosis is prevalent as are stomach complaints, skin diseases, respiratory problems, high fever and poor nutrition which contribute to increased sickness and slower development. During the consultations, refugees spoke of poor eyesight and dental problems as well as physical health problems relating to torture and rape.\textsuperscript{50} The refugees welcomed the return of MSF for referrals and emphasised the need for female doctors, a better transport system for emergencies and doctors on standby.\textsuperscript{51}

In Australia, according to Human Rights Watch, the Rohingya have increasingly been denied access to public health care. Although there is no law that patients must produce identity documents, some government clinics have turned away undocumented people.\textsuperscript{52}

Canada, which plans to resettle about 5000 Rohingya refugees in the next few years with more than 100 already resettled, acknowledges that those arriving are likely to have had minimal preventative health or dental care. The Citizenship and Immigration Department notes that approximately 50% of children show signs of malnutrition with a high prevalence of B2 deficiency. There are also many children with developmental delays particularly in the area of speech. The Department believes that these delays are consistent with inadequate stimulation and education, and it is likely that many children will need targeted education services upon resettlement. Literacy in camps is about 12%.\textsuperscript{53}

Furthermore, immunisation programs for BCG, polio, DPT, measles and hepatitis B do exist, but only 50-70% of the refugees are estimated to be covered.\textsuperscript{54} Hence a review of the immunisation status of newcomers on arrival is recommended by the Canadian Department.\textsuperscript{55} Also, with a high level of sexual violence in the camps including spousal abuse, Canada recognises that many women may need support in this area.\textsuperscript{56}

Despite all the hardships Rohingya refugees have suffered they are not giving up their fight for recognition. During the consultations in Bangladesh the desire to be able to work and provide for themselves rather than depend on rations was frequently highlighted.\textsuperscript{57} In fact, in a society in which the male role is defined as the family provider, the unemployed Rohingya man finds his social and economic value degraded, says MSF, and his capacities and potential wasted. MSF claims that working productively and earning an income was a hope for the near future, and it did not matter where.\textsuperscript{58} Canada, Australia and other countries willing to offer resettlement can fulfil this wish by committing to provide services specific to the needs of the Rohingya community.

Some of those already resettled in third countries are using the opportunity of a new beginning and are making their own recommendations in an urgent appeal for legal and physical protection of the Rohingya people in Burma, Bangladesh, Thailand and Malaysia, as well as increasing the numbers for resettlement in a third country. The Burmese Rohingya Community in Australia (BRCA) has expressed the need to help make public their plight to the international community through a forum – ‘Rohingya: Unheard Voices’ – held on the 28\textsuperscript{th} October 2008 at the University of New South Wales in Sydney.\textsuperscript{59} They urge governments and the international community to end the Rohingya persecution, human rights abuses and culture of impunity in Burma. They appeal to the same bodies to commit to protecting Rohingya refugees in Bangladesh, Thailand and Malaysia. They also appeal to the UNHCR to increase the number of Rohingya refugees for third country resettlement from Bangladeshi camps and to formally register with the UNHCR office the undocumented Rohingya refugees outside of Burma. They are also asking the Australian Government to ensure that new Rohingya arrivals in Australia are resettled in the same location for social support and to provide aid to camps overseas, in particular to rebuild and restructure those in Bangladesh.\textsuperscript{60}

Nevertheless, the individual assessments of the consultations in 2007 highlighted that in fact resettlement would not necessarily be an appropriate solution for all, for different
This paper has raised some of the issues that the Rohingya refugees, the Australian and Canadian Governments and people, the Burmese government and the international community will face in the near future. However, more extensive research amongst the Rohingya communities already resettled in third countries as well as in the camps outside of Burma needs to be conducted to find appropriate solutions. Despite the fact that third country resettlement can and will provide many opportunities for the Rohingya, this paper maintains that the primary responsibility for addressing the problem of statelessness should lie with the Burmese Government. Neighbouring countries like Bangladesh, Malaysia and Thailand also need to take responsibility and begin by signing the Refugee Convention. Third country resettlement is an important protection tool, but it is not the only one.

**Appendix: Recommendations:**

**The Burmese Rohingya Community in Australia (BRCA):**

1. Appeals to Member States of the United Nations and the international community to, in accordance with the 1948 Universal Declaration on Human Rights, the 1951 Refugee Convention and other international human rights instruments:

   (a) Demand that the State Peace and Development Council (SPDC) end Rohingya persecution, human rights abuses and the culture of impunity in Burma.

   (b) Provide effective international protection to all refugees in Thailand, Malaysia and Bangladesh, with a special focus on women at risk, according to the UN High Commissioner for Refugees (UNHCR) guidelines and procedures.

2. Appeals to the Governments of Bangladesh, Thailand and Malaysia to uphold the human rights and dignity of documented and undocumented Rohingya refugees, and to allow resettlement from these respective countries.

3. Urges the Australian people and the Government:

   (a) To receive group resettlement of Rohingya refugees from Bangladesh, Thailand and Malaysia.

   (b) To resettle Rohingya refugees near their own established communities in Australia, in order to facilitate social and community support.

   (c) To fund a Rohingya community service worker to support the growing Rohingya community in Australia.

4. Appeals to the UNHCR:

   (a) To lobby third country resettlement governments to increase the number of Rohingya refugees resettled from Bangladesh, Thailand and Malaysia.

   (b) To formally register, and provide aid and assistance to Rohingya refugees in Bangladesh, Thailand and Malaysia. In particular, undocumented refugees, such as those in the unofficial Taal Camp in Bangladesh, require urgent protection and assistance.

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14. Ibid.

15. Foundation House, UNHCR, University of NSW, Centre for Refugee Research UNSW, Refugee Consultations Bangladesh (March 2007) at 5.

16. Id at 5.


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22. Id at 27.

23. Id at 23.

24. Id at 22-3.

25. UNHCR, Conclusion on Women and Girls at Risk: Executive Committee Conclusions (2006).


27. Foundation House, UNHCR, University of NSW, Centre for Refugee Research UNSW, Refugee Consultations Bangladesh (March 2007) at 22.

28. Id at 22.

29. Id at 22.

30. UNHCR, Conclusion on Women and Girls at Risk: Executive Committee Conclusions (2006).

31. Ibid.

32. Ibid.

33. Foundation House, UNHCR, University of NSW, Centre for Refugee Research UNSW, Refugee Consultations Bangladesh (March 2007) at 20.


35. Ibid.


37. Foundation House, UNHCR, University of NSW, Centre for Refugee Research UNSW, Refugee Consultations Bangladesh (March 2007) at 10.

38. Id at 5.

39. Id at 9.


41. Human Rights Watch, Malaysia/Burma: Living in Limbo – The Rohingya's

42. A Universal Declaration on Human Rights, GA Res 217 (III), UN GAOR, 3rd sess, 183rd plen mtg (10 December 1948) art 15.


44 Ibid.

45 Ibid.

46 Ibid.


48 Ibid.

49 Ibid.

50 Foundation House, UNHCR, University of NSW, Centre for Refugee Research UNSW, Refugee Consultations Bangladesh (March 2007) at 34.

51 Id at 35.


54 Id at 2.

55 Id at 5.

56 Id at 2.

57 Foundation House, UNHCR, University of NSW, Centre for Refugee Research UNSW, Refugee Consultations Bangladesh (March 2007) at 40.


59 See appendix for a copy of the recommendations made by BRCA.

60 See appendix for a copy of the recommendations made by BRCA.

61 Foundation House, UNHCR, University of NSW, Centre for Refugee Research UNSW, Refugee Consultations Bangladesh (March 2007) at 44.

Laura Costello (Economic and Social Sciences/Law II) and Fiona May Graney (Law V) explore key issues faced by the present federal regulatory framework for animal welfare.

The Next Great Social Justice Movement

Despite Australia’s global reputation as a ‘sunburnt country’, famous for its ‘sweeping plains’ and ‘wide brown land’, millions of animals today are trapped in intensive indoor environments that provide little, if any, outdoor access or quality of life. Australia describes itself as a ‘world leader in animal welfare’. However, due to the ever-changing corporatisation of Australian agriculture, most farmed animals now spend their lives confined in large sheds with tens of thousands of others. Factory farmed animals rarely, if ever, experience normal social interactions or feel the sun, fresh air or grass under their feet. The Australian animal research industry is further responsible for the deliberate infliction of pain, suffering, distress and death on millions of animals in an arena that remains closed to public scrutiny, operating in secrecy and behind closed doors. For these reasons, President of the Law Reform Commission Professor Weisbrot has referred to the human treatment of animals as ‘the next great social justice movement.’

Animal Protection History

Animals have played an integral role in shaping Australian society since colonisation. However, legal consideration of the relationship between humans and animals has been historically limited. Animals have for centuries been characterised by the common law as the property of humans, and in accordance with the law governing such property, they could be treated in any way their owners saw fit. Three hundred years ago, the common law ‘recognised no rights in animals… and punished no cruelty to them, except insofar as it affected the rights of individuals to such property’.

Animals were regarded as property to be dealt with at the owner’s discretion, and the rights over these animals were ‘as absolute… as in any inanimate beings’. No man was held punishable ‘…even for an act of the most extreme cruelty to a brute animal… the owner of a beast (had) the tacit allowance of the law to inflict upon it, the most horrid barbarities.’

The end of this dark period for animals was prompted by a host of different factors. Radford suggests that there were at least six separate factors that formed the basis of the modern animal protection movement, including the development of new scientific views towards the animal kingdom, emerging new philosophical theories about humankind’s place in the universe, and the fact that animals were no longer integral to the everyday survival of human species. As societies have matured, greater attention has been paid to the human treatment of animals. Bentham propounded the concept of utilitarianism, which suggested that the goal of all morals and legislation was to promote pleasure and avoid pain for the greater possible number.

For these reasons, President of the Law Reform Commission Professor Weisbrot has referred to the human treatment of animals as ‘the next great social justice movement.’ It is true that there are many similarities in comparing the plight of animals to those of other great social justice movements in the past. The classification of slaves as property, exploitation of the environment, of women and children have all been entrenched in law and supported by seemingly insurmountable economic and social structures at different points in time.

However, this essay will begin by providing a brief background on animal welfare legislation in Australia and then move on to addressing the key issues resulting from this legal regime, which include incoherent inconsistencies, a lack of proper enforcement, and the unfair ‘balancing test’. This essay proposes a short-term harmonisation of State and Territory legislation to address these issues until such time as a Universal Declaration of Animal Welfare is endorsed by the United Nations. Once Australia becomes a signatory, the declaration would provide the basis for direct regulation of companion and farmed animals by the Commonwealth, relying on the external affairs power of the Australian Constitution.
South Wales until the 1850s. The early legislation established a broadly expressed prohibition on cruelty to animals. Following the reforms of the 1860s, this broad prohibition was refined, becoming more particular, and subject to a range of exemptions. Early in the 20th century, the States began including exemptions for particular types of farming practices, such as the dehorning of cattle, castration, and branding.12

**Current Legislation in the Australian Context**

Australia has since developed an abundance of Acts, regulations, codes and guidelines, at federal, State and local levels, which acknowledge the concept of animal welfare.

**Commonwealth Legislation**

Despite a lack of express constitutional power to regulate animal welfare, the Commonwealth indirectly regulates aspects of animal welfare under the trade, quarantine, fisheries, and external affairs heads of power.13 Relying on the external affairs power, the Commonwealth Parliament has passed the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) which regulates trade in endangered and native species. However the primary responsibility for enacting and enforcing animal law has largely fallen to State and Territory governments, as the Constitution does not provide a head of power pursuant to animal welfare.

**Prevention of Cruelty to Animals**

Australia’s State and Territory laws each provide legislation in the form of criminal laws that supposedly apply broadly to all animals.14 Generally speaking, the objectives of these Acts are to prevent cruelty to animals by prohibiting ‘unreasonable, unjustifiable or unnecessary suffering’.15 Some State and Territory provisions contain specific cruelty offences, including confining an animal or failing to provide adequate exercise, proper food, drink or shelter. Most of these provisions take the form of prohibitions. Queensland and Tasmania have gone one step further and imposed a positive duty of care on persons in charge of an animal.16 However, all jurisdictions have an exemption from offences under the animal cruelty legislation, particularly where there is compliance with relevant codes of practice. Codes are important for regulating practices of farmed animals, and animals used in scientific experiments, and can provide a defence to statutory offence provisions even though the code may fall well short of standards established in the legislation mandated that animal research be conducted in accordance with the federal *Code of Practice for the Care and Use of Animals for Scientific Purposes*.18 Burch and Russell’s 3R’s19 are widely recognised as the fundamental principles that should inform the use of animals in research:

1. Reduction: Researchers should use the minimum number of animals in their work.
2. Refinement: Methods used in animal experimentation should minimise the pain, suffering and distress inflicted on animals.
3. Replacement: Wherever possible, non-animal methods of experimentation should be used over animal methods.

Although The 3Rs are embedded in the regulatory framework governing research on animals in Australia and New Zealand, studies have shown that there is a significant gap between what is written on paper and what is happening in practice, which tends to focus predominantly on refinement, and ignore the other two Rs.

**Farmed Animals**

Codes of practice concerning farming practices were first developed in the 1970s in Australia, and the 1990s in New Zealand. In both countries, regulatory changes have been informed by the Farm Animal Welfare Council ‘Five Freedoms’, which were based on the report by the Brambell Committee in England, 1965, consisting of:

(a) freedom from hunger and thirst,
(b) freedom from discomfort
(c) freedom from pain, injury or disease
(d) freedom to express normal behaviour, and
(e) freedom from fear and distress.

Most States and Territories have adopted Model Codes of Practice, developed by the Primary Industries Ministerial Council (PIMC) consisting of Federal, State and Territory primary industries ministers.20 States and Territories have since developed their own codes in the same topic areas, which are often inconsistent with the Model Codes adopted by other jurisdictions.

**Live Export**

The West Australian case against Emanuel Exports Pty Ltd following the infamous Al Kuwait incident showed that the relevant protection against cruelty provisions of State Acts are overridden by the Federal Commonwealth legislation authorising live exports.21 In 2007 a national live export code was developed, the *Australian Standards for the Export of Livestock*. Aspects of the code rely heavily on State and Territory legislation, and are broadly expressed.

**Key Issues**

At first glance, this regulatory framework appears to provide a robust foundation for protecting the welfare interests of animals.22 However, a closer examination of the legislation reveals important issues regarding the application of general welfare standards.

**Incoherent Inconsistencies**

The current animal welfare protection legislation is riddled
with inconsistencies. Different Federal, State and Territory jurisdictions have their own Acts, codes and regulations with conflicting definitions, meanings and ultimate purposes. There is little higher court authority on consideration of the animal welfare legislation provisions. Almost all prosecutions are finally disposed of in magistrates’ courts. This further carries the risk of uneven application of legislation, across the States and Territories, and across jurisdictions.

