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CONTENTS

MARGARET THORNTON	<i>HOW THE HIGHER EDUCATION 'INDUSTRY' SHAPES THE DISCIPLINE OF LAW: THE CASE OF AUSTRALIA</i>	101
TAMARA TULICH, HARRY BLAGG & AVA HILL-DE MONCHAUX	<i>MISCARRIAGE OF JUSTICE IN WESTERN AUSTRALIA: THE CASE OF GENE GIBSON</i>	118
GEMIMA HARVEY	<i>DEFLECTION AND DETERRENCE: EUROPE'S SHRINKING ASYLUM SPACE AND ITS PARALLELS WITH AUSTRALIAN POLICIES</i>	143
THE HON MICHAEL KIRBY AC CMG	<i>JOHN MARSDEN'S IMPATIENCE AND LGBTIQ RIGHTS: THE ONGOING CHALLENGE FOR EQUALITY</i>	165
ASHRAFUL AZAD	<i>FOREIGNERS ACT AND THE FREEDOM OF MOVEMENT OF THE ROHINGYAS IN BANGLADESH</i>	183
BENEDICT COYNE	<i>'#RIGHTSPLAINING': THE CURRENT AND FUTURE STATUS OF HUMAN RIGHTS IN AUSTRALIA</i>	207

HOW THE HIGHER EDUCATION 'INDUSTRY' SHAPES THE DISCIPLINE OF LAW: THE CASE OF AUSTRALIA

MARGARET THORNTON*

This article argues that a constellation of factors combine to encourage law graduates to pursue a career in corporate law at the expense of alternative destinations. Most notable are the increasingly high tuition fees law students are charged, but the respective roles of government, the admitting authorities, law schools and the profession cannot be discounted. Each change in policy renders resistance more difficult. The proposed higher education changes contained in the 2017 Australian Federal Budget are exemplary. As it is already assumed that law can be offered cheaply while charging high fees, the Budget cuts could induce universities to increase the number of law students as well as the cost of discretionary law degrees, such as the Juris Doctor. This would not only increase competition for law-related jobs in the labour market, but it would also effect a more vocational orientation to the law curriculum.

CONTENTS

I	INTRODUCTION.....	101
II	THE 2017 BUDGETARY PROPOSALS.....	105
III	HOW THE BUDGETARY PROPOSALS ENCOURAGE VOCATIONALISM.....	108
IV	CONCLUSION.....	112

I INTRODUCTION

John Henry Newman, an iconic theorist of the *idea* of the university, believed that cultivation of the intellect was central to a university education. He argued that pursuing knowledge for its own sake contributed to the collective good by raising the intellectual tone of society as a whole.¹ While not endorsing the gendered, colonial, and classed times

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¹ I T Ker (ed), *John Henry Newman: The Idea of a University* (Oxford University Press, 1976) 154.

in which Newman wrote, one can only rue the fact that any semblance of the *idea* of the university has been lost as we confront the risk and uncertainty associated with the marketised university in what is now referred to as the higher education ‘industry’ — touted as Australia’s third most significant export after iron ore and coal, generating AUD\$21.8 billion in revenue in 2016.² The transformation of the *idea* of the university has been effected by a neoliberal policy of state disinvestment in higher education, whereby an increasing proportion of the cost has been shifted from the public purse onto students. In order to make up budgetary shortfalls, universities themselves have had to become market players, which has resulted in what Rob Watts describes as a culture of ‘market-crazed governance’.³ To signify the radical change in the *idea* of the university, managers have replaced professors as the university élite, a class that Watts wittily terms the ‘manageriat’.⁴ The market embrace has profoundly affected not just student aspirations, but what is taught and how it is taught, as I argue in relation to the discipline of law.⁵ As the overall aim of government higher education policy is to produce job-ready workers in order to maximise capital accumulation, the impetus is in favour of applied and functional knowledge, not the disinterested understanding of knowledge that Newman advocated.

The discipline of law not only graphically illustrates the market turn adopted by universities in Australia, Britain, the United States and elsewhere, it also illustrates the desire on the part of modern states to upgrade human capital by developing new knowledge economies. ‘Massification’ is the somewhat cumbersome descriptor that is applied to the dramatic increase of students in tertiary education, which is well illustrated in the case of law. There has been a striking increase in the number of law schools in Australia — from 12 to 40 — in the 30 years since the Dawkins Reforms (1988) were implemented.⁶ With a population of less than 25 million, this number is in stark contrast to that of Canada, which has 25 law schools (only three of which were established in the last

² Universities Australia, ‘Australia’s Education Exports at Record High’ (Media Release, 3 February 2017) <<https://www.universitiesaustralia.edu.au/Media-and-Events/media-releases/Australia-s-education-exports-at-record-high#.WWLUWmdLcY1>>.

³ Rob Watts, *Public Universities, Managerialism and the Value of Higher Education* (Palgrave Macmillan, 2017).

⁴ *Ibid.*

⁵ I have elaborated on these issues elsewhere. See, eg, Margaret Thornton, *Privatising the Public University: The Case of Law* (Routledge, 2012); Margaret Thornton, ‘Legal Education in the Corporate University’ (2014) 10 *Annual Review of Law and Social Science* 19.

⁶ Hon John S Dawkins, *Higher Education: A Policy Statement (White Paper)* (Australian Government Publishing Service, 1988).

40 years) for a population of 35 million. After the Dawkins reforms, Australia created 16 new universities, which were former colleges of advanced education. Their vice-chancellors were keen to establish law schools in the belief that law could be taught cheaply to large numbers of well-credentialed students and the income deployed to subsidise the research-intensive parts of the university, particularly the technosciences. While it is acknowledged that a 'pure market' does not exist in higher education where sellers are free to offer whatever courses they wish at whatever price they wish, and where buyers are free to study whatever they wish wherever they wish,⁷ the normalisation of the discourse of the market has induced universities to emulate practices normally associated with private for-profit corporations. This includes spending money on marketing in order to project a positive image of the university to attract students, particularly high fee-paying international students. The reintroduction of fees in 1988, euphemistically referred to as a 'contribution' (the Higher Education Contribution Scheme (HECS), now FEE-HELP) began at a modest \$1800 across the board, but soon moved to a differential disciplinary schema with law at the top. The higher contribution by law students was predicated on the assumption that they would earn more on graduation by working in private law firms as opposed to humanities or science graduates, and would thereby be able to repay the higher HECS debt more easily.⁸

However, the theory stumbles in light of the fact that the Australian legal profession, with little more than 70 000 practising lawyers,⁹ is unable to absorb the ballooning number of new graduates. It also fails to take cognisance of the fact that well over 50 per cent of law graduates pursue alternative careers in government, business and finance, the community sector, the media, and a host of other destinations. Nevertheless, the assumption underpinning the curriculum, as well as the high fees, is that traditional private practice continues to be the primary destination for law graduates.

⁷ Watts, above n 3, 156 ff.

⁸ Milton Friedman, with the assistance of Rose D Friedman, *Capitalism & Freedom* (University of Chicago Press, 1962) 105.

⁹ Urbis for the Law Society of NSW, '2016 Law Society National Profile: Final Report' (Report, Law Society of NSW, 24 August 2017).

While I agree with Krook that the corporate law firms undoubtedly play a role in entrenching the belief that they represent the ultimate destination for law graduates,¹⁰ I disagree that their role is determinative. The roles of government, the profession, and law schools, all play a role in the production of law graduates as corporate new knowledge workers. The Group of Eight universities (Go8) like to believe that a conveyor belt exists between them and the corporate law firms which, in a neoliberal climate committed to profit maximisation, represents the apex of the legal employment hierarchy for new graduates. Accounts of successful lawyer alumni frequently appear on law school websites to underscore the desirability of corporate legal practice.¹¹ Furthermore, as tuition fees have spiralled upwards, a high-paying corporate job has become economically rational for students themselves.

In the US context, the correlation between rising tuition debt and the pressure to obtain a high-paying position as a lawyer is documented by Brian Tamanaha.¹² He points out that the rule of thumb that 'debt should never exceed starting salary' is already inapplicable as tuition debts for law students have spiralled.¹³ The same caution would appear to apply in the case of law students paying full fees in Australia, a point on which I shall elaborate.

The key role of the admitting authorities in determining the preferred destination for law graduates should not be overlooked, as it ensures the subordination of law schools to the legal profession by mandating eleven areas of knowledge (known as the Priestley Eleven) as a prerequisite for admission to legal practice.¹⁴ Generally speaking, these core areas — including criminal law, torts, contracts, property and equity — echo what has been taught since law schools were first established in universities in the 19th century and, unsurprisingly, accord with the dominant interests of men of property. Nowhere do social justice, legal history, theory, or critique figure in the compulsory canon, although a broadening of the curriculum was a corollary of the modernisation that had been occurring for more than a decade before the Priestley Eleven were mandated in 1992.

¹⁰ Joshua Krook, 'The Role of the Corporate Mega-firm' (2016) 4(2) *Griffith Journal of Law & Human Dignity* 65.

¹¹ Margaret Thornton and Lucinda Shannon, "'Selling the Dream": Law School Branding and the Illusion of Choice' (2013) 23(2) *Legal Education Review* 249.

¹² Brian Tamanaha, *Failing Law Schools* (Chicago University Press, 2012).

¹³ *Ibid* 111.

¹⁴ Margaret Thornton, 'Dreaming of Diversity in Legal Education' in Ron Levy, Molly O'Brien, Simon Rice, Pauline Ridge and Margaret Thornton (eds), *New Directions for Law in Australia* (ANU Press, 2017).

A raft of new subjects, such as discrimination law, racism, social welfare and poverty law were taught from the 1970s onwards, albeit as options, when social liberalism was in the ascendancy. However, the neoliberal turn has seen a prioritising of subjects that privilege property and profits once again, with a tendency to slough off the critical.¹⁵ If law is taught merely as a series of mind-narrowing rules, as Frank Carrigan suggests,¹⁶ the prospects for the transferability of legal skills diminish. Indeed, the proliferation of law schools has seen the Law Admission Consultative Committee adopt a more prescriptive approach to legal education by specifying additional requirements for admission, including the nature of the law degree, its duration and its content, together with modes of teaching and assessment.¹⁷ All these factors combine to exert a homogenising and conservatising effect on the discipline of law, just when the expansion in the number of law schools suggests that greater diversity would be desirable.

Each incremental change by government to strengthen the higher education industry renders resistance more difficult. The changes proposed in the 2017 Australian Federal Budget represent the latest iteration, the effects of which have the potential to cause law students to focus even more single-mindedly on conventional understandings of credentialism and vocationalism.

II THE 2017 BUDGETARY PROPOSALS

The Abbott Coalition Government proposed the deregulation of undergraduate fees in 2014, which would have enabled universities to set their own fees according to what the market would bear. The initiative would have accentuated the neoliberal imperative of privatising public goods. However, there was a public outcry at the prospect of undergraduate degrees costing AUD100 000 and the policy was put on the backburner.¹⁸ The changes proposed in the 2017 Budget were less dramatic but more insidious, involving a modest increase in fees, a lower threshold for repayment of loans and cuts to university

¹⁵ Margaret Thornton, *Privatising the Public University: The Case of Law* (Routledge, 2012), 59–100.

¹⁶ Frank Carrigan, 'The Law Schools of Rapidly Diminishing Returns', *The Australian Financial Review (online)*, 9 August 2016 <<http://www.afr.com/business/legal/the-law-schools-of-rapidly-diminishing-returns-20160808-gqnday>>.

¹⁷ Law Admission Consultative Committee, *Proposal to Admitting Authorities, Accreditation Standards for Australian Law Courses*, February 2017.

¹⁸ See, eg, Paul Kniest, 'Federal Budget and Higher Education Policy: Masterly Inactivity or a Study in Ineptitude' (2016) 23(2) *NTEU Advocate* 16.

funding. An incremental approach to fee increases has shown itself to be politically palatable when there is initially strong opposition from students and the community.

The average cost of a Commonwealth Supported Place (CSP) for a four-year Bachelor of Laws (LLB) degree in 2017 was approximately \$43 983, but the reform proposed that fees would increase from 1.8 per cent each year between 2018 and 2021 to a total increase of 7.5 per cent.¹⁹ This would add approximately \$3000 to the cost of a law degree together with an adjustment for the Consumer Price Index. The budget was silent on the question of full fees, the setting of which is largely the prerogative of individual universities. A full-fee LLB can cost up to \$135 904 at Bond University, although the Juris Doctor (JD) is more commonly full-fee and I suggest that the indirect effect of the budget increase would encourage universities to increase both the cost of the JD and the number of enrolments.

The JD, which has replaced the LLB in both the US and Canada as the basic qualification for practice, was first introduced in Australia in the early 21st century. The number of JD programmes was accelerated after 2009 when a government prohibition on universities charging full fees for undergraduate courses was introduced. As the JD is characterised as a graduate degree, the prohibition was thereby circumvented.²⁰ The JD is now the only degree taught for admission to legal practice at both the University of Melbourne and the University of Western Australia Law Schools. The JD is nevertheless offered by another ten Australian law schools concurrently with the LLB. While there are some Commonwealth Supported Places (CSP) for JD students, the full-fee market has burgeoned. At the University of Western Australia, all places are CSP, whereas the University of New South Wales charged \$119 520 for a three year domestic place and \$131 040 for an international place in 2017.²¹ It is apparent that there is a wide variation between what law schools charge based on what they think the market will bear.

Despite the imperative in favour of privatisation, most Australian universities are still classified as public and are subject to a high degree of regulation. There are three not-for-profit institutions offering law degrees (Australian Catholic University, Bond, and Notre

¹⁹ Australian Government, *The Higher Education Reform Package* (Policy Proposal, May 2017) <https://docs.education.gov.au/system/files/doc/other/ed17-0138_-_he_-_glossy_budget_report_acc.pdf>.

²⁰ Donna M Cooper et al, 'The Emergence of the JD in the Australian Legal Education Marketplace and its Impact on Academic Standards' (2011) 21 *Legal Education Review* 23.

²¹ UNSW Sydney, *UNSW JD — Program Fees* (2017) UNSW Sydney Law <<http://www.law.unsw.edu.au/future-students/unsw-jd/cost>>.

Dame) and one for-profit law school (Sydney City School of Law at TOP Education Institute), which opened in 2016.

A second reform in the 2017 Budget relates to the lowering of the income threshold at which the repayment of FEE-HELP begins. From July 2018, it is proposed that the threshold will be \$42 000 instead of \$55 000,²² which will catch part-time and low paid workers. However, the rate of collection will be cut from four per cent to one per cent of income, which Professor Bruce Chapman, the architect of HECS, suggests will exercise only a minor effect on the majority of debtors.²³ Given the general availability of FEE-HELP as opposed to having to pay fees up-front, the impact would probably deter few students from enrolling in law.

More insidious is the likely effect on students of the third reform, which is a cut in direct funding to universities of \$384.2 million over two years, which will be in the form of an 'efficiency dividend' to the Commonwealth Grant Scheme of 2.5 per cent in 2018 and another 2.5 per cent in 2019.²⁴ The efficiency dividend is determined by completion and attrition rates, as well as student satisfaction rates, and any cuts would be likely to affect students disproportionately in less well-off institutions, which are generally located in outer suburban and regional areas. While the University of Sydney, Australia's oldest university, would lose \$15.7 million in cuts, the effect is unlikely to be catastrophic as its 2015 surplus of \$156.9 million²⁵ was greater than that of any other Australian university.²⁶ Nevertheless, the Go8 universities believe that the impact of the cuts will be significant for all students, as providers would lose more than \$1000 per student.²⁷

In a scathing critique of the cuts, Professor Greg Craven, Vice-Chancellor of the Australian Catholic University, argued that they would 'financially throttle' regional and newer

²² Above n 18, 15-6.

²³ Louise Watson et al, 'Federal Budget 2017: What's changing in Education?', *The Conversation* (online), 9 May 2017 <<http://theconversation.com/federal-budget-2017-whats-changing-in-education-77177>>.

²⁴ Above n 18, 11.

²⁵ Audit Office of New South Wales, *Report on Education 2017* (2017) <<https://www.audit.nsw.gov.au/publications/latest-reports/financial/volume-two-2016-focusing-on-universities/financial-performance-and-reporting>>.

²⁶ Julie Hare, 'Cuts "Hurt Strugglers, Punish the Profitable"', *The Australian* (online), 10 May 2017 <<http://www.theaustralian.com.au/budget-2017/budget-2017-higher-education-cuts-hurt-strugglers-punish-profitable/news-story/580de6ac4cf243dc88d3366c07d6ff75>>.

²⁷ Julie Hare, 'Students Set to Pay More for Less: Go8', *The Australian* (online), 14 June 2017.

universities,²⁸ which depend far more on government funding than the established universities. Thus Western Sydney University, which Craven describes as a 'great engine of social justice', depends on government for 41 per cent of its funding, compared with the University of Sydney, which receives 15 per cent from government.²⁹ The result of this inequitable funding model is that it favours those institutions with substantial endowments and positional goods acquired by virtue of age and location, while impoverishing others. Victoria University, for example, faces a cut of \$6.5 million, despite already having a deficit of \$12.6 million; job losses and a reduction in student services have been foreshadowed.³⁰

III HOW THE BUDGETARY PROPOSALS ENCOURAGE VOCATIONALISM

While the deferred repayment regime is intended to ensure equitable access for all students, the full-fee JD is likely to appeal more to middle class students than to those from low socio-economic backgrounds because of its high cost. Furthermore, as the FEE-HELP limit is approximately \$100 000, any fee differential above that is payable directly by the student. Research in the US and the UK, as well as Australia, has shown that fees are a strong deterrent to the poorest 10 per cent of students,³¹ despite the existence of FEE-HELP. It is therefore notable that increased tuition fees are causing class to be inserted by stealth into the discipline of law once again.

The disproportionate impact of a deregulated market is apparent in the US, where law school enrolments have plummeted since 2010, attributed to skyrocketing tuition and a bleak entry-level job market.³² When annual tuition fees were raised above US\$50 000 per annum by the Ivy League Law Schools, the non-elite schools felt compelled to follow suit to

²⁸ Greg Craven, 'End nears for sector as we know it', *The Australian*, 31 May 2017, 33.

²⁹ *Ibid.*

³⁰ Peter Dawkins, 'Cuts threaten reforms aimed at surplus', *The Australian* (online), 7 June 2017 <<http://www.theaustralian.com.au/higher-education/cuts-threaten-victoria-universitys-reforms-aimed-at-surplus/news-story/9d15a8e96b799870c36e4c7bfbbc7185>>.

³¹ Christine Mulhern, Richard R Spies and D Derek Wu, 'The Effect of Rising Student Costs in Higher Education: Evidence from Public Institutions in Virginia' (2015) *Ithaca S+R* <<http://www.sr.ithaca.org/publications/the-effects-of-rising-student-costs-in-higher-education/>>; Business, Innovation and Skills Committee, Great Britain Parliament House of Commons, *Government Report of Higher Education: 12th Report of Session, Vol 1* (2011); Ani Wieranga, Evelina Landstedt and Johanna Wyn, 'Revisiting Disadvantage in Higher Education' (Report, Youth Research Centre: University of Melbourne, November 2013) <http://socialequity.unimelb.edu.au/_data/assets/pdf_file/0004/1979536/revisiting_disadvantage_in_higher_education.pdf>.

³² Karen Sloan, 'Number of Students Enrolling in Law School Basically Flat', (2016) *The National Law Journal* <<http://www.nationallawjournal.com/id=1202774844249/Number-of-Students-Enrolling-in-Law-School-Basically-Flat>>.

show that they were competitive.³³ The rapid rise in fees and the collapse of the legal labour market as a result of the global financial crisis ('GFC') meant that students from non-élite institutions were confronted with substantial debts but were unable to meet their loan repayments because they could not obtain sufficiently well-paying jobs to service their loans.³⁴

While the situation may not yet be as dire in Australia because of the deferred repayment scheme, the 2017 budgetary reforms do not augur well for the discipline of law. Each time that fees are increased, the pressure on students to aspire to high-paying jobs on the corporate track is ratcheted up. This is despite the claim in the Budget that it will 'deliver a fairer and more sustainable higher education system that is more responsive to the aspirations of students'.³⁵ 'Massification' has also heightened competition for the relatively small proportion of corporate track positions available. For example, when Clifford Chance sought to appoint four to six summer clerks in 2015, it received 600 applications.³⁶ The private legal profession cannot absorb approximately 8000 new graduates each year, even though an increasing number of graduates are moving into alternative positions, such as in-house lawyering in private corporations.³⁷ The flood of new law graduates anxious to begin their careers in private law firms also fails to take cognisance of the reality that the demand by law firms for traditionally trained graduates is shrinking due to 'off-shoring' and other efficiency measures.³⁸ Furthermore, law is reported to be in the vanguard of technological innovation,³⁹ a scenario that is likely to complicate the situation further for entry-level lawyers.

The reduction in university funding also deleteriously affects teaching. Reduction in staffing invariably means a preference for large lectures over small-group teaching so that students

³³ Tamanaha, above n 12, 132.

³⁴ RW Bourne, 'The Coming Crash in Legal Education: How we got Here, and Where we go Now' (2011-12) 45 *Creighton Law Rev* 651; Tamanaha, above n 25.

³⁵ Australian Government, *Budget Overview* (2017) Budget 2017-18 <<http://budget.gov.au/2017-18/content/glossies/overview/download/Budget2017-18-Overview.pdf>> 19.

³⁶ Edmund Tadros and Katie Walsh, 'Too many law graduates and not enough jobs', *Australian Financial Review* (online), 22 October 2015 <<http://www.afr.com/business/legal/too-many-law-graduates-and-not-enough-jobs-20151020-gkdbyx>>.

³⁷ Mahlab, 'Mahlab Report 2016' (Report, Mahlab, 2016).

³⁸ William D Henderson, 'From Big Law to Lean Law' (2014) 38 *International Review of Law and Economics* 5.

³⁹ Richard Susskind, *Tomorrow's Lawyers: An Introduction to your Future* (Oxford University Press, 2013).

are afforded little opportunity to interrogate the knowledge being communicated to them. They are reduced once again to the status of passive learners who are expected to accept unquestioningly the views of the 'sage on the stage', and regurgitate them in exams, a model that law teaching moved away from some time ago.⁴⁰ An increasingly popular cost saving alternative is to offer courses on-line, a pedagogy that also lends itself more easily to doctrinal and applied knowledge, which invariably means a contraction of critique. Indeed, it is not the aim of higher education in a neoliberal climate to produce critically aware students, but a pool of skilled human capital to enhance competitiveness.⁴¹ This paradigm leaves little space for the pursuit of social justice concerns within the mainstream curriculum. While there are always individual students who want to make a difference, my argument is that concerns about rising debt and increased competition encourage students to seek, and law schools to offer, a more traditional doctrinally-oriented curriculum that is believed to appeal to prospective private law firm employers.

As the level of debt confronted by law students has soared, students have become more concerned about their employment prospects, so that the vocational sub-text remains in the curricular foreground. As ten law schools charge around AU\$100 000 for their full-fee JD, the pressure to secure a high-paying job on graduation has intensified. When the cap on undergraduate enrolments was lifted in 2012,⁴² universities were free to increase their enrolments based on demand. Thus, the combination of uncapped demand for the LLB together with expanded JD enrolments has served to increase the number of law graduates dramatically. However, this impetus is unlikely to slow down, for the effect of the budgetary cuts is likely to induce universities to increase the 'tax' that they already exact from their law schools to meet the further funding deficit. This is likely to engender pressure to raise the cost of full fee courses as well as to augment the student intake. We can therefore expect to see more JD and masters programmes. Initiatives to increase the proportion of international students enrolled in JD programs are already underway in several law schools in light of the higher fees they command. Fee increases invariably shift curricular demands

⁴⁰ Marlene Le Brun and Richard Johnstone, *The Quiet (R)evolution: Improving Student Learning in Law* (Law Book, 1994); Cf Mary Keyes and Richard Johnstone, 'Changing Legal Education: Rhetoric, Reality and Prospects for the Future' (2004) 26(4) *Sydney Law Review* 537.

⁴¹ Mark Purcell, *Recapturing Democracy: Neoliberalization and the Struggle for Alternative Urban Futures* (Routledge, 2008).

⁴² Hon Dr David Kemp and Andrew Norton, Submission to Department of Education, Australia, *Review of the Demand Driven Funding System*, 2014.

to a greater focus on traditional market-based legal knowledge that is applied and functional; social justice, theory and critique do not fit this paradigm.

This is illustrated by a publication prepared for law graduates by Graduate Careers Australia and supported by the College of Law in Sydney, acknowledging the generalist nature of the law degree and the wide range of careers available; but the areas needing lawyers included banking and finance, property, corporate, commercial, and mergers and acquisitions,⁴³ that is, they were the conventional areas of corporate practice associated with profit maximisation. The inference is that issues of social justice affecting individuals, such as the high incidence of discrimination, harassment and bullying in legal workplaces,⁴⁴ is of little consequence as the cost of access to justice for those affected is largely beyond their ability to pay.⁴⁵ The profits engendered by corporate law firms justifies their domination of legal practice in a neoliberal context where capital accumulation is lauded.⁴⁶ Legal aid commissions, community legal centres and specialist legal services receive minimal support from the state, which means that only the very poorest citizens are eligible for aid.⁴⁷ This excludes multiple employees who might have been victims of corporate malpractice. Indeed, many ordinary citizens, including those in regional, rural, and remote (RRR) areas cannot afford access to legal services.⁴⁸ Neoliberalism has seen a turning away from the support for legal aid from the public purse, as with social justice initiatives more generally. While law is invariably a middle class occupation that supports middle class interests, it has also been associated with challenging oppressive government policies and righting wrongs.⁴⁹ Of course, there is nothing to stop such initiatives by committed law graduates, but it is undoubtedly more difficult to do so in a context of privatisation,

⁴³ Graduate Careers Australia, *Careers for Law Graduates*, Graduate Careers Australia (2008) <http://www.graduatecareers.com.au/wp-content/uploads/2011/12/careers_for_law_graduates.pdf>.