The most alarming inconsistency of all, however, is in the treatment of different groups of animals. If regulatory intervention is justified by the sentiency of animals and the potential for harm which they might suffer, then there really is no rational basis for distinguishing between companion animals, farmed animals, animals used for research or animals in live export.23 So long as differential standards continue to apply to companion, farmed and research animals, the standard regulatory approach is incoherent. To take an example, the NSW POCTA’s objectives are:

(a) to prevent cruelty to animals,

(b) to promote the welfare of animals by requiring a person in charge of an animal:

(i) to provide care for the animal, and

(ii) to treat the animal in a humane manner, and

(iii) to ensure the welfare of the animal.

Section 9 therefore states that ‘a person in charge of an animal which is confined shall not fail to provide the animal with adequate exercise’. However, s 9(1)(a) limits the scope of the clause by clarifying that the clause ‘does not apply to a person in charge of an animal if the animal is (a) a stock animal other than a horse, or

(b) an animal of a species which is usually kept in captivity by means of a cage.

The effectiveness of this welfare protection is alarmingly undermined.

This exception to ‘stock’ animals means that thousands of Australian sows raised in factory farms are legally confined in sheds, spending most of their reproductive cycle in pens or stalls.24 Sow stalls generally measure 0.6m x 2.2m which is insufficient for the animals to turn around. In a natural environment, pigs spend most of their time grazing, walking around or manipulating materials with their snout. Within the confines of a factory farm however, many sows become frustrated and exhibit signs of ‘bar-biting’, ‘sham’ chewing, apathy, and clinical depression. Permanent confinement has also been associated with the development of physical difficulties, including joint damage, lesions, urinary infections, gastrointestinal problems and poor cardiovascular health. Upon ceasing capability to reproduce, sows are sent to the slaughterhouse.

Chickens raised in farms can be bred as layer hens to provide eggs. Modern factory farms, which may house up to 500,000 layer hens, stack battery cages in rows upon each in large sheds. Battery cages prevent chickens from nesting, dust bathing, stretching their wings and exhibiting most other natural behaviours.25 Despite possessing complex cognitive abilities, chickens in battery cages have no opportunities for decision making and control over their own lives. Behavioural repertoire becomes directed toward self or cage mates and takes on abnormal patterns, including feather pecking and cannibalism. Many hens are ‘de-beaked’ early in life. To minimise costs, this is carried out without pain relief, although the procedure may cause acute and chronic pain due to tissue damage and nerve damage.26

Lack of Proper Enforcement

The enforcement of animal welfare statutes remains alarmingly inadequate.27 The typical model of enforcement of animal welfare law limits the authority to enforce regulatory standards to the agents of three authorities: the police, departmental authorities, and the RSPCA. The role of the police is limited. Most Departments of Primary Industries face an inherent conflict of interest when it comes to challenging accepted farming practices as many of their clients are the same agribusinesses that stand to lose substantial profits if a practice is deemed unlawful.28 Animal welfare legislation is thus largely enforced by the RSPCA. However, lack of funding significantly constrains the RSPCA’s ability to provide adequate numbers of inspectors, and financial constraints further limit the ability of the RSPCA to commence prosecution.

The question is not ‘Can they reason? Nor, can they talk? But, can they suffer?’ - Jeremy Bentham

Proposed Future Direction

Harmonising Federal, State and Territory Regulation

The existing State and Territory based animal welfare legislation regime, with its inconsistencies, omissions, exemptions and selective and often poor enforcement record does not provide adequate standards of protection or care for the vast majority of animals. Sankoff has argued that the clever political manipulation of language in the past has allowed animal industries to engage in practices that would shock the average observer if considered on their own merits, at the same time allowing farm owners to state with confidence that they are complying in full with legal regulatory standards to the agents of three authorities: the police, departmental authorities, and the RSPCA. The role of the police is limited. Most Departments of Primary Industries face an inherent conflict of interest when it comes to challenging accepted farming practices as many of their clients are the same agribusinesses that stand to lose substantial profits if a practice is deemed unlawful.29 The focus is drawn to the ‘welfare’ of animals, the ‘prevention of cruelty’ and the end of ‘inhumane’ use. This means that practices that wind up being permitted are therefore deemed ‘humane’, ‘not cruel’, and ‘legal’. However, legislative intervention has made a positive difference, and continues to do so. Reform has the potential to improve this situation further.30 Under a national approach, unnecessary complications, confusion, duplication and inefficiencies could be minimised and States and Territories and the Commonwealth government would be able to engage in mutually beneficial interactions to improve the welfare of animals across the country.

We therefore propose:

(a) national harmonisation of Federal, State and Territory
regulation, into one comprehensive, binding Code that rejects differential treatment based on an animal’s relationship to human beings, and instead aims to protect the fundamental interests of all sentient beings. This would involve imposing a duty of care with minimum standards, and the removal of exemptions such as ‘stock’, and ‘animal research’.

(b) Increased funding to the RSPCA and other independent Animal Protection Groups in acknowledgement of Animal Protection as the Next Great Social Justice Movement,

(c) Encouragement of Animal Protection participation in Conferences and submissions to Conventions at an international level,

(d) Deeming Provisions enabling other independent Animal Protection Groups to investigate breaches of regulatory standards.

(e) Greater educational awareness programs for the Community

(f) The encouragement of animal protection and animal law as a field of study in Australian high school and tertiary institutions.

Universal Declaration of Animal Welfare
We acknowledge that these suggestions for reform do not address all of the issues in the contemporary regulatory environment; they merely represent some first steps. However, we feel that these reforms will help to provide short-term relief until such time as a Universal Declaration of Animal Welfare (UDAW), such as the one proposed by the World Society for the Protection of Animals, is endorsed by the United Nations. Once Australia becomes a signatory, the declaration would provide the basis for direct regulation of companion and farmed animals by the Commonwealth, relying on the external affairs power of the Australian Constitution. While particular regions of the world have developed cross-jurisdictional agreements in this area, such as the Protocol on Protection and Welfare of Animals in the European Union within the Treaty of Amsterdam, there is as yet no international agreement on animal welfare. The European Union has implemented several regional treaties. The World Health Organisation has been considering the need for national and international benchmarking of animal welfare outcomes.

The World Society for the Protection of Animals has been working on the development of a UDAW. The UDAW is a proposed inter-governmental agreement to recognise that animals are sentient and can suffer, to respect their welfare needs and end animal cruelty. If endorsed by the United Nations (in the same way that the Universal Declaration of Human Rights was) the UDAW would be a non-binding set of principles that acknowledges the importance of the sentence of animals and human responsibilities towards them. The principles have been designed to encourage and enable national governments to introduce and improve animal protection legislation and initiatives. If adopted, the Declaration may go some way towards raising international standards for the care and treatment of animals. Although it does not seek to prohibit all farming practices that affect the lives of more than 60 billion animals used globally for food production, the Declaration aims to influence the development of standards that minimise their pain and suffering. Indeed, the document has already been endorsed by Asia Pacific nations including Fiji, Cambodia and New Zealand; Australia, which claims to be an ‘animal welfare leader’ has yet to give its official support. The UDAW, once signed, could be ratified into the Australian legal system in a National Animal Welfare Act. Such an Act would mark a great step forward for mankind in the next great social justice movement of the 21st century.

References
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5 Lawrence, J. ‘On the Rights of Beasts’ in A Philosophical Treatise on Horses and on the Moral Duties of Man Towards the brute Creation (1796) reproduced in Nicholson, EB ‘The Rights of An Animal: A New Essay In Ethics’.
8 Id.
10 Animals Protection Act 1880 (NZ); Prevention of Cruelty to Animals Act 1920 (WA).
12 Ibid.
13 Ibid.
14 Most modern protection legislation in Australia is based on the concept of ‘animal welfare’. However, in the animal rights model, the well-being of animals is protected, their actual life is accorded no value. Furthermore, the model retains an in-built assumption that human interests are always more important than those of animals. Proponents of the ‘animal rights’ model, believe that animals have inherent value by virtue of being subjects of a life, with their own beliefs, desires, preferences and emotional life consistent with the capacity to feel pleasure and pain: Regan, T. The Case for Animal Rights (1983); Francione, G. ‘Animals – Property or Persons’ in Sanstein et al. Animal Rights: Current Debates and New Directions (2004).
16 For Example, s 17 of the Animal Care and Protection Act 2001 (Qld) requires a person in charge of an animal to take reasonable steps to meet an animal’s needs.
17 Companion Animals Act 1998 (NSW).
23 Sharmar, above n23.
24 Ibid.
25 Ibid.
26 Ibid.
28 Sharmar, above n23.
29 Sankoff, above n8.
30 Id.
31 White, above n12.
32 Id.
34 This campaign is being coordinate by the World Society for the Protection of Animals for Farming Purposes.
36 Ibid.
Antares Wells (Arts Advanced I) discusses the ethics and laws surrounding the gender reassignment of intersexed infants.

Would you permit your newborn baby’s nose to be reconstructed in infancy to reflect the normative nasal aesthetic of society? The question may sound absurd, but it essentially reflects the (ir)rationalere employed by clinicians administering sex reassignment surgery on ‘intersexed’ infants, an arbitrary and arguably unethical practice perceived as the modern solution to genital, gonadal, hormonal and chromosomal transgressions of the male/female dualism. This ethically dubious practice, pioneered at the Johns Hopkins Hospital, and known as the ‘Optimum Gender of Rearing’ (OGR) model, has been the norm since its development in the 1950s. Despite the publicised failures of this model, epitomised by the case of David Reimer, many contemporary medical practitioners adhere to its theoretical foundations, continuing to literally carve and reconstruct children’s bodies in alignment with Western heterosexist binary discourse. This reconstruction often involves sterilisation, iatrogenic harm and psychological distress made all the more unethical given the lack of scientific evidence for health risks posed by ‘ambiguous’ genitalia and divergences of sex development (bar two specific conditions). As Dreger, quoting Kessler, writes: “Intersexuality does not threaten the patient’s life; it threatens the patient’s culture.” The medical treatment of intersexuality thus raises pertinent questions regarding the human rights of non-normative sexual and gendered identities; the concepts of ‘consent’, ‘autonomy’, ‘battery’ and ‘neglect’; and the feasibility of the representational avenues available to intersex people within a heteronormative legal system.

To ascertain the level of human rights violation engendered by the medical treatment of intersex, one must investigate the applicability of notions of autonomy and consent to the particular context of an intersexed child. The spectre of battery presents a unique opportunity to examine the intersection of these concepts. Generally, battery is understood as liability deriving from the non-consensual violation of a person’s ‘bodily integrity’ and autonomy. However, the status of a child as a minor problematises this notion of autonomy and, by extension, complicates consent. As Professor Ngaire Neffine articulates the liberal understanding of ‘legal personhood,’

The individual must be constrained as soon as her actions affect others because that constrains the autonomy of the next person… This is generally how law interprets our physical natures: it posits us as whole, integrated and individuated beings… This depends on a particular liberal legal conception of what counts as a whole human. We only become persons once we individuate, in this view, once we separate from our mothers.

Within this framework, the child, as a minor incapable of possessing full autonomy, is subject to traditional state deference to parental decision-making. However, general consensus among intersex activists and analysts holds that this parental consent is only valid when properly informed. Many have questioned whether the emotionally charged environment post-birth, engineered largely by the amplification of the situation by medical professionals who present the appearance of intersex as a ‘psychosocial emergency,’ hardly creates an appropriate (let alone ethical) environment for careful consideration of the issues at hand. What parent, kept oblivious to other treatment possibilities and the true nature of their child’s condition, would not favour surgery when told by alarmist doctors that their child has ‘twisted ovaries’?

Comparative legal history sheds further light on the contextual specificity of ‘consent.’ Human rights researcher Karen Gurney draws valuable parallels between ‘Marion’s Case,’ wherein the parents of a disabled minor appealed to the High Court to authorise her sterilisation, and the non-consensual reconstruction (often sterilisation) of intersex bodies. Quoting Nicholson CJ, she writes

A minor is capable of giving informed consent when he or she ‘achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed’. The gravamen of the situation in that case, as extracted by His Honor, was that ‘If a child or young person cannot consent her/
himself to a medical procedure, parental consent… is ineffective where the proposed intervention is: invasive, permanent and irreversible; and not for the purpose of curing a malfunction or disease.\textsuperscript{20}

Certainly, many procedures aimed at normalising intersex bodies\textsuperscript{21} fit the latter description. However, some straddle the demarcation between iatrogenic harm\textsuperscript{22} and proper medical conduct, complicating the issue of liability. Intersex children with gonadal problems present one such case: due to the "high risk of malignant transformation,"\textsuperscript{23} many doctors opt for gonadectomy (complete removal of the gonads), thereby non-consensually sterilising the child. Here, the Federal offence of sterilisation without patient consent\textsuperscript{24} clashes with the medical protocol of preventing future harm, which serves as a comfortable defense against total liability for the loss of the child's reproductive functions. In negotiating this legal and ethical grey zone, legal bodies face the intersection of conflicting discourses mobilised by intersex medical procedures, serving to illustrate the complexity of legally regulating intersex practices.

**Intersexuality does not threaten the patient’s life; it threatens the patient’s culture…**

Aiming to introduce greater clarity to the problem of consent and award decision-making responsibility to the child, some have advocated ‘assent’ - the ‘age at which a child is deemed capable of weighing the risks and benefits of a procedure and reaching an educated decision.'\textsuperscript{25} The Constitutional Court of Colombia is one such body that has perceived assent as a mechanism that secures the autonomy and bodily integrity of the intersex child, ruling that at the age of 5, parents lose consensual power, and medical decisions must be postponed until the child reaches the age of assent.\textsuperscript{26} Clearly, by recognising that ‘there is, in ordinary circumstances, a steady ascendency of the child’s autonomous decision-making rights and a corresponding decline in the associated rights (and duty) of the child’s parents to make decisions on the child’s behalf,’\textsuperscript{27} this signifies a retreat from the legal principle of the ‘age of majority,’ preventing medical practitioners and pressured parents from maintaining dominion over the child’s body until they reach the coveted age of 18 or 21. However, the exact age of assent is sufficiently ambiguous, and rightly so: given the individuated nature of maturity and cognitive development, an age cannot be standardised without displacing individual difference and loading the weight of a crucial decision upon immature shoulders. That said, it is implicitly acknowledged that all children possess the potential to comprehend the implications of the procedures and thereby make an informed judgement; understanding that this process is individuated does not decrease the relevancy of the rights of consent and autonomy.

These rights and their relationship to intersex bodily integrity are explicitly addressed in the Yogyakarta Principles (2007), a comprehensive articulation of the duty of all states to protect the human rights of all persons irrespective of their sexual and gendered identities.\textsuperscript{28} Principles 17 and 18 are of particular importance in relation to the rights of intersex children, obligating states to

a) Take all necessary legislative, administrative and other measures to ensure full protection against harmful medical practices based on…gender identity, including on the basis of stereotypes, whether derived from culture or otherwise, regarding conduct, physical appearance or perceived gender norms;

b) Take all necessary legislative, administrative and other measures to ensure that no child’s body is irreversibly altered by medical procedures in an attempt to impose a gender identity without the full, free and informed consent of the child in accordance with the age and maturity of the child and guided by the principle that in all actions concerning children, the best interests of the child shall be a primary consideration… (Principle 18, Protection from Medical Abuses)\textsuperscript{29}

By defining any circumvention of the above principles as a violation of intrinsic human rights, the Yogyakarta Principles empower intersex subjects to actively participate in the legal acquisition of rights and prosecution of unethical medical practitioners within their own states. In recent years, as intersex activism has grown in both scope and recognition, academics and social theorists have proposed strategies which aim to prioritise the representation and rights of intersex subjects within a heteronormative legal system. French feminist philosopher Iris Young’s articulation of ‘a politics of difference’ constitutes an appropriate entry into this field of enquiry. Advocating the autonomous organisation of oppressed or disadvantaged groups and the possession of veto power by such bodies as mechanisms of defence against discriminatory or detrimental policies, Young’s theory serves as a general reflection of her belief in difference as a productive concept.\textsuperscript{30} However, it becomes problematic when appropriated to the intersex context, wherein identity politics are particularly hotly contested territory. While Young acknowledges ‘difference within difference,’\textsuperscript{31} the very notion of an ‘oppressed group,’ a disadvantaged ‘community,’ erroneously frames the issues facing intersex subjects as ‘unified and generalized phenomena’\textsuperscript{32} reflective of a shared identity. However, as Dreger and Herndon explain, this is not the case.\textsuperscript{33} Such attempts to conceptualise a ‘group identity’ are often essentialising, erroneously reducing subjects to characteristics and ideas perceived as shared, thereby displacing difference.\textsuperscript{34} How can the plurality of intersex identity be accommodated by an argument for ‘group’ generation of policy proposals in institutionalised contexts which require decision-makers to have regard to them and ‘group’ veto power [emphasis added]?\textsuperscript{35} Even if one were to somehow transcend the problem of creating a definition of intersex accepted by all of those affected by normalising medical procedures, how could these individuals
Law academics have advanced strategies that recognise the differentiated nature of intersex experience by targeting the legal needs of specific subjects. In her 2007 paper 'A Child's Expertise: Establishing Statutory Protection for Intersexed Children Who Reject Their Gender of Assignment,' Emily Bishop proposes a double-pronged legal framework aimed specifically at ensuring the autonomy of the small number of intersex children who reject their gender assigned at birth to complete a social gender transition irrespective of parental or clinical opinion. She provides sound legal rationale for the extension of minor consent statutes to include children with intersex in defence of their bodily integrity and autonomy. To secure these rights, she argues for a statutory provision that 'equates active parental interference with this transition with neglect…[and] failure to exercise due care to prevent physical, emotional, and mental harm to the child.' Valuably, her analysis necessitates closer interrogation of the meaning and applicability of 'neglect.' Bishop herself writes of the confusion, discomfort and fear on behalf of parents, augmented by medical alarmism, which operate to 'prevent parents from acting in their child's best interests.' However, does this match 'parental decisions to reject — or even punish — a child's expressions of gender identity' in nature? Surely inadvertent harm, presumably deriving of the parent's ability to grasp the enormity and potentially negative repercussions of gender reassignment, constitutes a radically different form of neglect in terms of intention and degree of consciousness than that of parents who actively punish their child for gender nonconformity. Following the anti-reassignment advice of medical practitioners, for example, is not on par with physical punishment for the 'masculine' intersex child dressing up in 'feminine' clothing. Ultimately, the child's wellbeing should be prioritised, but not at the expense of equating the genuine concern of parents for their child's future with the neglect usually associated with alcoholics and abusers. Statutory frameworks such as that conceived by Bishop must acknowledge that most parents of intersex children perceive themselves as acting in the 'best interests' of their child: to them, the fears of social ostracism and psychological distress are all too real, making gender reassignment an inconceivable option. Accordingly, the application of 'neglect' must be clarified within the legal framework to account for intention, rather than applied as a blanket term.

Medical decisions must be postponed until the child reaches the age of assent...

Another potential legal avenue targeting the needs of specific intersex subjects concerns the representation and hearing of non-heterosexual intersex people, rendered doubly unintelligible by a heteronormative legal system which often unconsiously perpetuates the discourse of the heterosexual matrix. An appropriate segue into the manner in which this discourse limits the fair hearing of an intersex subject in court is the case of Re A, where the mother of a fourteen-year-old genetic female with CAH desired the Family Court to authorise male sex-reassignment surgeries to complete the 'masculinisation' of her body:

His Honor [Mushin J] was certainly swayed by the medical advice, including that A had a fully developed male sexual identity...and that A was sexually attracted to girls. Implicit in the decision to grant the application [was the assumption that] gender should be the reflection of a heterosexual orientation...Part of the evidence that persuaded the Court as to A's inherent maleness was that relating to his sexual orientation: A was attracted to girls...It tends to suggest that one of the reasons the reassignment procedure was recommended in A's case was the heterosexual normalisation it would give to A's future sexual relationships...[This] leaves one in trepidation as to the outcome if A had been sexually attracted to boys.

This case provides a unique insight into how notions of 'the natural', inextricably linked to the maintenance of gender binarism, are mobilised to justify supposedly objective and detached decisions at the legal level. Clearly, it highlights the need for protective mechanisms unique to non-heterosexual intersex subjects, which can be used to challenge a ruling, given there is sufficient evidence that extralegal assumptions have played a constitutive role in a legal outcome.

Perhaps the most influential development from which current and future representational avenues open to intersex people within the legal system could benefit is the standardisation of the definition of intersex. The current conflicting approaches, imbricated in power/knowledge structures and impeded by differing conceptions of 'normality,' complicate effective representation of intersex individuals and thus hinder their ability to communicate their interests. How is one to defend that which is incoherently conceptualised and incredibly misunderstood? Additionally, how can intersex subjects represent themselves at the legal level while the current terminology continues to pathologise them ('Disorders of Sex Development')? While standardisation will undoubtedly be a problematic process in terms of accommodating the varying opinions of stakeholders and reaching a workable definition accepted by all, it is hardly a wild prediction to argue that it will ultimately result in more efficient legal proceedings.

An examination of the intersections between sexual identity, medical ethics and the law as mobilised in the spectre of sex-reassignment procedures conducted on intersex...
children highlights the contextual specificity of notions of consent, autonomy and neglect. In addition, it evidences the difficulty intersex subjects face in effectively defending their right to bodily integrity and informed consent within a heteronormative legal system. However, these walls are not insurmountable. The importance of dialogue between intersex subjects, activists, medical practitioners and governmental bodies cannot be overlooked and holds great potential to shape the current struggle for rights in a direction favourable to the wellbeing of the intersex individual in question. Communication, as opposed to oppositional autonomy which can often elicit an unproductive stasis both within the representative body and between groups, could go a long way in securing the rights of intersex minors and ensuring that medical practitioners are held accountable for unethical and harmful procedures.

References

1 The term ‘intersex’ is hotly debated as to its precise meaning, with opinions differing between (and within) activists, medical professionals and researchers. However, for the purposes of this essay, the term denotes any chromosomal, hormonal, gonadal or genital diversity, understood to develop significantly enough to be considered a deviation from ‘standard’ male and female biological composition. Given that this essay is primarily concerned with medical procedures that take as their aim the physical reconstruction of an infant’s body in alignment with normative notions of masculinity and femininity, the cases discussed herein will primarily refer to gonadal and genital divergence as opposed to chemical variation.


3 Judith Butler, Undoing Gender (2004). It is important to note herein that while many theorists agree that David Reimer does not constitute an intersex subject, genital divergence as opposed to chemical variation.


5 Dreger and Herndon, above n2; Dreger, above n4.


7 The notion of ‘ambiguous’ genitalia is a particularly contentious term, relying on problematic and oppositional notions of ‘normality’. See Dreger, above n4.

8 These conditions are Congenital Adrenal Hyperplasia (CAH) and Androgen Insensitivity Syndrome (AIS), which can be potentially life-threatening given the electrolyte imbalances and cancerous possibilities of each respectively. See Dreger, above n4 at 30-31; Elizabeth Loeb. ‘Cutting It Off: Bodily Integrity, Identity Disorders, and the Sovereign Stakes of Corporal Desire in U.S. Law’ (2008) 36:4 GLQ: Women’s Studies Quarterly at 52; Gurney, above n6 at 635. It must be emphasised, therefore, that the critique of intersex medical procedures offered by this essay is directed at those nonconsensual procedures which have no proven healthjustifications, those which take as their central aim the normalisation of bodies in alignment with social constructions of masculinity and femininity, and those which effect iatrogenic harm upon the patient.

9 Dreger, above n4 at 30.


11 Leob, above n8; provides a compelling argument for ‘bodily integrity’ as a construct that operates to legitimise racial, gendered and material inequalities.


13 Neffine, above n10 at 369.


15 D. Leov, above n6 at 636.

16 Gurney, above n6 at 649.

18 Dreger and Herndon, above n2 at 203.

19 Secretary, Department of Health & Community Services vs. JWB & Anor (1992) [175] CLR at 218, 231 (‘Marion’s Case’).

20 Gurney, above n6 at 649.

21 Leob, above n8 at 46-47.

22 Refers to harm caused by health care providers. See Gurney, above n6 at 635.


24 Tamar-Mattis, above n14.

25 Greenberg, in Creighton et al., above n11 at 252.

26 Id at 251-252.

27 Gurney, above n6 at 638.


31 Id, at 36.


33 Dreger and Herndon, above n2 at 11.

34 Preves, above n30 at 544; Lister, above n28 at 36.

35 Ibid.

36 Bishop, above n13 at 533.

37 Id at 550, 557.

38 Id at 533.

39 Id at 534.

40 Refers to the conception of the Western legal tradition as imbued in the discursive mechanisms of the “heterosexual matrix”, which naturalises artificial and hierarchical distinctions of male/female, masculine/feminine, heterosexuality/homosexuality and proposes that “for bodies to cohere and make sense there must be a stable sex expressed through a stable gender.” Judith Butler, Gender Trouble (1990) at 208.


42 Gurney, above n6 at 651-652.

43 ‘Extralegal’ is used here to denote any assumptions whose origins lie beyond the evidence for the case in question but profoundly influence its outcome. However, it is implicitly acknowledged that the legal system exists within, and perpetuates, Western heterocentric discourse and as such these assumptions are not truly ‘extralegal’, actively operating within the legal sphere.

44 Gurney, above n6 at 628; Dreger and Herndon, above n2 at 200.

45 Del LaGrace Volcano, in Creighton et al. at 254.

46 Dreger, above n4 at 29.

47 While Dreger and Herndon assert that this change of nomenclature “scientises and isolates what has happened to [intersex patients]”, the pathologising effect of the term ‘disorder’ can have profound repercussions for identity. As they acknowledge, attitudinal change may elicit alterations to this terminology, noting that Reis’ suggestion of ‘Divergences of Sex Development’ may gain greater prominence (Dreger and Herndon, above n2 at 212). Also see Elizabeth Reis, ‘Divergence or Disorder? The Politics of Naming Intersex’ (2007) 50 Perspectives in Biology and Medicine at 535 – 43.

48 According to Butler, the “heterosexual matrix” is a social construction that naturalises artificial, hierarchical distinctions of the ‘heterosexual’ which is seen as the ‘norm’. For the purposes of this essay, Butler’s concept of the ‘heterosexual matrix’ is adapted and presented as the discursive mechanisms of the ‘heterosexual’ which naturalises artificial and hierarchical distinctions of male/female, masculine/feminine, heterosexuality/homosexuality and proposes that “for bodies to cohere and make sense there must be a stable sex expressed through a stable gender.” Judith Butler, Gender Trouble (1990) at 208.
James Johnston (Arts/Law III) and Catherine Tayeh (Arts/Law III) assess the challenges and opportunities for recognition of GLBT rights internationally.

President Obama dedicated the month of June 2009 to the commemoration of the fortieth Anniversary of the Stonewall Riots, probably the most famous instance of homosexual resistance to state-sanctioned harassment in the United States. Obama's campaign to reform Lesbian Gay, Bisexual and Transgender (LGBT) laws is particularly significant as African Americans and homosexual Americans fought concurrent struggles against oppression during the 1960s. However, the progress of their respective movements has been divergent, such that today, racial and homosexual freedoms occupy contrasting positions at international customary law. This article will focus on the criminalisation of homosexual relations, as the most fundamental breach of gay rights, and threat to homosexual identity, and consider the progress and prospects of achieving international law reform through custom, treaty or academic opinion.

Securing universal sexual freedom for homosexuals requires LGBT rights to be protected by custom, as custom is the only international law that can impose obligations on states to decriminalise homosexual relations without their express consent. Though customary rights usually originate from treaties, it is only widespread state practice and *opinio juris* which makes these rules binding on non-parties to the treaty. In contrast to the multilateral response to racial discrimination, no international treaty has explicitly granted LGBT rights and only few have ever been construed to protect gay rights. The *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), both endeavours of the United Nations, grant rights to all individuals without discrimination on sex, race or any other status.

Though these treaties theoretically condemn all forms of institutionalised prejudice, they do not impose specific obligations on countries to decriminalise homosexual activity and counter institutionalised discrimination. Rather, they rely on further affirmation from subsequent treaties and reaffirming state practice to become an enforceable instrument for the decriminalisation of homosexuality, rather than merely reflective of the principled support of signatories. It is clear that racial rights have been achieved in this way, as the *International Covenant on the Elimination of All Forms of Racial Discrimination* and collective disapproval of segregation in the United States and South Africa evince racial discrimination to be a violation of international law. In contrast, there has been minimal progress in preventing similarly entrenched injustice towards homosexuals. The International Lesbian and Gay Association (ILGA) estimates that homosexual acts are illegal in 86 countries, almost half the nations on Earth, with penalties ranging from imprisonment to the death penalty. Attempts to defeat this widespread criminalisation of homosexual activity have been on the whole unsuccessful, and international progress has arguably been of symbolic rather than legal value.

The United Nations General Assembly maintains a fragile stance on the issue. December 2008 marked the first time in history that the General Assembly has issued a statement in support of LGBT rights. Endorsement by a mere 66 states to an opposition of 50, meant that it achieved little in establishing international custom. Nevertheless, several subsidiary bodies of the United Nations have made more tangible progress in promoting gay rights. The first UN action in defence of gay rights came from the Human Rights Committee, the body charged with monitoring states’ compliance with the ICCPR. In *Toonen v. Australia* in 1994, it ruled that Tasmanian law criminalising consensual sex between adult males breached the ICCPR’s right to privacy and protection from discrimination on the basis of sexual orientation.