⁴⁴ See, eg, Law Council of Australia, 'National Attrition and Re-engagement Study (NARS) Report' (Report, Law Council of Australia, 2014); Joanne Bagust, 'The Culture of Bullying in Australian Corporate Law Firms' (2014) 17(2) *Legal Ethics* 177; Paula Baron, 'The Elephant in the Room? Lawyer Wellbeing and the Impact of Unethical Behaviours' (2015) 41(1) *Australian Feminist Law Journal* 87.

⁴⁵ Community Law Australia, 'Unaffordable and Out of Reach: The Problem of Access to the Australian Legal System' (Report, Community Law Australia, 2012) 3 ff.

⁴⁶ See, eg, David Harvey, *A Brief History of Neoliberalism* (Oxford University Press, 2005) 159 *et seq.*

⁴⁷ Law Council of Australia, *Federal Election Policy Platform* (Law Council of Australia, 2016) 3.

⁴⁸ Productivity Commission (Australian Government), 'Access to Justice Arrangements: Productivity Commission Inquiry Report' (Report, Productivity Commission, 3 December 2014).

⁴⁹ Law Council, above n 47; Law Council of Australia, 'Federal Election Policy Platform' (Policy, Law Council of Australia, 2016).

corporatisation and debt.

Nickolas James acknowledges the dominance of vocationalism within contemporary legal education discourse that is supported by governments, universities, and law schools, but he is critical of the inability of those who question the focus on vocationalism without being able to stop it from gathering momentum.⁵⁰ His solution is to appropriate the concept of professionalism in order to 'hijack vocationalism's dominance'. James favours a broad understanding of professionalism that incorporates a commitment to social justice, as well as ethical reasoning and the public good. While the incorporation of this broad concept of professionalism within legal pedagogy is welcome, it is hard to see it supplanting vocationalism, which is the linchpin of the higher education industry. James does not address the problem posed by 'massification' of legal education that has given rise to the intensity of competition in the legal labour market, or the profound impact of the shift from free higher education to a user-pays regime, even if the impact on students is mitigated by the deferred repayment mechanism. Vocationalism is an ever-present sub-text for fee-paying students, which animates not only their employment aspirations, but also shapes the curriculum, particularly as determined by the admitting authorities. Most students will simply not enrol in feminist legal theory, welfare law or legal history if they think that such subjects are unlikely to carry the same weight with prospective employers as global business, corporate tax or international trade law.

IV CONCLUSION

Newman's *idea* of the university as a site of disinterested knowledge has been rendered passé as higher education has been seduced by the embrace of the market. Although many young people come to law school animated by a commitment to social justice and a desire to make the world a better place, the opportunities to do so have contracted as students are seduced by the lure of the corporate track. As 'rational egoists', they pragmatically recognise that such a choice is the best way to minimise their student debt. Higher education, however, is a preeminent public good and to halt the privatising imperative, Australia might have to consider following the example of Germany and Chile by abolishing fees, and as Labour Leader, Jeremy Corbyn, has pledged to do in the UK.

⁵⁰ Nickolas J James, 'More than Merely Work-ready: Vocationalism Versus Professionalism in Legal Education' (2017) 40(1) *University of New South Wales Law Journal* 186, 198.

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MISCARRIAGE OF JUSTICE IN WESTERN AUSTRALIA: THE CASE OF GENE GIBSON

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On 12 April 2017, the Western Australian Court of Appeal overturned the conviction of Gene Gibson, a young Aboriginal man who had spent nearly five years in prison after pleading guilty to the manslaughter of Joshua Warneke. The Court of Appeal unanimously quashed Mr Gibson's conviction on the basis that he suffered a miscarriage of justice as, amongst other things, he did not adequately understand the legal process, the case against him, or the nature and implications of his plea of guilty because of his cognitive impairments and English language difficulties. This article outlines the systemic failings of the Western Australian justice system in responding to Aboriginal peoples highlighted by this case and, in particular, Aboriginal persons suspected of having some form of cognitive impairment. We argue that the reforms instigated by the Western Australian Police in response to this case, while welcome changes, will not, of themselves, resolve many of the underlying problems that led to this miscarriage of justice. We argue that these reforms need to be accompanied by changes to Western Australia's mentally impaired accused regime, and must be developed within a broader paradigm shift that nurtures and strengthens community justice mechanisms and ensures greater partnership with Aboriginal people.

CONTENTS

I	INTRODUCTION.....	119
II	BACKGROUND.....	121

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III	SYSTEMIC FAILINGS OF THE WESTERN AUSTRALIAN JUSTICE SYSTEM.....	125
IV	A NEW PARADIGM: DECOLONISING CRIMINAL JUSTICE IN WESTERN AUSTRALIA.....	130
	<i>A The Paradigm Shift</i>	131
	<i>B Legislative Reform</i>	132
	<i>C Indefinite Detention Without Trial</i>	132
	<i>D A Country-Centric Approach</i>	134
	<i>E Making Diversion “Work”</i>	136
	<i>F Solution-Focused Courts</i>	137
V	CONCLUSION.....	138

I INTRODUCTION

On April 12 2017, the Western Australian Court of Appeal overturned Gene Gibson’s conviction for the manslaughter of Joshua Warneke, a 21-year-old man killed in the early hours of 26 February 2010.¹ Mr Warneke’s body was discovered on the side of the Old Broome Road by a taxi driver, and a post-mortem examination concluded the cause of death to be ‘head injury in a man with acute alcohol intoxication’, including extensive fracturing of the skull.² Expert opinion excluded injury from a car as the cause of death.³ Two years after the incident, Mr Gibson, an Aboriginal man from the remote community of Kiwirrkurra in the Gibson Desert in Western Australia, was identified as a person of interest in the investigation. Mr Gibson was 18 years old at the time of Mr Warneke’s death.

In 2012, following admissions made in interviews with the WA Police, Mr Gibson was charged with the murder of Joshua Warneke. He pleaded not guilty and a trial date was set

¹ Victoria Laurie, ‘Manslaughter Conviction Overturned, Gene Gibson Free’, *The Australian* (online), 13 April 2017 <<http://www.theaustralian.com.au/news/nation/manslaughter-conviction-overturned-gene-gibson-free/news-story/c5306a062d9f7e969ad745be8f95f619>>; ‘Gene Gibson Freed as Conviction for Broome Manslaughter of Josh Warneke Quashed’, *ABC News* (online), 12 April 2017 <<http://www.abc.net.au/news/2017-04-12/gene-gibson-josh-warneke-manslaughter-conviction-quashed-appeal/8436550>>. The Court of Appeal made its decision known on 12 April 2017, however the reasons for the decision were published on 28 July 2017: *Gibson v Western Australia* [2017] WASCA 141 (Buss P, Mazza and Beech JJA).

² *State of Western Australia v Gibson* [2014] WASC 240, [5] (Hall J); Corruption and Crime Commission, *Report on Operation Aviemore: Major Crime Squad Investigation into the Unlawful Killing of Mr Joshua Warneke* (Report, Corruption and Crime Commission, 5 November 2015) [7].

³ Corruption and Crime Commission, above n 2, [8].

for August 2014. In early July 2014, the police interviews were ruled inadmissible by the WA Supreme Court on the basis that the interviews were involuntarily obtained in breach of the *Criminal Investigation Act 2006* (WA) — the primary source of police powers in Western Australia — and that their admission would be unfair to Mr Gibson.⁴ Despite this, in July 2014, Mr Gibson pleaded guilty to manslaughter and, on 22 October 2014, was sentenced to seven years and six months imprisonment.⁵ In November 2016, Mr Gibson was granted leave to appeal against his conviction,⁶ and his appeal was heard in early April 2017. The Court of Appeal unanimously quashed Mr Gibson’s manslaughter conviction on the basis that he suffered a miscarriage of justice, because his plea of guilty ‘was entered in circumstances in which the integrity of the plea was impugned’ by, amongst other things, the likelihood that Mr Gibson ‘did not understand adequately’ the legal process, the case against him, legal advice about his plea or the consequences of pleading guilty, and the real risk ‘that the plea was not attributable to a genuine consciousness of guilt’.⁷ The Court of Appeal found that Mr Gibson had ‘significant and pervasive’ cognitive impairments, English language difficulties, and a ‘tendency for gratuitous concurrence’ at all material times.⁸ Mr Gibson was released after spending nearly five years in prison.⁹

As we will outline, this case highlights a number of systemic failings of the Western Australian justice system in responding to Aboriginal peoples and, in particular, Aboriginal persons suspected of having some form of cognitive impairment. The 2015 Report of the Corruption and Crime Commission, for example, identified systemic weaknesses in WA Police’s interviewing of Aboriginal witnesses and suspects, as well as in the administration of cautions to persons with English as a second language.¹⁰ The Commission also identified broader issues with breaches of the *Criminal Investigation Act 2006* (WA) and involuntary confessions.¹¹

⁴ *State of Western Australia v Gibson* [2014] WASC 240, 59, [183] (Hall J).

⁵ *State of Western Australia v Gibson* [2014] WASC 203 (Jenkins J).

⁶ ‘Josh Warneke Death: Gene Gibson Granted Leave to Appeal Against Conviction over Broome Killing’ *ABC News* (online), 15 November 2016 <<http://www.abc.net.au/news/2016-11-15/josh-warneke-death-case-gene-gibson-granted-leave-to-appeal/8026114>>.

⁷ *Gibson v Western Australia* [2017] WASCA 141, 79 [157] (Buss P, Mazza and Beech JJA).

⁸ *Ibid* 80 [161], 89 [200] (Buss P, Mazza and Beech JJA).

⁹ On 28 July, it was reported that Mr Gibson will seek compensation for his wrongful conviction: Irena Ceranic, ‘Gene Gibson Seeks Compensation over Wrongful Conviction for Josh Warneke Manslaughter’ *ABC News* (online), 28 July 2017 <<http://www.abc.net.au/news/2017-07-28/gene-gibson-to-sue-over-josh-warneke-conviction/8753032>>.

¹⁰ *Ibid* n 2, 33–41.

¹¹ *Ibid*.

Following the Court of Appeal decision, Premier Mark McGowan said that ‘a modern justice system should not fall down because people didn’t understand the language or suffered mental impairment’.¹² We agree and argue that a paradigm shift is required to improve the responsiveness of the Western Australian justice system to Aboriginal peoples and, in particular, to Aboriginal people with mental impairment. A shift of this kind would minimise the risk of miscarriages of justice. The proposed paradigm shift entails diversion into Aboriginal-owned therapeutic alternatives, particularly in the emerging sphere of “on-country” initiatives, drawing on the authority of Elders and respected persons in the Aboriginal community, and optimising opportunities for timely screening and intervention. We argue that this, combined with the changes instigated by WA Police in response to this case, can contribute to ensuring the Western Australian justice system does not continue to “fall down” when responding to Aboriginal peoples, and in particular young Aboriginal persons suspected of having cognitive impairment.

II BACKGROUND

Between 2010 and 2012, several people, including Mr Gibson, were identified as persons of interest in the homicide investigation into the unlawful killing of Mr Warneke undertaken by the Major Crime Squad in Perth, called ‘Operation Aviemore’.¹³ Mr Gibson became known to the police through ‘vague and contradictory’ information about a stolen vehicle being involved in the murder.¹⁴ Some witnesses suggested that Mr Gibson was seen in the car, while others indicated that he might have been involved in the death.¹⁵ Detective Senior Sergeant Baddock, then Officer in Charge of Broome Detectives, recommended that other witnesses be interviewed before Gibson; however this advice was not heeded.¹⁶ At the end of July 2012, it was decided that Mr Gibson was to be interviewed as a *witness*.¹⁷

On 16 August 2012, Detectives Gazzzone and Shannon flew to Kiwirrkurra to interview Mr Gibson.¹⁸ The interview lasted for almost three hours and no interpreter was present,

¹² Tim Clarke, ‘How Justice Failed Gene Gibson,’ *The West Australian* (online), 13 April 2017 <<https://thewest.com.au/news/wa/how-justice-failed-gene-gibson-ng-b88442950z>>.

¹³ Corruption and Crime Commission, above n 2, 3.

¹⁴ *Ibid* 4.

¹⁵ *Ibid* 3.

¹⁶ *Ibid*.

¹⁷ *Ibid* 5.

¹⁸ *Ibid* 6.

despite the fact that Mr Gibson's spoken language was Pintupi, a local Aboriginal language.¹⁹ As Detective Shannon prepared the written statement, Mr Gibson made a comment, 'significantly inconsistent with earlier comments', to the effect that he had struck the deceased with a vehicle.²⁰ Following this admission, Detective Gazzone contacted his supervisor, who instructed him to treat Mr Gibson as a suspect and continue the interview.²¹ It was not until after Mr Gibson made a further admission that he had assaulted the deceased that a camera was used to record the interview.²² A senior member of the Kiwirrkurra Community was then arranged to be an 'interview friend' and translator.²³ Not long after the commencement of the recorded interview, Mr Gibson exercised his right to obtain legal advice.²⁴ Mr Gibson spoke, by phone, to Ms Kilby, a lawyer from the Kalgoorlie office of the Aboriginal Legal Service ('ALS'), and was advised not to answer any more questions.²⁵ Despite this, the interview continued, with neither Detective clarifying whether Mr Gibson was willing to do so.²⁶

When the Detectives returned to Broome the next day, Detective Senior Sergeant Baddock listened to their account of the interview and advised Detective Sergeant Western, the Senior Investigating Officer, to redo the interview, offering to arrange for an interpreter.²⁷ This offer was declined, with Detective Sergeant Western relying on the interviewing detectives' accounts of Mr Gibson's English competency.²⁸ Mr Gibson then accompanied the detectives on a re-enactment and participated in a further interview. During the Broome interview, Mr Gibson was not assisted by an interpreter or an interview friend, nor was he given the opportunity to seek further legal advice.²⁹ Mr Gibson was charged with murder, to which he pleaded not guilty, and a trial date was set for August 2014.

In March 2014, Mr Gibson applied to the WA Supreme Court for a ruling that the Kiwirrkurra and Broome interviews were 'inadmissible because his participation was not voluntary and because the police failed to comply with the *Criminal Investigation Act 2006*

¹⁹ Ibid.

²⁰ *State of Western Australia v Gibson* [2014] WASC 240, 4 [8].

²¹ Corruption and Crime Commission, above n 2, 6.

²² Ibid.

²³ Ibid; *State of Western Australia v Gibson* [2014] WASC 240, 4.[9].

²⁴ Corruption and Crime Commission, above n 2, 7.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid 8.

(WA)', including the right to be assisted by an interpreter or other qualified person during an interview.³⁰ The *Criminal Investigation Act 2006* (WA) codifies police powers and responsibilities, and is the primary source of police powers in the State. Justice Hall held that the interviews between Mr Gibson and the Detectives on 16 and 17 August 2012 were inadmissible, as 'they were not voluntary, were obtained in breach of the CIA and to admit them would, in any event, be unfair to the accused'.³¹ Despite this, in July 2014, Mr Gibson pleaded guilty to manslaughter and, on 22 October 2014, was sentenced to seven years and six months imprisonment.³²

Following the Supreme Court's decision, the CCC commenced an investigation into 'Operation Aviemore' to determine if members of the WA Police had 'engaged in misconduct and/or reviewable police action during the investigation of the death of Joshua Warneke and the subsequent arrest and prosecution of Gene Gibson'.³³ The CCC found that the case demonstrated a number of 'systemic weaknesses', including a failure on the part of the WA Police to comply with the *Criminal Investigation Act 2006* (WA) and the WA Police Manual, which indicates accepted police practice.³⁴ Alongside the CCC, the WA Police Internal Affairs Unit also investigated the events of 16 and 17 August 2012 and instigated disciplinary proceedings in relation to a number of officers involved in the matter, resulting in three officers facing disciplinary charges under s 23 of the *Police Act 1982* (WA).³⁵

These reviews were key to the appeal against conviction leading to Mr Gibson's release. Lawyer Michael Lundberg noted the importance of the detailed reviews undertaken by the Internal Affairs Unit of the WA Police and the CCC, claiming that they 'helped focus the spotlight on Gene's case and his incarceration, and they both provided the catalyst for the bringing of this appeal'.³⁶

³⁰ *State of Western Australia v Gibson* [2014] WASC 240, 4–7 [12].

³¹ *Ibid* 58, [183] (Hall J).

³² *State of Western Australia v Gibson* [2014] WASC 203 (Jenkins J).

³³ Corruption and Crime Commission, above n 2, [47].

³⁴ *Ibid* 1. See also Chapters 6–10.

³⁵ *Ibid* [44], [232]; Kathryn Diss, 'Two WA Police Officers Face Possible Demotion over Bungled Josh Warneke Investigation' *ABC News* (online), 7 January 2016 <<http://www.abc.net.au/news/2016-01-07/wa-police-officers-face-disciplinary-action-josh-warneke-case/7074072>>.

³⁶ 'Gene Gibson: Indigenous Man Jailed over Josh Warneke's Death Has Conviction Overturned' *The Guardian* (online), 12 April 2017 <<https://www.theguardian.com/australia-news/2017/apr/12/gene-gibson-indigenous-man-jailed-over-josh-warnekes-death-has-conviction-overturned>>.

Mr Gibson's appeal against his conviction was heard on 3–6 April 2017 by the WA Court of Appeal. In a joint judgment, the Court of Appeal accepted the unchallenged evidence led on appeal of Ms Marley, a clinical psychologist, and Dr Vuletich, a clinical neuropsychologist. This evidence established that 'at all material times' Mr Gibson 'suffered from cognitive impairments that were significant and pervasive'.³⁷ These impairments 'seriously affected his capacity':

- (a) to function in day-to-day life;
- (b) to respond effectively in novel situations, especially those requiring abstract or flexible thinking;
- (c) to make decisions of importance;
- (d) to understand the implications of decisions of importance;
- (e) to understand complex oral instructions involving several steps;
- (f) to evaluate, weigh and synthesise several pieces of information;
- (g) to remember reliably detailed information;
- (h) to pursue and complete complex or challenging tasks;
- (i) to formulate and reflect on alternative strategies;
- (j) to ask questions to clarify his understanding or lack of understanding; and
- (k) to seek support from others.³⁸

On the basis of this evidence, the Court of Appeal was also satisfied that Mr Gibson is:

- (a) shy and reserved;
- (b) compliant and agreeable;
- (c) vulnerable to suggestions by others;
- (d) at risk of responding to others in a manner which he thinks will please them or secure their approval;

³⁷ *Gibson v Western Australia* [2017] WASCA 141, 80 [160] (Buss P, Mazza and Beech JJA).

³⁸ *Gibson v Western Australia* [2017] WASCA 141, 80 [160] (Buss P, Mazza and Beech JJA).

- (e) at risk of behaving in accordance with what he thinks others expect of him;
- (f) at risk of acquiescing or agreeing when questioned, rather than seek clarification about concepts, proposals or alternatives that he does not understand;
- (g) not necessarily reliable in expressing a clear and consistent choice with respect to alternative courses of action presented to him for decision; and
- (h) prone to some inflexibility in his thinking and a tendency to revert to over-learned, automatic responses,
- (i) and that these characteristics are attributable, to a significant extent, to his cognitive impairments.³⁹

The Court also found that Mr Gibson had limited English language proficiency: he could not read written English, and his oral English skills were inadequate to understand and communicate in the context of the issues raised in the police interviews and legal proceedings, including giving instructions and receiving legal advice.⁴⁰

The Court found that a miscarriage of justice had occurred as, due to his cognitive impairment and English language difficulties, Mr Gibson did not adequately understand the nature and implications of his plea of guilty, legal advice regarding the plea, the legal process, or the case against him.⁴¹ Further, there was a real risk 'that the plea was not attributable to a genuine consciousness of guilt'.⁴² The Court set aside the conviction for manslaughter and entered a judgment of acquittal.

III SYSTEMIC FAILINGS OF THE WESTERN AUSTRALIAN JUSTICE SYSTEM

There were a number of problems with the treatment of Mr Gibson, identified by Hall J in *State of Western Australia v Gibson*,⁴³ the Court of Appeal in *Gibson v Western Australia*,⁴⁴ and by the CCC in its 2015 Report,⁴⁵ which highlight systemic failings in the Western

³⁹ Ibid 80-1 [162] (Buss P, Mazza and Beech JJA).

⁴⁰ Ibid.

⁴¹ *Gibson v Western Australia* [2017] WASCA 141, 79 [157] (Buss P, Mazza and Beech JJA).

⁴² Ibid.

⁴³ [2014] WASC 240.

⁴⁴ [2017] WASCA 141.

⁴⁵ Corruption and Crime Commission, above n 2.

Australian justice system in relation to Aboriginal persons and, in particular, those suspected of having a cognitive impairment. These failings were conducive to the miscarriage of justice that occurred.

First, Mr Gibson was initially interviewed *as a witness*, not a suspect. As a result, he was not cautioned or arrested, and the interview was not recorded. An interpreter was not used. During this unrecorded interview, it was alleged that Mr Gibson made an admission of guilt. He was then arrested on suspicion of murder, and the detectives commenced recording the interview. The decision to interview Mr Gibson as a witness meant that he had limited rights. When a person is accompanying police, s 28 of the *Criminal Investigation Act 2006* (WA) only requires that police officers inform the person they are not under arrest, not required to accompany police, and are free to leave at any time. By contrast, where a person is suspected of having committed an offence, a number of rights come into play.

Justice Hall found that there was sufficient information available for the police to reasonably suspect Mr Gibson was responsible for the death of Mr Warneke.⁴⁶ As such, Mr Gibson should have been arrested and afforded the rights set out under ss 137(3) and 138(2) of the *Criminal Investigation Act 2006* (WA), including the right to be assisted by an interpreter or other qualified person, to be cautioned before being interviewed as a suspect, and to communicate with a lawyer. The interview should also have been recorded.⁴⁷ It is important to note that Hall J found that the decision to interview Mr Gibson as a witness was an honest but mistaken one — a mistaken but defensible decision that the CCC reported ‘had grave consequences’.⁴⁸

Second, there was a failure to ensure that Mr Gibson, once arrested, was assisted by a qualified interpreter as required by ss 137(3)(d) and 138(2)(d) of the *Criminal Investigation Act 2006* (WA). Once arrested, a senior member of Mr Gibson’s community attended as an interview friend. Mr Gibson and his interview friend conversed in the local Aboriginal language, Pintupi. Mr Gibson was not provided with an independent, qualified interpreter. His Honour found:

⁴⁶ *State of Western Australia v Gibson* [2014] WASC 240, 17 [43].

⁴⁷ *Criminal Investigation Act 2006* (WA) s 118.

⁴⁸ *State of Western Australia v Gibson* [2014] WASC 240, 17 [44]; Corruption and Crime Commission, above n 2, 6 [28].

Because the accused had only a very limited understanding of English the absence of an interpreter means that I cannot be confident that he understood what the police said to him about his rights. Nor can I be confident he sufficiently understood police questions or that his answers can be accepted at face value.⁴⁹

These findings were endorsed by the Court of Appeal.⁵⁰ The *Criminal Investigation Act 2006* (WA) obliges the police to use an interpreter or other qualified person when they are required to inform a person about matters such as their rights when the person cannot sufficiently understand or communicate in English. The WA Police Manual also provides that a professional independent interpreter must be used, stating that WA Police should not assume Aboriginal Australians who speak some English (as their second, third, or fourth language) are able to fully understand their legal rights and responsibilities in English, and that they may require an interpreter.⁵¹ The manual's recommended English language test was not administered. Justice Hall found that an interpreter was required — a finding endorsed by the Court of Appeal.⁵²

Third, problems were identified with the administering of the caution to Mr Gibson. In Western Australia, an arrested person must be given a caution before being interviewed as a suspect pursuant to s 138(2)(b) of the *Criminal Investigation Act 2006* (WA). A caution usually includes words to the effect that 'you have the right not to answer questions, and any answers can be used in evidence against you'.⁵³ The purpose of a caution is to ensure that any confession made is voluntary. Justice Hall stated, '[a]dmissions made out of court are not admissible in evidence unless they are made voluntarily ... in the exercise of free choice to speak or be silent'.⁵⁴ The caution must be given in clear and unequivocal terms and understood by an arrested person.⁵⁵ Where a person has an insufficient understanding of English, an interpreter should be used.⁵⁶ One way to ensure that a suspect understands

⁴⁹ *State of Western Australia v Gibson* [2014] WASC 240, [84] (Hall J).

⁵⁰ *Gibson v Western Australia* [2017] WASC 141, 83 [174] (Buss P, Mazza and Beech JJA).

⁵¹ *State of Western Australia v Gibson* [2014] WASC 240, [80]–[82] (Hall J).

⁵² *State of Western Australia v Gibson* [2014] WASC 240, [83] (Hall J); *Gibson v Western Australia* [2017] WASC 141, 83–4 (Buss P, Mazza and Beech JJA).

⁵³ *Criminal Investigation Act 2006* (WA) s 138(2)(b).

⁵⁴ *State of Western Australia v Gibson* [2014] WASC 240, [160] (Hall J).

⁵⁵ *Ibid* [147] (Hall J).