In response to mounting activism by public figures such as Louis-Georges Tin, who founded the International Day against Homophobia, the UN’s advisory limbs have also expanded as part of the effort to involve LGBT representatives. Special Rapporteurs have now been commissioned to report on gay rights violations and the
United Nations Economic and Social Council has accredited twoNon-Government Organisations representing LGBTpeople with consultative status, allowing them to makewritten and oral submissions, though they are not allowed tovote in caucus. So why has there been such a reluctance to establishtable framework which secures sexual rights? In contrast withthe overwhelming opposition to segregation in the UnitedStates, there is no equivalent universal support movement.LGBT rights lobbies have had difficulty in using internationalinstruments to free its people from the oppression ofnon-acknowledged gender identity. This is because it mustconfront unique local obstacles which are rooted as much inpolitics as in morality.

First, the gay rights movement appears unable to engage asufficient critical mass of support at an international level. Thekey difference between the anti-racism and gay rights movement is revealed in the way that people responded to the 1960s black civil rights protests, in contrast with the Stonewall riots. The American Freedom Rides were undeniably populist, as they were actively supported by many in the United States, and even contagious, as evinced by their Australian equivalent. LGBT protests, however, have failed to engage non-LGBT people in their fight, possibly because they lack an overt minority presence. Crucially though, the criminalisation of homosexuality encourages the suppression ofLGBT orientation in a way that segregation legislation never could, as individuals can “normalise” their own sexualidentity rather than choose to identify as gay.

A second significant impediment to establishing a formalsexual rights framework has been religious hostility towardshomosexuality within individual states, a moral repressionthat has been embedded in law. Religious opposition creates two hurdles to creating custom. Firstly, such disapprovalprevents the development of opinio juris, necessary tosecure LGBT rights as custom, as states do not feel morallyobligated to decriminalise homosexuality when they considerhomosexuality itself immoral. Secondly, it makes statesreluctant to extend existing human rights treaties to includeprotection of LGBT rights because, as noted by the Dutchforeign affairs minister, Maxime Verhagen, these allow fornod Сергій based on religion or culture.

The Philippines exemplifies such difficulty with reform. With over 80 percent of the population Catholic, the Catholic Church wields immense political influence. In July 2008, a bill prohibiting discrimination on the basis of sexual orientation was condemned by Representative Bienvenido Abante, also the head of the Committee on Civil and Political Human Rights and a Baptist Minister, as inviting the “wrath of God”. Abante’s denouncement of homosexuality as aWestern infection, ironically much like Catholicism to thecolonised nation, questions whether LGBT rights are moreculturally relative than other human rights. Yet this ignores thefact that homosexual relations have been criminalized inalmost all countries, including the Western world, until wellinto the last century. Hence gay rights cannot be considered to be culturally relative or a Western imposition, as has beenclaimed by countries opposed to gay rights. The Filipino caseis countered by the examples of Brazil and India, which haveboth legalised homosexual relations, as developing countriesbearing strong religious ties.

Potentially the focus on more progressive gay rights in theWestern world, such as gay marriage and gay adoption rights,has hindered the acceptance of gay rights in principle inless tolerant countries. The right to sexual orientation has become conflated with a liberal “portfolio” of LGBT rights, making criminalisation and institutionalised discrimination compelling floodgates to further activism. In opposing the anti-discrimination bill, the Filipino Catholic Church has argued its passing will lead LGBT activists to seek same-sex marriage legislation and thus devalue “the sanctity of the Filipino family”. Governments may be concerned that decriminalising homosexuality would embolden potential gay activists in their country to mobilise and demand more progressive reforms.

Establishing customary LGBT rights is unlikely to beachieved by multilateral treaty. This is because the passage ofcompelling General Assembly resolutions acting as evidence of opinio juris and supportive widespread state practice awaitsufficiency political consensus which may never emerge. Sufficientinternational support is still severely lacking, as demonstratedwhen Brazil proposed a resolution in the Commission on Human Rights supporting LGBT rights in 2003, which wasstrongly opposed by Islamic and Sub-Saharan African statesuntil Brazil dropped the motion in 2005. Moreover, theprocess of attempting to gain majority support would evenfurther polarise the issue.

A potentially more promising route to the codification ofgay rights is through implying LGBT rights from existinghuman rights doctrines, so as to nullify the global moral andpolitical opposition to homosexual rights reform. A meeting ofesteemed judges, academics, rapporteurs and non-government representatives in Yogyakarta, Indonesia in November 2006 applied the established international lawhuman rights framework to LGBT issues and created theYogyakarta Principles. They are a response to the nebulousrecognition of LGBT people at international law and an attempt to elucidate that discrimination against themconstitutes violations of overarching human rights. In doingso, they describe how states need to reform in order tosatisfy the rights obligations already existent at international law. Yogyakarta promotes legislative change as well as theintroduction of protection measures and means of redressfor victims, with the overall intention of altering the cultural
backdrop which legitimises and excuses such abuse.14

Recognition of the document has proved crucial to determining its validity and its potential applicability as law will be based on the accumulation of support. The principles were created by reputable academics from diverse countries, which enhances their persuasiveness as statements of law. Since 2007 their acceptance has been steadily gaining momentum, being brought to world attention by the UN High Commissioner for Human Rights, recognised by foreign governments such as New Zealand, Brazil and Germany and published by the respected American Society of International Law Journal.15 It is therefore a source of reputable academic opinion by highly qualified experts, which Article 38 (1) of the Statute of the International Court of Justice recognises as a “subsidiary means for the determination of rules of law”.16

However, in applying existing human rights protections rather than proposing “new rights”, the Yogyakarta Principles only codify the most basic gay rights.17 As for those of us hoping for more drastic reform? With most of Africa and the Middle East still exhibiting staunch opposition, it seems there is little the rest of the world community can do to effectively “legislate” on these matters. The way to enshrine the full portfolio of LGBT rights in custom seems effectively a bottom-up struggle, focused on changing responses to homosexuality at a grass-roots level. Only that way can international law propel more antagonistic states through the trajectory of growing acceptance to recognise diverse sexual identities, beginning with the universal decriminalisation of homosexual relations.

References
1 Barack Obama, ‘Lesbian, Gay, Bisexual and Transgender Pride Month’ (Press Release, 1 June 2009).
2 I Shearer, Starke’s International Law (11th edn, 1994) at 37-41.
10 Associated Press, above n7.
13 Douglas Sanders, above n9.
15 Ibid.
16 Statute of the International Court of Justice 1945 (United Nations) at Article 38.
17 Neil McFarquhar, ‘In a First, Gay Rights are Pressed at the UN’ New York Times (18 December 2008).
Donherra Walmsley (Arts II) reprimands the Rudd Government for its failure to enshrine marital equality in law and to uphold the human rights of same-sex couples.

According to Article 1 of the Universal Declaration of Human Rights, ‘all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.’ But are some, perhaps, more equal than others? That certainly seems to be the case for same-sex attracted people in Australia.

Despite the Federal Government having amended 84 pieces of discriminatory legislation in 2008, granting same-sex couples the same rights as de-facto couples in areas such as tax, superannuation, family law and child support, inequality remains institutionalised and enshrined in law in a number of ways. The most obvious case of this is the ban on same-sex marriage. Section 88EA of the Marriage Act 1961 provides that certain unions are not marriages. It states:

A union solemnised in a foreign country between:
(a) a man and another man; or
(b) a woman and another woman;
must not be recognised as a marriage in Australia.2 [Emphasis added]

This means that not only are same-sex couples unable to marry in Australia, but it is illegal to recognise foreign same-sex marriages! This ban was introduced in 2004 by the Howard Government3 and has been a focal point for queer rights activists ever since, with many disappointed that the Rudd Government has failed to repeal the ban. A recent Galaxy Poll showed that 60 percent of Australians support marriage equality, with support rising to 73 percent in people between the ages of 16 and 24 years.4 This clearly indicates that the government’s argument that the majority of Australians believe marriage should be between a man and a woman is unfounded. Even the Australian Bureau of Statistics will be recognising same-sex marriages from the next census in 2011.5 Thus, despite widespread support in the Australian community for marital equality, the Rudd Government shows no signs whatsoever of reversing its discriminatory stance on this issue.

The current restrictive Marriage Act, which confines marriage to a union between a woman and a man, is not only homophobic, it also fails to recognise people who may not exist within those gender binaries such as trans and intersex people. This lack of recognition is mirrored in federal anti-discrimination legislation. No legislation currently exists at a federal level to protect people from discrimination on the basis of their sexual orientation or gender identity. This is a glaring omission which the vast majority of Australians (85 percent) believe should be rectified.6

It is extremely disappointing to me, as a queer woman who voted for the Rudd Government in the 2007 election, to see them taking this position. Not only is our government lagging behind the Australian population as a whole, they are lagging behind an increasing number of companies, such as Westpac and Telstra, who have extended same-sex marriage recognition to their employees.7 It is unfathomable to me that corporations, which operate with the predominant purpose of making profits, are leading what is supposed to be a progressive government on this issue.

An international comparison reveals that Australia is also behind numerous other countries which have already legalised same sex marriage: Canada, Spain, the Netherlands, Belgium, Norway, Sweden, South Africa and six states of the USA (Vermont, Maine, New Hampshire, Connecticut, Massachusetts and Iowa). Historically speaking, Australia has been ahead of a number of these countries in terms of civil rights. Australia was the first of all the above countries to give women the right to vote. This right was granted in
Australia in 1902, whereas the same right was not granted in
Norway until 1913 or Belgium until 1919.8 Our government's
stance on same-sex marriage is all the more disappointing in
light of this history of progressive social change.

Furthermore, as well as banning same-sex marriage, the
Australian Government has failed to introduce any sort of
official relationship recognition scheme for same-sex
couples, such as a civil union or a relationship registry
scheme. Civil unions for same-sex couples exist under ACT
law,9 Victorian law,10 and Tasmanian law11 but no recognition
exists federally or in the remaining states. The lack of any
federally consistent relationship recognition system puts
Australia even further behind internationally in terms of
civil rights. Fifteen countries, including New Zealand, the
United Kingdom and Germany have nationally recognised
civil unions or relationship registries. To put it in the simplest
possible terms, there are twenty one countries which are
ahead of Australia on same-sex rights. I do not know about
you, but I think that is pretty abysmal.

To put it in the simplest possible terms, there are twenty one countries which are ahead of Australia on same-sex rights.

Some may argue that civil unions should be enough, and that
gay people are ‘being greedy’ by demanding full marriage
equality. I completely disagree with this sentiment. A national
civil union scheme or relationship registry is a step in the right
direction, and it is one which often precedes full marriage
equality, but it is only a step. Both Sweden12 and Norway13
recognised registered partnerships before they moved to full
marriage equality. Marriage equality is important symbolically,
because anything less than marriage equality creates a two
tiered system in which some relationships are valued over
others. Marriage equality would bring an end to legislative
discrimination, and the end of legislative discrimination
would bring us one step closer to ending discrimination
altogether. While marriage equality is important because of
what it signifies, it is also relevant on a very basic, practical
level. Marrying legalises and formalises a relationship.
Marrying provides people with a portable certification of
their relationship, which is useful when travelling or moving
overseas to countries which recognise same-sex relationships.
Marriage provides all of these benefits, but it is, notably, also
a way in which to celebrate and acknowledge a committed
relationship, usually in front of friends and family. Marriage
in Australia is a secular institution, so on what basis can same-
sex couples possibly be denied the right to publicly declare
their love for each other in a legally recognised ceremony?

In an attempt to bring government policy into line with
the opinion of the majority of Australians, Greens Senator
Sarah Hanson-Young introduced a bill to grant marriage
rights to all, regardless of sex, sexuality or gender identity
in June of this year.14 The Bill has been referred to the
Legal and Constitutional Affairs Committee for an inquiry
which is due to report in November.15 It is estimated that
over 20 thousand submissions have been received by the
inquiry, making it one of the most submitted to inquiries
in Australian parliamentary history. Hopefully the results of
the inquiry will reflect the sentiment expressed in the Galaxy
poll, and will press the Senate into accepting the amendment
put forth by Senator Hanson-Young.

The Australian public has shown that it is willing to follow
the government's lead on social policy initiatives when these
initiatives reflect the beliefs and principles of the public.
The 13 percent jump in the approval rating for the 2008
apology to Indigenous peoples after it was given is evidence
of this tendency.16 Therefore, we can state that not only does
the majority of the Australian population already support
marriage equality, but given this trend it is likely that support
for marriage equality will increase if government policy were
to come into line with that of other developed countries.

Although granting marriage equality will not end
discrimination, just as the legalising of inter-racial
marriages in the past did not eliminate racism, it will make
discrimination less socially acceptable. With Tasmania’s State
Labor Conference passing a motion supporting same-sex
marriage on the 27th of July 200917 it is becoming increasingly
evident that federal Labor is out of touch with the people of
Australia who it claims to represent. It is time that the Federal
Government stops dragging the chain on a basic right. The
Universal Declaration of Human Rights grants equality to all
people, including same-sex attracted people, and as such,
marrige equality should be granted without further delay.

References
1 Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform)
   Act 2008 (Cth).
2 Marriage Act 1961 (Cth) s 88EA.
3 Marriage Amendment Act 2004 (Cth) sched 1, s 3.
9 Civil Partnerships Act 2000 (Cth) s 3.
today we'll be learning about the separation of powers
Richard Murphy (Arts/Law) examines the shifting relationship between the Church and the State in Australia.

'We must respect the other fellow's religion, but only in the sense and to the extent that we respect his theory that his wife is beautiful and his children smart.' - Henry L Mencken

With the stated aim of guaranteeing freedom of religion and conscience, democracies around the world have adopted legal safeguards above and beyond the ballot box. These vary from the strict secularism of the French Constitution to the strict church-state separation enforced by the United States Supreme Court. Fast becoming an anomaly in the western world, the Australian system lacks any specific doctrine guiding, let alone governing, religion-state relations. (This may change when the National Human Rights Consultation reports in September.)

As the incubator of future citizens, education stands out as one of the most contentious arenas of religion-state relations. Using their impact on schools as our key focus, we will critically examine three legal conceptions of religion-state relations and the Australian situation on their ability to guarantee the freedom of conscience that is both promised by and essential to liberal democracy.

What Freedom of Conscience means in a Liberal Democracy

In a society as diverse as Australia, there is a huge range of what political theorists call ‘conceptions of the good’. These range from the orthodox Christian’s belief in honouring the biblical God ‘in all things,’ to the neo-Socratic sceptic’s ideal that ‘the life well lived is the one most examined’ and the humanistic agnostic’s view that one’s aim in life should be ‘to learn and be happy’.

A truly just, liberal democratic society must be governed by a neutral framework… that refuses to choose among competing purposes and ends. It must guard the individual’s right to choose which good she will follow and allow her to pursue it, without favouring one over another. It must be made clear that even the most well established doctrine cannot be treated as an end in itself. It can only be a servant of this freedom of conscience and the state neutrality which this demands.6

Doctrine One: French Secularism

Article 1 of the current French constitution mandates that: France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs…5 [Emphasis added.]

When asked to give an opinion on the intersection of secularism, schools and the wearing of religious garb, the Conseil d’Etat endorsed limiting freedom of expression when religious symbols inherently, in the circumstances in which they are worn, individually or collectively, or conspicuously or as a means of protest, might constitute a form of pressure, provoked, proselytism or propaganda.6

Assessment:

Article 1 is adequately described as a statement that respect will be granted by the state to religious beliefs, ‘on condition that those beliefs are kept private.’7 There are many who defend such an approach, particularly in schools, in the name of ensuring genuine freedom of conscience on the part of citizens.