⁵⁶ *Criminal Investigation Act 2006* (WA) s 10.

their rights is to have them explain the caution in their own words. This is recommended by the WA Police Manual.

Justice Hall found it was unlikely Mr Gibson understood the caution as he was given conflicting messages about it. Mr Gibson was never asked to explain in his own words what the caution meant.⁵⁷ The Court found the detectives could not have been satisfied that Mr Gibson understood the caution, and in particular his right to silence. This was compounded by directives given by the interview friend, who was a person in authority in Mr Gibson's community, which were regarded by the Court as imperative commands to Mr Gibson to speak to police.⁵⁸

Fourth, there was a failure to cease the interview after Mr Gibson's lawyer advised police that Mr Gibson did not wish to answer questions. During the interview, Mr Gibson was made aware of his right to contact a lawyer, and he contacted a lawyer in the Kalgoorlie office of the ALS.⁵⁹ The lawyer advised the police officers that Mr Gibson did not wish to answer questions. However, the interview was not stopped, and continued for some six hours including breaks. Mr Gibson made further admissions during this time. Justice Hall found that it was 'inappropriate for the police to continue with the interview in these circumstances'.⁶⁰

Fifth, problems were identified with the role of the 'interview friend'. An interview friend acts as a support for a suspect. The interview friend should be someone the suspect has confidence in, who can speak the same language, and who is independent of the police.⁶¹ Mr Gibson's interview friend was a person of authority in his community with whom he was in a kinship relationship. The Court found that because of this Mr Gibson would have felt pressured to answer the police questions.⁶²

Further issues were raised in Mr Gibson's appeal against his conviction before the WA Court of Appeal, including: the integrity of the plea of guilty entered; the difficulties obtaining qualified interpreters; the adequacy of interpreting services provided; the unsatisfactory provision of legal advice and instructions, and the absence of interpreters during

⁵⁷ *State of Western Australia v Gibson* [2014] WASC 240, [116] (Hall J).

⁵⁸ *Ibid* [150] (Hall J).

⁵⁹ *State of Western Australia v Gibson* [2014] WASC 240, 42-43.

⁶⁰ *Ibid* 57 [180].

⁶¹ *Ibid* 47 [148]; *R v Butler (No 1)* (1991) 102 FLR 341; *Njana* (1998) 99 A Crim R 273.

⁶² *State of Western Australia v Gibson* [2014] WASC 240, 57 [175] (Hall J).

instructions and advice; and the lack of resources for ‘medical and psychological experts to assess and report on the appellant’s neuropsychological condition’.⁶³ Further, one of the grounds for the appeal was that Mr Gibson’s plea was ‘induced by and/or entered in circumstances in which’:

(i) witness statements were obtained by investigating police officers which inculpated the appellant in the offence to which he pleaded guilty;

(ii) the circumstances in which those witness statements were obtained by police officers significantly affected the reliability of the inculpatory allegations that were made by the witnesses; and

(iii) after the appellant pleaded guilty, and as a result of further investigations that were conducted by the Western Australian Police, it has become apparent that the inculpatory allegations that were made by the witnesses were materially false.⁶⁴

The incriminating statements were made by two men who had been with Mr Gibson on the night of Mr Warneke’s death.⁶⁵ The men had originally claimed that they drove past the body without stopping but, after hearing Mr Gibson’s confession, changed their testimonies and claimed that the car stopped and ‘Gibson got out and hit Warneke’.⁶⁶ It was not until much later that the defence team learned that one of these men had retracted his statement within minutes, saying he had made it up because the interviewing officers were pushing him for answers.⁶⁷

An exchange from the Court of Appeal hearing, highlighting systemic concerns with the Western Australian justice system, was reported by the media:

Prompted by questions from Gibson’s barrister Sam Van Dongen SC, Brunello [Mr Gibson’s lawyer in Broome] painted a picture of a justice system that made it hugely difficult to represent a man such as Gibson; the ALS was “notoriously underfunded”; only two Pintubi

⁶³ *Gibson v Western Australia* [2017] WASCA 141, 85 [181], 80–90 (Buss P, Mazza and Beech JJA).

⁶⁴ *Gibson v Western Australia* [2017] WASCA 141, 12 [35] (Buss P, Mazza and Beech JJA).

⁶⁵ Victoria Laurie, ‘Indigenous Australian Gene Gibson Was Lost in Translation,’ *The Australian* (online), April 8 2017 <<http://www.theaustralian.com.au/news/inquirer/indigenous-australian-gene-gibson-was-lost-in-translation/news-story/6ea8c503fadce99928092b73120a95b5>>.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

interpreters in the entire state were available at certain times; and even when they were, funds to pay them to come to Perth were not.

...

Van Dongen told the court “a perfect storm” had led an illiterate Aboriginal man with “significant cognitive deficits” to plead guilty to a crime he repeatedly claimed not to have committed.⁶⁸

On 12 April 2017, the WA Court of Appeal quashed Mr Gibson’s conviction, finding that he suffered a miscarriage of justice as he did not adequately understand the nature and implications of his plea of guilty, the legal process, or the case against him because of his cognitive impairment and limited English proficiency, and there was a real risk ‘that the plea was not attributable to a genuine consciousness of guilt’.⁶⁹

IV A NEW PARADIGM: DECOLONISING CRIMINAL JUSTICE IN WESTERN AUSTRALIA

There has been a promising response from the WA Police to the CCC report and the WA Police Internal Affairs Unit investigation. Following the Internal Affairs Unit investigation, WA Police Commissioner Karl O’Callahan, accepted that mistakes were made in the handling of the investigation and reported that a number of changes would be made to improve the handling of future investigations, including:

- the creation of a specialist unit for dealing with Aboriginal witnesses and suspects from remote communities;
- the introduction of pre-recorded cautions in every Aboriginal language;
- improvements to victims’ liaison services;
- live review teams; and
- a new homicide investigation course for select officers.⁷⁰

Commissioner O’Callahan stated that, from now on:

in all cases when you go into an Aboriginal community to interview either a witness or a

⁶⁸ Victoria Laurie, above n 66.

⁶⁹ *Gibson v Western Australia* [2017] WASCA 141, 79 [157] (Buss P, Mazza and Beech JJA).

⁷⁰ Kathryn Diss, above n 35.

suspect, you will need an interpreter who is specialised in that language to provide the right sort of support ... this is a very significant change. And will have a very significant resource implication on the WA Police and Government in general.⁷¹

WA Police accepted most of the CCC's recommendations.⁷² In its 2015 Report, the CCC called on WA Police to ensure that:

- all officers know and apply their obligations under the Criminal Investigation Act and the Police Manual contained in the Corporate Knowledge Database;
- persons who are not proficient in English have the assistance of an interpreter;
- officers interacting with Aboriginal citizens are properly trained in culture and language; and
- decisions not to charge a person are properly authorised and accountable.⁷³

A year after the CCC report, in December 2016, the CCC sought further information on the implementation of the recommendations by the WA Police.⁷⁴ The WA Police's response outlined work which was currently underway to implement the recommendations, including the creation of the new Crime Investigation Standards and Family Violence Division tasked with 'identifying the best solution for the administration of a police caution to culturally and linguistically diverse community members'.⁷⁵

A The Paradigm Shift

A new approach is required to improve the responsiveness of the Western Australian justice system to Aboriginal peoples and, in particular, to Aboriginal people with cognitive impairment. This approach can, combined with the changes instigated by the WA Police, contribute to ensuring the justice system does not continue to "fall down" when responding to Aboriginal peoples, and in particular young Aboriginal persons suspected of having cognitive impairment. We argue, however, that the Gibson case offers an opportunity to

⁷¹ Ibid.

⁷² Corruption and Crime Commission, above n 2, [4].

⁷³ Corruption and Crime Commission, above n 2, [3]. See also Chapters 6–10.

⁷⁴ Corruption and Crime Commission, *Operation Aviemore: Commissioner of Police Response to Commission Recommendations* (Report, Corruption and Crime Commission, 2 December 2016).

⁷⁵ Ibid 2.

redress the imbalance of power between the mainstream justice system and Aboriginal Australians. While it is encouraging that steps are being taken to implement recommendations of the CCC, this does not go far enough to remedy the failing of the justice system that gave rise to the miscarriage of justice experienced by Mr Gibson. We argue that the Gibson case is both a manifestation of the systemic problems between the settler justice system and Aboriginal Australians, and evidence that these issues require a significant paradigm shift rather than piecemeal remedies. This shift would require both legislative reform and significant empowerment of Aboriginal communities.

B Legislative Reform

Legislative reform to Western Australia's regime for mentally impaired accused, contained in the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) ('the CLMIA Act'), is urgently required. Each Australian jurisdiction has separate legislation governing fitness to stand trial — fitness to stand trial relates to an accused's ability to comprehend the proceedings and communicate *at the time of a criminal trial*, which is central to the fairness of the trial process. Where a person who *may not* be fit to stand trial is tried, there is a miscarriage of justice: the miscarriage of justice 'is that there has been a trial where there should not have been'.⁷⁶ While designed to ensure fairness to an accused, members of the High Court have repeatedly emphasised that,

it should not be overlooked ... that the usual consequence of a finding that a person is unfit to plead is indefinite incarceration without trial. It is ordinarily in the interests of an accused person to be brought to trial, rather than suffer such incarceration.⁷⁷

C Indefinite Detention Without Trial

The Western Australian regime is controversial because it provides for *indefinite* detention in a *custodial* setting *without* trial of a person found unfit to stand trial for an offence carrying a term of imprisonment. A person found unfit, and thus unconvicted, can spend longer in detention than if they had pleaded guilty and were sentenced to imprisonment for the offence. There have been concerns raised in many quarters that Aboriginal people with

⁷⁶ *Eastman v The Queen* (2000) 203 CLR 1, [317] (Hayne J). See also *Kesavarajah* (1994) 181 CLR 230; *Ngatayi v the Queen* (1980) 147 CLR 1.

⁷⁷ *Eastman v The Queen* (2000) 203 CLR 1 [24] (Gleeson CJ); *Kesavarajah* (1994) 181 CLR 230, 249 (Deane and Dawson JJ).

cognitive impairments may be indefinitely detained under the CLMIA Act, pressuring lawyers to encourage early pleas of guilty, as any sanctions would be time-limited.⁷⁸

The CLMIA Act places lawyers representing unfit persons in a precarious position. This is not unique to Western Australia: similar concerns have been raised in Queensland and Local Court proceedings in New South Wales (where special hearings are not provided for).⁷⁹ Lawyers are faced with the dilemma of raising unfitness, which could result in their client being indefinitely detained without trial, or advising their client to plead guilty to the charged offences, as any custodial sentence imposed would be limited and shorter.⁸⁰ This is only further complicated by mandatory sentencing provisions in Western Australia. Justice Reynolds articulated the problem in *BB (a child)*:

The legislation in its current form puts undue pressure on legal advisers to go down the path of arguing that an accused is fit to stand trial in order to avoid exposing the accused to the possibility of an indefinite custody order. It is highly desirable for that undue pressure to be removed ... The obvious downside to accused persons pleading guilty or being found guilty when they are in fact unfit to stand trial is that they can become immersed in the criminal justice system at the expense of the focus being on the provision of appropriate mental health services within the community. That immersion can become particularly problematic if accused persons who are in fact unfit to stand trial plead guilty to offences which can then or later be taken into account for the purpose of mandatory penalties. Further, research shows that early intervention is a key in relation to the improvement of mental health.⁸¹

⁷⁸ See Catherine Crawford, 'Families Impacted by the Criminal Justice System on the Frontier: A New Model Required' (2010) 17(3) *Psychiatry, Psychology and Law* 464; Catherine Crawford, 'FASD Clinicians Forum' (Speech delivered at the Telethons Kids Institute, 18 November 2014); Chief Justice Martin, 'Indigenous Incarceration Rates: Strategies for Much Needed Reform' (Speech delivered at the Law Summer School, Perth, 20 February 2015); Parliament of Western Australia, Legislative Assembly, Education and Health Standing Committee, 'Foetal Alcohol Spectrum Disorder: The Invisible Disability' (Report No 15, Parliament of Western Australia, Perth, 2012); *The State of Western Australia v BB (a child)* [2015] WACC 2; *State of Western Australia v Tax* [2010] WASC 208.

⁷⁹ Betheli O'Carroll, 'Intellectual Disabilities and the Determination of Fitness to Plead in the Magistrates' Courts' (2013) 37(1) *Criminal Law Journal* 51; New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Report No 138 (2013) 345-6

⁸⁰ See Australian Human Rights Commission, 'Equal Before the Law: Towards Disability Justice Strategies' (Report, February 2014).

⁸¹ *The State of Western Australia v BB (a child)* [2015] WACC 2, [55], [59].

This is not to suggest that Mr Gibson was pressured to plead guilty or that the CLMIA Act formed part of the reasoning process behind advice to Mr Gibson to so plead. Rather, the Court of Appeal decision quashing Mr Gibson's conviction makes it clear that Mr Gibson's cognitive impairments and limited English language proficiency meant that he did not adequately understand the legal process or the nature and implications of his plea of guilty.⁸² We argue that the CLMIA Act must be reformed so that it can prevent, rather than compound, unfairness to an accused person who cannot adequately understand a legal process.

The paradigm shift we propose is underpinned by what is increasingly being called a decolonising approach — a form of engagement that acknowledges the colonial roots of modern Indigenous disadvantage and seeks to reform structures, law, and policies in ways that give back power to Indigenous communities. Mainstream disciplines, such as law, social work, psychiatry, and education are imbued with a colonial mentality that perpetuates mainstream control over Indigenous people. For example, Dudgeon and Walker argue that mainstream psychology 'colonises' by individualising human behaviour and negating Aboriginal knowledge.⁸³ Decolonising projects focus on 'social and emotional wellbeing'.⁸⁴ Holistic social and emotional wellbeing encourages 'a positive state of mental health and happiness associated with a strong and sustaining cultural identity, community, and family life that provides a source of strength against adversity, poverty, neglect, and other challenges of life'.⁸⁵ There are a number of projects across Australia that offer "on-country" cultural experience based on social and emotional wellbeing principles.

D A Country-Centric Approach

The paradigm shift involves nurturing Aboriginal owned therapeutic alternatives, particularly in the emerging sphere of "on-country" initiatives, drawing on the authority of Elders and respected persons in the Aboriginal community, and optimising opportunities for timely screening and intervention. Our decolonising model tasks agencies with new demands: *the requirement, not simply to divert individuals, but to help strengthen Aboriginal*

⁸² *Gibson v Western Australia* [2017] WASCA 141, 79 [157] (Buss P, Mazza and Beech JJA).

⁸³ Pat Dudgeon and Roz Walker, 'Decolonising Australian Psychology: Discourses, Strategies, and Practice' (2015) 3(1) *Journal of Social and Political Psychology* 276.

⁸⁴ *Ibid.*

⁸⁵ National Mental Health Commission, extracted in Dudgeon and Walker, above n 84, 278.

owned initiatives through resource sharing and the establishment of local protocols that would facilitate diversionary programs run and owned by Aboriginal people. This may be enabled and maintained by establishing a local community justice group, as recommended by the Law Reform Commission of Western Australia ('LRCWA') and as practised in Queensland and New South Wales, to 'increase the participation of Aboriginal people in the operation of the criminal justice system and to provide support for the development of community-owned justice processes'.⁸⁶ The Commission recommended amendments to the *Communities Act 1979 (WA)* that would allow discrete communities gazetted under the Act to establish community justice groups on the grounds that:

The recognition of Aboriginal customary law in the criminal justice system will depend heavily on the ability of courts and other justice agencies to access the expertise, community and customary law knowledge, and authority of community justice groups.⁸⁷

However, the LRCWA's recommendations refer only to discrete remote communities as defined for the purposes of the *Communities Act 1979 (WA)*, whereas we consider it essential to create community justice groups in urban, rural and remote communities, not covered by this legislation. The LRCWA's recommendations on this issue appear outdated in that they do not take into account native title legislation and the role this has given to Prescribed Bodies Corporate, Traditional Owner groups, and similar entities, who now have a crucial role in social and economic development.

The model developed in Queensland under the Community Justice Group ('CJG') Program is more flexible, and provides support to Aboriginal and Torres Strait Islander people within the criminal justice system. The program allocates 'funding to Aboriginal and Torres Strait Islander organisations to develop strategies within their communities for dealing with justice-related issues and to decrease Aboriginal and Torres Strait Islander peoples' contact with the justice system'.⁸⁸ The CJG, amongst other functions, ensures that there are

⁸⁶ Law Reform Commission of Western Australia, *Aboriginal Customary Law Final Report*, Final Report No 94 (2006) 97.

⁸⁷ *Ibid.*

⁸⁸ Queensland Department of Justice and Attorney-General, 'Community Justice Group Program' (Report, Queensland Courts, 21 February 2016) 1.

suitable Aboriginal Elders, or significant people, to sit in Murri courts and be involved in diversionary conferencing; these are paid positions.

E Making Diversion “Work”

Blagg, Tulich, and Bush argue for renewal at two key strategic points of contact with the criminal justice system to create the prerequisites for a new paradigm: the point of first contact with the police; and the courts.⁸⁹ Aboriginal youths remain under-represented in front-end diversion and over-represented at the more punitive stages.⁹⁰ In Western Australia, Aboriginal young people are more likely to be proceeded against by way of arrest and bail, to be held in police custody, and less likely to be issued with a court attendance notice than non-Aboriginal young people.⁹¹ A Price Consulting Group report noted that in 2007 approximately 80% of non-Aboriginal young people were being diverted from court, in contrast to only 55% of young Aboriginal people.⁹² An inquiry into youth justice in Western Australia by Amnesty International Australia also expressed concerns about the low rate of diversion for Aboriginal youth in the Kimberley.⁹³

Making diversion “work” for Aboriginal youths and young adults, particularly those with a cognitive impairment, may require a shift in thinking and practice towards greater multi-disciplinary assessment and engagement. We argue that this should include a strong emphasis on Aboriginal ownership, the use of cultural assessments, “on-country” programs, and leadership by Aboriginal community organisations. At the court stage, there could be “solution-focused” courts that take elements from the Koori Court model, with its focus on the involvement of Elders in the court process, and the Neighbourhood Justice Centre (NJC) model, which has a single magistrate, a comprehensive screening process for

⁸⁹ See Harry Blagg, Tamara Tulich and Zoe Bush, ‘Diversionary Pathways for Indigenous Youth with FASD in Western Australia: Decolonising Alternatives’ (2015) 40(4) *Alternative Law Journal* 257.

⁹⁰ See Chris Cunneen and Robert Douglas White, *Juvenile Justice: Youth and Crime in Australia* (South Melbourne: Oxford University Press, 3rd ed, 2007).

⁹¹ N S N Loh, M G Maller, J A Fernandez, A M Ferrante and R J Walsh, ‘Crime and Justice Statistics for WA: 2005’ (Report, Crime Research Centre, University of Western Australia, 2005) 46.

⁹² See Fiona Macleod, B Macnish and Darlene Gould, ‘A Review of Structure and Service Delivery for the Community and Juvenile Justice Division, Department of Corrective Services’ (Report, Price Consulting Group, 2009).

⁹³ See Amnesty International Australia, ‘A Brighter Tomorrow: Keeping Indigenous Kids in the Community and Out of Detention in Australia’ (Report, May 2015).

clients when they enter the court, and rapid entry into, preferably “on-country”, support.⁹⁴ Unlike other ‘specialist’ courts, NJCs cover the spectrum of issues many defendants and their families face, including health, mental health, disability, drug and alcohol dependency, housing etc, and do not require a plea of guilty to access services.⁹⁵

F *Solution-Focused Courts*

While adopting the terminology of “solution-focused” courts, we stress that, in the Aboriginal context, solution-focused courts must be *strengths* and *needs* based.⁹⁶ Such an approach acknowledges that the “solution” resides not with the court or the mainstream justice process, but with the Aboriginal community. Improving diversionary pathways and interventions requires an understanding of the needs of Aboriginal peoples, particularly those with cognitive impairments, and a close synthesis of medical knowledge and the law. It recasts contact with the system as an opportunity for diversion into community-owned networks of care and support, with a focus on cultural health and wellbeing. We argue that this diversionary approach should be available for adults as well as juveniles, especially young adults in the 18–25-year-old population range.

The Commonwealth Senate Standing Committees on Community Affairs, in its report on the Inquiry into the Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia, found that:

There is a need for... [specialist] courts to be adapted for remote Aboriginal and Torres Strait Islander communities ... Such mobile courts could deal with alleged criminal activity in a culturally appropriate way that acknowledges the inappropriateness of any proven negative behaviours and then provides a suitable therapeutic on-country pathway.⁹⁷

⁹⁴ Harry Blagg, Tamara Tulich and Zoe Bush, ‘Placing Country at the Centre: Decolonising Justice for Indigenous Young People with Foetal Alcohol Spectrum Disorders (FASD)’ (2016) 19(2) *Australian Indigenous Law Review* 4; Harry Blagg, Tamara Tulich and Zoe Bush, ‘Diversionary Pathways for Indigenous Youth with FASD’, above n 90; Harry Blagg, Tamara Tulich and Zoe Bush, ‘Indefinite Detention Meets Colonial Dispossession: Indigenous Youths with Foetal Alcohol Spectrum Disorders in a White Settler Justice System’ (2017) 26(3) *Social and Legal Studies* 333.

⁹⁵ Harry Blagg, Tamara Tulich and Zoe Bush, ‘Indefinite Detention Meets Colonial Dispossession’, above n 94.

⁹⁶ See Sarah Murray, Tamara Tulich and Harry Blagg, ‘The Innovative Magistrate and Legitimacy —Lessons for a ‘Solution-Based’ Model’ (2017) 40(2) *UNSW Law Journal* 897, 913.

⁹⁷ Senate Standing Committee on Community Affairs, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) [3.104].

The potential game changer that could provide the basis for a new Aboriginal justice paradigm emerges not from western epistemology alone, but at the point of intersection between Aboriginal and non-Aboriginal knowledge.⁹⁸ It is at this point of intersection that hybrid forms of justice innovation are developing. *Indigenous place can become a fulcrum upon which a new decolonised justice system can be leveraged into being.*

V CONCLUSION

The Gibson case adds to a long list of miscarriages of justice in Western Australia, highlighting how systemic failures in the justice system continue to place Aboriginal peoples and people with impairments at great risk of miscarriages of justice. It also demonstrates that miscarriages of justice are not always the result of deliberate attempts to withhold or corrupt vital evidence, rather they are the outcome of poor decision making, lax regimes of accountability, and weakly enforced rules and guidelines. In this respect, the decision by the WA Police to strengthen its practices in relation to interaction with Aboriginal communities is a very welcome move. Clearly, this move needs to be accompanied by reform of the draconian, and Dickensian, CLMIA Act. However, these changes alone, will not resolve many of the underlying problems unless they are also developed within a broader paradigm shift that strengthens community justice mechanisms and ensures greater partnership with Aboriginal people.

Miscarriages of justice, often involving Aboriginal people with limited English skills and carrying some form of cognitive impairment, continue to haunt the criminal justice system of Western Australia, to its considerable detriment. As Justice Cory, in his report of the Manitoba Justice Commission of Enquiry, intones: 'A wrongful conviction is as much a wrong to the administration of justice and to our society, as it is to the individual prisoner. Wrongful imprisonment is the nightmare of all free people. It cannot be accepted or tolerated.'⁹⁹

⁹⁸ Harry Blagg, Tamara Tulich and Zoe Bush, 'Indefinite Detention Meets Colonial Dispossession', above n 94.

⁹⁹ Peter de C Cory, Thomas Sophonow, *The Inquiry Regarding Thomas Sophonow: Investigation, Prosecution and Consideration of Entitlement to Compensation* (Winnipeg, Manitoba Justice, 2001), extracted in Malcolm McCusker AC CVO QC, 'Miscarriages of Justice' (2015) 42(9) *Brief* 14, 14.

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DEFLECTION AND DETERRENCE: EUROPE'S SHRINKING ASYLUM SPACE AND ITS PARALLELS WITH AUSTRALIAN POLICIES

GEMIMA HARVEY*

In 2015, as asylum seekers, refugees, and migrants began making their way to Europe in larger numbers, the European Union set about putting policies in place to shut them out and protect its external borders. In the process, the protection of borders has become primary to the protection needs of people, and policies have been designed to contain people in regions of origin, deter them from their desire to reach Europe and deflect responsibility for processing asylum claims to states elsewhere. The framing of resettlement as a reward for countries that cooperate, and people who wait, and the shifting of responsibility onto other states where refugees cannot enjoy full rights, are reminiscent of Australia's approach to asylum law and policy.

CONTENTS

I	INTRODUCTION.....	143
II	A BRIEF CONTEXT.....	144
III	RESETTLEMENT INITIATIVES.....	145
IV	CASE STUDY: EU-TURKEY DEAL.....	148
V	FOLLOWING IN AUSTRALIA'S FOOTSTEPS.....	153
	<i>A A dangerous paradigm: the deserving versus the undeserving.....</i>	153
	<i>B Protection somewhere, elsewhere, anywhere but here.....</i>	155
VI	CONCLUSION.....	157

I INTRODUCTION

This essay looks at how European Union asylum laws and policy rapidly evolved in 2015, when people from countries like Syria, Afghanistan and Iraq started arriving in unprecedented numbers on the shores of Greek islands. Previously there had been little emphasis on resettlement, but post-2015 this became increasingly important as a way of

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demonstrating solidarity with countries in turmoil, while limiting responsibility for people arriving spontaneously on the doorstep of the EU. In the face of these mass-arrivals, the EU-Turkey deal was crafted, with measures designed to close the main route across the Aegean Sea from Turkey to Greece. By labelling Turkey a “Safe Third Country”, the EU can declare asylum applications inadmissible and shift responsibility for processing onto Turkey. These developments in law and policy reflect two deflection prongs — using resettlement as migration management by punishing “bad”, spontaneous arrivals and rewarding “good” refugees who stay further afield and, secondly, externalising processing to buffer zones beyond the sea with the aim of asylum seekers finding protection elsewhere. These deterrence strategies mirror Australia’s approach of shrinking the protection space available to asylum seekers arriving spontaneously under the benevolent mask of showing concern for saving lives at sea; all while people languish without rights or solutions in countries they thought would be a temporary stop on the way to a life of dignity.