It is precisely because I want to secure children’s right to “free and creative responses to the diversity of goods” that I want to protect them from those forms of indoctrination that would limit their own legitimate choices and ways of life.8

It is true that the aims of liberal democracy in freedom of conscience are served by students learning values of autonomy at school, something we will explore in more detail later. However, as Callan retorts, when the state actively denies the pursuit of religious conceptions of the good, it would presuppose a political monopoly on moral and philosophical truth regarding matters of the deepest human importance where reasonable dissent is possible… political coercion which presupposes that is sheer tyranny.9

As Bader writes, such is ‘incompatible with reasonable pluralism concerning the Good Life.’10 A strict secularism in the public sphere, aimed at imposing a ‘thick’ national identity...
is in fact at the expense of freedom of conscience and liberal democracy to the extent that it limits an individual’s ability to pursue certain religious ideals. Where secularism becomes an end in itself, rather than a means of ensuring freedom of conscience, liberal neutrality is degraded.\(^\text{11}\)

**Doctrine Two: Freedom of Conscience with Liberal Democratic Qualifications - Europe**

At face value, the doctrines of the European Convention on Human Rights present a more liberal approach than the blanket secularism of France. It guarantees the right ‘in public or private, to manifest [one’s] religion or belief, in worship, teaching, practice and observance.’\(^\text{12}\) [Emphasis added.] However, this right is subject to qualifications and may be limited if the restriction is ‘deemed necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.’\(^\text{13}\)

**Assessment:**
The use of caveats to freedom of conscience is justifiable in a liberal democratic framework.\(^\text{14}\) They reflect legitimate reasons by which a liberal democratic state can promote some ideals of the good and limit others. This cannot be on the basis that a certain conception of the good is preferable to another. It may only be on the basis of one’s utility in maintaining liberal democracy. In a school, what are termed ‘neutral reasons’\(^\text{15}\) may justify the promotion of national pride, to prevent the nation and the liberal democracy it cradles from falling apart: ‘the interests of public safety’. Values of self-evaluation, analysis and understanding may also be promoted on the basis and only to the extent that they are necessary to the conduct of a liberal democracy, an ability to empathise being of utility in ‘the protection of rights and freedoms of others’.

However, the European Court of Human Rights has abused these qualifications to freedom of conscience, in endorsing both the sacking of a hijab-wearing teacher in Switzerland and the 2004 French Law on ‘Secularity and Conspicuous Religious Symbols in Schools.’

It was with the rhetoric of these ‘neutral reasons’ that the court approved of the expulsion of a French girl from PE class for refusing to remove her hijab.

In a democratic society, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected.

Pluralism and democracy must also be based on dialogue and a spirit of compromise necessarily entailing various concessions on the part of individuals which are justified in order to maintain and promote the ideals and values of a democratic society.\(^\text{16}\)

Yet it is difficult to see how the removal of any religious symbol promotes ‘mutual tolerance.’ A spirit of compromise seems code for coercing Islamic submission into secular conceptions of the good. The inability of the court to adequately justify its decision sends a warning against the use of such caveats when freedom of conscience is at stake.

In theory, the caveats of the Convention are legitimate. In practice they are tools of oppression. As Callan writes of decisions which hide intentional favour or censure certain groups behind ‘neutral’ reasons, ‘a state imposing values ‘for the sake of slight or highly speculative social gains smacks of discrimination’\(^\text{17}\)

**Doctrine Three: Separation of Church and State – The United States of America**

The First Amendment to the United States Constitution provides that

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...\(^\text{18}\)

The words ‘separation of church and state,’ are based on a recent move toward Thomas Jefferson’s interpretation of the amendment. As an example, the Supreme Court’s Lemon test demands that legislation have a ‘secular legislative purpose,’ and must not ‘have the primary effect of either advancing or inhibiting religion’ or ‘result in an excessive government entanglement’ with religion.\(^\text{19}\)

To such an end, the court has prohibited state funding of even secular classes in religious schools, and came within a vote of doing the same for the bus passes of their students.\(^\text{20}\)

It has outlawed weekday religious education: ‘scripture’ on school premises\(^\text{21}\) and optional reflection times in Alabama public schools, because they had the purpose of encouraging prayer. Laws banning evolution from being taught, or even demanding that it be balanced against intelligent design have been found unconstitutional.\(^\text{22}\)

However, this is distinct from French attempts to forge a thick identity grounded in secularism. When it comes to individual conscience, the court frequently rules against coercion. The Supreme Court has allowed the meeting of religious groups in the same capacity as any club, so long as they are student initiated.\(^\text{23}\) The now classic case of *Meyer v Nebraska*,\(^\text{24}\) which struck down a law banning even private schools from teaching German language before a certain age, ‘evidences a strong abhorrence to public laws whose sole purpose is to ensure assimilation’.\(^\text{25}\)

It was in this vein that the right of parents to send their children to private schools was guarded (although the state retained power over curriculum), as was the withdrawal of Amish children from school before leaving age. Similarly, in *Altman v Bedford Central School District*,\(^\text{26}\) the Federal Court of Appeals for the Second Circuit ruled against spiritual teaching that went against traditional religion.

**Assessment:**
Defenders of the strictly separationist US model say it
guarantees freedom of conscience through maintaining an uncorrected ‘marketplace’ of beliefs. Indeed, in a country as fervently Christian as France is secular, the maintenance of a school system which refrains from imposing the views of the majority is a significant win for liberal democracy.

The major problem with the US doctrine is that it fails to allow for the circumstances when government support or even interaction aids freedom of conscience. The court has noted that ‘the establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions or prefer one religion over another. These actions may have desirable results. As Spinner-Halev notes, ‘the default position in schools is the majority culture. Children may be taught in schools that they can lead many kinds of life, but their choices will surely be shaped by those around them.’ Here, a state education system which will have nothing to do with religion may be degrading certain conceptions of the good by omission. Measures such as scripture, chaplains, acknowledgement of religious festivals or even the acknowledgement of religious viewpoints in regular classes may be essential in giving students of certain traditions the ability to make a true choice, rather than feeling obligated to conform to the majority culture. The absence of official sanction of religion, even if secularism as an end is not pursued does not necessarily guarantee freedom of conscience.

Conversely, others may object to the freedoms granted to parents in the US education system, as epitomised in Yoder v Wisconsin, where the court allowed Amish parents to remove their children from school at the age of 14, thereby denying them a significant chance to choose a life outside their faith, limiting freedom of conscience.

**Doctrine Four: Active Interaction - Australia.**

So far, we have criticised doctrines which seek to repress rival conceptions of the good in favour of ‘thick’ values of national secularism. We have been wary of exceptions to protections, which, in the name of liberal democracy, in fact have the effect of legitimising the illiberal oppression of particular ideals. While praising the US commitment to negative freedoms of conscience, we have queried the ability of a state to truly guarantee freedom of conscience and a more equal playing field for various conceptions of the good, when it is not allowed to interfere at all.

The restrained interpretation of Australia’s only constitutional limit on religion-state interaction and a general reluctance by governments in the multicultural era to impose limits on religious expression in schools has meant that rival conceptions of the good are granted some vestige of neutrality in schools. They are acknowledged through scripture, cultural activities and chaplaincy programs. However, the question may be asked, has Australia gone too far? Has it been overly tolerant and overly involved in religious conceptions of the good, to the extent that liberal democratic values are undermined?

A key example is the funding of private, religious schools, which is both prevalent in Australia and something constitutional doctrines prevent both the French and American government from doing: church-state interaction at a comparative extreme. On the one hand, it seems unjust that those governments favour and reward parents and children whose ideals and beliefs are unlikely to be undermined by the environment of a public school, formed by the majority. On the other hand, an educational environment which denies a child the tools to evaluate and assess the conception of the values she is brought up with as well as the capacity to understand rival conceptions, denies the child freedom of conscience and threatens liberal democracy.

In Callan’s opinion, children can be brought up in a religious value system, so long as education provides the tools she needs to rise above ‘ethical servility’. This includes values of autonomy and an ability to sympathise with rival views on life, but only to the extent necessary to ensure a certain freedom of conscience. (When the state attempts to promote these values as ends in themselves, it violates neutrality.) Religious schools whose curriculum is under government observation (as is required in NSW) are less likely to render their students ethically servile. However, the comparable lack of student diversity, so important in teaching these values, may still have that effect.

The compatibility of encouraging, as opposed to allowing, religious education with liberal democracy, is something the Australian government could be more sceptical of, but even this, the extreme of Australian church-state entanglement is far from warranting extra-parliamentary restraints, when the limitations imposed by the negative doctrine of the USA is taken into account.

...a legal doctrine restricting government interaction with religion would cause more harm than good.

**Conclusion**

The multicultural nature of Australia and the (at least comparative) absence of a majority bent on imposing values means that a legal doctrine restricting government interaction with religion would cause more harm than good. A very general doctrine committing Australia to the principle of freedom of individual conscience in public and private spheres may be desirable. The European situation suggests that any qualifications to such a right must be considered with extreme care. Further, as much as the risks of the current Australian judiciary shooting down legitimate liberal policy seem minimal, a system of the courts publically issuing declarations of incompatibility may be preferable to binding judicial oversight. Above any sort of binding legal doctrine,
the best safeguard for freedom of conscience is an educated citizenry, which values the rights of others to choose and follow their own path.

References
13. Id, Article 9, Para 2.
14. Indeed, Article 9, Clause 2 contains similarities in wording to Article 14.2 of the United Nations Convention on the Rights of the Child, which reads ‘Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.’
18. United States Constitution amend I.
31. The restrained interpretation by the high court of s116 of the Australian constitution is part of this. When considering whether s116 of the Australian Constitution, which bars the Commonwealth form making ‘any law for establishing any religion,’ prohibited the Commonwealth from funding a religious school, the High Court allowed the funding and, distinguishing support for a religion from establishment, found that the phrase would only prohibit the establishment of ‘a particular religion or religious body as a state religion or state church.’ Attorney-General (Vic); Ex Rel Black v Commonwealth (1981) 146 CLR 559 at 582 (Barwick CJ) and 597 (Gibbs J).
32. The tension is reflected between the United Nations Convention on the Rights of the Child which guarantees the child’s right to ‘freedom of thought, conscience and religion’ (UNCRC, Art 14.1) and the International Covenant on Economic, Social and Cultural Rights which mandates a parental right ‘to ensure the religious and moral education of their children in conformity with their own convictions.’ (ICESCR, Art 13.3).
34. Education Act 1990 NSW, s92.
Daria Orjekh (Commerce/Law IV) explores the significance of voting rights and the problems with disenfranchisement of certain groups of people.

The cornerstone of any democracy, such as that in Australia, is the vesting of sovereignty completely with the people. The Constitution is the most supreme source of law in Australia, enshrining the democratic nature of the country. However, it reflects a high notion of parliamentary sovereignty, making it easy to overlook that ultimate control lies with the people, who elect their representative parliament and not vice-versa. The legitimacy and obligation to obey the law flows directly from every citizen’s right to vote. Consequently, the right to vote is critical to existence of a representative government based on democratic elections and ‘directly chosen by the people.’

The existence of an express Constitutional guarantee of the right to vote in Australia is questionable as the High Court has adopted a very narrow interpretation of section 41 of the Constitution, essentially rendering it obsolete. However, the combined reading of other Constitutional provisions supports the existence of an implied right. The words of sections 7 and 24 of the Constitution, as a result of changed historical circumstances, including the effect of legislation, have become a constitutional protection of the right to universal franchise requiring a direct choice by the people. Toohey J has stated that, ‘according to today’s standards, a system which denied universal adult suffrage would fall short of a basic requirement of representative democracy.’ McTiernan and Jacobs JJ have also highlighted that: “universal suffrage may now be recognised as a fact.” Although this implied right protects the democratic entitlements on which Australia depends – including the existence of the right to vote – it does not require equality of voting rights.

Disqualification from Voting

The critical nature of the franchise to a democracy requires a ‘substantial reason for exclusion’ prior to disenfranchisement and anything short of this would be “arbitrary” and inconsistent with ‘choice by the people.’ Parliament should be unable to legislate to disenfranchise people unless they have radically broken their social contract, and this breach is sufficiently severe as to warrant the temporary removal of their right to vote. This cannot be an arbitrary decision. It must be proportionate to the offence committed by the person in question, and it must further have regard to the culpability of the offender.

However, the democratic nature of our society binds parliament by the rule of law. This concept ultimately prevails over parliamentary sovereignty. Hence, the High Court is able to intervene in matters – particularly of disenfranchisement – that challenge the essence of our society and breach the minimum requirements of representative democracy and responsible government.

As the right to vote is so vital to the maintenance of our democratic nation, it is essential that this system of confidential voting remain and uphold the integrity of the right to vote.

As universal suffrage is a creature of legislation in Australia, the Commonwealth Electoral Act is the governing statute in this area of law. The present Electoral Act provides for three very specific exceptions to the right to vote: unsound mind, 3 years imprisonment and treason. The rationale
behind these exceptions may be difficult to justify due to the paramountcy of universal suffrage in our democracy. However, this is not an exhaustive list and provides a good basis on which to analyse the validity of potential future alterations to the legislation. Parliamentary reform will likely occur in four key areas: electronically-assisted voting for the vision impaired, electoral corruption, domestic violence and terrorism offences.

Electronically Assisted Voting for the Vision Impaired
The ability to cast a vote through special machines – telephone-style keypads and headphones connected to a computer – allows the visually impaired to exercise their right to vote in a confidential, secret and independent ballot. Although this system was only introduced in Australia at the 2007 election at 29 polling booths, the Rudd government is already threatening to abandon it after just one election, claiming the cost of running the system is too high because an insufficient number of people used it to cast their vote.

Such abandonment is manifestly undemocratic and is tainting Australia’s previously progressive reputation, such as being the first country to use the secret ballot in 1856, and giving women and Indigenous Australians the right to vote earlier than abandoning it. Further, Greens Senator Bob Brown has rightly noted that ‘the more who use [electronically assisted voting], the cheaper it gets.’

Electoral Corruption Offences
Corruption undermines democracy and the rule of law, distorts market forces and facilitates activities like organised crime and terrorism. As such, parliament may attempt to amend the Electoral Act so that any person convicted of an electoral corruption offence, such as bribery or interfering with the political liberty of a person, shall be removed from the electoral roll and be ineligible to vote for a period of three years. This is the current position in New Zealand.

People convicted of an electoral corruption offence may be viewed as having ‘no just claim to participate in the community’s self-governance’ because this type of offence manifests ‘such a rejection of civil responsibility as to warrant temporary withdrawal of a civic right.’

An electoral corruption offence, by its very nature, interferes with electoral integrity and a ‘rational connection’ may be found to exist between such offences and participation in the electoral process. Accordingly, an ineligibility to vote for one electoral cycle (which amounts to three years) would be valid and consistent with the court’s reasoning in Roach.