II A BRIEF CONTEXT

In 2014, almost 600 000 people applied for asylum in the EU.¹ In the following year, this number more than doubled. In 2015, a massive increase in migration, unseen in Europe since WWII, marked a turning point in EU asylum policy. German Chancellor Angela Merkel famously repeated the mantra ‘Wir schaffen das’, meaning, ‘We can do this’, in relation to suspending the Dublin Regulation,² to welcome and integrate Syrian refugees.³ At the same time, thousands of people were arriving every day on the Greek islands — a key arrival point along the eastern Mediterranean route — leaving a life of poverty, oppression, or conflict in the hope of finding security, dignity, and peace. In 2015, Germany alone received more than 440 000 asylum applications, up from about 170 000 in 2014 — a 155 per cent increase.⁴ While Germany was welcoming asylum seekers, Hungary set about building a 500 km long, four-metre high razor wire fence along its border with Serbia and Croatia to

¹ Communication from the commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the region: A European Agenda on Migration [2015] COM 240.

² The Dublin Regulation is an EU multilateral agreement for determining the state responsible for assessing an application for asylum. This is generally the first EU state that asylum seekers enter (unless there are family factors or previous connections to a country to consider).

³ Janosch Delcker, ‘The Phrase That Haunts Angela Merkel’, *POLITICO* (online), 19 August 2016 <<http://www.politico.eu/article/the-phrase-that-haunts-angela-merkel/>>.

⁴ Eurostat, ‘Record number of over 1.2 million first time asylum seekers registered in 2015’ (News Release, 44/2016, 4 March 2016) <<http://ec.europa.eu/eurostat/documents/2995521/7203832/3-04032016-AP-EN.pdf/>>.

keep would-be asylum seekers out.⁵ In March 2016, Austria introduced a cap of 80 daily asylum claims, while at the other end of the Balkan migration route, Macedonia closed its border with Greece to all but a trickle of Syrians and Iraqis.⁶ That month, the Balkan route was officially closed, leaving Greece to cope with what would become 60 000 people seeking protection.⁷

Just prior to the border closing, the Visegrád countries — Czech Republic, Hungary, Poland and Slovakia — adopted a statement highlighting their support for increased border controls. As expressed in the nation's joint statement: 'With the very foundations of the European Union at stake ... the key strategic objective now is to preserve Schengen, which can only be achieved by regaining control over the European Union's external borders'.⁸

III RESETTLEMENT INITIATIVES

Resettlement, voluntary repatriation, and local integration are the three durable solutions available to refugees, which represent the end of protracted displacement, and offer a chance to begin anew, rebuild, or become a part of another society. A 2003 feasibility study on establishing a resettlement program in the EU included the specification that 'any resettlement scheme must be complementary to, and not alternative, to the processing of spontaneous asylum claims in EU Member States or at the borders.'⁹ Still, more than a decade later, without an agreed system, very few people were being resettled within the EU. In 2013, while the US resettled 66 200 refugees, Australia 13 200 and Canada 12 200, the EU resettled just 5 449.¹⁰ In 2014, certain individual EU member states pledged to

⁵ Aljazeera, 'Hungary Building Border Fence to Curb Immigration', *Aljazeera* (online), 1 August 2015 <<http://www.aljazeera.com/news/2015/08/hungary-building-border-fence-curb-immigration-150801051501749.html>>.

⁶ Gemima Harvey, 'Syrian Families Relive their Refugee Odyssey', *Deutsche Welle* (online), 9 March 2016 <<http://www.dw.com/en/syrian-families-relive-their-refugee-odyssey/a-19103578>>.

⁷ *Communication from the commission to the European Parliament, the Council: Eight Report on Relocation and Resettlement* [2016] COM 791.

⁸ The Visegrád Group: The Czech Republic, Hungary, Poland and Slovakia, 'Joint Statement on Migration' (Joint Statement, 15 February 2016) <<http://www.visegradgroup.eu/calendar/2016/joint-statement-on>>.

⁹ Migration Policy Institute, Tender No. DG.JAI-A2/2002/001 on behalf of the European Commission, *Study on The Feasibility of setting up resettlement schemes in EU Member States or at EU Level, against the background of the Common European Asylum system and the goal of a Common Asylum Procedure*, 2003 <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/docs/pdf/resettlement_study_full_2003_en_en.pdf>.

¹⁰ FRA, 'Legal entry to the EU' (Publication, FRA: European Union Agency for Fundamental Rights, February 2015) <http://fra.europa.eu/sites/default/files/fra-focus_02-2015_legal-entry-to-the-eu.pdf> 7; UNHCR, 'War's Human Cost: UNHCR Global Trends 2013' (Publication, UNHCR, 2013)

resettle a total of around 7 500 people.¹¹

However, in 2015, when one million people made their way to Europe, the situation was deemed a crisis and EU countries scrambled to implement measures that would safeguard the integrity of the EU's open borders and passport-free travel policy within the Schengen zone. Since then, EU asylum laws and policies have been developing rapidly to keep up with the pace of changes to migration flows in the region and to restore order and control at external borders. A number of schemes relating to resettlement were announced in 2015, including the European Resettlement Scheme and the EU-Turkey Action Plan (both discussed in more detail below).¹²

In July 2015, the European Commission adopted the proposal for a European Resettlement Scheme and member states agreed to resettle 22 504 people in need of international protection.¹³ The voluntary scheme covers a period of two years and uses a distribution key taking into consideration factors such as population, GDP, unemployment rates, spontaneous asylum applications, and previously resettled refugees.¹⁴ Also, member states are to resettle — on a voluntary basis — Syrian refugees from Turkey as part of the EU-Turkey Action Plan.¹⁵

As of February 2017, almost 14 000 refugees — mostly from Turkey, Jordan and Lebanon — were resettled within the EU under the European Resettlement scheme and the EU-Turkey Action Plan.¹⁶ This is clearly a big step up from the 5449 resettled within the EU in 2013.

In 2016, the European Commission released a proposal for a permanent Union

<www.unhcr.org/5399a14f9.pdf> 20-21; UNHCR, 'EU Resettlement Factsheet' (Factsheet, UNHCR), 1 <<http://bit.ly/2xKy6i0>>.

¹¹ Eurostat, *Resettled Persons Annual Data* (11 August 2016) <<http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tps00195&plugin=1>>.

¹² See generally *Commission Recommendation of 8.6.2015 on a European resettlement scheme* [2015] COM 3560.

¹³ European Commission, 'Relocation and Resettlement: EU Member States urgently need to deliver' (Press Release, 16 March 2016) <http://europa.eu/rapid/press-release_IP-16-829_en.htm>.

¹⁴ *Commission Recommendation of 8.6.2015 on a European resettlement scheme* [2015] COM 3560.

¹⁵ European Commission, 'Commission presents Recommendation for a Voluntary Humanitarian Admission Scheme with Turkey for refugees from Syria' (Press Release, 15 December 2015) <http://europa.eu/rapid/press-release_IP-15-6330_en.htm>.

¹⁶ European Commission, 'Relocation and Resettlement: Member States need to build on encouraging results' (Press Release, 8 February 2017) <http://europa.eu/rapid/press-release_IP-17-218_en.htm>.

Resettlement Framework.¹⁷ The European Council on Refugees and Exiles (ECRE) has expressed concerns about the proposed framework. Rather than being about providing durable solutions to the most vulnerable, the Framework is constructed as a “partnership activity” and aims to ‘encourage certain countries to cooperate on migration control, deterrence, and readmission.’¹⁸ According to the ECRE, the Framework ignores protracted refugee situations and ‘risks instrumentalising resettlement to exert leverage on these “partner countries”’.¹⁹ Similarly, the European Economic and Social Committee has called for ‘the common criteria for resettlement to focus mainly on people’s need for protection and to be uncoupled from partnership agreements with third countries.’²⁰

Responding to the proposal in the Guardian, Amnesty International’s Europe director, John Dalhuisen, said:

The proposals the commission published today are not about improving refugee protection globally, but about reducing irregular arrivals to Europe. They take good tools, like resettlement, and put them to bad ends; they use fine words, but these mask some pretty cynical intentions.²¹

Where in the past EU states have overlooked resettlement as a durable solution,²² there is now a shift in EU asylum acquis,²³ toward using resettlement as a technique to restore controlled migration. While increased resettlement places are a positive step in providing protection to people in need, it’s also important to recognise the underlying political motivations, which reveal that, rather than being an act of pure benevolence, resettlement is being used to reward countries that cooperate with the EU ‘on irregular migration,

¹⁷ Proposal for a Regulation of the European Parliament and of the European Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council [2016] COM 468.

¹⁸ ECRE (European Council on Refugees and Exiles), ‘Untying the EU Resettlement Framework’ (Policy Note, ECRE, 2016) <<https://www.ecre.org/wp-content/uploads/2016/10/Policy-Note-01.pdf>>.

¹⁹ Ibid.

²⁰ European Parliament, *Legislative train schedule towards a new policy on migration*, (2016) EU Resettlement Framework <<http://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-eu-resettlement-framework>>.

²¹ Patrick Kingsley, ‘EU officials finalise common asylum system to resettle refugees’, *The Guardian* (online), 13 July 2016 <<https://www.theguardian.com/world/2016/jul/13/eu-officials-finalise-common-asylum-system-resettle-refugees>>.

²² Agnes Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford University Press, 2009) 86.

²³ This refers to the accumulated legislation, legal acts, and court decisions which constitute the total body of European Union law.

readmission and return.’²⁴

IV CASE STUDY: EU-TURKEY DEAL

In response to 800 000 people taking the Eastern Mediterranean route (across the Aegean Sea from Turkey to the Greek Islands) in 2015,²⁵ and to discourage future attempts, the EU-Turkey deal was created. Turkey is the main transit state out of the Middle East. At this time, 91 per cent of people arriving in Greece were from the top ten refugee-producing countries.²⁶ So while anti-immigration sentiment and right-wing extremism were rising, the vast majority of people arriving in Greece had legitimate protection needs and the right to seek that protection within the EU. This agreement means that asylum seekers who arrive in Greece after 20 March 2016 are to be returned, with their claims dubbed “inadmissible” given the declaration of Turkey as a ‘Safe Third Country’.²⁷

An application for protection in the EU can be deemed inadmissible on the basis that a person could have applied for asylum in a Safe Third Country (STC) they travelled through, or because they already had protection in a First Country of Asylum (FCA).²⁸ The STC and FCA concepts aim to ‘expel asylum seekers without having to necessarily examine their application for asylum on its merits with the consequence of removing them from the jurisdiction of legal protection’.²⁹

If a member state wishes to return a person seeking international protection to another (non-EU member) country, under the STC rule, a number of criteria must be met under the Asylum Procedures Directive.³⁰ This includes no risk of serious harm or *refoulement*, and

²⁴ European Commission, ‘Enhancing legal channels: Commission proposes to create common EU Resettlement Framework’ (Press Release, 13 July 2016) <http://europa.eu/rapid/press-release_IP-16-2434_en.htm>.

²⁵ Jonathan Clayton and Hereward Holland, ‘Over one million sea arrivals reach Europe in 2015’, *UNHCR* (online), 30 December 2016 <<http://www.unhcr.org/news/latest/2015/12/5683d0b56/million-sea-arrivals-reach-europe-2015.html>>.

²⁶ Harvey, above n 6.

²⁷ European Commission, ‘Implementing the EU-Turkey Statement – Questions and Answers’, (Fact Sheet, European Commission, 15 June 2016) <http://europa.eu/rapid/press-release_MEMO-16-1664_en.htm>.

²⁸ Boldizsar Nagy, ‘The Aftermath of an Invalid Referendum on Relocation of Asylum Seekers: a Constitutional amendment in Hungary’, *Asylum, EU Institutions, Relocation, Solidarity* (10 November 2016) <<http://eumigrationlawblog.eu/the-aftermath-of-an-invalid-referendum/>>.

²⁹ Vincent Chetail, ‘The Common European Asylum System: Bric-à-brac or system?’ in P De Brucker, V Chetail and F Maiani (eds), *Reforming the Common European Asylum System: the new European refugee law* (Research Paper, No 2564990, 16 February 2015) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2564990> 26-27>.

³⁰ *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common*

the possibility of claiming refugee status and receiving protection in accordance with the Refugee Convention.³¹ The United Nations High Commissioner for Refugees ('UNHCR') asserts that to be considered a STC, countries cannot maintain the geographical limitation on the Refugee Convention (they must ratify the 1967 Protocol) and fundamental rights must be provided in both law and practice.³² Turkey maintains a geographical limitation on the Refugee Convention, which means it only recognises refugees from Europe. This means that Syrians do not have access to the broad rights ensured by the Refugee Convention. Instead they are given a temporary protection status, treated as guests and denied the possibility of long-term integration.³³

The Norwegian Refugee Council is highly critical of the idea that Turkey could be considered a STC and notes this arrangement 'denies refugees the right to have their asylum applications processed in Europe.'³⁴

Under the agreement, for each Syrian returned to Turkey from the Greek islands, another will be resettled within the EU directly from Turkey.³⁵ Priority is given to refugees who have not previously tried to enter the EU irregularly.³⁶ This agreement was designed to restore order to migration routes, rewarding those who wait in Turkey with a legal, and safe, route to the EU and punishing those who risk their lives crossing the Aegean Sea to reach Greece. One year on, and 3565 Syrians have been resettled from Turkey to EU

procedures for granting and withdrawing international protection [2013] OJ L 56/60.

³¹ Ibid.

³² UNHCR, 'Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept' (Publication, UNHCR, 23 March 2016) <www.unhcr.org/56f3ec5a9.pdf>.

³³ Steve Peers and Emanuela Roman, 'The EU, Turkey and the Refugee Crisis: What could possibly go wrong?', *EU Law Analysis: Expert Insight into EU Law Developments* (5 February 2016) <<http://eulawanalysis.blogspot.com/2016/02/the-eu-turkey-and-refugee-crisis-what.html>>.

³⁴ Eirik Christophersen, *What is a safe third country?* (9 March 2016) Norwegian Refugee Council <<https://www.nrc.no/news/2016/march/what-is-a-safe-third-country/>>.

³⁵ European Council, 'EU-Turkey Statement' (Press Release, 18 March 2016) <<http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>>; European Parliament, *EU-Turkey Statement and Action Plan* (20 October 2017) Legislative Train Schedule towards a New Policy on Migration <<http://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-eu-turkey-statement-action-plan>>.

³⁶ Ibid.

member states,³⁷ while Turkey continues to host almost 3 million Syrians.³⁸

In the same period, 1487 people were returned to Turkey under the action plan. These people had either: not submitted asylum applications, withdrawn their applications or had negative decisions on their claims.³⁹

As of early October 2017, no one had yet been forcibly returned on the basis that Turkey is a STC because a court ruling has been pending in Greece's highest court. In September the court paved the way for the first forcible returns of asylums seekers under the EU-Turkey deal, when it declared the asylum claims of two Syrian refugees inadmissible, deciding that Turkey is a STC and is therefore responsible for providing protection.⁴⁰

Amnesty International notes: 'These decisions breach a very clear principle: Greece and the EU should not be sending asylum-seekers and refugees back to a country in which they cannot get effective protection.'⁴¹

Another measure involving resettlement of Syrians from Turkey — the Voluntary Humanitarian Admission Scheme — is conditional on Turkey preventing people from leaving its shores to seek protection in the EU.⁴² An assessment of whether these conditions have now been met is still pending.⁴³

Resettlement from Turkey or 'humanitarian admission' is, therefore, a compromise to allow for increased migration control and externalisation of asylum processing. Countries like Jordan, Lebanon, and Turkey have struggled for years to host millions of refugees from

³⁷ European Commission, 'Questions and Answers: Commission calls for renewed efforts in implementing solidarity measures under the European Agenda on Migration' (Fact Sheet, European Commission, 2 March 2017) <http://europa.eu/rapid/press-release_MEMO-17-349_en.htm>.

³⁸ Mercy Corps, *Quick facts: What you need to know about the Syria crisis* (9 March 2017) <<https://www.mercycorps.org/articles/iraq-jordan-lebanon-syria-turkey/quick-facts-what-you-need-know-about-syria-crisis>>.

³⁹ European Commission, 'Fifth Report on the Progress made in the implementation of the EU-Turkey Statement' (Press Release, 2 March 2017) <http://europa.eu/rapid/press-release_IP-17-3081_en.htm>.

⁴⁰ Amnesty International, 'Greece: Court decisions pave way for first forcible returns of asylum seekers under EU-Turkey deal', *Amnesty International* (online) 22 September 2017 <<https://www.amnesty.org/en/latest/news/2017/09/greece-court-decisions-pave-way-for-first-forcible-returns-of-asylum-seekers-under-eu-turkey-deal/>>.

⁴¹ *Ibid.*

⁴² European Commission, 'Commission presents Recommendation for a Voluntary Humanitarian Admission Scheme with Turkey for refugees from Syria' (Press Release, 15 December 2015) <http://europa.eu/rapid/press-release_IP-15-6330_en.htm>.

⁴³ European Commission, *Sixth Report on the Progress made in the implementation of the EU-Turkey Statement*, Report From the Commission to the European Parliament, the European Council and the Council No 6 (2017).

countries like Syria, Iraq, and Afghanistan, yet it was only when these refugees began arriving in Europe, irregularly and *en masse*, that the EU got serious about resettlement. Initiatives such as this are pitched as preventing the loss of life on the Mediterranean, a noble goal no doubt, but they are also linked to 'restoring a fully functioning Schengen system' by pushing asylum seekers back to regions of origin.⁴⁴

Since the EU-Turkey deal came into effect, the number of people crossing the Aegean Sea to reach Greece has gone down from thousands every day to tens.⁴⁵ But just because people are now out of sight, does not mean their suffering has ceased or that they won't try other ways of seeking asylum within the EU. Part of the deal means Turkey is required to prevent people from leaving its shores to reach the doorstep of the EU — in other words, to create obstacles for those attempting to seek asylum. In response to Turkey's arrest of more than 1000 asylum seekers in 2015, the International Rescue Committee's Melanie Ward told the Guardian that the EU-Turkey agreement 'is deeply concerning because it is primarily designed to obstruct the movement of those seeking refuge in the EU, which runs contrary to the EU's basic founding principles.'⁴⁶

Similarly, François Crépeau, United Nations Special Rapporteur on the Human Rights of Migrants, said that while numbers of people drop in the short term, the deal will not have a meaningful impact in the long term, and the 'number of deaths at sea will likely rise, as more people will try their luck going around the barriers and new sea routes will be developed.'⁴⁷

Speaking about the sea crossing from Turkey to Greece, Syrian father of four, Imad Omar, told me at a refugee transit camp on Lesbos: 'The whole time I was thinking about what I

⁴⁴ European Commission, 'Back to Schengen: Commission proposes Roadmap for restoring fully functioning Schengen system' (Press Release, 4 March 2016) <http://europa.eu/rapid/press-release_IP-16-585_en.htm>.

⁴⁵ Ibid.

⁴⁶ Patrick Kingsley, 'Turkey arrests 1,300 asylum seekers after £2bn EU border control deal', *The Guardian* (online), 30 November 2015 <<https://www.theguardian.com/world/2015/nov/30/turkey-arrests-1300-asylum-seekers-after-2bn-eu-border-control-deal>>.

⁴⁷ François Crépeau, *Domino effect: Turkey's new visa rules violate the principle of non-refoulement*, (9 January 2016) <<http://francoiscrepeau.com/fr/domino-effect-turkeys-new-visa-rules-violate-the-principle-of-non-refoulement/>>.

would do if the boat started to sink. Who would I try to save, my children, my wife, my mother?'⁴⁸

No one risks the lives of themselves and their family members unless they feel they have no choice.

The reasons refugees feel compelled to travel onward through countries that others may consider safe are myriad and individual, like people. Some might have family already settled in northern Europe, others might see Turkey as already overburdened with almost 3 million Syrians and lacking job prospects and the possibility of integration, and others may have heard about more hospitable reception conditions, advanced support services and efficient asylum processes in countries like the Netherlands, Austria, Sweden, and Germany.

Mustafa, 24, who travelled in the same boat as Omar and his family from Turkey to Greece, said: 'If you try to cross the border from Syria to Turkey, the Turkish authorities will shoot you, it's up to your luck. If we stay in Syria we die, if we try to pass the border, if you are not lucky, you will die.'⁴⁹

Stories of Syrians getting shot at while trying to enter Turkey are not uncommon. In June 2016, Turkish border guards reportedly shot and killed a family of Syrian refugees, including women and children, who tried to cross the border.⁵⁰ In 2016 alone, the Britain-based Syrian Observatory for Human Rights reported that border guards shot 163 Syrians trying to reach safety.⁵¹ As recently as June 2017, a baby girl and her family were reportedly killed trying to cross into Turkey.⁵²

Mustafa walked hours through the mountains with his sisters and cousins and their kids to sneak into Turkey. If the very real risk of getting shot at while trying to reach safety was not reason enough to feel uneasy about starting a new life there, Mustafa said he did not want

⁴⁸ Interview with Imad Omar (Greece, 4 March 2016).

⁴⁹ Interview with Mustafa Alhamoud (Greece, 4 March 2016).

⁵⁰ Reuters Staff, 'Turkish troops kill 11 Syrians trying to cross border: monitor', *Reuters* (online), 19 June 2017 <<http://www.reuters.com/article/us-mideast-crisis-turkey-border-idUSKCN0Z50CY>>.

⁵¹ Jamie Dettmer, 'Monitoring Group Accuses Turkish Border Guards of Killing 163 Syrian Refugees', *VOA News* (online), 6 December 2016 <<https://www.voanews.com/a/sohr-turkish-border-guards-syria-refugees/3625086.html>>.

⁵² Business Standard, 'Baby girl among five Syrians shot dead at Turkish border', *Business Standard* (online), 16 June 2017 <http://www.business-standard.com/article/news-ians/baby-girl-among-five-syrians-shot-dead-at-turkish-border-117061600019_1.html>.

to stay in Turkey because 'there are no jobs and no place to study.'⁵³

V FOLLOWING IN AUSTRALIA'S FOOTSTEPS

AA DANGEROUS PARADIGM: THE DESERVING VERSUS THE UNDESERVING

The notion of using resettlement as a tool for migration management is not new. Governments do this when they say something to the effect of "we are doing our part by resettling people, and therefore the ones who are arriving on our shores spontaneously have greedily come out of turn and should be excluded from the sphere of our protection."

The above construction is how the Australian Government has framed its asylum policies and political debate — perpetuating the myth there is a queue. This design uses resettlement as a reward for those who *wait in line until their "number" is called*. It represents a dangerous and false "deserving" versus "undeserving" paradigm that is used as a means of driving support for draconian policies by promoting the notion that there is a line that refugees are supposed to wait in, and that if they come before they are called they are "jumping the queue" and are, therefore, undeserving of effective protection. In this way, the person who languishes for five years in a dusty camp is more deserving than the one who decides the conditions in the camps are unbearable and that getting on a boat is the only option.

This sentiment is reflected in the proposed Union Resettlement Framework, which would penalise refugees by denying them resettlement if they have entered, or attempted to enter, the EU irregularly in the previous five years.⁵⁴

OXFAM's British chapter counsels that orderly entry measures must complement and not replace a fair system for assessing applications from asylum seekers arriving spontaneously within the EU.⁵⁵ In this way, resettlement should be seen as the durable solution it is rather than a tool for managing migration and, critically, '[a]ny distinctions between "good" resettled refugees and "bad" spontaneous arrivals must be avoided in

⁵³ Kingsley, above n 46.

⁵⁴ Above n 17.

⁵⁵ MIGREUROPE, Resettling Refugees, the European Instrument for the Externalisation of Asylum Procedures (2016) <<http://www.migreurope.org/article978.html?lang=fr>>.

rhetoric and in practice'.⁵⁶

The damaging consequences of such a distinction, inflicted by the punishment of people seeking protection, can be seen in Australia's asylum policy and practice. In Australia, Operation Sovereign Borders puts military forces in charge of intercepting and towing or turning boats back to where they came from, often Indonesia (which has not signed the Refugee Convention). Since 2013, 30 boats carrying 765 asylum seekers have been intercepted and returned.⁵⁷ These operations have involved asylum seekers being held at sea for more than a month, the Australian Government building lifeboats to forcibly return people on,⁵⁸ and, according to Amnesty International, the government paying boat crew members to return its passengers to Indonesia.⁵⁹

When turn-backs to countries of departure are not possible, asylum seekers are shipped to, and warehoused on, impoverished Pacific islands. In June 2017, a class action was settled, with the Australian Government, and the contractors operating its offshore camps, agreeing to pay almost 2000 asylum seekers and refugees on Manus Island, Papua New Guinea, AUD70 million in damages for mental and physical injuries suffered in detention.⁶⁰

In relation to this case, Guardian journalist Ben Doherty incisively writes: 'It is legal to seek asylum and to arrive by any means to do so. And it is unprincipled, immoral and indefensible to punish one group of people who have committed no crime in the name of deterring others from doing the same.'⁶¹

⁵⁶ Ibid.

⁵⁷ Janet Phillips, 'Boat 'turnbacks' in Australia: a quick guide to the statistics since 2001' (Fact Sheet, 22 June 2017)

<http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/BoatTurnbacksSince2001>.

⁵⁸ Ben Doherty, 'Asylum seeker boat turnbacks illegal and don't deter people, report finds', *The Guardian* (online), 2 May 2017 <<https://www.theguardian.com/world/2017/may/03/asylum-seeker-boat-turnbacks-illegal-and-dont-deter-people-report-finds>>.

⁵⁹ Amnesty International, 'Australia: By Hook or by Crook – Australia's Abuse of Asylum-Seekers at Sea', *Amnesty International* (online), 28 October 2015 <<https://www.amnesty.org/en/documents/ASA12/2576/2015/en/>>.

⁶⁰ Ben Doherty and Calla Wahlquist, 'Government to pay \$70m damages to 1,905 Manus detainees in class action', *The Guardian* (online), 14 June 2017 <<https://www.theguardian.com/australia-news/2017/jun/14/government-to-pay-damages-to-manus-island-detainees-in-class-action>>.

⁶¹ Ben Doherty, 'Brutal truth of Australia's detention regime can't be written off. Not even for \$70m', *The Guardian* (online), 14 June 2017 <<https://www.theguardian.com/australia-news/2017/jun/15/brutal-truth-of-australias-detention-regime-cant-be-written-off-not-even-for-70m>>.

B *PROTECTION SOMEWHERE, ELSEWHERE, ANYWHERE BUT HERE*

The EU-Turkey deal reduces the pull factor to Europe, by returning people seeking asylum to Turkey and also by obstructing the ability of people to reach Greece through increased patrols, while at the same time reducing the push factor by funnelling 6 billion euros into Turkey to boost refugee reception and protection initiatives.⁶² This deal shares deterrence and responsibility shifting parallels with Australia and its regional cooperation arrangement with Indonesia, where asylum seekers are intercepted and returned, despite the fact there is no durable solution available to them in the “transit country” they tried to leave. While the Indonesian Government takes a largely tolerant approach toward asylum seekers and refugees,⁶³ it has not acceded to the 1951 Refugee Convention or its 1967 protocol. Refugees are therefore not afforded legal rights, such as the right to a livelihood. Without work rights, and because getting an interview after initial registration with UNHCR can take between eight months and almost two years,⁶⁴ and securing a resettlement place can take another five years,⁶⁵ thousands of asylum seekers and refugees are surrendering themselves to detention centres in order to access food and shelter.⁶⁶

The Australian Government has an arrangement with the Indonesian Government and the International Organisation for Migration (‘IOM’), which means that asylum seekers intercepted *en route* to Australia and taken back to Indonesia are given material assistance by the IOM.⁶⁷ Australia also paid to increase Indonesia’s immigration detention capacity, with the Global Detention Project pointing out: ‘Like transit countries in other regions of

⁶² European Council, ‘EU-Turkey Statement’ (Press Release, 18 March 2016) <<http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>>.

⁶³ Linda Ruth Briskman and Lucy Imogen Fiske, ‘Asylum seekers and refugees in Indonesia: problems and potentials’ 8(2) *Cosmopolitan Civil Societies: An Interdisciplinary Journal* 22 <<https://epress.lib.uts.edu.au/journals/index.php/mcs/article/view/4883>>.

⁶⁴ UNHCR, ‘Indonesia factsheet’ (Fact Sheet, UNHCR, February 2016) <<http://www.unhcr.org/50001bda9.pdf>>.

⁶⁵ Fortify Rights and Burmese Rohingya Organisation UK, ‘Everywhere is Trouble: An Update on the Situation of Rohingya Refugees in Thailand, Malaysia, and Indonesia’, (Report, March 2016), 18 <<http://www.fortifyrights.org/downloads/EverywhereisTrouble.pdf>>.

⁶⁶ Asia Pacific Refugee Rights Network, ‘Indonesia Country Briefing’ (Brief, September 2015) <http://www.aprrn.info/1/pdf/Combined_AUS_Final.pdf>.

⁶⁷ Savitri Taylor and Brynna Rafferty-Brown, ‘African refugees in Indonesia: An uncertain future’, *Pambazuka News* (online), 3 June 2010 <<http://www.pambazuka.org/human-security/african-refugees-indonesia-uncertain-future>>.

the world, the growth of Indonesia's detention capacities has been largely driven by the policies and practices of nearby destination countries, namely Australia.⁶⁸

The fact that countries like Turkey and Indonesia offer relative safety is seen as reason enough for governments not to be in breach of international law when returning people there. This is despite the fact these countries do not offer durable solutions to refugees and, instead, people are forced to live in limbo, stuck in a protracted state of transit, unable to go forward or back and often scraping by without access to fundamental rights or the ability to meet basic needs.

Hurwitz argues that the rationale behind the STC concept is 'the existence of effective protection somewhere.'⁶⁹ By shifting responsibility onto other states closer to the region where asylum seekers are fleeing from, protection needs are out of sight and whether these needs are being met becomes obscure, no longer the burden of western nations. Durieux is astute in his analysis that so-called "destination countries" are prudent in their efforts to 'evade responsibilities at the admission/recognition level, lest they are saddled with the 'burden' of granting durable asylum.'⁷⁰ He notes that deflection strategies typically involve shifting responsibility onto 'first asylum' and 'transit states' and that 'this unilateralism may be tempered by the practical necessity of signing readmission agreements with states "elsewhere"'.⁷¹

Readmission deals are vital in the implementation of the STC concept.⁷² Scholars have argued that readmission deals reflect 'unequal power relationships' and that they are 'tantamount to burden shifting'.⁷³

The EC Partnership Framework communication notes:

Increasing coherence between migration and development policy is important to ensure that development assistance helps partner countries manage migration more effectively, and also incentivizes them to effectively cooperate on readmission

⁶⁸ Global Detention Project, *Indonesia Immigration Detention Profile* (January 2016) <https://www.globaldetentionproject.org/countries/asia-pacific/indonesia#_ftn3>.

⁶⁹ Hurwitz, above n 19, 57.

⁷⁰ Jean-François Durieux, 'Protection - Where - or When - First Asylum, Deflection Policies and the Significance of Time Opinion' (2009) 21 *International Journal of Refugee Law* 75.

⁷¹ *Ibid.*, 76-77.

⁷² Hurwitz, above n 22, 45.

⁷³ *Ibid.*

of irregular migrants.⁷⁴

It continues that 'positive and negative incentives should be integrated in the EU's development policy' rewarding countries that comply with readmission requests, manage the flow of migrants from other countries and host people in need of protection.⁷⁵ Trade policy is also raised as a way of punishing those who do not cooperate on readmission and return.⁷⁶ This highlights the *quid pro quo* approach of responding to the protection needs of vulnerable people seeking asylum. Rather than being about providing durable solutions, third countries are given development assistance in return for containing would-be asylum seekers within their borders.

Durieux highlights that no state can guarantee the protection performance of another state and so where responsibilities are shifted onto another country, the issue of whether effective protection is being provided becomes abstract. He encapsulates this by saying that the question of 'protection where?' remains as elusive as ever.⁷⁷

VI CONCLUSION

The EU appears to be following Australia's approach to asylum and refugee protection — deflecting and deterring rather than granting the rights and protections that developed nations can afford to provide. Resettlement has become a carrot and stick of reward and punishment, dangled in front of those "good" refugees who wait and removed from the grasp of those who make their own way to the EU. This durable solution has become a migration management measure. At the same time, transit countries are called safe, regardless of whether effective protection can be found there, for the purpose of deflecting responsibility away from the frontier and "protecting" borders.

⁷⁴ Communication from the commission to the European Parliament, the Council: Action Plan on the integration of third country nationals [2016] COM 240.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Durieux, above 67, 76-78.

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JOHN MARSDEN'S IMPATIENCE AND LGBTIQ RIGHTS: THE ONGOING CHALLENGE FOR EQUALITY*

THE HON MICHAEL KIRBY AC CMG**

A biennial lecture to commemorate a prominent lawyer and civil libertarian, John Marsden, takes as its theme his commitment to LGBTIQ equality. It collects some positive developments that have occurred in the world since John Marsden's death in 2006, including judicial decisions and legislative reforms. Most significantly, the advance in the availability of marriage to LGBTIQ persons has been remarkable, although delayed in Australia by parliamentary indecision and by a postal survey. Negative developments are also recorded, most especially the widespread persistence of criminal laws originating in colonial times and a log-jam preventing their reform. The year 2016 saw the establishment of the mandate of the UN Human Rights Council for an Independent Expert on Sexual Orientation and Gender Identity. That mandate narrowly survived attempts to terminate or defund it in the UN General Assembly in late 2016; but the strength of the negative vote suggests the difficulties that still lie ahead.

CONTENTS

I	JOHN MARSDEN REMEMBERED	166
II	LGBTIQ REFORM: THE GOOD NEWS	167
III	LGBTIQ: THE NEGATIVE NEWS.....	172
IV	LGBTIQ RIGHTS: PUSHBACK AT THE UN.....	174
V	BEYOND LGBTIQ RIGHTS AND EQUALITY	177

* Text based on the 10th Anniversary John Marsden Memorial Lecture, 2016. The lecture was delivered at the Masonic Centre, Sydney, on 1 December 2016. It was sponsored by the New South Wales Council for Civil Liberties(CCL) and by Mardens Lawyers.

** Justice of the High Court of Australia (1996-2009); Honorary Life Member, New South Wales CCL; Gruber Justice Prize 2010.

I JOHN MARSDEN REMEMBERED

John Marsden was a well-known Law Society President, civil libertarian, and successful lawyer in New South Wales. He died on 18 May 2006. A Memorial Lecture was inaugurated to make sure that his restless, courageous, remarkable personality would be remembered. Those of us who had known him (and sometimes suffered from his criticisms and castigation) recognised him as a “change agent”. His occasional excesses and errors were far outweighed by his service to the cause of law reform and civil liberties in Australia.¹

That was why Rights Australia, the then new national human rights advocacy group incorporated in 2004, established a lecture series in his honour. The task of hosting the lecture substantially fell to the New South Wales Council for Civil Liberties (NSWCCL), of which John Marsden had been President, and of which he was later to become an Honorary Life Member.

This is the fifth lecture in the series. It has settled into a biennial tradition. The first lecture in October 2008 was given by me on the theme ‘The Uncomfortable Demand for Civil Equality’. Later contributions were provided by Anand Grover, a Senior Advocate from India, who in 2009 described ‘Overturning India’s anti-sodomy law’; by Jenni Milbank in 2010, ‘Surrogacy Reproduction and Exploitation’; and by Nicholas Cowdery AM in 2012, ‘The Times they are a Changing: Where to for Criminal Law?’.

Given the recent postal survey, it is appropriate that I should revert to the theme of the first lecture. HIV and AIDS continue to take a disproportionate toll on lesbian, gay, bisexual, transgender, intersex and otherwise queer people worldwide (LGBTIQ).² It is therefore appropriate to return to the theme of 2008 and to consider the progress, or lack of progress, we have made in achieving liberty and equality for LGBTIQ people in Australia and internationally. In doing this, it is right to remember that the liberties that John Marsden espoused were not confined to LGBTIQ issues. They ranged far beyond, a matter to which I will return. John Marsden was a strong proponent of his home district, Campbelltown, and

¹ John Marsden admitted to occasional excesses. See John Marsden, *I Am What I Am: My Life and Curious Times* (Penguin, Melbourne, 2004), 325, where he said, ‘I have been described as tough, noisy, arrogant and outrageous; but as a courageous fighter for what I think is right’.

² Michael Kirby, ‘The Uncomfortable Demand for Civil Equality’ (Speech delivered at the John Marsden Memorial Lecture, Masonic Centre Sydney, 15 October 2008). The lecture was later published by the *University of Western Sydney Law Review*.

a generous benefactor and supporter of Western Sydney University. His gifts have helped to fund scholarships for students at that University.

Much of my lecture in 2008 was addressed to the progress attained by that time in the struggle for relationship recognition (marriage equality) for LGBTIQ people worldwide. In the intervening years, much progress has been made on that issue, and on others. However, in Australia, the progress on relationship recognition has been patchy. I therefore wish to outline the positive developments that have occurred; the not so positive developments; and the developments that represent a danger for the attainment of justice and true equality for LGBTIQ people worldwide. The outcome of this analysis will afford an explanation of why the impatience always expressed by John Marsden remains a necessary stimulus for us in the world of today. And why citizens, LGBTIQ and otherwise, must accept the challenge to demand, and contribute to, change.

II LGBTIQ REFORM: THE GOOD NEWS

The biggest impediment to making progress towards equality for the rights of LGBTIQ people worldwide lies ultimately not in the law as such, but in social prejudice, religious hostility, educational inertia, and individual human distaste.³ Nevertheless, the law plays an undoubted part in reinforcing antipathy and prejudice as impediments to equality. Particularly is this so when the law imposes on LGBTIQ people criminal punishment as a sanction for adult, consensual, private sexual activity. In doing this, criminal law reinforces the hostility. It appears to give it the sanction of community disapprobation.

It follows that reforming and repealing such criminal laws has become an important primary objective of those who are seeking to attain civic equality for LGBTIQ people worldwide. John Marsden contributed to this reform in 1984 when a law was enacted that finally removed the anti-gay provisions of the New South Wales *Crimes Act*.⁴ Similar reforming statutes had been enacted throughout Australia beginning with Don Dunstan's South Australia in 1975 and finally concluding with reform of the *Tasmanian Criminal Code*

³ Michael Kirby, 'Kinsey, Empiricism, and Homo/Trans-Phobia', (2016) 4(2), *Griffith Journal of Law & Human Dignity*, 121.

⁴ *Crimes Act 1900* (NSW), s 79 ("Buggery and Bestiality") in a Part of the Act called "Unnatural Offences". Reformed 1984.

in 1998,⁵ the latter with a little help from a federal statute⁶ based on the ruling by the United Nations Human Rights Committee in *Toonen v Australia*.⁷ That ruling enshrined, for the whole world, the principle that the mediaeval criminal offences imposed on LGBTIQ victims were contrary to the provisions of universal human rights law.

Notwithstanding this declaration of universal principles, criminal statutes (mostly inherited from colonial times) continued to punish the consensual, adult, and private sexual activities of LGBTIQ people in two major groupings of the world: the former colonies of the British Empire and additional countries of the Arab/Islamic world. To this day, in 41 of the 54 countries of the Commonwealth of Nations, which succeeded to the British Commonwealth and Empire, the old sodomy laws continue to apply. Nevertheless, in recent years some progress has been made, including in Australia's own region. Thus, within the area of Oceania, in addition to Australia and New Zealand, the sodomy laws have more recently been abolished by Fiji,⁸ the Cook Islands, Palau, and Nauru.

Wider afield, enlightened judicial decisions have struck down the sodomy law as incompatible with constitutional provisions governing human rights in the Delhi High Court of India⁹ and the courts of Belize.¹⁰ The gratification with these decisions was diminished by the appeals that were lodged against them. Nevertheless, the initial decisions appeared to indicate that the tide of informed decision-making was turning. Subsequent decisions revive the hope of change.¹¹

Many other areas of the law affecting the legal rights of LGBTIQ people have been changed in recent years. Within Australia, reform of the criminal law, affording protection for a so-called 'gay panic attack', was proposed after a majority decision of the High Court of Australia in *Green v The Queen*.¹² That was a case in which Justice Gummow and I dissented

⁵ *Criminal Law Consolidation Act 1935* (SA). Amended 1975 by the *Criminal Law (Sexual Offences) Act 1975* (SA) s 8. See also *Criminal Code* (Tas) 1924, s 122 (repealed).

⁶ Human Rights (Sexual Conduct) Act 1994 (Cth).

⁷ *Toonen v Australia* (1994) 1 Int Hum Rts Reports 97 (no. 3).

⁸ *McCoskar v State* (2005) FJHC 500.

⁹ *Naz Foundation v Union of India* [2009] 4 LRC 828, (2009) DLT 277 (DelHC).

¹⁰ *Orozco v Attorney-General of Belize* 5 EHRLR 2016.

¹¹ See *Puttaswamy v Union of India*, Supreme Court of India, unreported, (Writ Petition 494/2012) per D.Y. Chandrachud J. [126] ['Sexual orientation is an essential attribute of privacy. Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core at the fundamental rights guaranteed by Articles 14, 15 and 21 of the [Indian] Constitution.'].
¹² (1998) 191 CLR 334.

in separate reasons. In several Australian jurisdictions, and overseas, laws have been enacted to modify the previous expression of the criminal law to remove the suggestion that violent and even lethal responses to a non-violent sexual advance by LGBTIQ persons could be justified in law as proportionate, amounting to a defence even to a murder charge.

Another area in which progress has been made in recent years has been the law on the adoption of children. Although, traditionally, adoption was restricted to married couples in a heterosexual marriage, more recently, the law has extended rights in adoption to de facto opposite sex couples and in some jurisdictions (all Australian jurisdictions other than the Northern Territory) this has been opened up to same-sex couples because of their inclusion in the statutory definition of 'de facto' relationships.

In the Northern Territory,¹³ an order for adoption can only be made where the 'man and woman are married to each other and have been so married for no less than two years'. These are the ways in which subnational law in Australia continues to discriminate against LGBTIQ couples, despite the fact that much scientific evidence demonstrates the centrality of parental love and the provision of a supporting environment for adopted children, rather than the sexual orientation or gender identity of the parental figures concerned. Unless reformed, such subnational laws would probably prolong discrimination, even following Australia's move towards marriage equality under federal law in December 2017.

However, it is in relationship recognition itself that the most striking changes have occurred in foreign jurisdictions in the past decade. They represent nothing short of a legal revolution that few would have envisaged even at the beginning of the present century.

The first nation to enact the 'opening up' of marriage to LGBTIQ persons was the Netherlands in 2000.¹⁴ This was quickly followed by Belgium (2003), Canada and Spain (2005); South Africa (2006); Norway and Sweden (2007); and there the position rested at the time of the inaugural lecture in this series.

However, since that time, marriage has been opened up in many other jurisdictions: Portugal, Iceland, and Argentina (2010), the United States of America and in the

¹³ Adoption of Children Act (NT) s 13(1)(a).

¹⁴ Michael Kirby, 'The ACT Marriage Equality Case: Losing the Battle but Winning the Constitutional War?' (2015) *Queensland Legal Yearbook* 391, 392.

Netherlands Caribbean (2012), in France, Brazil, the United Kingdom, and New Zealand (2013), in Luxembourg, Puerto Rico, and Ireland (2015). During that last year, decisions of the Supreme Court of the United States of America struck down, as unconstitutional, the *Defense of Marriage Acts* (DOMA) and effectively mandated marriage equality throughout that country.¹⁵ In 2016 Colombia enacted the law, as did Finland with effect from 2017. The German federal legislature adopted the reform in late 2017.¹⁶ Slovakia followed soon after. Meantime, in the highest court of the Republic of China (Taiwan) on 24 May 2017, the Council of Grand Justices, held that withholding marriage from LGBTIQ couples violated the 'people's freedom of marriage' and 'the people's right to equality'.¹⁷ Now 24 countries have opened marriage to same-sex couples. However, until late 2017, the Australian Government and Parliament continued to hold out against this development.

Notwithstanding the initial resistance to same-sex marriage at a federal level, two important further developments have occurred in Australia that suggested the way the issue was developing.

In 2013, the High Court of Australia struck down, as unconstitutional, a law of the Australian Capital Territory Legislative Assembly which sought to make a form of marriage available to LGBTIQ couples in that Territory. Whilst disappointing to many couples who had hastened to formalise their marriages under the law, that outcome had a silver lining. The High Court unanimously held that the *Australian Constitution* in s 51 (xxi), where it empowers the making of a law with respect to 'marriage', is not to be construed as confined to notions of 'marriage' that may have existed in 1900 when the Constitution was adopted.¹⁸ The Court swiftly and clearly concluded that 'marriage' under the *Australian Constitution* could lawfully include same-sex marriage. It would therefore be open to the Federal Parliament to so provide, if the political will existed to enact such a measure.

¹⁵ *Obergefell v Hodges*, 576 US 138 SCt 2583; 192 LEd 2d 609 overruling *Bowers v Hardwick* 478 US 186 (1986). See Michael Kirby, 'Marriage Equality Law and the Tale of Three Cities: How the Unimaginable Became Inevitable and Even Desirable' (2016) 22 *Auckland University Law Review* 11.

¹⁶ The German Bundestag passed a Bill allowing same-sex marriage on 30 June 2017. The Bill was passed by the Bundesrat on 7 July 2017. It was signed into law by the German President on 20 July 2017. It came into force on 1 October 2017.

¹⁷ Benjamin Haas, 'Taiwan's top court rules in favour of same-sex marriage', *The Guardian*, 24 May 2017. The ruling, unique in Asia, affords the Government the opportunity to modify the marriage law within 2 years. If not, the court's ruling will come into force on its own.

¹⁸ *The Commonwealth v ACT* (2013) 250 CLR 441 at 467 [56].

This holding resulted in a novel tactic in the Federal Parliament by opponents of same-sex marriage. They moved to superimpose an exceptional legislative requirement for a plebiscite before the Federal Parliament would consider any such opening up of marriage in Australia. A Bill to this effect was introduced by the Federal Government and passed by the House of Representatives. However, on 22 November 2016, the Australian Senate, by a vote of 33–29, rejected the proposed plebiscite. No such procedural impediment had been adopted as a pre-condition for earlier steps by the Australian Parliament to enlarge the civil rights of Aboriginals, women, non-Caucasian persons when ‘White Australia’ was abolished, disabled persons, or other vulnerable groups. The defeat of the plebiscite proposal was therefore an important success for civic equality in Australia, even if a consequence was a temporary delay in the adoption of federal legislation on same-sex marriage.¹⁹

The later resubmission of the plebiscite proposal was again defeated in the Australian Senate on 9 August 2017. In the result, the Australian Government pressed forward with what was called a ‘postal survey’. This was to be conducted not by the Australian Electoral Commission, which has an established record of expertise and professionalism, but by the Australian Bureau of Statistics. That proposal was, in turn, challenged in the High Court of Australia on constitutional and statutory grounds. That challenge was heard with expedition but rejected by the High Court of Australia on 7 September 2017.²⁰

The non-binding and non-determinative postal survey was concluded on 15 November 2017. The Australian Labor Party, the Greens and a significant group in the Liberal Party of Australia supplied a ‘Yes’ vote. However, a sizeable number of mostly Coalition supporters, together with most religious institutions and sections of the media supported the campaign to vote ‘No’ to same-sex marriage and sought to preserve ‘traditional’ marriage. Whilst denying that the opposition was based on homophobia and protesting concern about the risks to religious freedom, the tone of the debate was surprisingly unpleasant. However the

¹⁹ Michael Kirby, ‘The Centenary of Sir Harry Gibbs: Constitutional Methodology, Lawmaking and the Marriage Plebiscite’ (2016) 35 *University of Queensland Law Journal* 283.

²⁰ *Wilkie v The Commonwealth; Australian Marriage Equality Ltd v Cormann* (2017) 91 ALJR 1; Melissa Davey, ‘Same-sex marriage postal survey is lawful high court finds’, *The Guardian* (online), 7 September 2017 <<https://www.theguardian.com/australia-news/2017/sep/07/same-sex-marriage-postal-survey-is-lawful-high-court-finds>>.

vote showed nearly 62 per cent in favour and amendments to the *Marriage Act 1961* (Cth) followed immediately

If the above record is weighed, it appears to indicate that the overall tide is generally moving in the direction of LGBTIQ equality, at least in jurisdictions similar to Australia. However, before so concluding, it is necessary to evaluate the negative news on this global issue. There has been more than a little bad news and it is vital to face up to it.

III LGBTIQ: THE NEGATIVE NEWS

Although in many parts of the world efforts have been pursued to amend legislation to remove the sodomy and other anti-gay criminal laws, in some jurisdictions amending laws have been enacted which have actually increased the burdens upon LGBTIQ people. Thus in Brunei Darussalam, a decree was adopted in 2015 to increase the punishments imposed by the criminal law for homosexual activity to revive earlier colonial penalties of the sentence of death in certain cases. Death penalty provisions were earlier proposed in Uganda, in sub-national jurisdictions in Nigeria and in other jurisdictions of Africa. In Russia, laws were enacted by the Duma introducing restrictions on what was described as 'propaganda' promoting so-called 'non-traditional' relationships. Such laws have enjoyed support from the Russian Orthodox Church. They have since been copied in several nations of the Commonwealth of Independent States, which have historical, legal, religious, and cultural links to the Russian Federation.

In a number of countries, disappointing decisions have been handed down by final national courts, rejecting challenges to penal and other laws against LGBTIQ citizens based on local constitutional provisions for equality, privacy, and other basic values. Thus, the highest court of Zimbabwe declined to follow a South African ruling invalidating the anti-sodomy law.²¹ In Singapore, a challenge to the local *Criminal Code* provision was rejected by the Court of Appeal.²² In India, the Supreme Court of India, constituted as a two judge bench, in the *Koushal Case*, reversed the earlier enlightened decision of the Delhi High Court in the *Naz Foundation case*.²³ That decision was later challenged by a 'curative petition' which is still awaiting hearing in the Supreme Court of India. In Malaysia, a decision of the Sabah

²¹ *Banana v State* [2000] 4LRC 621 (Zim SC). See also [1999] 1 LRC 120 (Zim SC).