This is subject to proper regard being paid to the seriousness of the offence as an indicium of culpability and temporary unfitness to participate in the electoral process. However, if parliament fails to distinguish between what is deemed a severe penalty and that which is a lesser infringement of civic responsibility, potential reform in this field is unlikely to be upheld by the High Court.

Electoral Corruption Offences are Defined by Parliament
Freedom of political communication on matters of government and politics has been identified as an ‘indispensable incident’ of the system of representative government, established and maintained by the Constitutional text. Since the definition of an ‘electoral corruption offence’ is set solely by parliament, potential for undemocratic political gain exists here. If the definition was broad enough to encompass members of a major political party or residents of a particular area and exclude them from voting, it would be deemed invalid. Due to risks involved in involving parliament an avenue to suppress certain views, it would be prudent to construe this definition narrowly for a potential amendment of this kind to be upheld.

The Diceyan principle of ‘if you don’t like it, vote the government out’ has been used to justify such an action. However, disenfranchising people on the basis of an electoral offence may be deemed as impeding the right to freedom of political expression because they would not even have the power to cast their vote. This is antidecademic because it denies certain kinds of dissentients their right to vote.

Proportionality
The penalties for breach of electoral corruption offences, prescribed by s326 and 327 of the Electoral Act, range between large monetary fines and 6 months to 2 years imprisonment. Notions of citizenship are not extinguished by the mere fact of imprisonment, as this does not necessarily indicate serious criminal conduct. The validity of such a potential amendment is called into further question as application of the three year disenfranchisement to all offenders – regardless of the gravity of their wrongful conduct or the period of incarceration – would be arbitrary. As no connection with the nature and seriousness of the offence would exist, it would constitute an additional punishment.

Acknowledging the different statutory contexts, there is a greater willingness of the High Court to consider international developments to aid in constitutional interpretation. Therefore, similar New Zealand legislation may be of heightened relevance. It should be noted that while such an automatic blanket ban on all offenders is considered arbitrary in the UK, the existence of an express right to vote under the New Zealand Bill of Rights Act 1990 has not precluded the enforcement of such a law.

Upon closer examination of the Australian position, the High Court will uphold such an amendment only if regard is paid to the relative culpability of offenders and a distinction
is drawn between short- and long-term prisoners. This is particularly important as approximately 65% of the prison population are imprisoned for 6 months or less. The defendant's personal circumstances, such as financial position and vagrancy, might mean that such a sentence would be imposed upon these offenders, due to the impracticability/inappropriateness of alternative forms of punishment.

Valid if Restriction is Imposed

However, parliament retains the power to define what constitutes a 'serious violation of civic responsibility.' If an element of proportionality is introduced into this potential amendment, it may very well be upheld by the court because it would be seen as protecting the integrity of the electoral result by excluding voters whose capacity to vote responsibly and independently has been affected. This is achievable by setting a benchmark of what constitutes a 'serious violation' (for example, incarceration for one year or more), and only disenfranchising persons who satisfy this definition.

Domestic Violence Conviction

The heightened focus of the Commonwealth government to raise awareness about domestic violence and increase the rate of reporting of offences was seen in 2007/8 through extensive television advertising campaigns such as that entitled 'To violence against women – Australia says “No.”' This could potentially lead to the amendment of the Commonwealth Electoral Act to disenfranchise anyone who within the last 12 months has been convicted of a domestic violence offence or who has been found by a court to have failed to meet his or her obligations to pay maintenance to a spouse or child. Such action would signal society's disapproval of the anti-social actions of people who refuse to accept their family responsibilities. Further, the parliament may justify the provision by reference to the fact that at the time of federation, New South Wales had such a law.

However, since democracy is a 'dynamic phenomenon,' the Constitution must be viewed as a living document which cannot be 'frozen by reference to the year 1900.' Its effect must change with the political, social and economic developments in new communities, and be interpreted 'in light of the developments in democratic standards and not by reference to circumstances as they existed at Federation.' Accordingly, the existence of a law disenfranchising people convicted of domestic violence offences at the time of federation should not be a persuasive factor when determining the validity of a proposed amendment in this area.

Society has progressed considerable since Federation to grant previously disqualified groups (such as women and Aborigines) the vote. The High Court is therefore reluctant to reverse this evolution purely on the basis that exceptions previously existed. Instead, they will uphold the integrity of our Constitution on the basis of present views and legislative developments.

It is interesting to contrast this position with the minority view held in the High Court. Under the minority approach, the argument of such a law existing at the time of Federation would have been accepted. Since ‘directly chosen by the people’ is an ‘expression of generality,’ it is not intended to give rise to a requirement for universal suffrage. For this reason, attempts to narrow the franchise on the basis of race, age, gender and religion are undesirable, but not necessarily unconstitutional.

The nature of the domestic violence offence will be integral to the validity of such an amendment. A physical assault case constitutes a crime against society in a similar way that murder constitutes an offence against the community. This provides a stronger argument for disenfranchisement due to the rational connection that exists between violence against those who are the most vulnerable in our society, and a rejection of one's civic responsibilities. On the other hand, failure to make maintenance payments may result from financial difficulties, rather than being a rejection of civic responsibility. As such, it is unlikely to be held as inconsistent with citizenship, despite the seriousness of this offence and altered community attitudes toward it.

The Constitution must be viewed as a living document...its effect must change with the political, social and economic developments in new communities.

Moreover, if proportionality is not introduced into such an amendment, the criterion for disenfranchisement becomes arbitrary as the regime would operate without regard to factors such as the nature of the offence committed, the duration of the term of imprisonment imposed, the maximum penalty for the offence, or the personal circumstances of the offender.

Furthermore, the proposed amendment purports to disenfranchise anyone convicted of any domestic violence offence in the last 12 months. It does not provide any justification for the imposition of this retrospective timeframe. Ultimately, such a far reaching provision casts the net of disqualification too wide and so would be held invalid due to its disproportionate application.

An additional reason for the invalidity of such an amendment would be the existence of other more appropriate avenues of reprimand, such as imposition of longer prison sentences. If these are longer than three years, section 93 will apply and the offender will be disenfranchised in this manner.

Unlawful/Terrorist Organisations

In response to threats of terrorism, the Commonwealth government has passed a series of legislative reforms. As members of the executive of unlawful associations are no longer entitled to vote for 7 years under s 30FD of the Crimes
Act 1914 (Cth), this disenfranchisement may in the future also be extended to members of ‘terrorist organisations’ under Part 5.3 of the Criminal Code (Cth), on the ground that members of terrorist organisations, by their actions, have rejected their civil responsibilities and privileges. As parliaments have the power to make laws for the qualification of electors, this would, in theory, allow for the 7 year disenfranchisement under section 30FD to be extended to ‘terrorist organisations’, provided that the government complies with certain criteria.

Firstly, the definition of ‘terrorist organisations’ must be sufficiently clear and concise so as to ensure that potential defendants are aware they are members of such organisations, and able to access the law. A rational connection exists in excluding such groups from enjoyment of civic rights. Therefore, no double punishment is involved as deprivation in excluding such groups from enjoyment of civic rights. However, the High Court may be likely to uphold the validity of such an amendment, due to public policy reasons relating to the protection of national security and the federal power to legislate on defence issues. A balancing act will have to be undertaken to deny the franchise to racial minorities would be offensive to the dominant practices/ideologies. Furthermore, any attempt to define dissenters according to their pursuance of a political right runs contrary to the freedom of expression and arbitrarily sanctions people who question the integrity of our democratic society is something which should be preserved and subject to very few, if any exceptions at all. As the number of situations where disenfranchisement is allowed increases, the community moves further from a democracy, and closer to a dictatorship. As such, the majority of the High Court is extremely reluctant to disenfranchise persons and the potential amendments discussed above are unlikely to be upheld. However, if a limiting element regarding the definitions of what is considered a ‘serious breach’ is inserted, the High Court may be unable to declare invalidity in such circumstances.

References
1. A-G (Commonwealth); Ex rel McKinlay v Commonwealth (1975) 135 CLR 1 (‘McKinlay’).
47. Crimes Act 1914 (Cth). Section 30FD provides for an exemption from disenfranchisement by virtue of section 41 of the Constitution. However, as stated above, this section has been interpreted narrowly by courts and is unlikely to apply.
50. Electoral Act 1918 (Cth) s93.
52. Crimes Act 1914 (Cth), Division 104.
54. Constitution s 51(vi).
Nicholas Olson (Arts/Law II) explores the construction of law enforcement in reality programming.

Most governments around Australia have an obsession with ‘law-and-order’, a policy platform emphasising zero-tolerance law enforcement and uncompromising sentencing. These policies generally depend on giving police more power, and expecting them to enforce their powers more rigorously. Some of this recent legislation, particularly the Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Act 2009, tilts the balance of the criminal process further away from defendants and toward the state.

The Act allows police officers to conduct covert searches, remove property, and delay notification of the search by more than eighteen months. Defendants who have been covertly searched would find it harder to prepare a defence because they would not know exactly what evidence the police had against them. For the public to accept such legislation, they must trust that it will not be misused. John Hatzistergos’ Second Reading Speech, delivered to the Legislative Council on 24 March 2009, contains repeated, strident assurances of ‘comprehensive safeguards’ and ‘strict judicial oversight’. However, the most crucial figures of trust are, arguably, the police themselves; the public must have faith in frontline officers to use their powers judiciously and effectively.

One type of reality television currently popular is the reality police documentary, examples of which include Missing Persons Unit (Channel Nine), Recruits (Channel Ten) and The Force: Behind the Line (Channel Seven). Such programmes typically present a highly favourable image of the police force and the work they do. This article will consider whether these programs have any appreciable influence on the public perception of the police, and whether they in turn support the perpetuation of the public obsession with law-and-order.

Content case study – The Force: Behind the Line

The Force: Behind the Line is an observational documentary about the Western Australian police force. Premiering on Channel Seven in August 2006 and hosted by Simon Reeve, the programme averaged 1.453 million viewers in metropolitan areas in its first season. It was made with the enthusiastic cooperation of the Western Australian Police Commissioner Karl O’Callaghan, who believed that it would give the viewing public a glimpse into the real nature of police work. However, the police force still retains the right to veto any material which may pose legal problems, such as the identification of underage offenders or the broadcast of material currently before the courts.

For this article, Episode S05E03 (originally broadcast 3 May 2009) was randomly chosen as a case study. Like other episodes of The Force, it follows about four cases. Its material ranges from being humorous, to sometimes being mundane or serious.

Female officers are relatively prominent in this episode: two of the five officers who play a major role in the episode are women. Constable Ayre, a young, friendly female officer, pulls over a young mother driving over the blood-alcohol limit. Sergeant Willet is older, and adopts a tougher attitude: she plays a leading role in the arrest of a man suspected of trespassing on train tracks and throwing a rock at the window of a carriage. Both officers directly address the camera, explaining the action to the audience, and as such are prominent figures in the episode. Women constitute 24.58% of all officers in the Western Australian Police (and only 10% of those in senior leadership roles), but in this particular episode of television programme, they account for 40-50% of those who feature prominently. This is a significant overrepresentation.

The programme has a focus on crimes that are of widespread concern. This episode features two stories concerning traffic infringements, one which concerns rock throwing (an issue of great public concern after a spate of incidents between 2007 and 2008), and one which is about theft. Many police reality documentaries, such as the American programme Cops, target the extreme end of policing, often featuring high speed car chases. In contrast, Constable Ayre of The Force explains the alternatives police have to initiating chases. The crimes covered by the programme are the sorts of crimes that viewers are most likely to encounter in their everyday lives. As such, The Force shows police dealing with those crimes which most immediately concern the viewing public. The programme actively courts this sort of emotional reaction to its material. Simon Reeve narrates in a serious, ponderous tone, adding judgmental comments such as ‘police have just detained a man they believe hurled a rock at the window.
of a train full of people – it’s a dangerous and violent act’. The music is thumping and ominous in a way that is hardly warranted by the mundane nature of the material. These techniques encourage the audience to believe that these everyday crimes are cause for serious concern.

At the same time, the programme encourages the audience to believe that the police are dealing with these crimes competently and successfully. Repeated close-up soundbites from grim-faced officers establish the seriousness of the police, and this is reinforced by editorial comments from Reeve: he explains that ‘the brothers aren’t here, but the police have many more leads to track them down,’ and that ‘Sergeant Willet’s instincts are spot on’. Two of the stories end with contrite comments from the criminals. Nadina, arrested for driving over the limit, tells the audience ‘even if you’ve had just one drink, just don’t get in the car – it’s just not worth it’ while Robert Quartermaine, a violent thief, says ‘gotta get caught one day, don’t you?’ These comments build up an image of the effectiveness of police work and the inevitability of their victory over crime. Alongside this formidable image, however, the police are also presented as being fair, reasonable and friendly. In one story, officers spot a car with a large object attached insecurely to the roof. They chuckle to themselves, use nicknames and, in an example of cooperation with the police being rewarded, the officers decide not to issue the apologetic drivers with a fine – ‘normally it would cop an infringement’, one says, ‘but not tonight. We decided we’d give them a break’. In another instance of fair-minded policing, Sergeant Willet tells the suspected rock Thrower that ‘you’ll get to tell us what you think has happened, we’ll tell you what we think has happened, and we’ll go from there’. The sheer extent of crimes committed in Australia, and the fact that Police Commands in Australia often cover rather large jurisdictions means that effective policing depends on the cooperation and assistance of the community.

In her article ‘Police, crime and the media: an Australian tale,’ Suzanne Hatty comments on the relationship between the use of the media by police departments to shape their own image and the concept of ‘community policing’, an operational theory which suggests that effective policing requires strong relationships with the community. Police forces now regularly have their own media liaison departments and, since the late 1980s, have recognised the benefits of media reportage of their work. Hatty gives the example of a ‘transport blitz’ on north-coast trains in 1989. Before the operation a press release was issued saying ‘all media are welcome and arrangements can be made to accompany police on the operation for photo opportunities’. It is obviously desirable that the police have a good relationship with the community they serve, if only because they depend on community cooperation to do their job. The 1973 BOCASAR report Unreported Crime indicated that survey respondents claimed to have been the victims of 4.27 times the robberies, 6.37 times the frauds, 8.82 times the sex offences (other than rape) and 13.18 times the assaults than the official figures for these offences. The argument is that if respondents found their police force approachable and helpful, and if they believed police were likely to be able to resolve the issue, they may have been more likely to report the offence. This is the reasoning behind community policing, and it makes sense as a strategy for increasing reportage rates.