²² *Lim Meng Suang v A-G Singapore* [2013] 3 SLR 118 and following cases.

²³ *Koushal v Naz Foundation* [2014] 1 SCC 1.

Court of Appeal was reversed in 2014 by a ruling of the Federal Court of Malaysia, adverse to the rights of transgender persons in that country.²⁴ The Malaysian decision can be contrasted with the enlightened judgment of the Court of Final Appeal of Hong Kong, effectively requiring that the legislature in Hong Kong make provision for the marriage of transgender persons in that territory.²⁵

In addition to disappointing developments in the law affecting LGBTIQ minorities in many countries, countless media reports describe the violence, hostility, and cruelty exhibited towards this minority. The news reports range from cases of shocking brutality in Jamaica, the cruelty of public executions photographed in Iran; and brutal violence in Bangladesh. In Dhaka, Bangladesh, two young gay activists, Xulhaz Mannan and Nahibob Tonoy established the first gay newsletter in that country. In retaliation, their home was invaded by 6 opponents who hacked them to death.²⁶ Government responses to these violent acts are often extremely passive. Indonesia did not inherit an anti-gay criminal offence from colonial times.²⁷ However, in 2016, an application was heard by the Constitutional Court of Indonesia appealing for the insertion of a criminal offence into the Penal Code which the legislature has not so far enacted. It was only narrowly rejected in 2017. Meanwhile, in the province of Aceh, where Shari'a law is enforced, the conviction of a young medical student and his partner in 2017 of (consensual) same-sex activity resulted in the administration of 200 strokes of the cane, the number administered being actually increased by the court beyond that demanded by the prosecutor.

In countries of the kind mentioned above, the issue of law reform raised by these developments is not the enactment of relationship recognition, still less same-sex marriage. It is either resistance to efforts to enlarge the criminal sanctions presently ordained or reforming efforts to overcome the hostility that has resulted in a log-jam that presents an

²⁴ *State Government of Negeri Sembilan & Ors v Muhammad Juzaili Mohd Khamis & Ors* [2015] CLJ JT 13.

²⁵ *W v Registrar of Marriages* [2003] HKCFA 39, Court of Final Appeal (Hong Kong).

²⁶ Saad Hammadi and Aisha Gani, 'Founder of Bangladesh's first and only LGBT magazine killed: Xulhaz Mannan hacked to death where several academics and bloggers have been brutally murdered', *The Guardian*, 24 April 2017, 1.

²⁷ The Netherlands abolished the sodomy offence in 1803 under the influence of amendments to the French Penal Code of 1793. In Indonesia, as in the Netherlands East Indies, the Penal Code did not include such an offence. A special Shari'a law offence was later adopted in the Province of Aceh as part of a constitutional settlement. It was not adopted more generally in Indonesia.

obstacle to repealing the criminal laws that have been repeatedly held to be contrary to universal human rights law.

Weighing the positive and the negative news recounted here demands a sombre conclusion that progress is very slow. In some places it is non-existent or even moving in an adverse direction.

IV LGBTIQ RIGHTS: PUSHBACK AT THE UN

It is against this background that it is appropriate, to consider the issues in this article from a global perspective, as reflected in recent decisions of the General Assembly of the United Nations. That body, provided for in the *Charter* of the United Nations,²⁸ comprises all of the nations that have joined the Organisation which, by its *Charter*, is established in the name of all the people of the world.

Resolutions of the General Assembly can themselves contribute to a development of the universal law of human rights. Thus, the *Universal Declaration of Human Rights* (UDHR),²⁹ adopted on 10 December 1948, with Dr H.V. Evatt of Australia presiding as President of the General Assembly, although not expressed in terms of binding treaty law, now represents a recognised source of international law. It is an influential statement of the universal human rights that belong to all people everywhere. Article 1 of the UDHR declares that, 'Everyone is born free and equal in dignity and rights'. This is an important legal and symbolic statement. It affirms the claims for equality by LGBTIQ people in all countries. It is the foundation of many statements that were made by Ban Ki-moon during his term as Secretary-General of the United Nations which concluded in December 2016. It is on the basis of this universal principle, amongst others, that Ban Ki-moon upheld the rights of LGBTIQ people everywhere.³⁰

Encouraged by the leadership given by Ban Ki-moon and also by Helen Clark (then Administrator of UNDP), Michel Sidibé (Executive Director of UNAIDS) and other UN leaders, the UN Human Rights Council in 2016 established a mandate for an Independent

²⁸ Charter of the United Nations, Chapter IV, art 9.

²⁹ The UDHR was adopted (1948) 217A (iii) on 10 December 1948.

³⁰ See eg statement by Ban Ki-moon, remarks to special event on Leadership in the Fight against Homophobia, 11 December 2012 available <<http://www.un.org/sg/statement/index.asp?nid-6504>>.

Expert on Sexual Orientation and Gender Identity (SOGI).³¹ That mandate was then advertised. A selection process followed and Professor Vitit Muntarbhorn of Thailand, an experienced international lawyer and past UN mandate-holder, was appointed by the Human Rights Council to be the first mandate-holder of the SOGI mandate. Without delay, he set about the discharge of his duties and the organisation of his response to the world-wide challenges involving violence and discrimination, suffered by the SOGI minorities in many countries.

It was at this point that the 'African Group' in the General Assembly of the United Nations moved in the Third Committee of the General Assembly to impose a 'no action' order on the Human Rights Council's resolution establishing the mandate. Its motion was initiated, in the name of the African Group, by Botswana. This was itself a surprise because of the previously enlightened administration of Botswana, particularly in response to the HIV epidemic, reflecting the insistence by its former President (Festus Mogae) upon equality for LGBTIQ persons.³²

The Africa Group's resolution proposed a delay in the implementation of the resolution of the Human Rights Council whilst further consideration was given by member states to the proposed elements of SOGI rights, alongside United Nations' statements of human rights, together with the views adopted in some member countries concerning the inapplicability of international human rights law to SOGI rights. To counter the resolution proposed by Botswana, a substantial effort was mounted by international and national civil society organisations to defend the SOGI mandate and to resist the 'no action' resolution.

After a short but furious effort by both sides, a vote was taken in the Third Committee of the General Assembly (the Political Affairs Committee) on 21 November 2016. The outcome

³¹ The resolution on the SOGI mandate of the UNHRC is found in UN Human Rights Council, Resolution 32/2. Protection against violence and discrimination based on sexual orientation and gender identity, 30 June 2017, UNDoc.A/HRC/RES/32/2, <http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/32/L.2/REV.1> (accessed 26 January 2017). The mandate is occasionally described as dealing with 'SOGIE' issues and includes gender identity *or expression*. However, as this additional phrase does not appear in the UN resolutions the 'SOGI' appellation is retained.

³² President Festus Mogae of Botswana was a member (as was the author) of the UNDP Global Commission on HIV and the Law. That Commission recommended removal of criminal laws against homosexuals. A similar recommendation was made earlier by the Eminent Persons Group of the Commonwealth of Nations. See Commonwealth Secretariat, EPG, *A Commonwealth for All* (2011).

was close.³³ Eighty-four countries voted in favour of the continuation of the mandate. Seventy-seven countries voted against. Seventeen countries abstained. No vote was recorded on the part of several countries which, deliberately or accidentally, were absent when the vote was taken. A subsequent further attempt to block the mandate in the Fifth Committee of the General Assembly (the Budget Committee) in December 2016 produced a like outcome. In each case the vote was very close. The opponents almost won. A final challenge that was advanced into the plenary session of the General Assembly resulted in substantially the same close vote. The mandate survived; but the vote showed the high level of opposition.

This is not the occasion to analyse all of the features of this vote.³⁴ Given that the origin of much of the opposition to LGBTIQ equality derives from the countries of the former British Empire, it is useful to record the votes of the countries of the Commonwealth of Nations on the SOGI mandate. Those which voted in favour of the mandate were Australia, Bahamas, Belize, Canada, Cyprus, Fiji, Kiribati, Malta, New Zealand, Samoa, Seychelles, South Africa, Sri Lanka, United Kingdom and Vanuatu. Of the Commonwealth countries that voted against the mandate, the predominance of opposition in Africa, the Caribbean, and Islamic countries stands out: Antigua, Bangladesh, Botswana, Brunei, Cameroon, [Gambia], Ghana, Guyana, Jamaica, Kenya, Lesotho, Malawi, Malaysia, [Maldives], Mauritius, Namibia, Nauru, Nigeria, Pakistan, St Kitts, St Lucia, St Vincent, Singapore, Uganda, and [Zimbabwe].³⁵

Amongst the countries that abstained on the Africa Group resolution, or which did not vote, a number are members of the Commonwealth: Barbados, Granada, India, Mozambique, Papua New Guinea, Rwanda, Solomon Islands and South Sudan.

The Russian Federation and its allies and cultural neighbours, including China, voted against the Human Rights Council's SOGI mandate. However, there were some surprises in this category including Cambodia, Georgia, Mongolia, Venezuela and Vietnam (normally of like mind to Russia), all of which voted in favour of the mandate. Almost all of the members

³³ UN General Assembly (Third Committee) A/C3/71/L.46.

³⁴ Michael Kirby, 'A Curious UN Vote Upholds a New Mandate on Sexual Orientation and Gender Identity' (2017) 1 *European Human Rights Law Review* 37. The countries shown in brackets, at the time of the votes, had resigned from membership of the Commonwealth or had been suspended.

³⁵ At the times of the successive votes in 2016 proposing the termination of the SOGI mandate by the General Assembly, Gambia, Maldives and Zimbabwe had either been suspended as members of the Commonwealth of Nations or had purportedly withdrawn from its association. They are counted here to demonstrate the historical considerations that appear to have influenced the voting patterns.

of the Organisation of Islamic Cooperation voted against the mandate. The only substantive Islamic country to vote in favour of the mandate was Albania. Indonesia voted against the mandate.

The foregoing voting patterns in the United Nations indicate the persisting hostility towards LGBTIQ people worldwide. If some or most of the Commonwealth countries that abstained, or were absent from, the vote had attended and had voted in support of the 'no action' resolution moved by Botswana, the mandate would have been terminated.

The votes successively recorded in the Third Committee and Fifth Committee of the General Assembly are an indication of the fragility of the global moves to defend the vulnerable minority representing LGBTIQ people. That fragility was all the more surprising because the focus of the mandate of the Independent Expert was on the *violence* and discrimination suffered by this minority. The murder of the young gay activists in Bangladesh and elsewhere suggests the need for such a mandate. However, such violence is not confined to developing countries. The brutal shootings at the Pulse Nightclub in Orlando in the United States of America on 12 June 2016 showed that violence is a worldwide phenomenon.³⁶ That demonstrates why the initiatives of the Human Rights Council are so timely. And why the initiatives of those that sought to terminate the mandate were misguided, in terms of human rights priorities.

The struggle over the UN SOGI mandate is not over. It will not be concluded in our lifetimes. In September 2017, Professor Muntarhorn announced his retirement as Independent Expert after holding the mandate for a year. He explained the relinquishment of the office on medical grounds. He deserves appreciation for launching the mandate and for defending it at a moment of intense hostility. He was succeeded by Victor Madrigal-Borloz (Costa Rica).

V BEYOND LGBTIQ RIGHTS AND EQUALITY

It would be a mistake to portray John Marsden as solely a gay rights activist. He was that; but he was much else besides. He never accepted what he saw as injustices in the world or

³⁶ On 11 June 2016 at the Pulse Nightclub in Orlando Florida, 50 persons at the gay venue, including the perpetrator Omar Mateen, were killed by gunfire and an equal number were seriously injured.

in Australia. When in 2005 he was honoured by appointment as a life member of the NSWCCCL, he delivered a powerful address with a clarion call for civil liberties.³⁷ That address listed the causes that, he felt, needed the attention of the Australian community at that time. These included the civil liberties of asylum seekers and detainees; the civil liberties of persons detained under anti-terrorism laws; and the disproportionate incarceration of indigenous Australians. They also extended to the ever increasing rise in the use of custodial punishment in Australia; the interference by governments and legislatures in judicial sentencing discretions; the effective reduction of financial provisions for legal aid; the enlargement of administrative and bureaucratic intrusions into the judicial process; the failure of Australia to adopt even the modest proposal for a national human rights charter or statute as recommended by the Brennan committee;³⁸ the growing disillusionment with the democratic electoral process; the diminishing participation of citizens in the established political parties; the decline of civic egalitarianism in Australia; and the increasing intolerance of protestors and citizens espousing views different from one's own.

Concern about these and other issues for human rights and civil liberties demonstrate the ongoing relevance of these issues for those who struggle to uphold and extend liberty in Australia and the world. The 2016 votes in the United Nations on the SOGI mandate represent an indication that the global struggle for universal human rights and liberties is by no means over. Indeed, in historical terms, it has only just begun. The challenge before humanity is enormous. However, we all know that the journey of a thousand miles begins with a single step. At least some of us are have started the journey.

I pay tribute to the many valiant people who have worked to defend and advance civil liberties in Australia. A large number of those, who in the 1960s and 70s participated with me in the NSWCCCL, went on to become political leaders, judges, and other leading citizens. Although there have been many failures, as John Marsden asserted, there have been successes as well. It is a healthy society that chooses leaders and judges from a pool that includes individuals with a commitment to civil liberties. I hope that such traditions will

³⁷ John Marsden, 'Speech to the Council for Civil Liberties', unpublished, NSWCCCL, February 2005, on the occasion of his life membership.

³⁸ See Justice Margaret McMurdo, 'A Human Rights Act for Queensland?' (2015) *Queensland Legal Yearbook* 403 referring to proposals for a human rights statute in Queensland in addition to the *Human Rights Act* 2004 (ACT) and the *Charter of Human Rights and Responsibilities Act* 2006 (Vic).

continue. Beyond that, I hope that civil liberties in Australia will continue to produce restless, sometimes angry, always dissatisfied change agents like John Marsden to help shake us from our complacency. And to advance the cause of civil liberties in Australia and the world.

Engagement with equality and law reform are essential attributes of the professionalism of a lawyer today. Engagement with the human rights of people in countries beyond Australia is the fulfilment of the aspirations expressed in the *Charter* of the United Nations and spelt out in the *Universal Declaration of Human Rights*.³⁹ Both at home and abroad Australians should contribute to the attainment of such aspirations. Like everyone, John Marsden was flawed, imperfect, and sometimes inconsistent. However, he knew the importance of having global aspirations. In his lifetime, he made important contributions to their attainment. We must all continue to contribute to making them a practical reality.

³⁹ UDHR Art 1; 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'. Art 2 'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

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FOREIGNERS ACT AND THE FREEDOM OF MOVEMENT OF THE ROHINGYAS IN BANGLADESH*

ASHRAFUL AZAD**

It is estimated there are almost one million Rohingya refugees in Bangladesh. Most of these refugees are living without formal refugee status. Bangladesh has not signed the UN Refugee Convention, neither has it any domestic refugee regime. The Rohingya people are usually considered 'illegal foreigners' under the Foreigners Act 1946. Consequently, they face various restrictions in Bangladesh. This article discusses the restriction on freedom of movement of the Rohingyas within the country and internationally. Based on the legal analysis and empirical findings, this article shows that the Rohingyas in Bangladesh live in fear of arrest and detention, which deter their daily movement outside designated camps. However, despite obstacles, many Rohingyas manage to bypass the system using various informal and inconsistent ways. On the other hand, the government of Bangladesh considers the free movement of Rohingyas as a security threat and has taken measures to keep the refugees within camps.

CONTENTS

I	INTRODUCTION.....	184
II	ROHINGYA PEOPLE IN BANGLADESH.....	185
III	LAWS REGULATING FREEDOM OF MOVEMENT.....	188
	<i>A The Foreigners Act and Status of Rohingya in Bangladesh.....</i>	188

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IV	IMPACT OF THE RESTRICTIONS ON FREEDOM OF MOVEMENT.....	193
	<i>A Local Movement</i>	193
	<i>B International Movement</i>	197
V	CONCLUSION	199

I INTRODUCTION

In January of this year, I accompanied some students from the University of Chittagong to visit Rohingya refugee camps in Cox's Bazar, following the recent mass arrival of Rohingyas fleeing persecution in Myanmar. The camps are located in Ukhiya and Teknaf Upazilla (sub-district) of Cox's Bazar. After reaching Cox's Bazar, we took a local minibus to Ukhiya and then an auto-rickshaw (locally called CNG taxi or CNG) to the "unregistered" camps in Kutupalong and Balukhali. We faced no obstacle on the way.

However, when we were returning to Cox's Bazar, we had to face several check posts guarded by police and border guards. One of the students, Mustafij, who comes from the area, explained that the security personnel were looking for two 'things': yaba (a drug) and illegal Rohingya, both coming from bordering Myanmar. I will focus here only on Rohingya.

How do they identify the Rohingya? The Rohingya apparently look like local Bangladeshi people. Mustafij continued, 'though the Rohingya can speak the local dialect, they cannot speak Bengali. Moreover, most of them have very poor clothes and lack confidence in a new country. If caught, usually they are forced to leave the vehicle and walk back to the camp'. I noticed that many men and women in shaggy clothes and mostly bare feet are standing, sitting on land, or walking beside the highway. They are mainly newcomers who have no food and shelter and are unable to earn a livelihood, as they are barred from moving to Cox's Bazar where work and possibly help is available.

This article attempts to answer the following questions:

- What are the Bangladeshi laws that regulate the freedom of movement of refugees? How are the laws implemented?

- How do the restrictions on freedom of movement impact on the life of Rohingya refugees in Bangladesh?

The article consists of three main parts. The first part provides a brief introduction to the arrival and general status of Rohingyas in Bangladesh. The second part focuses on analysing Bangladeshi laws on the movement of refugees; this part principally comes from a research project on the legal status of Rohingya in Bangladesh.¹ The final part addresses the impact of the restrictions on freedom of movement on the life of Rohingya in Bangladesh. This part is mostly based on qualitative interviews conducted with unregistered Rohingya refugees in the Kutupalong camp. In total, 20 interviews were conducted in January 2017. The participants were selected purposively; however, attempts have been made to ensure gender and age diversity. The interview data is presented here anonymously for the safety of participants.

It should be noted that after the fieldwork was conducted, there has been another massive influx of Rohingya refugees in Bangladesh since 25 August 2017. This new influx of more than 600 000 refugees, the largest so far, has more than doubled the Rohingya refugee population in Bangladesh. This study only includes the newspaper reports and published comments regarding the new refugees; it has not included their primary interviews.

II ROHINGYA PEOPLE IN BANGLADESH

The Rohingya are an ethno-linguistic-religious minority group originating from the Northern Rakhine State of Myanmar. Facing persecution by Buddhist majority groups and the state authorities,² many Rohingya have fled to neighbouring Bangladesh.

In 1978, driven by *Operation Nagamin* (Dragon King) which was an attempt by the

¹ Ashraful Azad, Equal Rights Trust, 'Legal Status of the Rohingya in Bangladesh: Refugee, Stateless or Status Less' in *Confined Spaces: Legal Protections for Rohingya in Bangladesh, Malaysia and Thailand* (2016) 57.

² Maung Zarni and Alice Cowley, 'The Slow Burning Genocide of Myanmar's Rohingya' (2014) 23(3) *Pacific Rim Law & Policy Journal* 683; Fortify Rights, 'Policies of Persecution: Ending Abusive State Policies Against Rohingya Muslims in Myanmar' (Report, Fortify Rights, February 2014); Office of the High Commissioner of Human Rights, 'Report of OHCHR Mission to Bangladesh' (Flash Report, Office of the High Commissioner of Human Rights, 3 February 2017); Ashraful Azad, *The Ongoing Genocide in Myanmar* (3 January 2017) Open Democracy <<https://www.opendemocracy.net/ashraful-azad/ongoing-genocide-in-myanmar>>.

Burmese Army to clear out alleged “illegal migrants”, approximately 222 000 Rohingya people from Northern Arakan, fled to neighbouring Bangladeshi territories.³ Negotiations between the Burmese and Bangladeshi governments resulted in 187 250 refugees being returned to Burma by December 1979.⁴

In 1991–92, following the increased military presence in frontier areas, there was widespread forced labour, torture, rape, and killing of Rohingya resulting in around 250 000 Rohingya Muslims seeking asylum in Bangladesh.⁵ Between 1992 and 2008, 236 599 refugees were repatriated to Myanmar.⁶ In 1997, it was noted that the process of repatriation did not follow due process, with reports of forced repatriation.⁷

As of March 2017, there were 33 148 registered Rohingya refugees in Bangladesh, living in two official camps, Nayapara and Kutupalong, in the district of Cox’s Bazar. These camps are administered by the Government of Bangladesh with the assistance of the United Nations High Commissioner for Refugees (UNHCR).⁸

As noted, there are concerns about the repatriation process. In particular, it has been noted that many refugees were repatriated without their free, informed consent.⁹ Moreover, there have been no effective changes to the situation in the Rakhine State,¹⁰ resulting in many of the repatriated Rohingya once again crossing the border back to Bangladesh. On re-entry, many of these Rohingya were refused registration, or they did not seek it at all.¹¹ Lacking any formal legal status, these Rohingya built their makeshift huts or mingled with local Bangladeshi people in villages and slums. These Rohingya people, together with new arrivals are the so-called “unregistered” refugees.

³ K Maudood Elahi, ‘The Rohingya Refugees in Bangladesh: Historical Perspectives and Consequences’ in John R Rogge (ed), *Refugees: A Third World Dilemma* (Rowman & Littlefield, 1987) 227.

⁴ C R Abrar, Refugee and Migratory Movements Research Unit, *Repatriation of Rohingya Refugees* (1996), cited in Carl Grundy-Warr and Elaine Wong, ‘Sanctuary under a Plastic Sheet — The Unresolved Problem of Rohingya Refugees’ (1997) 5(3) *IBRU Boundary and Security Bulletin* 79.

⁵ Grundy-Warr and Wong, above n 4.

⁶ Imtiaz Ahmed (ed), *The Plight of the Stateless Rohingyas: Responses of the State, Society & the International Community* (The University Press Limited, 2010) 101.

⁷ Grundy-Warr and Wong, above n 4.

⁸ United Nations High Commissioner for Refugees, *Bangladesh: Factsheet* (March 2017) <<http://www.unhcr.org/50001ae09.pdf>>.

⁹ Grundy-Warr and Wong, above n 4.

¹⁰ For information on the recent situation in the Rakhine State, see Fortify Rights, above n 2.

¹¹ Chris Lewa, ‘Invisible Refugees: Study on the Self-Settled Burmese Rohingyas in Bangladesh’ (Report, Embassy of the Kingdom of the Netherlands, Dhaka, August 2008).

There are now about one million unregistered Rohingya refugees in Bangladesh.¹² In 2014, it was estimated that there were between 200 000 and 500 000 unregistered Rohingya in Bangladesh.¹³ This number continued to increase as the Rohingya have continued to flee Myanmar. Following ethnic violence in Myanmar in 2012, there was another influx. In response to the violence in October 2016, it was estimated by the United Nations (UN) that around 74 000 new Rohingya have fled to Bangladesh.¹⁴ The largest flow of Rohingya refugees started to enter Bangladesh since 25 August 2017. From 25 August to 28 October, 607 000 new refugees have arrived in Bangladesh and the number is increasing every day.¹⁵ The government of Bangladesh has allowed the refugees to stay in designated camps and is facilitating humanitarian aid in cooperation with local and international non-governmental organisations (NGOs) and the UN. However, the government has refused to provide them 'refugee status'. Rather, it is conducting a bio-metric registration and providing them a 'Myanmar National's Registration Card'.

Some unregistered Rohingyas live in visible camps in Cox's Bazar. Until recently, there have been two such camps: one is on the fringes of the official Kutupalong camp, and another in the Leda area, seven kilometres from the Nayapara camp.¹⁶ I observed another new unregistered camp being built in the Balukhali area during the field visit in January 2017. Outside of these camps, other unregistered Rohingya are less visible, as they live alongside Bangladeshi citizens. Indeed, some came many years ago and have now

¹² Max Bearak, 'Bangladesh Is Now Home to Almost 1 Million Rohingya Refugees', *Washington Post* (online), 25 October 2017

<https://www.washingtonpost.com/news/worldviews/wp/2017/10/25/bangladesh-is-now-home-to-almost-1-million-rohingya-refugees/?utm_term=.b3493e74b0c5>.

¹³ United Nations High Commissioner for Refugees, *Bangladesh: Factsheet* (September 2014). The Government of Bangladesh has recently conducted a census to determine the actual number of 'undocumented Myanmar nationals' (UMN) living in the country. However, the outcome of the census has not been published yet. See Sheikh Shahariar Zaman, 'Final Rohingya Census Report by Nov', *Dhaka Tribune* (online), 20 June 2016 <<http://archive.dhakatribune.com/bangladesh/2016/jun/20/final-rohingya-census-report-nov>>.

¹⁴ United Nations High Commissioner for Refugees, above n 8.

¹⁵ International Organization for Migration and Inter Sector Coordination Group, *ISCG Situation Update: Rohingya Refugee Crisis, Cox's Bazar —29 Oct 2017* (29 October 2017) Relief Web <<https://reliefweb.int/report/bangladesh/iscg-situation-update-rohingya-refugee-crisis-cox-s-bazar-29-oct-2017>>.

¹⁶ Esther Kiragu, Angela Li Rosi and Tim Morris, 'States of Denial: A Review of UNHCR's Response to the Protracted Situation of Stateless Rohingya Refugees in Bangladesh' (Review, PDES/2011/13, United Nations High Commissioner for Refugees, December 2011) 8.

integrated into Bangladeshi society.¹⁷ After the recent arrival of refugees, the government has allocated 2000 acres of forest land near the Kutupalong camp to build new shelters.¹⁸

III LAWS REGULATING FREEDOM OF MOVEMENT

Freedom of movement is recognised in several international instruments, including the *International Covenant on Civil and Political Rights* (ICCPR).¹⁹ The UNHCR has emphasised that aliens whose status has been regularised are entitled to enjoy the right to move freely.²⁰ Despite being a signatory to most UN human rights instruments, Bangladesh follows domestic legal provisions and administrative procedures regarding the movement of refugees.

A The Foreigners Act and Status of Rohingya in Bangladesh

Bangladesh has not ratified the 1951 Refugee Convention,²¹ nor either of the two Statelessness Conventions;²² nor does it have any domestic law governing refugee status or the granting of asylum. Consequently, the legal status of Rohingya is governed by the national law on the entry and residence of foreign aliens, rather than laws which cater for their particular vulnerabilities. In the absence of any legal regime on refugees and stateless persons, the vast majority of Rohingyas are dealt with under the general law applicable to all non-citizens, and many aspects of their lives are controlled through administrative measures rather than standard legal procedures.

In the absence of domestic law specifically regulating the status of the Rohingya in national law, the rights of Rohingya to enter and remain in Bangladesh are set out in the

¹⁷ Lewa, above n 11. See also Ahmed, above n 6.

¹⁸ Hannah Beech, 'Bangladesh Plans to Build Huge Refugee Camp for Rohingya', *New York Times* (online), 16 September 2017 <<https://nyti.ms/2y5FUtQ>>.

¹⁹ *International Covenant on Civil and Political Rights*, opened for signature on 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 12.

²⁰ Human Rights Committee, *General Comment No 27: Article 12 (Freedom of Movement)*, 67th sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999).

²¹ *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).

²² *Convention Relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960); *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975).

Foreigners Act 1946;²³ the *Foreigners Order 1951*;²⁴ the *Foreigners (Parolees) Order 1965*;²⁵ the *Registration of Foreigners Act 1939*;²⁶ the *Registration of Foreigners Rules 1966*;²⁷ the *Control of Entry Act 1952*;²⁸ and the *Passport Act 1920*.²⁹ However, the laws are applied differently for registered and unregistered Rohingya.

The only Rohingya in Bangladesh who have secured official recognition are those living in the two official camps. These are the Rohingya who entered Bangladesh during the 1991–1992 influx and were accepted as refugees on a prima facie basis,³⁰ under executive decisions.³¹

The Refugee Relief and Repatriation Commissioner (RRRC) under the Ministry of Disaster Management and Relief of Bangladesh is responsible for administering the registered refugee operation, while UN agencies such as the World Food Programme and UNHCR coordinate humanitarian assistance. Each camp has a ‘Camp-In-Charge’ (CiC), the civil service cadres of the Bangladeshi government under the auspices of the RRRC, who live in and administer the camp.

Registered refugees living in the camps typically prove their legal residency through UNHCR photo-identity cards which are issued to all refugees above the age of five. Though these cards do not grant immunity from arrest nor do they give the cardholders the right to freedom of movement, refugees in possession of a card stand a better chance of being released and/or granted bail once arrested.³² The CiC is the legal and administrative guardian of the refugees in the assigned camp: for example, the issue of refugee ration books and travel passes, permission to file a police case, and marriage and divorce are all

²³ Foreigners Act 1946 (Bangladesh).

²⁴ Foreigners Order 1951 (Bangladesh).

²⁵ Foreigners (Parolees) Order 1965 (Bangladesh).

²⁶ Registration of Foreigners Act 1939 (Bangladesh).

²⁷ Registration of Foreigners Rules 1966 (Bangladesh).

²⁸ Control of Entry Act 1952 (Bangladesh).

²⁹ Passport Act 1920 (Bangladesh).

³⁰ Pia Prytz Phiri, ‘Rohingyas and Refugee Status in Bangladesh’ (2008) 30 *Forced Migration Review* 34, 34.

³¹ Uttam Kumar Das, ‘Legal Protection for Refugees: Bangladesh Perspective’ in Mizanur Rahman (ed), *Human Rights and Good Governance* (ELCOP, 2004) 179. See also Arpeeta Shams Mizan, *Analyzing the Legislative Gaps in the Detention Scheme of the Foreigners in Bangladesh: The Released Prisoners* (National Human Rights Commission, 2014).

³² Das, above, n 31.

authorised by the CiC.³³ In the absence of any legal standards, the protection is provided in an 'ad hoc, arbitrary and discretionary system'.³⁴

In addition to the Rohingya living in the camps, there are many unregistered Rohingya living in villages and towns across Bangladesh who do not have any legal status.³⁵ The government and media typically categorise such persons as 'refugees', 'Rohingya intruders', 'illegal foreigners', 'illegal Burmese', 'undocumented Myanmar nationals (UMN)', and 'economic migrants'.³⁶

Various sources and observations during field visits confirm that the International Organization for Migration ('IOM') is playing the leading role in the humanitarian operations for the unregistered Rohingya population.³⁷ However, it has not been possible to verify the extent of activities performed by IOM and its partner agencies.

Entry, exit, and stay of non-citizens in Bangladesh are mainly determined by the *Foreigners Act* (the *Act*).³⁸ The *Act* regulates all foreigners staying in Bangladesh, irrespective of the individual grounds for such a stay. For example, it does not differentiate between a foreigner who entered Bangladesh for business purposes and a persecuted asylum seeker. The *Act* was enacted during the British colonial era to manage migration movements initiated by the British plantation owners.³⁹ Both India and Bangladesh use the law, and it has been a source of constant constitutional debate in the sub-continent.⁴⁰

Article 2(a) of the *Act* defines a 'foreigner' as 'a person who is not a citizen of Bangladesh'. In accordance with this definition, Rohingyas are treated as 'illegal foreigners', as the *Act*

³³ Azad, above n 1. This information was gathered in Equal Rights Trust's interviews with UNHCR staff members on 10 October 2015.

³⁴ Phiri, above n 30.

³⁵ Kiragu, Rosi and Morris, above n 16.

³⁶ In the National Strategy Paper published by the Bangladeshi government, the government has officially used the term 'undocumented Myanmar nationals' (UMN). See Inter Sector Coordination Group (ISCG), *National Strategy on Myanmar Refugees and Undocumented Myanmar Nationals*, Government of Bangladesh <<http://cxbcoordination.org/resources/policy/>>.

³⁷ See, eg, International Organization for Migration, *Featured Stories* (2017) International Organization for Migration <<https://iom.org.bd/press-room/featured-stories/>>; Inter Sector Coordination Group, *Humanitarian Response* (2017) Humanitarian Response <<http://cxbcoordination.org/>>.

³⁸ Foreigners Act 1946 (Bangladesh).

³⁹ Law Commission of India, *175th Report of the Indian Law Commission on the Foreigners (Amendment) Bill, 2000* (2000) <<http://lawcommissionofindia.nic.in/reports/175thReport.pdf>>.

⁴⁰ Aju John, *Foreigners Act Defective* (30 May 2012) MyLaw <<http://blog.mylaw.net/foreigners-act-defective/>>.

requires that any foreigner 'shall not enter Bangladesh, or shall enter Bangladesh only at such times and by such route and at such port or place and subject to the observance of such conditions on arrival as may be prescribed'.⁴¹ Under the *Act*, the government can require a foreigner to reside in a particular place, impose restrictions on movement, and prohibit him or her from engaging in specific activities.⁴² The *Act* also authorises a police officer 'to take such steps and use such force as may in his opinion, be reasonably necessary for securing compliance' with the provisions of the *Act*.⁴³

Breach of the provisions of the *Act* is punishable by a prison term of up to five years or a fine.⁴⁴ Although the government does not arrest many of the unregistered Rohingya for their 'illegal entry' into Bangladesh, as evidenced by the presence of a large number of unregistered Rohingya concentrated in specific areas, some people are arrested and sentenced under this *Act*. Moreover, some individuals prosecuted and convicted under the *Act* are not released after having served the full five-year term, as they are required to be transferred to authorities of his or her country of nationality or habitual residence. As Myanmar refuses to recognise any Rohingya, these individuals may remain in detention notwithstanding the expiry of his or her sentence. In 2012, there were 90 prisoners whose sentence had expired in four district prisons, among whom 83 persons were identified as 'Burmese' — suggesting they may have been Rohingya.⁴⁵ This practice amounts to arbitrary detention and 'undoubtedly amounts to a violation of the Constitution'.⁴⁶ Further, should an individual prosecuted under Article 3 of the *Act* be released, he or she is liable to immediate re-arrest for the same offence.⁴⁷

Very recently, the High Court Division of the Supreme Court of Bangladesh provided a series of judgements in response to four Writ Petitions filed by the Refugee and Migratory Movements Research Unit (RMMRU) in favour of five Rohingya who had already served their sentence. On 31 May 2017, the court declared that the detentions of the five Rohingya in jail were without lawful authority. The judgments ordered the release of the concerned Rohingyas and directed that they be handed over to the Petitioner RMMRU so

⁴¹ *Foreigners Act 1946* (Bangladesh) art 3(2)(a).

⁴² *Ibid.*

⁴³ *Ibid* art 11(2).

⁴⁴ *Ibid* art 14.

⁴⁵ Mizan above n 31, 20.

⁴⁶ *Ibid*, 17.

⁴⁷ *Ibid.*

that UNHCR can take appropriate steps to accommodate the released Rohingyas in the two Rohingya camps in Cox's Bazar.⁴⁸

The Rohingyas were all charged with violating the *Act* and were tried by the different courts of judicial magistrates of Chittagong, Cox's Bazar, and Rangamati. They were found guilty and sentenced to imprisonment for various terms ranging from one to five years under s 14 of the *Act*. The magistrates had ordered for their expulsion/push back to Myanmar after the end of their respective prison terms. Regarding the judicial magistrates' order for expulsion, the High Court

referred to art 33 of the *Refugee Convention of 1951* to hold first, that the court can take judicial notice of the persecution, torture, killing and other atrocities systematically committed upon the Rohingyas in Myanmar and that tens of thousands of them have sought refuge in Bangladesh and the government with the help of UNHCR is providing food and shelter to thousands of these Rohingyas. Secondly, though Bangladesh has not ratified the refugee convention, art 33 of the convention has become a part of customary international law. Hence Bangladesh was obliged not to violate art 33 by forcing these detainees back to Myanmar. Furthermore, the court also noted that, Bangladesh was a signatory to the 1984 convention against torture and art 3 of that convention also prohibits refoulement. Consequently, the court held that the detention of these Rohingyas were without lawful authority and ordered for their settlement in the Rohingya refugee camps of Cox's Bazar.⁴⁹

Importantly, article 10 of the *Act* also provides that the government may exempt individuals from liability under the *Act* by passing an order:

The Government may by order declare that any or all of the provisions of this *Act* or the orders made thereunder shall not apply, or shall apply only with such modifications or subject to such conditions as may be specified, to or in relation to any individual foreigner or any class or description of foreigner.⁵⁰

⁴⁸ 'HC Orders Release of Five Rohingyas: They Are in Jail after Serving Sentences', *The Daily Star* (Dhaka), 2 June 2017. See also, Refugee and Migratory Movements Research Unit, 'Breaking News: High Court Declares Detention of 5 Rohingyas Unlawful' (Press Release, 31 May 2017).

⁴⁹ Refugee and Migratory Movements Research Unit, above n 48.

⁵⁰ *Foreigners Act 1946* (Bangladesh) art 10.

Thus, although Bangladesh does not have a legal regime on refugees, the government has scope under article 10 of the *Act* to exempt Rohingya refugees from the provisions of the *Act* (particularly the provision of detention for illegal entry into and stay in Bangladesh).

IV IMPACT OF THE RESTRICTIONS ON FREEDOM OF MOVEMENT

Rohingyas in Bangladesh face considerable restrictions on their freedom of movement. The restriction on movement impacts on other rights, most importantly the right to seek a livelihood. This section provides an analytical description of the experiences of the Rohingya in Bangladesh under restrictions on movement dividing it into two parts — local and international movement.

A Local Movement

In 1993, the Bangladeshi government signed a Memorandum of Understanding (MoU) with the UNHCR; conditions in this MoU included that refugees would be restricted to the area of the camps and that refugees would refrain from engaging in economic activities.⁵¹ Refugees can apply for a one-day pass from CiC to travel to seek medical care or to visit other refugees living in another camp; passes for more than one day are infrequently issued and whilst passes are free of charge in principle, in practice refugees are often required to pay for them.⁵²

For the unregistered stateless Rohingya, there is no official permission to move freely. For those living in the makeshift camps, stepping outside of the camp places them at risk of arrest and detention under the *Act*. Though the police do not always detain them, most of the refugees who were interviewed expressed fear and anxiety about the restrictions on movement. The following statements by refugees illustrate the situation:

I feel so scared for fear of getting arrested by police ... I do not have any legal document. So do not even know what I have to do if someday I get caught.'
Halim (18 y/o)

⁵¹ Kiragu, Rosi and Morris, above n 16, 9.

⁵² Ibid.

I know many people who did not come back after going to work. Later, we knew that they were arrested. Now their wife and children are suffering ... I feel scared of being arrested at any time. I feel scared when the police get near to the car ... The Imam of our mosque is in jail now. He was arrested at a check point when he went to see relatives. Our kids' study has been affected due to the arrest of the Imam.' Ali (28)

I do not go outside that much. Once my husband and I went to my aunt's house in Cox's Bazar. There, police arrested my husband and beat him very much ... In Burma, we have many relatives who helped us with money. After giving the money to police, they released my husband.' Laila (24)

It is not practical for the police to detain all the unregistered refugees due to their high number. When they are caught at a check point, they are usually asked to go back to the camp area. Yasmin (33) said, 'We can only go up to Ukhiya. If we go further, BGB (Border Guards Bangladesh) stop us and ask to go back to the camp.'

Though there is no legal mechanism to allow freedom of movement, it is found that there are some informal ways that provide some protection against arrest, which include census cards, student identity documents (IDs), and marital relations with Bangladeshi citizens. It should be noted that as these are informal possibilities; they may not be applied consistently for everyone and at all times.

Several refugees said that the 'census card', which has been issued recently, provides them protection from arrest.

Before getting census card, there were problems, but from when I got this card, there is no problem in movement'. Rojina (28)

'We have a census card. We have to take the card with us while going out. Otherwise the police/BGB detain us. A few days ago, I went to Balukhali for working in the field but unfortunately forgot my card. In the way of returning, camp police kept me detained till 10 pm.' Halima (42)

One refugee mentioned that a student ID ensures freedom of movement. Atullah (26) said that 'when I used to study in Patiya Madrasha, I had a student card. By this card, I

could move everywhere. If any police inquired me, then I would say that I studied in Patiya Madrasha and showed the card.'

It was also found that patients are allowed to go to bigger hospitals in Cox's Bazar and Chittagong. Ataulah (26) further said, 'any serious patients are sent to Chittagong if needed'.

There is no income-generating activity available in the camps, and the many unregistered Rohingya are not in receipt of food aid.⁵³ As a result, many Rohingya seek informal employment in Cox's Bazar. The risk of being arrested results in them living in a constant state of fear and some unscrupulous employers take advantage of the situation of unregistered Rohingya to pay them less.⁵⁴

In addition to arrest and detention by the police, Rohingya are at risk of being bullied, harassed, and beaten by the local population. They are harassed as 'kalar' and 'Bengali' in Myanmar;⁵⁵ in Bangladesh "Burmaya" is a derogatory term for the Rohingyas that is frequently used in the streets of Cox's Bazar. The 'Rohingya Resistance Committees' in different areas of Cox's Bazar lead hate campaigns against Rohingya.⁵⁶

'After coming here, my husband went to cut wood to the western jungle and sold those in the camp. But he stopped going there after extortion by some local people. The Rohingya who go to that jungle have to pay them 40/50 taka.' Halima (42)

'There are also some local people who take money and mobile phone forcefully ... last year they took the money and a new mobile phone from me. I bought the phone by conducting tarawih prayer in Ramadan.' Sabur (20)

As a result of the stigmatisation faced by Rohingya, they keep a low profile and do not expose their identities.⁵⁷ All of these factors contribute to the sense that freedom of

⁵³ Chris Lewa, 'Unregistered Rohingya Refugees and the Kutupalong Makeshift Site' (Report, Canadian High Commission, Dhaka, February 2011); Physicians for Human Rights, 'Stateless and Starving: Persecuted Rohingya Flee Burma and Starve in Bangladesh' (Emergency Report, Physicians for Human Rights, March 2010) 6-7.

⁵⁴ Ashraful Azad and Tazrin-A-Jakea, 'Employment and Integration of the Stateless: The Case of Rohingyas in Cox's Bazar' (2013) 28 *The Chittagong University Journal of Social Sciences* 179.

⁵⁵ Fortify Rights, above n 2, 16.

⁵⁶ Chris Lewa, *Unregistered Rohingya Refugees in Bangladesh: Crackdown, Forced Displacement and Hunger* (11 February 2010) Burma Library 7 <<http://www.burmalibrary.org/docs08/Bangladesh-Crackdown.pdf>>.

⁵⁷ Lewa, above n 53.

movement is severely restricted. It should also be mentioned that after the mass arrival of refugees, thousands of local Bangladeshi people flocked to the camps and border areas with lifesaving aid that helped the newly arrived refugees survive until international aid arrived. The relationship between Rohingya and their host community is complex, intertwined with many factors. Uddin has identified this as a 'hosting' and 'hurting' relationship depending on the time and situation.⁵⁸

A recent study on the mental health of registered refugees found that freedom of movement was a top concern for the refugees. The quantitative study interviewed 148 adult refugees and found that:

The most common daily stressors cited by participants included concerns about attaining food (95 per cent), lack of freedom of movement (82 per cent), general lack of fair access to services within the camps (78 per cent), and concerns about safety or protection (77 per cent). When asked to rank their top three concerns, the majority of participants indicated problems with attaining food, lack of freedom of movement, and safety or protection concerns.⁵⁹

If stopped or questioned by police, the refugees try to save themselves by providing a fake local address. However, this approach might not always be successful. A young refugee explained: 'We memorise the name of member and chairman [of Union Council] to tell where needed. Though many are behind bars now trying this way.'

The experienced police members can usually differentiate between a local and a Rohingya by noticing the small differences in accent. When asked how the police recognised whether they were Rohingya, Senowara (19) replied, 'by the language'.

The restrictions on movement increased after the arrival of a large number of refugees since 25 August 2017. This is indeed a humanitarian, national security, and diplomatic challenge for Bangladesh. The government instructed refugees to stay in designated camps and set up 27 check posts on the way out from camp areas to other parts of Bangladesh. Police stations all over the country are instructed to look for Rohingya.⁶⁰

⁵⁸ Nasir Uddin (ed), *To Host or To Hurt: Counter-Narratives of Rohingya Refugee Issues in Bangladesh* (Institute of Culture & Development Research, 2012).

⁵⁹ Andrew Riley et al, 'Daily Stressors, Trauma Exposure, and Mental Health among Stateless Rohingya Refugees in Bangladesh' (2017) 54(3) *Transcultural Psychiatry* 304, 315.

⁶⁰ Pinaki Roy and Mohammad Ali Jinnat, 'Rohingyas Fan Out', *The Daily Star* (Dhaka), 17 September 2017.

Rohingyas detained in other districts have been sent back to the camps,⁶¹ and some were sent to jail.⁶² In a statement on 16 September 2017, a police spokeswoman said, 'they should stay in the designated camps until they return to their country ... they cannot travel from one place to another by roads, railways or waterways ...'⁶³ She also said, as Al Jazeera reports, 'Rohingya were also asked not to take shelter in the homes of their friends or acquaintances and locals have been asked not to rent houses to the refugees.'⁶⁴ It is not hard to understand that the concern of the Bangladeshi government is dictated by the huge task of managing a staggering one million refugees in an already densely populated and resource-poor country.

It is also reported that there are many brokers (locally called 'dalal') who help Rohingya to move out of the camps. These brokers move Rohingya to other parts of Bangladesh in exchange for money. Following the recent mass arrival of refugees and subsequent increased activity of brokers, police have arrested 280 brokers.⁶⁵

B International Movement

If Rohingya wish to travel internationally, they must seek assistance from human traffickers/smugglers or bribe corrupt officials to obtain a Bangladeshi passport.⁶⁶ The UNHCR estimates that 170 000 people have moved from the coasts of Myanmar and Bangladesh to Thailand, Malaysia, and Indonesia by boat from 2012 to 2015. The majority of those seeking to undertake such a perilous journey are from Northern Myanmar or Southern Bangladesh. The ultimate destination for these individuals is Malaysia which hosts a large number of Rohingya and Bangladeshi people.

During these perilous journeys, around 2 000 people died because of hunger, dehydration, drowning, and beating by smugglers or traffickers. Following a long, arduous journey through the Bay of Bengal and the Andaman Sea, passengers are taken

⁶¹ '103 Rohingyas Detained in Chittagong', *Daily Prothom Alo* (online), 18 September 2017 <<http://en.prothom-alo.com/bangladesh/news/159903/103-Rohingyas-detained-in-Chittagong>>.

⁶² '20 Rohingyas Found in Manikganj', *The Daily Star* (Dhaka), 15 September 2017.

⁶³ Roy and Jinnat, above n 60.

⁶⁴ *Ibid.*

⁶⁵ Nur Uddin Alamgir, 'Many Brokers Trying To Spread Rohingyas', *The Daily Sun* (Dhaka), 21 September 2017.

⁶⁶ Azad, above n 1. This information was gathered in Equal Rights Trust's telephone interviews with several people from host communities in Cox's Bazar in November 2015.

to camps in the jungles of Thailand near the Malaysian border. These camps are essentially used as prisons where the passengers are detained and tortured until their relatives pay ransom money to the traffickers. People in these camps die from a variety of causes including beatings, illness, and starvation. Hundreds are suspected to have died in the transit camps in Thailand: indeed, there has been significant media coverage of the discovery of mass graves in the Thai jungle.⁶⁷ The trafficking of Rohingya is a hugely profitable business for 'transnational criminal networks'. UNHCR estimates that this illegal business has generated as much as US\$100 million in revenues at its peak.⁶⁸

This illegal journey is locally called the "boat line". Farzana argues that refugees are very aware of the risks and dangers of this journey but choose this out of desperation. A young refugee said:

I know that the boat line is risky. They [the brokers] say that they will take us to Malaysia, but we never know where we will end up. They might take us to Thailand, Indonesia, or even Burma. If God is kind on me, I will survive on this sea journey ... If I don't take the risk now, I have to live in refugee camp my whole life!⁶⁹

The instances of boat journeys of Rohingya and Bangladeshi have largely reduced after the discovery of mass graves in Thailand. In the following investigation and trial, a Thai court convicted dozens including a Thai Lieutenant General in July 2017.⁷⁰

The Bangladeshi government has enacted an anti-human trafficking law in 2012, titled *Prevention and Suppression of Human Trafficking Act*.⁷¹ The law prescribes severe punishments for human trafficking including fines, imprisonment, and the death sentence. However, the 2017 *Trafficking in Persons* report by US State Department notes that 'the Government of Bangladesh does not fully meet the minimum standards for the

⁶⁷ 'Emmanuel Stoakes, 'Thailand Human Trafficking Death Toll Far Greater than Feared, Claims Rights Group', *The Guardian* (online), 6 May 2015 <<http://www.theguardian.com/global-development/2015/may/06/thailand-human-trafficking-mass-grave-burma-rohingya-people>>.

⁶⁸ UNHCR Regional Office for South-East Asia, *Mixed Maritime Movements in South-East Asia* (2015) United Nations High Commissioner for Refugees, 5 <<https://unhcr.atavist.com/mmm2015>>.

⁶⁹ Kazi Fahmida Farzana, 'Voices of the Burmese Rohingya Refugees: Everyday Politics of Survival in Refugee Camps in Bangladesh' (2016) 24(1) *Pertanika Journal of Social Sciences & Humanities* 131, 139.

⁷⁰ Ryn Jirenuwat and Russell Goldman, 'Dozens Found Guilty in Thailand Human Trafficking Case', *The New York Times* (online), 19 July 2017 <<https://www.nytimes.com/2017/07/19/world/asia/thailand-human-trafficking-case.html>>.

⁷¹ Prevention and Suppression of Human Trafficking Act 2012 (Bangladesh).

elimination of trafficking; however, it is making significant efforts to do so'.⁷² The report downgraded Bangladesh to the Tier 2 Watch List.⁷³

Bangladesh does not have any law specifically concerned with migrant smuggling. The illegal migration and violation of migrants' rights are usually addressed under the *Overseas Employment and Migrants Act 2013*.⁷⁴

However, Rohingya are not confined solely to ocean or land travel. A large number of Rohingya live in the Gulf States, mainly in Saudi Arabia.⁷⁵ These countries are largely only accessible by air. If Rohingyas seek to move to Saudi Arabia, or other Gulf states, they must therefore obtain 'legal' documents. As they are stateless, the only option available is to procure fake or forged documents from corrupt officials. There is no reliable data available on the number of Rohingyas who managed to obtain Bangladeshi passports to go abroad, but the Expatriates Welfare and Overseas Employment minister estimates that there are 50 000 Rohingya people living abroad on Bangladeshi passports.⁷⁶ Bangladeshi police have also arrested Rohingya who attempt to pass through airports on a Bangladeshi passport.⁷⁷

IV CONCLUSION

This paper has shown that the Rohingya refugees in Bangladesh live in an uncertain legal space. They are allowed to stay in Bangladesh through administrative decisions in the absence of any domestic refugee regime. Though many refugees live, move, and work

⁷² United States Department of State, *Trafficking in Persons 2017 Report: Country Narratives, Bangladesh* (2017) <<https://www.state.gov/j/tip/rls/tiprpt/countries/2017/271142.htm>>.