The Force is not a product of direct manipulation by police PR, but it is silent on two significant deficiencies of the Service. Repeated studies have identified a distinctive occupational culture within police forces, one that encourages an insular
‘us-and-them’ mindset, and an accompanying unwillingness to confront or report fellow officers for misconduct, and discrimination against female officers.\textsuperscript{12} Researchers suggest that, personally, police officers are less likely than ever to feel engaged with their community because of a belief that they are now more vulnerable to violence\textsuperscript{13}. This disposition was reflected in the actions of Redfern police around the time of the 2004 riots.\textsuperscript{14} However, one would never guess that this was an issue when watching constables on \textit{The Force} jokingly casually with motorists. It is also widely known that women, despite generally being considered to make very good police officers, have poorer prospects for promotion than their male counterparts, and must often ‘defeminise’ themselves to fit in with station culture.\textsuperscript{15} In light of this, \textit{The Force}’s high proportion of prominent female officers is plainly deceptive.

Public opinion and the law-and-order game
In their article ‘Police accountability and the media’ Jerome Skolnick and Candace McCoy raise a troubling prospect: ‘public opinion is the final measure of police accountability.’\textsuperscript{16} The article suggests that media examination of the police and their work is among the most effective of checks and balances, but this does not account for the possibility of police manipulation of the media. The image presented of the police, not only in the news media but also in reality programmes such as \textit{The Force}, is, to a large degree, one of their own making.

In Australia, there is a perception that the police are beset on all sides, that their resources and powers are inadequate to their task, and that they need all the support they can get. A recent demonstration of this arose in a March 2009 rally staged outside the Western Australian Parliament to support mandatory sentencing for those who assault police officers. The president of the Police Union told the 2500 strong rally that ‘it was time Parliament responded to the wishes of the public’ and that ‘lawyers were taking advantage of legal loopholes to enable offenders to beat assault charges.’\textsuperscript{17} This is an example of the belief that the good work that police do is continually being undone by laws that are too ‘soft’ on defendants. Programmes such as \textit{The Force} seek to create a rapport between the public and the police by presenting a positive, sympathetic image of them. As such, they could contribute to the mentality that sees extra powers for police as necessary to support them in doing their job.

There are grounds for thinking that prolonged exposure to reality police documentaries might shape public opinion. The researchers Hanley & Manzolati found that heavy viewers of television crime drama were more likely than light viewers to endorse theories of crime consistent with those presented on television.\textsuperscript{18} An obvious problem with this research is that ‘heavy viewing’ was defined as four or more hours of crime drama each day, an unrealistically high level of exposure (equivalent to eight episodes of \textit{The Force}). However, this research dealt with obviously fictional drama programmes, whereas the defining feature of programmes such as \textit{The Force} is their purported reality. Potentially, reality police documentaries could be more powerful pieces of entertainment because of their status as reality, not fiction.

Yet even if it could definitely be proven that reality documentaries had \textit{some} effect on public opinion, it would be much more difficult to quantify this effect. The police are already highly trusted – they ranked tenth in the 2008 Reader’s Digest survey ‘Australia’s Most Trusted Professions’ – so it is not clear that an increase in trust brought about by television programmes, if it could be identified at all, would make any significant difference to public opinion. Furthermore, public trust in the police force is a practical necessity. Poor police-community relations do not just make the work of policing more difficult, but they cause the escalation of social tensions within the community, like those that erupted in the 2004 Redfern riots and the 2005 Macquarie Fields riots. The more trusted and respected the police, the more moral authority the law has at a grassroots level. This is an important deterrent of criminal behaviour\textsuperscript{19}. Of course, a television programme could not avert a riot by its depiction of community-friendly policing, but nor should it be criticised for encouraging trust and understanding.

\textit{A television programme could not avert a riot by its depiction of community-friendly policing, but nor should it be criticised for encouraging trust and understanding.}

Conclusions
Reality police documentaries are not necessarily something to be concerned about. \textit{The Force}, for example, is definitely not as sensational as its American counterparts and it does provide a real, if decidedly favourable, glimpse at what policing actually involves. In doing so, it may help to build trust and an understanding of the reality of policework. Both of these are outcomes that ought to be welcomed. The problem is that these programmes exist against the background of the law-and-order obsession of contemporary Australian politics and the near-universal prevalence of the police perspective in the media. These policies are a response to a perception within the electorate that ‘tougher action on crime’ is necessary. The depiction of friendly, community-minded police humbly going about their work fighting community-harming crime that is presented in \textit{The Force} and other programmes arguably contributes to the perpetuation of this perception, and thus to the perpetuation of the law-and-order policies that have tipped the balance of the criminal process decisively against defendants.

The solution is not, I believe, to take programmes such as \textit{The Force} off the air. Well used, their depiction of policework as it really is could play a role in providing the public with more accurate knowledge of the realities of crime-fighting. But although a well-informed public should know of the good work the police do, there should also be acknowledgement...
of the darker side of policing – the troubling occupational culture and the discrimination against female officers, for example. At the root of the problem is the general ignorance of the public on matters of law and crime. This ignorance can only be remedied by opening up as many sources of reliable information as possible. Reality documentaries may have a role to play in this, but only if the perspective they present is balanced and honest.

References
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8 S Harty (1999) at 177.
10 S Harty (1999) at 177.
11 Steve Brien, Restructuring Media and Marketing Branch, Submission to Police Minister and Commissioner (10 March 1989).
17 Warwick Stanley, ‘Thousands rally to support WA police’ The Age (17 March 2009).
18 Edith Greene, ‘Media’s effect on jurors’ (1990) 14 Law and Human Behaviour 439 at 444.
Phillip Boncardo (Law IV) explores how the blurring of the line between work and play can have legal implications on employer-employee relationships.

Employee privacy and the boundary between work and private life

Employment law is not usually a topic of human rights discourse. Yet the ability of employers to intrude into, investigate and monitor the lives of their employees outside the workplace raises important issues as to employees’ fundamental right to privacy. Recent developments in the law surrounding unfair dismissal evidence that legitimate and legal extra-work activities of the employees may be inquired into and monitored by employers. In a milieu where there has been an explosion of online social networking sites such as Facebook and Twitter, these developments call into question the ability of employees to enjoy life outside of work without answering to their bosses.

The case of Carlie Streeter

In late February 2007, the staff of the Miranda Telstra Shop decided to hold a belated business Christmas party. After a night spent feasting and consuming considerable amounts of alcohol at a local restaurant – forebodingly named The Naked Grape - three of the staff retired to a pre-booked hotel. One of these staff was Carlie Streeter. Heavily inebriated, Carlie and two other male employees left the room to a swim in the hotel pool. At around 2am, two of the employees were awoken by Carlie and another employee Akash Sharma having sex on the floor adjacent to where they were sleeping. Akash and Carlie then went to the bathroom, accompanied by recently promoted Store Manager Steve Hatzistergos, and jumped into the bath. Daniela Hyett, who had been awoken by Carlie and Akash, knocked on the bathroom door and demanded to be let in to use the toilet. She was let in by Carlie and urinated whilst the others remained in the bath.

The following morning the three employees returned to work. Daniela informed management of the drunken debaucheries of the previous night. Alana Andrews, one of the employees awoken by Carlie and Akash, broke down and was sent home. Telstra management decided to investigate. Hauling Carlie in, they questioned her about whether she had sex with Akash and had ‘made’ Daniela urinate in front of herself and her companions in the bath. Carlie refused to respond to their questions. After a brief deliberation, Telstra management announced that Carlie was summarily dismissed for both sexually harassing her fellow employees by having sex in their presence and for not being honest with Telstra management about the events of the previous night. Carlie lodged an unfair dismissal application, arguing that the termination of her employment was harsh, unjust and unreasonable. At first instance, Hamberger SDP ordered that Carlie be reinstated, holding that Telstra had no valid reason to terminate her employment as her activities did not constitute sexual harassment and that she was under no obligation to divulge activities of an inherently personal nature undertaken outside the work environment to her employer. She was, in the Senior Deputy President’s words, a woman ‘more sinned against than sinning’.

Telstra appealed the ruling. A majority of the Full Bench of the Australian Industrial Relations Commission agreed that whilst Carlie’s activities did not constitute sexual harassment, Telstra had a right to investigate the happenings in the hotel room and Carlie had an obligation to be honest in relation to her extra-work activities, notwithstanding their intrinsically personal nature. Her dishonesty entailed that Telstra could dismiss her.

The majority’s findings struck an almighty blow for employee privacy, radically expanding the capacity of employers to pry into the extra-work activities of their employees. The majority’s decision opens the way for employers to investigate the private lives of employees and mandates employee honesty in such investigations. In an era replete with online social networking, the position articulated by the majority has potentially dire implications, blurring the line between private and work life. The WorkChoices statutory unfair dismissal regime, under which the decision was made has, by and large, been reproduced in the Rudd government’s Fair Work Act. Resultantly, the majority’s finding is likely to be good law under the new legislation.

A woman not “more sinned against than sinning”: gender and the majority decision

The majority decision was based upon Hamberger SDP exercising his discretion to determine whether Streeter’s dismissal was harsh, unjust or unreasonable. The scope
for appellate courts to grant leave to appeal discretionary decisions is manifestly circumscribed, with *House v King* determining that an appellate court should only intervene if a decision maker; *acts upon a wrong principle… allows extraneous or irrelevant matters to guide or affect [them]… mistakes the facts… does not take into account some material consideration.* Larkin C, in a strong dissenting judgment, argued that no such errors were present in his Honour’s reasons and refused to grant leave to appeal. The reason why the majority radically altered the law to allow the appeal may be illuminated by examining their highly gendered construction of Carlie Streeter.

At the beginning of their reasons, they take it upon themselves to restate the ‘circumstances surrounding the termination’. Their bullet point recitation varies significantly from the facts given by Hamberger SDP. The employees who witnessed or were present in the room with Carlie are not named. They are numbered as ‘first employee’, ‘second employee’ and so on. Carlie is the only person named. The circumstances surrounding Daniela’s, or ‘first employee’s’ entrance into the bathroom are altered. The fact she knocked on the door and asked to be let in is elided. She merely appears in the bathroom whilst Streeter engaged ‘in rowdy behaviour’. Their Honours go to great lengths to detail Streeter’s fellow employees views of her. ‘First employee’ is said to be ‘repulsed by her’. ‘Third employee’ was ‘so blown out that Ms Streeter could have so little dignity in front of other people’. First employee also lamented that she should have acted to put a stop to the happenings so ‘we would not have had to endure the filth we did’. This construction of Carlie is highly gendered. Carlie appears in the majority’s recount to be an errant woman who has deviated markedly from appropriate womanly conduct. She is a woman whose sexuality has been loosed and their Honour’s find this distressing. They were thus moved to find that ‘whether the matters were personal or not, Ms Streeter had an obligation to answer Telstra’s reasonable inquiries honestly.’

**Ramifications of the majority decision**

At first instance, Hamberger SDP emphasised that Carlie’s employment duties involved dealing with stock and cash. Pointing to the fact that there was no evidence that she had been dishonest in relation to these duties, he concluded that her dishonesty in respect of her extra-work activities did not constitute a valid reason for her dismissal. On appeal, the majority of the Full Bench repudiated this finding, holding that her obligation to be honest could not be ‘compartamentalised’ as pertaining only to stock and cash. They held that her private extra-work activities had had an effect on the workplace by distressing her fellow employees and were likely to continue to affect the work environment. She was answerable to her employer about them and her dishonesty destroyed the relationship of trust and confidence between herself and Telstra, determining that her dismissal was valid and fair.

The test applied by the majority appears to be, that where employees are upset by legitimate and legal conduct of their fellow employees that may be unconnected with the workplace, employers are able to demand employee candour about such conduct. Whilst obviously applicable to behaviour actually witnessed by other employees, there seems to be no conceptual reason why the majority’s test could not be extended to information, photos and correspondence posted on employee’s Facebook page.5

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**Under Australian common law, the fundamental human right to privacy is flaccidly protected.**

Recent experiences in the United Kingdom and United States illustrate the potential for employers to delve into the private lives of their employees, as portrayed on the internet. Stacey Snyder, a trainee teacher in the US, posted a picture of herself on her MySpace page with a caption entitled ‘Drunken Pirate’.6 The court at first instance held that there was a potential for students to view this ‘alcoholically irresponsible’ picture, and she was disallowed from completing her teacher’s training. She challenged her termination in Court, arguing not that her right to privacy had been infringed, but that her constitutionally enshrined right to free speech had been contravened. The District Court for the Eastern District of Pennsylvania dismissed her application, holding her dismissal to be lawful.7

Likewise in England, teacher Sarah Green was terminated after a video of her acting in a raunchy commercial years before entering the teaching profession was viewed by her students on YouTube.8 Green did not challenge this decision in Court. It is nonetheless indicative of the potential for conduct engaged in outside the workplace, even years before an employee enters that workplace and portrayed on the internet, to be a legitimate reason for an employer to terminate an employee’s employment. Following the majority decision in Streeter’s case, there is no reason why an employee would not be answerable to an employer for a Facebook post or photo that offended a fellow worker.

**The human right to privacy**

Article 12 of the *Universal Declaration of Human Rights*9 and Article 17 of the *International Covenant on Civil and Political Rights*10 provide that no one shall be subject to unlawful or arbitrary interference with their privacy and that an individual’s privacy shall be protected by law. The United Nations Human Rights Commission interprets ‘arbitrary interferences’ to mean legal interferences, but only insofar as they are reasonable in the circumstances of a particular case. The right has been argued by commentators to encompass various forms of privacy including; bodily, territorial, communicational, locational and informational privacy.11

Under Australian common law, the fundamental human right to privacy is flaccidly protected. Equity provides relief where private information is obtained in circumstances that make
its publication unconscionable.12 Tort law is yet to recognise a right to privacy, although Callinan J’s dissenting opinion in ABC v Lenah Game Meats Pty Ltd (2001)13 suggested that the tort of invasion of privacy should now be recognised in Australian common law. Tortious and equitable doctrines are, however, not directly applicable to jurisprudence surrounding statutory regimes such as that provided for employee unfair dismissals. It is noteworthy that neither the Full Bench nor Hamberger SDP at first instance referred to any right to privacy in their decisions.

The current statutory Unfair Dismissal regime merely provides that a tribunal must determine whether a dismissal is harsh, unjust and unreasonable, after having recourse to a number of factors including whether an employer has a valid reason to terminate an employee. Tribunal members are therefore required to make law to give content to these statutory provisions. Underlying the majority’s findings in Streeter’s case is the Neo-Liberal notion that employers have an unconstrained prerogative to manage their workplaces. This prerogative is not balanced at all by the majority with an employee’s fundamental right to privacy. The majority decision is manifestly at odds with Article 17 of the ICCPR, as it arguably comprises an unreasonable interference with Carlie’s privacy. Apart from statutory reform to the legislation to overturn majority decisions, an interpretative obligation, imposed on Courts by a statutory charter, is the sole means to ensure that the law surrounding unfair dismissal is developed in line with fundamental human rights such as the right to privacy.

A statutory charter and employee privacy rights

The federal Fair Work Act regulates the terms and conditions of approximately eighty-five per cent of Australian employees.14 As Streeter’s case demonstrates, the development of the law surrounding that Act’s unfair dismissal regime has great ramifications for employee’s human right to privacy. Streeter’s case is illustrative of the utility of a statutory charter that compels courts and tribunals to develop the law as far as possible in conformity with human rights.