⁷³ Ibid.

⁷⁴ Overseas Employment and Migrants Act 2013 (Bangladesh).

⁷⁵ Al Jazeera reports that there are an estimated 200 000 Rohingya in Saudi Arabia and 10 000 in the United Arab Emirates (UAE). See 'Persecution Path: Following Myanmar's Fleeing Rohingya', *Al Jazeera* (online), 15 March 2017 <<http://www.aljazeera.com/indepth/interactive/2017/03/persecution-path-myanmar-fleeing-rohingya-170314125333337.html>>.

⁷⁶ '50,000 Rohingya People of Myanmar Staying Abroad with Bangladeshi Passports, Says Minister', *Bdnews24.com* (online), 13 August 2015 <<http://bdnews24.com/bangladesh/2015/08/13/50000-rohingya-people-of-myanmar-staying-abroad-with-bangladeshi-passports-says-minister>>. See also Kamran Reza Chowdhury, 'Rohingyas in KSA Must Forgo Bangladeshi Passports', *Dhaka Tribune* (online), 20 July 2013 <<http://www.dhakatribune.com/bangladesh/2013/07/20/rohingyas-in-ksa-must-forgo-bangladeshi-passports/>>.

⁷⁷ 'Rohingyas with Green Passports', *The Daily Star* (Dhaka), 12 August 2012; 'Chittagong Airport Police Stops 22 'Rohingyas' from Flying', *Bdnews24.com* (online), 18 June 2017 <<http://bdnews24.com/bangladesh/2017/01/18/chittagong-airport-police-stops-22-rohingyas-from-flying>>.

outside of designated camps, this leaves them at risk of arrest, detention, or deportation to camps. Some refugees have managed to invent various informal, and often illegal, coping strategies in collaboration with local networks to bypass official restrictions and move within and beyond the border of Bangladesh. The coping strategies and function of this collaboration require further research.

Rohingya have taken asylum in Bangladesh because they experience increased security compared to their country of origin, Myanmar. The statement made by a refugee, Rojina (28), reflects this: 'whatever the situation, we are grateful here because there is no fear of military'. However, restrictions on movement limit their human rights, as obstacles in accessing employment, education, entertainment, and other necessities of life are created. On the other hand, the Bangladeshi government sees the free movement of Rohingya as a security threat, particularly as it is not hard for Rohingya people to mix with local Bangladeshi and obtain fake identity documents through illegal means. The government is also concerned with the possibility that the permission to move and work may discourage the refugees to go back to Myanmar when there is an agreement on repatriation.

This is indeed a welcome initiative on the part of the Bangladeshi government, as it has allowed approximately one million refugees to stay in the country on humanitarian grounds, despite being a densely populated developing country. The camp provides safety of life for persecuted people. However, in the long run, it also wastes life by not just limiting Rohingya people's movement, but also destroying their hope of leading normal lives.

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#RIGHTSPLAINING: POLITICAL SPINERTIA OR A HISTORIC FUTURE FOR HUMAN RIGHTS IN AUSTRALIA?

BENEDICT COYNE*

Opening Speech for the Inaugural Australian Lawyers for Human Rights (ALHR) National Human Rights Conference at La Trobe University Law School City Campus, Melbourne, 17 February 2017 presented by ALHR national President Benedict Coyne, and setting the scene for the conference by focusing on current, hot-topical issues in human rights in Australia, and attempting to illuminate a path forward for positive progress on human rights as a means of addressing human wrongs!

CONTENTS

I	INTRODUCTION.....	X
II	THE CURRENT STATUS OF HUMAN RIGHTS IN AUSTRALIA.....	X
III	GUARDIANS OF THE STORIES.....	X
IV	#RIGHTSPLAINING & HUMAN RIGHTS EDUCATION	X
V	A RIPE TIME FOR A BILL OF RIGHTS	X

I INTRODUCTION

Australian Lawyers for Human Rights ('ALHR') was established in 1993 by Kate Eastman SC and is a national association of Australian solicitors, barristers, academics, judicial officers, and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees, a range of thematic national subcommittees and a secretariat at La Trobe University Law School in Melbourne. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices, and protects universally accepted standards of

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human rights throughout Australia and overseas.

II THE CURRENT STATUS OF HUMAN RIGHTS IN AUSTRALIA

On 9 February 2017, at the annual Department of Foreign Affairs and Trade Human Rights Non-Governmental Organisation Forum at the National Museum of Australia in Canberra, Foreign Minister the Hon Julie Bishop MP stated:

The idea that humans have inherent rights because and by virtue of their humanity, in fact defines Australia's approach to the promotion and protection of human rights, both at home and abroad. The Australian Government remains committed to the United Nations, to its principles and its Charter.¹

Unfortunately, such sentiment flies hard and fast into the face of reality — perhaps of the “alternative fact” species of flying animal?

Attorney-General Brandis then made the very welcome, albeit overdue, announcement about ratifying the *Optional Protocol to the Convention against Torture*, by December 2017 with the words: ‘This will be an important reaffirmation of Australia's deep commitment to preventing torture and other mistreatment in our places of detention.’²

As he spoke those words:

- the most up-to-date figures record 390 people, including 45 children, detained on Nauru and 872 on Manus Island;³ as is now well known to us, the conditions of detention on those islands of despair were found by the former United Nations (UN) Special Rapporteur on Torture Juan Mendez in breach of the Convention Against Torture⁴ and by the Papua New Guinea Supreme Court in breach of the

¹ Julie Bishop, ‘2017 DFAT-NGO Forum on Human Rights’, (Speech delivered at the Forum on Human Rights, National Museum of Australia, Canberra, 9 February 2017).

<http://foreignminister.gov.au/speeches/Pages/2017/jb_sp_170209.aspx>.

² George Brandis, ‘2017 DFAT-NGO Forum on Human Rights’, (Speech delivered at the Forum on Human Rights, National Museum of Australia, Canberra, 9 February 2017)

<<https://www.attorneygeneral.gov.au/Speeches/Pages/2017/FirstQuarter/2017-dfat-ngo-forum-on-human-rights-national-museum-of-australia-canberra.aspx>>.

³ ‘ICC asked to examine offshore refugee camps’, *Sky News Australia* (online), 13 February 2017

<<http://www.skynews.com.au/news/top-stories/2017/02/13/icc-asked-to-examine-offshore-refugee-camps.html>>.

⁴ United Nations Human Rights Council, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or punishment, Juan Méndez, 28th sess, UN Doc A/HRC/28/68/Add.1 (6 March 2015).

universal right to freedom from arbitrary detention;⁵

- the Global Legal Action Network (GLAN) in Collaboration with the Stanford Human Rights Clinic were in the final preparations for lodging yet another Communique in the International Criminal Court (ICC) (the fifth and counting) alleging Crimes Against Humanity by the Australian government and private corporations to warrant a *proprio motu* investigation by Chief Prosecutor Fatou Bensouda pursuant to article 15 of the Rome Statute;⁶ and
- the systemic abuse at juvenile detention centres around Australia continued, as did egregiously disproportionate rates of incarceration of indigenous children and adults in places of detention throughout Australia.

You could hardly script such aberrant contradictions between political statement and reality. As Orwell imparted, 'doublethink' means 'the power of holding two contradictory beliefs in one's mind simultaneously, and accepting both of them'.⁷ An acquired skill no doubt!

To know and not to know, to be conscious of complete truthfulness while telling carefully constructed lies, to hold simultaneously two opinions which cancelled out, knowing them to be contradictory and believing in both of them, to use logic against logic, to repudiate morality while laying claim to it, to believe that democracy was impossible and that the Party was the guardian of democracy, to forget, whatever it was necessary to forget, then to draw it back into memory again at the moment when it was needed, and then promptly to forget it again, and above all, to apply the same process to the process itself — that was the ultimate subtlety; consciously to induce unconsciousness, and then, once again, to become unconscious of the act of hypnosis you had just performed.⁸

Whilst the tones of disingenuous Brandis-ian and Bishop-ian doublespeak might sound *prima facie* alluring to the eager-green-shoot human rights advocate, sadly in the real

⁵ *Namah v Pato* [2016] PGSC 13; SC1497 (Supreme Court of Papua New Guinea) <<http://www.paclii.org/pg/cases/PGSC/2016/13.html>>.

⁶ Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002); See Global Legal Action Network, Communication made to International Criminal Court requesting investigation of Australia and corporate contractors (14 February 2017) <<http://www.glanlaw.org/single-post/2017/02/13/Communication-made-to-International-Criminal-Court-requesting-investigation-of-Australia-and-corporate-contractors>>.

⁷ George Orwell, *1984* (Penguin, 1992) ch 3.

⁸ *Ibid.*

world of contemporary Australia — outside the insulated bubble of Canberran UN Human Rights Council candidacy aspirations — we find ourselves in a crisis of history, a time when human rights norms and their protective institutions are under significant threat.

These are dark times for human rights in Australia and the world. Increasingly, we behold the un-righteous rise of right wing nationalists trumpeting a new era of anti-rights with leadership hostile to established international human rights law norms and institutions, including the United Nations and its many and various bodies. The ascension of an Alt-Right, who are not interested in truth, evidence or facts, makes the job of a legal advocate increasingly challenging in a “post-truth” “alternative fact” dystopia. The silver lining of course is that the more extreme the rhetorical pendulum swings, the more opportunities there are for all of us to stand up, speak out, and robustly reaffirm the value of basic human rights and fundamental freedoms as the building blocks of our “fair go”, lucky country, ANZAC-spirited way of life.

Lest we never forget that Colonel Hodgson, a Gallipoli Survivor, was one of the eight members of the Universal Declaration of Human Rights drafting party under Eleanor Roosevelt.⁹ Not only did Hodgson champion the rights of small nations, as did the famous Doc Evatt,¹⁰ but he and Indian social activist and educator, Hansa Mehta (who was renowned for changing Eleanor Roosevelt’s preferred phrase ‘all men are created equal’ to ‘all human beings’), argued robustly for a World Court of Human Rights — for what indeed is the point of having rights if they cannot be enforced?¹¹ We have not established a World Court of Human Rights... yet!

III GUARDIANS OF THE STORIES

As advocates, we are all the guardians of the stories of human rights. That is our sacred duty and solemn quest, especially in times when the currency of human rights is being crudely corrupted by the emergence of entities like the so-called Human Rights Law

⁹ See generally Mary A Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House, 2001).

¹⁰ Referring to the famous Australian Herbert Vere Evatt who was a former High Court judge, former federal Attorney-General and an early President of the United Nations General Assembly (third session – September 1948 to May 1949) who oversaw the adoption of the *Universal Declaration on Human Rights* on 10 December 1948.

¹¹ Mary A Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House, 2001) 38.

Alliance ('HRLA'), backed by the Australian Christian Lobby ('ACL'), who take their lead from the American Defence League.¹² The HRLA appears to be on a mission to dismantle established standards of international human rights law under the guise of "human rights" — a somewhat tragic Trojan horse of very thin veneer.

Notwithstanding that we are rapidly descending neck-deep into doublespeak, I take heart in the fact that the worth of human rights terminology is so compelling that its detractors would use it as strong PR currency. Exposing their core contradictions should not be difficult. We must just persist in telling and retelling history's stories and learnings of human rights. Educate, educate, educate, and then educate some more.

Professor Yuval Noah Harari, the famous historian, in his recent TED talk,¹³ 'Why Humans Dominate Planet Earth?', states:

All the huge achievements of humankind throughout history, whether it's building the pyramids or flying to the moon, have been based *not* on individual abilities, but on this ability to cooperate flexibly in large numbers.

Now cooperation is, of course, not always nice; all the horrible things humans have been doing throughout history — and we have been doing some very horrible things — all those things are also based on large-scale cooperation. Prisons are a system of cooperation; slaughterhouses are a system of cooperation; concentration camps are a system of cooperation. Chimpanzees don't have slaughterhouses and prisons and concentration camps.¹⁴ (emphasis added).

Harari then focuses on our capacity to tell and believe in stories about 'fictional realities' (as opposed to objective realities), including nation-states, corporations, the international monetary economic system and human rights.¹⁵ Now I do not fully accept Harari's premise that human rights are mere non-objective fictional narratives, for the

¹² See Human Rights Law Alliance, *Human Rights Law Alliance* (2017) <<http://www.hrla.org.au/>>; Duncan Fine, 'New human rights legal centre not so keen on human rights', *Sydney Morning Herald* (online), 6 September 2016 <<http://www.smh.com.au/comment/new-human-rights-legal-centre-not-so-keen-on-human-rights-20160905-gr997z.html>>; Gina Rushton, 'Mother Of 13 To Challenge Abortion Law In Court, With Christian Lobby Support', *BuzzFeed News* (online), 5 October 2016 <https://www.buzzfeed.com/ginarushton/mother-of-13-to-challenge-abortion-law-in-court-with-christi?utm_term=.auMnpd11E#.tnqbj5vv6>.

¹³ Author of the acclaimed bestseller: *Sapiens – A Brief History of Humankind* (Harvill Secker, 2014).

¹⁴ Yuval Noah Harari, 'What Explains the Rise of Humans?' (Speech delivered at the Official TED Conference, TED Global London, June 2015) <https://www.ted.com/talks/yuval_noah_harari_what_explains_the_rise_of_humans#t-884811>.

¹⁵ *Ibid.*

injurious harms caused by human rights violations are certainly objectively ascertainable, and, at that point, human rights and human wrongs become much more than mere beliefs. But that is perhaps a debate for another time.

Our civilisation's fundamental belief in the story of human rights is indispensably important for the future welfare of our peoples and our planet.

Human rights are positive foundational stories for humane civilisation. They articulate the benevolent narratives required by humankind to walk us closer to the daylights of dignity and the fulsome flowerings of self-realisation. Legal advocates, on behalf of the voiceless, the chastised and the choice-less, are the protectors and promoters of these vital, underlying historic stories — these indispensable democratic dictums of human dignity.

IV #RIGHTSPLAINING & HUMAN RIGHTS EDUCATION

I recently saw a photograph on Instagram that read 'Equal Rights for Others Does Not Mean Less Rights for You. It's Not Pie.'

Whilst reference to "pie" in the singular bereft of pronoun reveals the North American vernacular "pie". In Australia, we might say "a pie" or "a meat pie" or even "a gluten free organic vegan pastry free paleo pie". Notwithstanding international conflict around articulations of "pie", the point is that the fountain of human rights is an infinite spring and should flow freely for everyone.

It is a profound misconception and absurd proposition that to extend rights to others will somehow diminish one's own rights. In Australia, we have a lot of hashtag *#rightsplainning* (yes, a significant improvement on "mansplaining") to do — especially for our political class. That we are bereft of a Bill of Rights or Human Rights Act means that the educative impact of such a righteous document at the heart of our democracy and national identity, is *not* present and we must thus significantly compensate.

One of a few things I strongly agree with Phillip Ruddock on is the lack of education of politicians in the realms of international human rights and treaty law. Can you imagine sending in a plumber to fix a job without the right tools, equipment and knowledge? How can our federal politicians possibly do a proper lawmaker's job without knowledge of

how international law works, and what our obligations are? I have heard of colleagues encountering the most aberrant, asinine responses to our refugee crisis in the corridors of Canberra along the lines of: “What Convention? What obligations? Well, why don’t we just become un-part of it!?” The quite absurd ‘Recommendation 4’ of the Queensland Parliamentary Inquiry into a Queensland Human Rights Act, that the judiciary have no part in the implementation of a Human Rights Act,¹⁶ appears also to be strong evidence of this problem of a culture of political rights ignorance. The following question during the Committee’s Inquiry into a Possible Human Rights Act for Queensland, from the Committee Chair to Queensland Anti-Discrimination Commissioner, seems to be more symbolic of a culture of legal ignorance amongst our lawmakers: ‘[i]t has been put to the committee: why do we not just enhance pieces of *common law legislation* to fix that sort of issue that I just presented to you rather than produce a human rights act?’¹⁷

We can neither forget nor forsake history. History is happening and historical amnesia breeds catastrophe. A non-myopic perception of the present requires a considered and wholesome understanding of the past. I think our federal politicians need at least a one-day induction in international law. That they don’t, whilst not entirely their own fault, I think is a hallmark of professional negligence.

Let’s teach them about the robustly blustering Colonel Hodgson, an Australian hero of international diplomacy and Great War veteran. Let’s reimagine the ANZAC legacy infused with a Brandis-ian respect for “traditional freedoms” (or we could just call them “human rights”), that our young people, sacrificed their lives, limbs, and sanity on the unforgiving and irreversible fires of war for; to protect all of our rights and freedoms — the basic building blocks that make up our fair-go-lucky way of life! And then let’s legally protect those fundamental rights and freedoms — because they are still worryingly absent from our corpus of law in Australia.

¹⁶ Legal Affairs and Community Safety Committee, Submission No 30 to Parliament of Queensland, *Inquiry into a Possible Human Rights Act for Queensland* (30 June 2016) xx
<<http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2016/5516T1030.pdf>>.

¹⁷ Legal Affairs and Community Safety Committee, Parliament of Queensland, *Public Hearing—Human Rights Inquiry* (2016) 42 (emphasis added)
<<https://www.parliament.qld.gov.au/documents/committees/LACSC/2015/14-HumanRights/14-trns-09Jun2016.pdf>>.

The responsibility for all of us here is to *#rightsplain* those proud, righteous parts of our national identity to our compatriots.

V A RIPE TIME FOR A BILL OF RIGHTS¹⁸

On the back of Rudd Government's 2020 Summit, the 2008-09 Brennan Human Rights inquiry was the most comprehensive public consultation in Australian history and recommended the implementation of a federal Human Rights Act.¹⁹ Unfortunately, despite the overwhelming public support for a Human Rights Act, it was not to be. Instead, the public was served a lacklustre substitute in the form of the National Human Rights Framework comprising the implantation of statements of compatibility (with international human rights norms) for all new legislative instruments and the establishment of the Parliamentary Joint Committee on Human Rights ('PJCHR'). While the PJCHR has consistently authored comprehensive and robust reports about implications of all new legislative instruments on universal human rights standards to which Australia is bound, scant attention has been seemingly paid by the legislature to those reports, as rafts of rights-violating legislation has been pushed through since the establishment of the Framework. In short, the Framework has failed to protect human rights in Australia.

These are the years for human rights! In December 2014, the ALHR established a new Human Rights Act Subcommittee to reignite the debate for a federal Human Rights Act. In February 2015, I attended the 40th Anniversary of the *Racial Discrimination Act* at the Australian Human Rights Commission, and during the lunch break, I bumped into another academic idol, Professor George Williams. I told Professor Williams of our plan to reignite the fight as it were. He wisely suggested that before Australia is ready for a federal Human Rights Act, it might be better to raise the consciousness of our nation and firstly get more states and territories to implement Human Rights Acts. Of course, the ACT was first to introduce a Human Rights Act in 2004, and Victoria introduced its Human Rights Charter

¹⁸ See Benedict Coyne, 'The Time is Ripe for a Bill of Rights' (2015) 128 *Precedent* 8 <<http://search.informit.com.au/documentSummary;dn=316224285638643;res=IELHSS>>.

¹⁹ Unfortunately the National Human Rights Inquiry Webpage, including all the submissions, was taken down when the Abbott government came into office and the Hon George Brandis was made Attorney-General of Australia. Prior to that the materials for the consultation and its interim and final reports were available here: Parliament of Australia, *Parliament and the Protection of Human Rights* <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook43p/humanrightsprotection>.

in 2006. At the time I spoke to George, there was an opportunity in Queensland with the formation of the new minority ALP Palaszczuk Government, and it felt sort of like a “go forth my son” moment.

I returned to Queensland and set about co-organising a broad coalition of organisations and excellent colleagues who have — with guidance from our colleagues in Victoria — including former Victorian Attorney-General Rob Hulls, Professor George Williams, and the Human Rights Law Centre— strategically campaigned smart and hard for the past two years with success!²⁰ We now have a commitment from an initially very reluctant Premier and Attorney-General (once again due to the heretofore referred lack of education which we dutifully remedied) to implement a Queensland Human Rights Act in the coming months based on the Victorian model of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).²¹

So, what is with politicians’ initial reluctance around rights? Well, it goes back to the educational point I referred to earlier, and the fact that our laws do not protect the basic values of our Australian society. It was former Prime Minister John Howard that gave a most compelling reason for introducing a Bill of Rights or Human Rights Act. When asked by media about the introduction of a federal Human Rights Act, he responded that he was not a fan because they interfere with the business of government — which is precisely the point!²² Legally protecting the human rights of Australians is to shield them from potential human rights violations and abuses by the government. Introducing a Human Rights Act in Australia will “Backyard Blitz” our somewhat dilapidated democracy. It will give us a brand-new back-deck and platform, from which we can then more legitimately point the finger at our international neighbours if we were to ascend to the UN Human

²⁰ See Australian Lawyers for Human Rights, *Leading Australian Human Rights Lawyers call on Premier Palaszczuk to initiate discussion on Queensland Human Rights Act* (11 May 2015) <<https://alhr.org.au/leading-australian-human-rights-lawyers-call-premier-palaszczuk-initiate-discussion-queensland-human-rights-act/>>.

²¹ Bruce Chen, ‘Opinion: Premier to be applauded for pursuing Human Rights Act’, *The Courier Mail* (online), 2 November 2016 <<http://www.couriermail.com.au/news/opinion/opinion-premier-to-be-applauded-for-pursuing-human-rights-act/news-story/5c352f9e3ac3f28bb8a011c12a3c415f>>; Human Rights Law Centre, *Queensland Commits to a Human Rights Act* (16 November 2016) <<https://www.hrlc.org.au/news/queensland-commits-to-a-human-rights-act>>.

²² See generally John Howard, ‘2009 Menzies Lecture by John Howard (full text)’ *The Australian* (online), 27 August 2009 <<http://www.theaustralian.com.au/archive/politics/menzies-lecture-by-john-howard-full-text/news-story/d579cb42e24f5e9d9b1414a844571a2a>>.

Rights Council — and there will be less doublespeak and doublethink required by our political leaders, which must be a significant gross domestic benefit to our society!

ALHR is now supporting the campaign being kick-started by the Tasmanian Council for Civil Liberties.²³ Western Australia is in our sights,²⁴ as is the Northern Territory. It is time we had that federal debate again. I will certainly be focusing on reinvigorating the call for a federal Human Rights Act in the coming year, and I hope that my fellow lawyers will all join me in doing so!²⁵

And there is cause to be hopeful! While Labor governments appear to be more receptive to rights and the idea of legally protecting them, there is no reason why, without education, it could not become a bi-partisan issue. Again, history. The first Bill of Rights in Australia attempted at the state level was by the conservative Nicklin Country Party Government in Queensland, perhaps Australia's most conservative State, in 1959.²⁶

In spite of these tumultuous and challenging times, let us take heart in the sentiment of Dr Martin Luther King Junior when he said: 'only when it is dark enough can you see the stars',²⁷ coupled with the ancient proverb '[t]he darkest part of the night is just before the dawn.'²⁸

In conclusion, I was going to attempt to channel the Attorney-General Brandis, quoting Eleanor Roosevelt at length about the fundamental importance of human rights. However, I will keep it short and quote Brandis himself regarding Roosevelt's famous reference to human rights doing their most important work for ordinary, everyday

²³ See Blair Richards, 'Campaign begins to put a human rights Act back on agenda', *The Mercury* (online), 21 January 2017 <<http://www.themercury.com.au/news/politics/campaign-begins-to-put-a-human-rights-act-back-on-agenda/news-story/d70cf11696eed0de5c42cf2be381335f>>.

²⁴ See Jim McGinty, 'Human Rights Report Completed' (Media Release, 20 December 2007) <<https://www.mediastatements.wa.gov.au/Pages/Carpenter/2007/12/Human-Rights-report-completed.aspx>>; Human Rights Law Centre, Submission to Consultation Committee for a Proposed Western Australian Human Rights Act, *Charter of Rights: Report of WA Human Rights Act Inquiry* (August 2007) <<http://hrlrc.org.au/western-australia-human-rights-act-inquiry-report/>>.

²⁵ See Coyne, above n 18.

²⁶ See George Williams, *A Charter of Rights for Australia: Not Only an Important Shift in Law*, Evatt Foundation <<http://evatt.org.au/papers/charter-rights-australia.html>>; Benedict Coyne, 'Charting New Waters for a Queensland Bill of Rights – Part A', *Australian Lawyers Alliance* (29 January 2016) <<https://www.lawyersalliance.com.au/opinion/charting-new-waters-for-a-queensland-bill-of-rights-part-a>>.

²⁷ Martin Luther King Jr, 'I've Been to the Mountaintop' (Speech delivered at the Mason Temple, Memphis, Tennessee, 3 April 1968) <<http://www.americanrhetoric.com/speeches/mlkivebeentothemountaintop.htm>>.

²⁸ Ancient proverb, source unknown.

people in “small” places:

Such attention to context ensures that human rights are not merely fine sentiments, not merely cries into the void, but instead, are translated into real respect for dignity of actual individuals. Of course, Australia's several jurisdictions have already established a variety of mechanisms to protect those rights for people in detention, but we cannot afford to be complacent.²⁹

Well, let's keep him to his word! We have work to do!

²⁹ Brandis, above n 3.

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