The Victorian Charter of Human Rights and Responsibilities15 imposes on Courts and Tribunals an obligation to interpret statutory provisions as far as is possible, consistently with human rights. In giving effect to this statutory interpretative command, Courts and Tribunals may have recourse to international law and judgements of international and domestic courts that pertain to human rights.16 Importantly, at clause 13(a), the Charter prescribes that a person is not to have their privacy unlawfully or arbitrarily interfered with. The Victorian Charter also imposes a balancing act, with rights such as the right to privacy capable of being subject to reasonable limits that can be demonstrably justified in a free and democratic society.17

If a Charter had been operative in the federal sphere when Streeter’s case was decided, the AIRC would have been compelled to have at the forefront of its mind Streeter’s right to privacy when making its decision. An employer’s prerogative to manage their workplace would necessarily have had to be balanced with Streeter’s right to privacy. Adoption of a statutory charter or a like mechanism that compels courts and tribunals to place human rights at the forefront of statutory interpretation and development is necessary if employee privacy is to be protected.

References

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10 UNDHR, above n1, art 13; International Covenant of Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 407, art 12 (entered into force 23 March 1976) (‘ICCPR’).
12 Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd (2001) 208 CLR 199.
13 Callinan J, in ABC v Lenah Game Meats at 314.
14 New South Wales v Commonwealth (Work Choices Case) [2006] 81 ALJR 34.
15 Charter of Human Rights and Responsibilities (Vic) (2007), Section 32(1).
16 Ibid.
17 Ibid.
Emma Ede (Arts/Law IV) examines the legality and morality of assisted suicide in Australia.

For many people the concept of death, its finality and process, is a mystifying and somewhat frightening prospect. Most of us have experienced the distress of losing a loved one and the awful emptiness that persists in their absence. It is little wonder that for many, death can be a difficult subject. However, death is a universal experience that will one day visit us all, and as such it is important that we as a society come to terms with the ethical dilemmas that it poses.

This year, a Government run Human Rights Consultation has been taking place throughout the country, aimed at uncovering which rights the Australian community feels are most important and how we believe they should be protected and promoted. This consultation has given both advocates and critics of controversial rights, such as the right to a dignified death, an opportunity to engage in a public dialogue about the merits and potential risks of enshrining such rights in law. Clearly, the debate is value-laden. The issue of legislating on the right to die with dignity through decriminalising voluntary euthanasia challenges us all to reflect upon our own moral, religious and philosophical beliefs. It affects the rights of individuals to do as they wish with their own bodies, and to live or to end their lives in a way of their own choosing. It also raises important public issues, challenging the relationship between an individual’s autonomy and the right of the State to interfere to protect the public interest. This article will argue that the right to die with dignity is not a violation of the right to life, but is in many ways an extension of, and tribute to, the sanctity of that right. By legalising some form of voluntary euthanasia, we can ensure that all individuals facing the end of their lives will die with dignity, whether that is by a natural death, or as the result of an autonomous decision made to die free from pain and suffering.

The euthanasia debate is never far from the public consciousness, reappearing frequently in our legislatures, courts and the press. Discussion of euthanasia is often complicated by the means patients and medical practitioners use to deal with terminal illness. Withdrawal of life support, an increase in the provision of pain relief that may shorten life and respecting an individual’s right to refuse treatment are all complex legal and philosophical issues. They are not, however, forms of voluntary euthanasia. To simplify matters, this article will adopt the definitions provided in the Dutch euthanasia legislation. It defines voluntary euthanasia as death that results from the deliberate (as opposed to passive) ending of a patient’s life from the use of medication intended to hasten death at the explicit request of the patient. This law also defines ‘physician assisted suicide’ as intentionally assisting a patient to self-administer life-ending medication prescribed by the physician.

The Legal Position in Australia

While the act of suicide itself is not illegal in Australia, assisting another person to commit suicide is an offence in every jurisdiction. The relevant section of the Crimes Act 1900 (NSW) states:

1. A person who aids or abets the suicide or attempted suicide of another person shall be liable to imprisonment for 10 years.
2. Where:
   a. a person incites or counsels another person to commit suicide, and
   b. that other person commits, or attempts to commit, suicide as a consequence of that incitement or counsel, the firstmentioned person shall be liable to imprisonment for 5 years.

This offence applies to assistance provided by a qualified physician as part of treatment of a terminal illness. In some circumstances where further treatment is futile, withdrawal of life-prolonging treatments, such as artificial nutrition and hydration in favour of palliative care, may be acceptable. A patient’s right to refuse further treatment is dealt with explicitly in Victoria by statute but has been the subject of case law in various common law jurisdictions.

Voluntary euthanasia has only ever been legal in one Australian jurisdiction. In 1995 the Northern Territory Parliament passed the Rights of the Terminally Ill Act by a conscience vote. The Act allowed a patient suffering from a terminal illness, who was experiencing pain, suffering and distress to an unacceptable extent, to request medical assistance to end his or her life. More importantly, the legislation decriminalised the actions of a medical practitioner who chose to accept
that request, and (subject to a number of conditions) to provide that assistance. Under this legislation four people took their own lives, assisted by doctor and euthanasia advocate Philip Nitschke. The Act was operative for nine-months before being overturned by the Federal Parliament. Last year Greens’ leader Bob Brown introduced a bill to Parliament, the object of which was to recognise the right of the territories to legislate on euthanasia. The bill became the subject of an inquiry by the Senate Legal and Constitutional Affairs Committee, members of which ‘elected not to form a majority view on whether or how the bill should proceed,’ recognising that there were significantly diverging views on the issue. Presumably the bill will thus not be debated in Parliament this year and nor will it go to a conscience vote. Voluntary euthanasia and physician assisted suicide are legal in various forms in other jurisdictions including Oregon (USA), the Netherlands, Luxembourg, Switzerland and Belgium.

A Right to Dignity in Death

Last year, 31 year old Melbourne woman Angelique Flowers, recorded a heart-breaking plea to the Australian Government to legalise euthanasia. Angelique, who had suffered from Crohn’s disease since the age of 15, was diagnosed with terminal colon cancer in 2007. The cancer was incurable and although Angelique was provided with palliative care, she continued to suffer pain. In her video, she expresses a desire to end her life peacefully and pain-free, and avoid one of two inevitable ends: death by a painful and complete bowel obstruction, or by spontaneous rupture of her tumour. In her final weeks Angelique researched alternative ways to end her life and hid that research from her loved ones. The inaccessibility of a pain-free death meant that her final days were spent away from family in anxiety and fear. As she so movingly argues, not only was she robbed of her life, but the illegality of euthanasia meant that she was also robbed of her dying. Not long after the video was filmed, Angelique died from a bowel obstruction, spending her final hour in pain, vomiting faecal matter.

There are so many stories like this one and all are harrowing. Despite the wonderful benefits that advances in medical technology have provided, such advances have also resulted in many cases of individuals being kept alive for longer than may be natural. Furthermore, while palliative care can provide support, a sense of normality and some pain relief, it cannot give individuals a pain-free death at a time and in a manner of their choosing. This is especially true of illnesses as debilitating and agonising as Motor Neurone Disease, advanced Multiple Sclerosis or various cancers.

When we talk about a dignified death, what do we mean? Joseph Azize has argued that dignity is an inalienable human characteristic that cannot be diminished or eliminated until the physical end of a person’s life. As such, he argues, an individual cannot lose their dignity while they remain alive despite frailties and illnesses. To my mind this argument is far too absolutist. Though it affirms in some ways that we each have a right to be treated with dignity, it denies that an individual can in any way define the measure of their own dignity, or even evaluate what events may cause them to feel that it is lost. Certainly, it is a complex philosophical argument that Azize engages, but if we are to respect an individual at a difficult and vulnerable point in their life we must understand that a loss of bodily control or the inability to make choices relating to their own physical and mental person might represent to them both a feeling of dependency and of indignity.

As a human right, the right to a dignified death is not recognised in any international human rights conventions, or by the European Court of Human Rights. Many have argued that euthanasia contradicts the inherent right to life enshrined in Article 3 of the Universal Declaration of Human Rights and Article 6(1) of the International Covenant on Civil and Political Rights. I am not sure that a right to die with dignity needs to be accorded the status of an inalienable human right in and of itself. A dying patient who requests medical intervention to end their life is not forfeiting or being arbitrarily deprived of his or her inherent right to life. That patient is simply choosing a peaceful end to intolerable suffering. A dignified death need not take away from the sacredness that we accord to human life. On the contrary, allowing a terminally ill patient to have a dignified and pain-free death is to honour the sanctity of life in its final stages.

Not only was she robbed of her life, but the illegality of euthanasia meant that she was also robbed of her dying.

Protecting the rights of the vulnerable

A concern that many opponents of euthanasia share is that to legalise voluntary euthanasia and/or physician assisted suicide would result in many vulnerable individuals feeling pressured to end their own lives, and that it might be used to the detriment of groups historically oppressed or neglected by institutions such as state-run health care. This is a very serious concern and one that cannot be dismissed lightly. One issue that was raised often in submissions to the Senate inquiry into the ‘Rights of the Terminally Ill Bill’ was that many indigenous Australians, people who may already distrust government services, are wary of euthanasia legislation and may be reluctant to visit a non-indigenous medical practitioner if euthanasia was legalised.

Similar concerns, unique to the society in which the legislation is debated, have arisen elsewhere. In Germany even the term euthanasia is politically loaded. It is associated with the forced euthanasia of millions of Jews, homosexuals, mentally ill and disabled persons under the Nazi regime. For cultural reasons however, assisted suicide is not criminal. As Katrina George has shown, support for voluntary euthanasia and physician assisted suicide is lowest among traditionally vulnerable populations including women, ethnic minorities, and those
from low socio-economic backgrounds. Certainly, it would be a disastrous outcome if a practitioner prescribed lethal treatment in the best interests of a voiceless patient against their wishes.

This ethical dilemma has arguably been largely resolved in the jurisdictions in which euthanasia legislation is operative. Research shows that the inclusion of stringent and numerous safeguards largely protect the system from abuse and that the number of patients choosing to end their own lives has not skyrocketed but has remained stable. While the risk of abuse cannot be eliminated it can be greatly mitigated through the observance of due care measures. In the Netherlands, legislation requires that before a physician can authorise voluntary euthanasia or physician assisted suicide he or she must hold the conviction that the request by the patient was voluntary and well considered and that the patient's suffering is lasting and unbearable. He or she must have informed the patient about their situation and prospects. The physician must share with the patient a conviction that there is no other reasonable solution, and must have consulted at least one other independent physician who has seen the patient and has given his or her written opinion on the requirements of due care.

If Australia was to legalise euthanasia, I would argue that an added condition should be that the patient be suffering from a terminal illness. This was a condition of the Northern Territory legislation but it is certainly not one that all euthanasia advocates agree on. In the Netherlands, shortly after their legislative scheme commenced, the Supreme Court held that a physician who had assisted in the suicide of an 86-year-old suffering from physical decline and from a self-perceived ‘pointless and empty existence’ had contravened the law. The reasoning of the Court being that the patient’s suffering was existential and not medical. Although it is a valid contention that mental illness may be for some an equally painful and distressing experience, we need to draw a line beyond which criminal liability should still be imposed. While I sympathise deeply with the situation of an individual so overwhelmed by the prospect of old age that they are willing to take their own life, I believe that to condone a physician’s assistance in such an act would set a dangerously low standard for the provision of euthanasia.

Regulation of an Existing Practice

Euthanasia is an existing practice in this country. There have been a number of cases in Australia of persons either getting access to a lethal dose of the barbiturate Nembutal and ending their own lives, or of travelling to the Dignitas clinic in Switzerland to obtain a physician assisted death. Some cases, such as the deaths of Angie Belecctiu, Nancy Creek, and Graeme Wylie have been well publicised. Some academics argue that there is in fact little difference between easing treatment or prescribing large quantities of (palliative) pain relief medication where the foreseeable consequence is death and the administration of a drug to hasten that inevitable death. This issue was anticipated by Lord Browne-Wilkinson in Airedale NHS v Bland when he confessed that his finding that removal of futile medical treatment was within the confines of the law may seem to some irrational. He asked, How can it be lawful to allow a patient to die slowly, though painlessly, over a period of weeks from lack of food but unlawful to produce his immediate death by a lethal injection, thereby saving his family from yet another ordeal to add to the tragedy that has already struck them? I find it difficult to find a moral answer to that question. But it is undoubtedly the law and nothing I have said casts doubt on the proposition that the doing of a positive act with the intention of ending life is and remains murder.

Without a clear parliamentary enunciation of the legality of end-of-life practices, and without legalising voluntary euthanasia and/or physician assisted suicide the limits of criminal culpability remain blurred. As euthanasia advocate Dr Rodney Syme argues, the same legal principles should not apply to medically hastened deaths committed in compassion at the request of a patient as are applied to murder. If euthanasia is already occurring, surely it is far better that it occurs in a regulated manner, where practitioners can be held accountable to set standards, where the practice is transparent, conducted in accordance with guidelines, subject to psychiatric and medical assessments and performed with the knowledge and involvement of loved ones.

Death is an incredibly personal experience.

While some fear that legalising euthanasia might lead to a slippery slope of cases, research from other jurisdictions makes evident that this concern cannot be substantiated. In the Netherlands, the legalising of euthanasia in 2002 saw a decrease in the number of people choosing to end their own lives with medical assistance in favour of deep or terminal sedation. In Oregon, figures collected in 2004 showed that over six years the number of persons reported as having died from a prescription of lethal medication per year fluctuated between 16 and 42. The numbers are not large. As Alan Rothschild has shown, on average fewer than one tenth of one percent of Oregonians die from physician assisted suicide.

There are many compelling arguments both for and against legalising voluntary euthanasia and it is essential that each of us arrives at an ethical opinion of the matter that accords with our own conscience. Intuitively, I can see how many of the arguments against voluntary euthanasia are persuasive, appealing as they do to the sanctity of human life. However, many of the core criticisms of voluntary euthanasia are merely speculative and have not been substantiated by the research coming out of jurisdictions in which the practice has been decriminalised. The arguments that do remain are not forceful enough to persuade me personally that a person suffering from a fatal and degenerative disease should not...
have the right to end their own unbearable suffering and experience a peaceful death.

Death is an incredibly personal experience. Each of us gets our own unique death and not every person needs to choose voluntary euthanasia as the means of theirs. Indeed, statistics show that most people, even those living with an untreatable illness, do not. For many, it may contradict a personal morality or religious belief, some may be too stoic, others too committed to the idea of life to end it deliberately regardless of the suffering it causes them. However, that it is not an option that every one of us would take, does not mean that we, as a compassionate and merciful society, should deny it to our fellow human beings. Those individuals and their families experiencing the trauma of a terminal illness, those suffering from physical pain, weakness, loss of breath and fear of the future, deserve our respect and understanding. Each of us has a right to end our lives with dignity, maintaining our autonomy, free from pain and at peace.

References
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